UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

In Re: VIOXX	:	
	:	**MDL Docket NO. 1657**
PRODUCTS LIABILITY LITIGATION	:	
	:	**SECTION L**
	:	
This document relates to ALL ACTIONS	:	**JUDGE FALLON**
	:	**MAG. JUDGE KNOWLES**
	:	

PLAINTIFFS' LIAISON COUNSEL'S MEMORANDUM IN SUPPORT OF MOTION FOR AWARD OF PLAINTIFFS' COMMON BENEFIT COUNSEL FEES AND REIMBURSEMENT OF EXPENSES

Date: January 20, 2009

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I. INTRODUCTION

The Vioxx MDL Settlement is a monumental achievement. Within three years of the largest pharmaceutical recall of its kind, this Court, along with the assistance of Judges Carol E. Higbee, Victoria G. Chaney and Randy Wilson, resolved consolidated and coordinated litigation of enormous magnitude. The judicial oversight of extensive discovery, substantive and procedural motions practice, 6 bell-whether trials within the MDL and coordination with other state jurisdictions wherein 13 trials also transpired within this constrained time period, compelled the parties to reconcile their differences and resolve tens of thousands of outstanding claims.

The work of the Plaintiff's Steering Committee (PSC), the PSC's affiliated "common benefit" attorneys working at their direction, and the coordinated state litigations in New Jersey, California and Texas, were clearly instrumental in achieving this crowning success. The collective work of these counsel was essential to establish the liability of Merck & Co., Inc. ("Merck"). Whereas Merck defended Vioxx alternatively on the grounds that Vioxx did not increase the risk of cardiovascular injuries or that the increase in risk of injury that did exist did not occur for persons using the drug less than 18 months, the PSC and common benefit counsel, gathered and developed the crucial evidence that debunked Merck's arguments and supported plaintiffs' liability case. As a consequence of the evidence employed by the PSC, and the relentless coordinated efforts by all counsel (both federal and state), Merck was driven to resolve its liability exposure.

Thanks to the efforts of the dedicated common benefit counsel and with the courts' guidance, the litigation was well situated for resolution. All of the common benefit efforts by

these counsel culminated in the fruit of the labors of the Negotiating Plaintiffs Counsel (NPC), consisting of federal and state litigators, who were able to hammer out a settlement with Merck, after approximately one year of intensive negotiations. The Settlement Agreement quickly and amply met the needs of all the Vioxx patients that suffered a heart attack, ischemic stroke or sudden cardiac death by offering them entree into the largest private, individual settlement program of any mass tort claim. The novel $4.85 billion settlement is indeed unparalleled in size, scope and speed of recovery for the claimants. As a medical-record driven settlement, enrolled claimants are having their claims determined at a record pace. Already, 4,585 persons have received interim payments on their claims and final payments of all MI claims are expected by Summer of 2009. *See* Status Conf. Hearing Transcript at 19 (E.D.La. Dec. 19, 2008).

With the advent of the Vioxx MDL Settlement, Merck agreed to provide $4.85 billion to pay the claims of those claimants enrolled in the program. Whereas payment of the claimants is assured, payment to the counsel that bestowed this benefit upon them remains contingent. The attorneys have yet to receive compensation for their services because their fees are properly subject to Court approval. Under the terms of Article 9 of the Settlement Agreement an assessment of common benefit fees is to be imposed upon the gross recoveries of any person participating in the settlement and deducted from the total amount of counsel fees payable under individual plaintiffs' counsel's retainer agreements.[1] Given the enormous benefits conferred upon these persons, the affiliated Common Benefit Counsel request an award of 8% of the $4.85

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[1] *See* Settlement Agreement §9.2.1. Reimbursement of litigation expenses will be separately funded out of the clients' recoveries pursuant to the Settlement Agreement §9.2.2 ("Reimbursement of these expenses shall be deducted from the clients' net recovery").

billion fund or $388 million for attorneys fees.[2] These funds would be obtained by approving the 8% assessment that was agreed upon by Merck and the NPC when they endorsed the Settlement Agreement on November 9, 2007, and, which assessment, was also agreed upon by each Vioxx claimant that registered in the Settlement. This 8% assessment for attorneys fees would supercede the assessment provided to MDL common benefit attorneys pursuant to Pretrial Order No. 19.

The amount requested here reflects a relatively modest percentage of recovery compared to the benchmark range in other class actions and global settlements and to percentage awards in these other large settlements that compare to this settlement only in terms of dollar value. Further, in contrast to what Merck paid to its counsel, the fees requested by the Joint Petitioners are modest. Based upon Merck's public filings, it appears that Merck expended in excess of $1.6 billion in aggregate Vioxx legal defense costs and, unlike the petitioners, Merck's counsel operated with no contingent risk.[3]

Nonetheless, we are mindful that our request is for a substantial amount of money. But apart from the quantum, the 8% award has been fairly earned. The common benefit attorneys devoted 503,185 hours to this litigation having a collective lodestar valued between $217,128,800.40 and $321,897,534.95. For many counsel involved, they dedicated their entire

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[2]One member of the PSC and his affiliated counsel does not subscribe to the relief requested in this motion.

[3]Merck's defense costs were calculated only for the period between 2005 - 2008. *See* Form 10-K of Merck & Co., Inc. for the year ended December 31, 2005, at 3 ($285 million); Form 10-K of Merck & Co., Inc. for the year ended December 31, 2006, at 3 ($500 million); Form 10-K of Merck & Co., Inc. for the year ended December 31, 2007, at 17 ($616 million); Form 10-Q of Merck & Co., Inc. for the quarterly period ended September 30, 2008, at 19 ($222 million for the first 3 quarters of 2008).

practice to this litigation alone. For counsel undertaking such risks, ample reward is justified. Here, the reward requested is well within any judicially established benchmark. And given the superlative efforts by counsel, the single-digit percentage award requested, which was agreed to by the parties, is not only eminently fair and reasonable, but well deserved.

We will leave to the Court for another day the allocation of whatever award is permitted.[4] The present determination of the percentage award merely sets the bounds by which all counsel will be compensated. But the time for this petition has now arrived, bringing to mind the sage's adage:

If I am not for myself, who will be for me?
But if I am only for myself, who am I?
If not now, when?

Hillel, Ethics of the Fathers, 1:14

As will be demonstrated, the percentage award requested herein falls well within the Fifth Circuit's jurisprudence of *Johnson v. Georgia Highway Express, Inc*, 488 F.2d 714, 717-19 (5th Cir.1974) and *High Sulfur Content*, 517 F.3d at 227-28.

II. FACTUAL BACKGROUND

A. THE HISTORY OF VIOXX

Vioxx was a medication sold for the treatment of acute pain and relief of osteoarthritis

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[4]Pursuant to PTO No. 6D, the Allocation Committee is actively engaged in efforts that will result in a recommendation to the Court for allocations of any award amongst counsel participating in this petition at the completion of its analysis. In that connection, the committee has reviewed affidavits submitted by counsel and met with counsel in Atlantic City, New Orleans, Houston and Los Angeles, to create a record for this Court's review. In due course, the Allocation Committee's recommendation will be presented that will address the relative input and value of services provided by fellow common benefit attorneys as dictated by existing jurisprudence. *See, e.g., High Sulpher Content Gasoline Products Liability Litigation,* 517 F.3d 220 (5th Cir. 2008); *Turner v. Murphy Oil USA, Inc.*, 2008 WL 4661806 (E.D.La. Oct. 6, 2008).

and other conditions. It was designed to avoid the adverse gastrointestinal problems experienced by patients using the class of pain relievers known as non-steroidal anti-inflammatory drugs ("NSAIDs"). The adverse reaction most frequently associated with NSAIDs is the risk of gastrointestinal perforations, ulcers, and bleeds (PUBs). *In re Vioxx Products Liability Litigation*, 448 F.Supp.2d 741, 743 (E.D. La. 2006).

The mechanism by which NSAIDs relieve pain is through the inhibition of cyclooxygenase ("COX"), an enzyme that stimulates synthesis of prostaglandins. *Id.* When it was discovered that prostaglandin synthesis in humans was catalyzed by two forms of COX, *i.e.*, cyclooxygenase-1 ("COX-1") and cyclooxygenase-2 ("COX-2"), scientists began investigating the potentials for developing drugs that mediated only COX-2, but not COX-1. It was understood that COX-1 functioned to protect the gastric mucosa and promoted normal platelet functions while COX-2 mediated inflammation and pain. The hypothesis was formed that by selectively inhibiting COX-2 without effecting COX-1, the benefits of pain relief without the associated PUB adverse reactions could be accomplished. In the early 1990's, Merck and other pharmaceutical companies rushed into researching what promised to be an extremely profitable and growing market for such pain relievers.

Merck developed a selective COX-2 inhibitor, Rofecoxib or Vioxx, that received approval for marketing from the Food and Drug Administration ("FDA") on May 20, 1999. At that time, Vioxx was approved for the treatment of osteoarthritis, acute pain in adults, and the treatment of severe menstrual pain. Through Merck's efforts, Vioxx was widely promoted and achieved "blockbuster" success. Merck averaged over $2 billion in sales per year with total sales from 1999 through 2004 exceeding $10 billion. *See* Chris Mondics, *Two Vioxx Critics*

Allege Pressure, PHILADELPHIA INQUIRER, Nov. 19, 2004, at A1, A22 ("Vioxx generated sales of $2.5 billion a year, making it a blockbuster product for a company that in recent years has had difficulty developing new medications, a problem faced by much of the pharmaceutical industry."). Despite this financial success, on September 30, 2004, Merck withdrew Vioxx from marketing after the data safety monitoring board overseeing Merck's long term study of Vioxx in patients at increased risk of colon polyps, Adenomatous Polyp Prevention on Vioxx ("APPROVe"), revealed a significantly increased risk of serious cardiovascular events, including heart attacks and strokes.

Prior to the alarming results of the APPROVe study, Merck had insisted that Vioxx was safe based upon the findings of its pivotal clinical study known as VIGOR (Vioxx Gastrointestinal Outcomes Research). *See* Bombardier, C., Laine L., Reicin A, et al., *Comparison of Upper Gastrointestinal Toxicity of Rofecoxib and Naproxen in Patients with Rheumatoid Arthritis*, New England Journal of Medicine, 11/23/00: 343 (21); 1520-1528. This pivotal trial study for Vioxx involved 8,076 patients with rheumatoid arthritis that demonstrated that Rofecoxib had lower gastrointestinal toxicity than Naproxen. VIGOR was not designed to evaluate cardiovascular events, however, it did reveal that Vioxx was highly associated with cardiovascular events. Despite private, internal emails acknowledging that "the CV events are clearly there,"[5] Merck publicly interpreted the VIGOR study to maintain that "significantly fewer thromboembolic events [in other words heart attacks and strokes] were observed in

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[5] *See McDarby v. Merck & Co., Inc.*, 949 A.2d 223 (N.J.App.Div. 2008), *quoting* March 9, 2000 Email of Edward M. Scolnick, then President of Merck Research Laboratories, and further quoting Dr. Scolnik's comments: "it is a shame but it is a low incidence and it is mechanism based as we worried it was." *See also In re Merck & Co., Inc. Securities Derivative & "ERISA" Litig.*, 543 F.3d 150, 154 (3d Cir. 2008)

patients taking naproxen in this GI outcomes study, which is consistent with naproxen's ability to block platelet aggregation." *In re Merck*, 543 F.3d at 154. In other words, Merck inverted the study's findings to suggest that Naproxen was cardio-protective, not that Vioxx caused cardiovascular problems.

Chinks in Merck's armor disputing the absence of CV risk caused by Vioxx quickly began to develop and pile up. In August 2001, in an article published in the Journal of the American Medical Association co-authored by noted cardiologists at the Cleveland Clinic, the authors challenged VIGOR's study design which had excluded all patients requiring aspirin for cardiac reasons. In addition, they noted that if all serious cardiovascular events were compared between the patients in the Vioxx group and the Naproxen group, "the risk of of serious cardiovascular events in the rofecoxib group was 2.2 times higher than in the naproxen group." Mukherjee D., Nissen S., Topol E., *Risk of Cardiovascular Events Associated with Selective COX-2 Inhibitors*, JAMA 2001; 286:954-9. On September 21, 2001, the FDA issued a warning letter to Merck stating that its promotional efforts were "false, lacking in fair balance or otherwise misleading" due to misrepresentations of the safety profile of Vioxx. *In re Merck*, 543 F.3d at 156. Later in the fall of 2001, the FDA had begun the process to require Merck to strengthen the warning in the Vioxx label to address the CV safety profile of the drug. Those efforts were rebuffed, refused and diluted by Merck over a period of months, until April 11, 2002, at which time, a revised label issued. No cardiovascular warning appeared in this revised label as desired by FDA. It was replaced with a much more narrowly worded precaution to use Vioxx with caution in patients with a "history of ischemic heart disease." *See McDarby*, 949 A.2d at 246; *In re Merck*, 543 F.3d at 159.

As time progressed more and more studies exposed the dangers of Vioxx. In August 2004, an FDA researcher, Dr. David Graham, presented the results of his analysis of Kaiser Permanente's database which revealed that Vioxx users were more likely to suffer a heart attack or sudden cardiac death than those taking another COX-2 Inhibitor, Celebrex. *See* Graham D., *Risk of Acute Myocardial Infarction and Sudden Cardiac in Patients Treated with Cyclo-Oxygenase 2 selective and Non-selective Non-Stearoidal Anti Inflammatory Drugs: Nested Case Control Study*, Lancet, Vol. 365, 475 (Feb. 2, 2005)(the publication of the study occurred months after its initial presentation). Merck immediately challenged Dr. Graham's report. Shortly thereafter, however, Graham's findings were corroborated by Merck's study results in the then on-going APPROVe study. This clinical study demonstrated a more than two-fold risk of heart attack and other cardiovascular events in patients taking Vioxx as compared to placebo, which necessitated its immediate cessation. *See* Topol E., *Failing the Public Health – Rofecoxib, Merck, and the FDA*, N.Engl.J.Med. 351;17, 1707-08 (Oct. 21, 2004). Without any comparator drug upon which to pass the blame (as was done with Naproxen), Merck was ignominiously forced to withdraw Vioxx from marketing. With an estimated 105 million prescriptions, involving approximately 20 million patients taking Vioxx in the United States alone, it was the largest withdrawal of any pharmaceutical drug in history.[6] *See In re Vioxx Products Liability*

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[6] The scale and impropriety of virtually every facet of Merck's marketing of Vioxx was phenomenal. Perhaps most emblematic of the insults which the public and medical community suffered was the rare publication of the *Expression of Concern* in the New England Journal of Medicine. *See* Curfman G, et al., *Expression of Concern: Bombardier, et al., "Comparison of Upper Gastrointestinal Toxicity of Rofecoxib and Naproxen in Patients with Rheumatoid Arthritis," N Engl J Med, 2000; 343:1520-1528*, N Engl J Med 2005; 353:2813-2814. After being presented with evidence disclosed in his MDL deposition, the editor-in-chief of the journal voiced his shock and incredulity regarding Merck's improper treatment of the data reported in its

(continued...)

Litigation, 2008 WL 4681368, *1 (E.D.La. Oct. 21, 2008).

Nevertheless, Merck employed the APPROVe study in an effort to demonstrate the there was no cardiovascular risk posed by Vioxx before 18 months of continuous use of the drug. Even this so-called "18-month Hypothesis" was discredited and the immediate dangers presented by Vioxx use were revealed as the study results became final. Indeed, in 2006, a *Correction* to the APPROVe study was published that eliminated Merck's basis for asserting an increase in risk after 18 months use. *See* Bresalier, *Cardiovascular Events Associate with Rofecoxib in a Colorectal Adenoma Chemoprevention Trial*, N Engl J Med 2005; 352:1092-1102 *as amended by Correction*, N Engl J Med 2006; 355(2): 221. As a result of Merck's malfeasance, it has been estimated that as many as 139,000 Americans experienced unnecessary Vioxx-induced cardiovascular events and that as many as 55,000 of these people died. *See* Graham, M.D., M.P.H., Testimony before the United States Senate Committee on Finance, Nov. 18, 2004 available at http://finance.senate.gov/hearings/testimony/2004test/111804dgtest.pdf. This conduct led to the extraordinary litigation now before the Court.

B. THE LITIGATIONS INSTITUTED AGAINST MERCK

1. An Overview of Vioxx Litigation in State Courts

In certain venues, litigation against Merck began prior to the company's withdrawal of

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[6](...continued)
pivotal VIGOR study that was heavily relied upon by Merck to merchandise Vioxx. Recounting the knowing omission of three myocardial infarctions from the data presented to the Journal, Dr. Curfman lamented that, "these inaccuracies and deletions call into question the integrity of the data on adverse cardiovascular events in this article." Bias and misrepresentation in scientific findings has come under increasing scrutiny by the courts. The judiciary must now exercise caution when relying upon industry sponsored studies. *See Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2626 n. 17 (U.S. 2008)("Because this research was funded in part by Exxon, we decline to rely on it.").

Vioxx. In Texas, for example, some litigants represented by certain common benefit attorneys put Merck on notice of dangerous cardiovascular events by filing lawsuits beginning as early as 2000. *See* Affidavit of Russ M. Herman in Support of The Plaintiffs' Liaison Counsel's Motion for Award of Plaintiffs' Common Benefit Counsel Fees and Reimbursement of Expenses, ¶7 [hereafter "Herman Affid., ¶__"]. These prescient claimants asserted that the label originally associated with Vioxx was deficient and failed to warn of the dangers of cardiovascular events associated with the drug. Individual cases were filed shortly thereafter in multiple venues in Texas. California, however, was the first state jurisdiction to aggregate Vioxx litigation. There, the Judicial Council of California agreed to coordinate all of the California Vioxx proceedings in one Superior Court, *In re Vioxx Coordinated Cases*, No. JCCP 4247 (Los Angeles Co., Calif., Super. Ct. Oct. 30, 2002). *See* Herman Affid., ¶11. The California litigation was centralized before the Honorable Victoria G. Chaney.

Likewise, in New Jersey, where Merck is headquartered, the New Jersey Supreme Court centralized for management purposes all Vioxx cases filed in the state court system on May 20, 2003. *Id.*, ¶6. Designated as a "Mass Tort," the litigation was coordinated before one Superior Court judge, the Honorable Carol E. Higbee. Under Judge Higbee's watchful eyes, the litigation was capably managed with discovery taking place and cases being prepared for trial. *Id.*

In Texas, the Honorable Randy Wilson was appointed on September 6, 2005, to preside over that state's multi-district litigation, *In re Texas State Vioxx Litigation*, No. 2005-59499 (District Ct., Harris County, Tx, 157th Judicial District). *See* Herman Affid., ¶9.

Vioxx litigation was developed in these state jurisdictions prior to the JPML's initial transfer order. In Texas, Carlene Lewis and Shelly Sanford first began representing clients

against Merck in the summer of 2000 and by September of 2001 they were representing several hundred individuals. Throughout 2001 and 2002, they retained and prepared experts, took depositions of Merck executives, and had produced to them 10.5 million pages of documents. *Id.*, ¶¶7-8. These counsel associated themselves with trial counsel on certain cases. They also took a number of the original depositions of Merck witnesses, including Alice Reicin, Deborah Shapiro and Adam Schechter. Moreover, they helped develop experts such as Benedict Lucchesi, Wayne Ray, Cheryl Blume, Joye Carter and David Egilman. In preparation for the trial of *Ernst v. Merck*, the firm also examined thousands of documents, hired, and deposed experts and conducted several mock trials. The case was significant as it was the first Vioxx trial against Merck. The case was tried for 8 weeks in the Summer of 2005. The jury returned with a verdict for the plaintiff in the amount of $253 million. *Id.*, ¶14.

Ultimately, the Texas MDL involved approximately 900 cases that were filed for pre-trial. Judge Wilson appointed his own PSC comprized of 11 counsel. Under Judge Wilson's guidance, these counsel were actively preparing 5 waves of cases for trial to begin in the Spring of 2007. *Id.*, ¶9. On April 19, 2007, however, after extensive briefing and argument, Judge Wilson granted Merck's Motion for Summary Judgment on the Texas "Presumption" Statute and all discovery and trials in Texas courts were stayed pending appeal of the Order. The matter was in the Texas Appellate Courts when the Vioxx Settlement Agreement was announced in November of 2007. *Id.*

In New Jersey, Seeger Weiss was appointed as Liaison Counsel of the coordinated proceedings in 2003. Through the efforts of a working group of excellent trial lawyers, these common benefit lawyers litigated the case aggressively long before Vioxx was withdrawn from

the US market in September 2004. *Id.*, ¶6. They engaged in extensive motions practice, coordinated discovery of corporate documents and multiple corporate depositions. These early New Jersey efforts included, but are not limited to, the following efforts:

> ·The establishment of a large, multi-user electronic document depository maintained at Seeger Weiss in New York. This depository made available to Vioxx litigants the millions of pages of then-produced documents in searchable format, as well as multiple databases and raw clinical trial data produced by Merck, as well as deposition transcripts and exhibits. Through this depository, the Common befit applicants created document and reviewing protocol.
>
> ·Reviewed countless pages of Merck documents which ultimately became the basis of the "Theme Grid" that became an integral part of the MDL 1657 "Trial Package."
>
> ·Conducted numerous pivotal depositions, including, but not limited to Beth Seidenberg, Brian Daniels, Thomas Bold, Louis Sherwood, Douglas Watson, Adam Schecter, Jennifer Ng, David Anstice, Briggs Morrison, Alise Reisin, Alan Neis, Ray Gilmartin, and Peter Honig.
>
> ·Developed numerous experts who ultimately became MDL experts, including Wane Ray, PhD, Benedict Lucchesi, MD and Richard Kronmal, Ph.D.

In California, Judge Chaney actively presided over intense litigation that resulted in three Vioxx trials that reached a jury verdict. All were defense verdicts or hung jurys. But the court's efforts in the Summer of 2007 to accelerate 80 trial settings for California residents subject to preferential trial settings under California Code of Civil Procedure §36 created tremendous incentives for the parties to conclude the litigation. *Id.*, ¶11. *See also Individual Vioxx Cases*, Case No. JCCP No. 4247, Order re: June 1, 2007 General Status Conf. (Los Angeles Co., Calif., Super. Ct. June 28, 2007)[Attached hereto as Exhibit "A"].

2. <u>An Overview of Vioxx Litigation in the MDL</u>

After September 30, 2004, upon the withdrawal of Vioxx from marketing, a tidal wave of litigation against Merck ensued. Thousands of cases began to compile in the federal district

courts across the country and in state venues, as well. On behalf of the federal litigation, a petition for consolidation was filed before the Judicial Panel on Multi-district Litigation (the "JPML"). The JPML issued its initial Transfer Order to this Court on February 16, 2005. *See In re Vioxx Products Liability Litigation*, 360 F.Supp.2d 1352 (J.P.M.L. 2005).

Upon transfer, this Court immediately charted a course to organize the litigation. The Court reached out to its state counterparts and the litigation became successfully coordinated. On February 28, 2005, through Pretrial Order No. 2, this Court appointed Russ Herman to act as Plaintiffs' Liaison Counsel. Thereafter, in PTO No. 6, the Court appointed its Plaintiffs' Executive Committee ("PEC") comprised of Russ Herman, Andy D. Birchfield, Jr. (Co-Lead), and Christopher A. Seeger (Co-Lead). PTO No. 6 also identified the Plaintiffs' Steering Committee ("PSC"), comprised of the aforementioned counsel and Arnold Levin, Thomas R. Kline, Richard J. Arsenault, Carlene Rhodes Lewis,[7] Elizabeth J. Cabraser, Gerald E. Meunier, Troy A. Rafferty, Mark P. Robinson, Jr., Drew Ranier and Christopher V. Tisi.[8] Leonard Davis was subsequently approved by the Court to assist the PLC. The role of the PSC was to be responsible for efficiently coordinating with all of the plaintiffs in the MDL, to represent their interests before the Court, to complete all generic discovery, litigate pretrial issues and conduct settlement negotiations on behalf of plaintiffs. The PSC immediately set about to complete the

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[7] Upon Ms. Lewis's untimely death, the court appointed her partner, Shelly Sanford, to replace Ms. Lewis on the PSC. *See In re Vioxx Products Liability Litigation*, MDL No. 1657, Order (E.D.La. June 8, 2006).

[8] In Pretrial Order No. 7, the Court also appointed Defendants' Steering Committee comprised of Douglas R. Marvin (lead counsel), Theodore V. H. Mayer, John H. Beisner, Richard C. Stanley, Anthony M. DiLeo and Phil Whittmann (liaison counsel). Subsequently, Dorothy H. Wimberly was also appointed to the Defendants' Steering Committee. *See In re Vioxx Products Liability Litigation*, MDL No. 1657, Order (E.D.La. Dec. 16, 2005).

duties bestowed upon it.

Shortly after PTO No. 6 was entered and consistent with the mandate of that order, the PSC presented a series of administrative orders to the Court, usually in advance of the regularly held monthly Status Conferences, that addressed the various anticipated procedural matters in the litigation. These orders were introduced to effectively and efficiently streamline practices so as to avoid burdening the Court. The orders presented resulted in their adoption or issuance of several pretrial orders covering numerous topics, including: Electronic Service (PTO No. 8); Deposition Guidelines (PTO No. 9); Confidentiality of documents (PTO No. 13); and Plaintiff and Merck Profile Forms (PTO No. 18 as amended).

3. Significant Discovery Took Place

With the initial practice guidelines in place, the MDL was situated to function efficiently and effectively, so as to avoid any criticism of being labeled a "black hole."[9] Under this regime,

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[9] Multidistrict litigation involving dangerous drugs and medical devices has been criticized for inefficiency, with individual cases becoming stranded in the transferee court without prompt resolution. *See* Fallon, *Bellwether Trials in Multidistrict Litigation*, 82 Tulane L.Rev. 2323, 2330 n. 21 (June 2008); Gary Wilson, *et al.*, "*The Future Product Liability In America*," 27 WILLIAM MITCHELL L.REV. 85, 112-113 (2000)("Generally, MDL transfer has been a black hole [where] remand and trial come only after years of slow-moving pretrial activity..."); Judith Resnick, "*Aggregation, Settlement and Dismay*," 80 CORNELL L.REV. 918, 920 (1995)("functionally, MDL transfers often translate into stays that decrease the value of cases by the delay produced"). One need only cite the litigation experience involving *Asbestos*, *Three Mile Island*, *Bendectin*, *Dalkon Shield*, *Breast Implants*, *Agent Orange*, and *HIV Contaminated Blood* to make the point that in a mass tort case, victims typically go without relief or, if they are lucky, receive meager amounts of compensation decades after they suffered their injuries. *See Bellwether Trials,* 82 Tulane L.Rev. at 2330 n. 21; Deborah R. Hensler, "*Fashioning a National Resolution of Asbestos Personal Injury Litigation*," 13 CARDOZO L.REV. 1967 (Apr.1992); *In re TMI Litig.*, 193 F.3d 613 (3rd Cir.1999)(sustaining summary judgment against those exposed to radiation because of the difficulty of proving injury causation); *Wilson v Merrell Dow Pharm., Inc.*, 160 F.3d 625 (10th Cir.1998)(sustaining summary judgment in a prescription drug product liability action because of the difficulty of establishing causation);

(continued...)

the PSC set about to conduct discovery. Three comprehensive sets each of Interrogatories and Requests for Production of Documents were prepared and served upon Merck. *See* Herman Affid., ¶20. Seventy-eight (78) subpoenaes were prepared and served upon third parties. *Id.* From this discovery, review of approximately 50 million pages of documents produced by Merck and third parties took place. *Id.* Depositions of 170 key witnesses were noticed, prepared for and taken within the MDL and another 1757 relevant depositions were collected and reviewed by the PSC. *Id.* Overall, more than 2000 depositions were conducted. *See In re Vioxx Products Liability Litigation,* 2008 WL 4681368 at *2 n.6. The PSC prepared over 45 substantive motions, monitored well over 100 substantive motions prepared by other plaintiffs in the MDL, and similarly monitored or responded to the almost 200 substantive motions filed by Merck. *See* Hennan Affid, ¶25, Exhibits B, C, & D. In addition, the PSC monitored as appropriate the hundreds of non-substantive and procedural motions routinely filed within the

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[9](...continued)
Raynor v. Merrell Pharm., Inc., 104 F.3d 1371 (D.C.Cir.1997)(same); Georgene M. Vairo, "*Georgine, The Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*," 31 LOYOLA OF LOS ANGELES L.REV. 79, 125 (Nov.1997); Deborah R. Hensler & Mark A. Peterson, "*Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*," 59 BROOKLYN L.REV. 961 (Fall 1993); Jack W. Snyder, "*Silicone Breast Implants: Can Emerging Medical, Legal and Scientific Concepts be Reconciled?*," 18 J. LEGAL MED. 133 (June 1997); Joseph M. Guzzardo & Jennifer L. Monachino, "*Gulf War Syndrome–Is Litigation the Answer?: Learning Lessons from In Re Agent Orange*," 10 ST. JOHN'S J. LEGAL COMMENT 673 (Summer 1995); Joseph Kelly, "*The Liability of Blood Banks and Manufacturers of Clotting Products to Recipients of HIV-Infected Blood: A Comparison of Law and Reaction in the United States, Canada, Great Britain, Ireland, and Australia*," 27 J. MARSHALL L.REV. 465 (Winter 1994). This is because of the vast financial resources available to the pharmaceutical giants to conduct a "scorched earth" defense, the legal obstacles to securing class relief, the delays engendered by the complexity of the litigation, and the risk of a bankruptcy as the inevitable and ultimate defense against the financial press of such cases. *Id.* Obviously, this MDL has transcended the difficulties experienced by past MDLs to prove itself to be the model for other cases that follow.

MDL. *See generally* Hearing Transcript at 39-40 (E.D.La. Nov. 9, 2007).[10]

The PSC also retained experts in the fields of cardiology, pharmacology, and neurology, among others, to assist all of the plaintiffs in the prosecution of the MDL. *See* Herman Affid., ¶22. These experts presented reports and each was defended at their deposition by PSC attorneys consistent with this Court's scheduling orders. The PSC also reviewed the Defendants' expert reports and deposed each of the Defendants' experts. *Id.*, ¶24.

To support the PSC, a document depository that was coordinated with the New Jersey, Alabama and California depositories was established in New Orleans to house the substantial forest of documents produced. *Id.*, ¶20. The MDL depository acted as the nerve and communication center for all litigation nationally. The depository inhabited separately rented office space nearby the offices of Herman, Herman Katz & Coltar, LLP. It was equipped with modern office equipment including photocopiers, computers, faxes and telephones. Rent and equipment costs were borne by the PSC and have not yet been reimbursed. The depository was administered by Penny Grisamore and staffed by attorneys and capable paralegals. Salaries of these professionals and para-professionals were borne by members of the PSC. *Id.*

4. <u>The Bellwether Trials</u>

From the outset of the MDL, this Court contemplated a series of bellwether trials to advance the litigation. *See Bellwether Trials,* 82 Tulane L.Rev. at 2325. Given Merck's

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[10] During the course of the MDL proceedings before this court, thousands of orders and opinions were issued by the Court. *See* Herman Affid., ¶28, Exhibit E. Fifty-one of the Court's opinions are available on Westlaw. *Id.* Two reported opinions of appeals to the Fifth Circuit are also available on Westlaw. *Id.*, ¶29.

repeated insistence that it intended to try every case,[11] the necessity for representative trials to mature the claims and provide a range of values from which the parties could evaluate the litigation for settlement purposes was necessary. In the MDL, a series of six bellwether trials were contemplated. The premier trial for the MDL of Plunkett took place in Houston, Texas due to the devastating disruptions caused by Hurricane Katrina. *See* Herman Affid., ¶42. That trial resulted in a hung jury. Thereafter, the Plunkett retrial and the remaining bellwether trials took place in the recovering New Orleans.[12] One of the MDL trials, Barnett, resulted in a $51 million plaintiff's verdict that was subject to remititur. All the others resulted in defense verdicts won by Merck.

The MDL trials and the other 13 trials are captured in the following chart:

CAPTION	RESULT
MDL CASES	
Evelyn Irvin Plunkett, Individually, and as the Personal Representative of the Estate of Richard Irvin, Jr. v. Merck & Co., Inc., Case No. 05-4046	(S.D.Tex., Houston Div., Dec. 13, 2005) (hung jury), *retried* (E.D.La., Feb. 13, 2006) (judgment for defendant), *vacated* (E.D.La., May 29, 2007)
Barnett et al v. Merck & Co., Inc., Case no. 06-485	(E.D.La., June 28, 2007) ($51 million verdict for plaintiff, $1 million as punitive damages, with $1.6 million remittitur award accepted by plaintiff), *appeal dismissed*, Case No. 07-30897 (5th Cir., Apr. 18, 2008)

[11] *See, e.g.*, Press Release: Merck Wins Federal VIOXX Product Liability Case (Feb. 17, 2006) available at http://www.merck.com/newsroom/press_releases/corporate/2006_0217.html.

[12] The first in-depth demographic analysis of the Hurricane strike zone revealed the disproportionate impact the storm had on particular communities of New Orleans. *See* Logan, *The Impact of Katrina: Race and Class in Storm-Damaged Neighborhoods* (Brown Univ. Jan. 25, 2006) available at www.s4.brown.edu/Katrina/report.pdf. As a consequence, the jury pools in the New Orleans vicinage were noticeably different following Katrina.

Smith v. Merck & Co., Inc., Case No. 05-04379	(E.D.La., Oct. 4, 2006) (defense verdict)
Mason v. Merck & Co., Inc., Case No. 06-00810	(E.D.La., Nov. 20, 2006) (defense verdict)
Dedrick v. Merck & Co., Inc., Case No. 05-02524	(E.D.La., Dec. 15, 2006) (defense verdict)
TEXAS	
Ernst et al v. Merck & Co., Inc., Trial Court Cause No. 19961*BH02	(Dist. Ct., Brazoria County, Tx. Aug. 15, 2005) (awarding Ernst's estate $26 million after a verdict of $253 million), *reversed*, 2008 WL 2201769 (Tex. App. May 29, 2008)
Garza v. Merck & Co., Inc., Trial Court No. DC-03-84	(Dist. Ct., Starr County, Tx. Apr. 21, 2006) (awarding Garza's estate $7.75 million following a verdict of $32 million), *reversed*, 2008 WL 5169577 (Tex. App. Dec. 10, 2008)
NEW JERSEY	
Humeston v. Merck & Co., Inc., No. ATL-L-2272-03	(N.J. Sup. Ct., Atlantic County, Nov. 3, 2005) (defense verdict), *vacated*, No. ATL-L-2272-03 (N.J. Sup. Ct., Atlantic County, Aug. 17, 2006), *retried* (N.J. Sup. Ct., Atlantic County, Mar. 12, 2007) ($47.5 million verdict)

McDarby (and Cona) v. Merck & Co., Inc., No. ATL-L-1296-05	(N.J. Sup. Ct., Atlantic County, April 5, 2006) ($15.7 judgment for McDarby, awarding compensatory and punitive damages, as well as attorneys' fees and costs; $2.27 million judgment for Cona, awarding damages of $135 and the remainder as attorneys' fees and costs), *affirmed in part, reversed in part*, 949 A.2d 223 (N.J. Sup. Ct., Appellate Division, May 29, 2008) (affirming award of compensatory damages to McDarby pursuant to the New Jersey Products Liability Act ("PLA"); reversing the award of punitive damages pursuant to the PLA as preempted by the Federal Food and Cosmetic Act; reversing the awards of damages to McDarby and Cona and the awards of attorneys' fees pursuant to the New Jersey Consumer Fraud Act ("CFA"), determining that plaintiffs' CFA claims are subsumed within the PLA)
Doherty v. Merck & Co., Inc., No. ATL-L-638-05	(N.J. Sup. Ct., Atlantic County, July 13, 2006) (defense verdict)
Hermans v. Merck & Co., Inc., No. ATL-L-5520-05	(N.J. Sup. Ct., Atlantic County, Mar. 12, 2007) (defense verdict)
ALABAMA	
Albright v. Merck & Co., Inc., Case No. CV05-2316	(Alabama Circuit Ct., Jefferson County, Dec. 15, 2006) (defense verdict)
CALIFORNIA	
Grossberg v. Merck & Co., Inc., Docket No. BC 327729	(Superior Ct. of California, County of Los Angeles, Aug. 2, 2006) (defense verdict)
Arrigale v. Merck & Co., Inc., No. 05CC03136	(Superior Ct. of California, County of Los Angeles, Jan. 18, 2007) (hung jury)
Appell v. Merck & Co., Inc., No. BC328858	(Superior Ct. of California, County of Los Angeles, Jan. 18, 2007) (hung jury)

ILLINOIS	
Schwaller v. Merck & Co., Inc., Case No. 05-L-687	(Illinois Circuit Court, 3rd Judicial Circuit, Madison County, March 27, 2007) (defense verdict)
FLORIDA	
Kozic v. Merck & Co., Inc., Case No. 03-9248	(Circuit Court for the 13th Judicial Circuit, Hillsborough City, Florida, October 5, 2007) (defense verdict)

5. The Settlement Agreement with Merck

During the Bellwether trials, this Court along with coordinate Judges from New Jersey, Texas, and California, directed certain plaintiffs' counsel from each respective litigation center to focus their efforts on a negotiated resolution with Merck. *See* Hearing Transcript at 5 (E.D.La. Nov. 9, 2007). The NPC, Russ Herman, Andy Birchfield, Christopher Seeger, Arnold Levin, Edward Blizzard and Thomas Girardi, were selected based upon recognition of their core responsibility for strategic and tactical decisions in their relevant jurisdictions. The NPC began negotiating in earnest on behalf of the plaintiffs' interests with counsel for Merck beginning in December 2007. *See* Herman Affid., ¶43. After a year of hard fought, "robust" and very arms-length negotiations, Hearing Transcript at 16 (E.D.La. Nov. 9, 2007), the Settlement Agreement was reached. It was presented to the Court, sitting along with its brother and sister Judges, on November 9, 2007.

The Settlement Agreement was a uniquely tailored instrument. "Unlike a class settlement, the MSA is a private, opt-in settlement that was not secured through a settlement class vehicle and therefore pose[d] no risk of binding any unwilling plaintiff to its terms." *In re Vioxx Products Liability Litigation*, MDL No. 1657, Order & Reasons at 7 (E.D.La. Dec. 12,

2008). The settlement provides compensation for Vioxx claimants whose objective medical records establish their use of Vioxx in proximity to certain defined injuries (myocardial infarctions, ischemic strokes and sudden cardiac death). The details of the Settlement Agreement are contained within a 65 page document with 14 highly specialized exhibits exceeding 100 pages.

To be activated, the Settlement Program required a minimum participation, favorable response rate of 85% of all eligible claimants. The Settlement Program, however, was so well received that the minimum participation levels were far exceeded. In total, 99.79% of all Vioxx Claimants that registered in the program enrolled into the Settlement Program. *See* Status Conf. Hearing Transcript at 9 (E.D.La. Dec. 19, 2008). This overwhelming response reflects the extraordinary benefits conferred upon the Vioxx plaintiffs who otherwise confronted litigation risks, including proof of causation at trial.

The administration of the Settlement Program is based upon objective data. Eligible Claimants were therefore required to submit to the Claims Administrator certain medical records documenting their injury ("Event Records") and records documenting their Vioxx usage. This so-called "Claims Package" was to be submitted along with a Release and Dismissal Stipulation in order for the Eligible Claimant to participate in the Settlement Program. Based upon the Claims Package, BrownGreer, LLC, the Claims Administrator determines whether an Eligible Claimant qualifies for compensation based upon certain threshold criteria being met. These threshold criteria are referred to as "Gates" which evaluate the (1) event, (2) duration of Vioxx use, and (3) proximity of Vioxx use to the injury. To meet the "Event Gate", medical records must confirm that the Eligible Claimant suffered a heart attack, ischemic stroke or sudden

cardiac death. The "Duration Gate" requires that medical or pharmacy records establish that the Eligible Claimant receive at least 30 Vioxx pills within sixty days prior to the injury. Finally, the "Proximity Gate" requires that medical or pharmacy records confirm that Vioxx was being used by the Eligible Claimant within fourteen days of the Vioxx-related heart attack, ischemic stroke or sudden cardiac death.

The Settlement permits Eligible Claimants review opportunities of the Claims Administrator's determination of whether Eligible Claimant's qualify for compensation. All determinations by the Claims Administrator that a claim is ineligible are reviewed by a "Gates Committee." The Gates Committee has been and remains actively involved in reviewing thousands of such determinations since the initiation of the Settlement Program. A Gates Committee determination is also appealable to the Special Master who is to review *de novo* any determination that an Eligible Claimant did not qualify for compensation.

Based upon any determination of not qualifying for compensation, each Eligible Claimant has the right to return to the tort system and receive back their Release and Dismissal Stipulation contingent upon the submission of a future evidence stipulation, or do nothing and have their case dismissed, or, as previously discussed, appeal the negative determination to the Special Master. In the event the Special Master rules in favor of the Eligible Claimants qualifying for compensation then, like all eligible claimants, the claim gets submitted to the Claims Administrator to participate in the valuation process.

The valuation process for qualifying claims uses a point system to ensure that the valuation is consistent across similarly situated Qualifying Claimants and reflects the likely relative value of each claim within the tort system. Under the points system, the Claims

Administrator individually evaluates the medical records in support of each Qualifying Claimant along several dimensions. Claims are first assigned a base point total, which reflects the qualifying claimants injury type, level of injury within the injury type, age at the time of the MI or IS, and duration of Vioxx use. Claims involving longer Vioxx use, a younger Vioxx Claimant, and a more severe injury will be assigned more points than claims involving briefer Vioxx use, and older Vioxx Claimant, and less severe injury.

Adjustments to the base point total are then adjusted by the Claims Administrator based on various standardized liability adjustments and risk factor adjustments. The adjustments reflect aspects of the Qualifying Claimant's Vioxx use and medical history that would be expected to affect the value of the Qualifying Claimant's claim within the tort system and are based upon a Qualifying Claimant's event records, follow up records, and any Profile Form, submitted to Merck or the Court. The liability adjustments involve the consistency of the Qualifying Claimant's Vioxx usage in the twelve months preceding the event and whether the Qualifying Claimant's Vioxx use and the MI or IS occurred prior to March 9, 2000, between March 9, 2000 and April 11, 2002, or after the April 11, 2002 label change. The risk factor adjustments include consideration such as smoking history, high cholesterol, hypertension, diabetes, etc. Again, the Claims Administrator's determination of each Qualifying Claimant's total point award is appealable to the Special Master.

Once the total number of points of all qualifying MI and IS claims is known, the Claims Administrator will then be able to make final payments from the settlement funds. The total gross payments to be made to Qualifying Claimants under the agreement is $4.85 billion, with approximately $4 billion to be allocated among MI Qualifying Claimants and approximately

$850 million to be allocated among IS Qualifying Claimants.

The Settlement Agreement also provides for interim settlement payments to certain claimants. The Claims Administrator regularly reports to the Court at its monthly status conferences, the status of interim settlement payments amongst its reports on the progress of claims administration. In addition, the program also provides for extraordinary injury payments for certain Qualifying Claimants with documented economic damages of at least $250,000.00. The Settlement also provides for a Lien Resolution Administrator, Matthew L. Garretson and the Garretson Law Firm. Mr. Garretson has already favorably resolved the governmental liens on behalf of all Vioxx Claimants, which in and of itself affords claimants an extraordinary benefit. Herman Affid., ¶46.

In addition, the Settlement Agreement contemplated the use of a bank to provide financial services attendant to funding the Settlement Program. The MDL common benefit counsel conferred with and interviewed several prospective institutions before selecting and retaining U.S. Bank as the escrow agent to provide these financial services. Significant negotiations and collaboration have taken place between MDL common benefit counsel and U.S. Bank in connection with its role as escrow agent. U.S. Bank has been and remains a financially sound financial institution despite the current financial crisis within the banking industry. Herman Affid., ¶48.

The Settlement Agreement received widespread notice. It was published on the MDL Court's website, a website entitled www.officialvioxxsettlement.com and other locations. In addition, the members of the NPC traveled to various forums to promote the Settlement Agreement and to inform interested claimants and their counsel of the benefits of the Settlement

Program. Herman Affid., ¶49 (these educational seminars took place in Philadelphia, New Orleans, Los Angeles, Houston, Puerto Rico, Las Vegas and other locations). Further, tremendous outreach was conducted to encourage *pro se* Vioxx claimants to participate in the Settlement Program. These efforts precipitated the extraordinary and overwhelming participation levels experienced.

6. The Post-Settlement Efforts to Defend the Settlement Program

Despite the overwhelming acceptance of the Settlement Program by the majority of Vioxx claimants at the rate of 99.79%, there has been some remonstration. The settlement therefore remains under the watchful supervision of the NPC, PSC and common benefit counsel who continue to monitor and address the various challenges occurring at a real time pace. *See* Herman Affid., ¶30. For example, following the announcement of the Settlement, the law firm of Stratton, Faxon sought a prospective declaratory judgment against Merck and each of the individual members of the NPC. Stratton, Faxon contended that it was not ethically required to observe Section 12.8 of the Settlement Agreement, which required "enrolling counsel to affirm that he has recommended . . . to 100% of the Eligible Claimants represented by such a enrolling counsel that such Eligible Claimants enroll in the program." Settlement Agreement §1.2.8.1. *See Stratton Faxon v. Merck & Co., Inc., Andy D. Birchfield, Jr., et al.*, 2007 WL 4554190 (D.Conn. Dec. 21, 2007). This case was dismissed for lack of jurisdiction, *i.e.*, there was no case or controversy. *Id* at *2.[13]

[13]The Court held: "Stratton Faxon merely has a difficult decision to make about an ethical rule. It must either recommend that all of its client accept the private and consensual settlement, none of its clients accept the settlement, or trust its interpretation of the Connecticut ethical rules that would place it, and its clients, in the safe harbor. There indeed may be adverse future (continued...)

Other litigants represented by Ann Oldfather challenged this Court's "Lone Pine" order, Pretrial Order No. 28, which was entered in aid of the settlement. *See* Herman Affid., ¶31. The PSC responded to the motion and participated in argument. *See In re Vioxx Products Liability Litigation*, 557 F.Supp.2d 741, 744 (E.D.La. May 30, 2008)(extending deadlines). Litigants represented by Ronald Benjamin also challenged PTO No. 28, in addition to moving to vacate or modify the Master Settlement Agreement by having this Court recuse itself from its administrative role in the settlement. On September 15, 2008, the PSC prepared an extensive memorandum opposing the Benjamin motion and was prepared to argue the motion before the Court. The Court declined argument, but denied the motion in its entirety. *See In re Vioxx Products Liability Litigation*, MDL No. 1657, Order & Reasons (E.D.La. Dec. 10, 2008).

In addition, common benefit counsel are still working to resolve outstanding issues that have surfaced after the announcement of the settlement addressing liens and other post-settlement disputes. *See* Herman Affid., ¶32. Several such disputes have appeared. On February 20, 2008, Healthcare Recoveries, Inc. filed a Rule 27 Petition against the PSC seeking information regarding the identities of all insureds enrolled in the settlement. In response, the PSC filed a motion to dismiss. On May 6, 2008, this Court dismissed the HRI Petition. *In re Vioxx Products Liability Litigation*, 2008 WL 1995098, *6 (E.D.La. May 6, 2008).

Subsequently, 1199SEIU Greater New York Benefit Fund, filed a class action against BrownGreer LLC and the NPC. *See* Herman Affid., ¶33. The NPC moved to dismiss that suit

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[13](...continued)
consequences to any potential decision Stratton Faxon makes. But lawyers make difficult decisions about ethical rules on a daily basis. Not every difficult decision constitutes a "case of actual controversy."

and to strike the class allegations. In addition, another non-governmental Third Party Payor, Avmed Inc., filed suit against BrownGreer LLC. Both parties sought preliminary injunctive relief. The NPC and PSC were actively involved in opposing the challenges brought by these TPPs, participated in the hearing, filed amicus papers and other briefs. The Court refused to grant the injunctions. *See In re Vioxx Products Liability Litigation*, 2008 WL 3285912 (E.D.La. Aug. 7, 2008), *aff'd, Avmed Inc. v. BrownGreer PLC*, 2008 WL 4909535 (5th Cir. Nov. 17, 2008). *See also In re Vioxx Products Liability Litigation*, *supra*, 2008 WL 4681368 (granting motions to sever and strike class allegations).

Given the ongoing dispute over these insurer's subrogation interests, the common benefit counsel have worked extraordinarily hard to resolve the non-governmental TPP lien claims. Without resolution of these subrogation interests, extraneous litigation and dissipation of client recoveries could continue for extended lengths of time. Following lengthy negotiations, a tentative settlement agreement with Avmed Inc. has been reached which is expected to favorably resolve these claims by capping recoveries on favorable terms to all Vioxx claimants. *See* Herman Affid., ¶34.

* * *

As a matter of public policy, even though the Settlement Agreement is a private settlement, the agreement dictates that judicial approval be obtained with respect to attorneys fees and reimbursement of expenses. The Settlement Agreement therefore provides for common benefit attorneys to be compensated by assessing claimants' recoveries, depositing those assessments into a Settlement Fee and Cost Account, and having that account "administered by this Court in consultation with the coordinated state judges from New Jersey, Texas and

California, in accordance with established Fifth Circuit precedent, *e.g,. Blum v. Stenson*, 465 U.S. 886, 900 (1984); *Copper Liquor, Inc. v. Adolph Coors, Co.*, 624 F.2d 575, 583 n. 15 (5th Cir. 1980); *Johnson*, 488 F.2d at 717-19; *Strong v. BellSouth Telecomms., Inc.*, 137 F.3d 844, 851-52 & n. 5 (5th Cir. 1998); *Forbush v J.C Penney Co.*, 98 F.3d 817, 823 (5th Cir.1996); *Turner v. Murphy Oil USA, Inc.*, 472 F.Supp.2d 830 (E.D. La. 2007)." Settlement Agreement §9.2.3 (the MSA contemplated that class action and aggregate attorney fee jurisprudence would apply to this award). The Settlement Agreement sets the assessment at no more than 8% of any recovery, as follows:

> To ensure that NPC, PSC, PEC, PLC, and common benefit attorneys (hereinafter referred to as "Common Benefit Attorneys") are fairly compensated but that their fees are in conformance with reasonable rates, an assessment of common benefit attorneys' fees will be imposed at no more than 8% of the gross amount recovered for every client that registers under the terms of the Settlement Agreement. Any sum paid as a common benefit fee shall be deducted from the total amount of counsel fees payable under individual plaintiffs' counsel's retainer agreement. The maximum 8% attorneys' fee assessment shall supersede the assessment provided to MDL common benefit attorneys pursuant to Pretrial Order No. 19.

Settlement Agreement §9.2.1.

After years of litigation of the highest caliber, against quite a formidable opponent and equally impressive defense counsel,[14] the largest private settlement of its kind was achieved by

[14]Among the many excellent firms representing Merck around the country in this matter included: Williams & Connolly LLP; Hughes Hubbard & Reed LLP; O'Melveny & Myers LLP; Stone Pigman Walther Wittmann LLC; Dechert LLP; Bartlit Beck Herman Pelanchar & Scott LLP; Baker Botts L.L.P.; Fulbright & Jaworski L.L.P.; Sedgwick, Detert, Moran & Arnold LLP; and Reed Smith LLP.

the NPC for the victimized plaintiffs.[15] And while some work is ongoing, just as our efforts handsomely benefitted the plaintiffs, we now request that we be rewarded the 8% assessment deservedly obtained to assure that compensation can be furnished for work already performed and that adequate funds are reserved to compensate counsel still laboring for the common benefit of all Vioxx plaintiffs.[16]

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[15]Commentators have already begun to favorably remark upon the novel approach employed to resolve the individual personal claims with the unique aggregate settlement program. *See* Issacharoff, *Private Claims, Aggregate Rights,* 2008 Supreme Court Rev. 1, 31 (Oct. 24, 2008), available at http://ssrn.com/abstract=1289505 ("What Vioxx offered . . . was a novel means of using private ordering to bring sensible closure to common claims, with court supervision, but outside the boundaries of formal procedural law.").

[16]The issue of the amount to be reserved for future common benefit work is a matter that will be addressed by the Allocation Committee when it makes its recommendation to the Court. The Allocation Committee was appointed by this Court in PTO No. 32 and is comprized of Russ Herman (Chairman); Andy D. Birchfield, Jr. (Secretary); Christopher A. Seeger; Edward F. Blizzard; Thomas V. Girardi; W. Mark Lanier; Arnold Levin; Troy Rafferty; and Perry Weitz. It is important to note, however, that significant work remains to be performed by the Gates Committee in connection with the thousands of Eligible Claimants subject to review by the Gates Committee. The NPC still remains active and confers regularly to insure that the Settlement Agreement is being implemented properly and efficiently. In this regard, the NPC is still negotiating the terms of the tentative settlement with Avmed regarding liens. Also, the NPC regularly answers inquiries by counsel, resolves disputes that arise over matters related to the settlement and other matters. The Allocation Committee also has additional responsibilities including the preparation of a report to the Court recommending an appropriate division of whatever fees result from the instant award request.

III. ARGUMENT

A. PRINCIPLES GOVERNING THE DETERMINATION OF THE AMOUNT OF A MASS TORT MDL COMMON BENEFIT FEE AWARD

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 Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Boeing v. Van Gemert*, 444 U.S. 472 (1980); and *Blum, supra.*

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

(like the case *sub judice*), 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 Guidant Corp. Implantable Defibulators Products Liability Litigation*, 2008 WL 682174, *5 (D. Minn. March 7, 2008), *citing*, *Awarding Attorneys' Fees and Managing Fee Litigation* at p. 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, FOURTH, § 14.121 at 186 (Fed. Jud. Ctr. 2004)("The common-fund exception to the American Rule is grounded in the equitable powers of the courts under the doctrines of ***quantum meruit*** and unjust enrichment.")[hereafter the "MCL"].

The courts have generally used a percentage-of-recovery methodology to determine the amount of the common benefit fee in a mass tort setting where a fund is created. *See In re Thirteen*

Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litigation, 56 F.3d 295, 308 (1st Cir. 1995)("the court below did not err in proposing to allocate fees based on the POF method, emphasizing the attorneys' 'relative contribution' to the creation of the Fund"); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005)("The trend in this Circuit is toward the percentage method"); *In re General Motors Corporation Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 821 (3d Cir. 1995) (recognizing application of the "percentage-of-recovery method" in mass tort cases "which do not actually generate a common fund"); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 774-75 (9th Cir. 1977); *In re MGM Grand Hotel Fire Litig.*, 660 F. Supp. 522, 526 (D. Nev. 1987)("When calculating a fee under the 'Common Benefit Doctrine,' 'a reasonable fee is based on a percentage of the Fund.'").[17]

An example of percentage awards permitted in recent large litigations are set forth in the following chart:[18]

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[17] Since the issuance of the *Report of the Third Circuit Task Force, Court Awarded Attorneys Fees*, 108 F.R.D. 237 (1985) in 1985, virtually every circuit court has joined the United States Supreme Court in approving use of the percentage-of-the-fund method in common fund cases. *See, e.g., In re Thirteen Appeals*, 56 F.3d at 307; *In re GMC*, 55 F.3d at 821-22; *Rawlings v. Prudential-Bache Props.*, 9 F.3d 513, 515-17 (6th Cir. 1993); *Florin v. Nationsbank, N.A.*, 34 F.3d 560, 564-65 (7th Cir. 1994); *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 246 (8th Cir. 1996); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1296 (9th Cir. 1994); *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994)(authorizing percentage approach and holding that use of lodestar/multiplier method was abuse of discretion); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991)("After reviewing *Blum*, the [Third Circuit] Task Force Report, and...cases from other circuits, we believe that the percentage of the fund approach is the better reasoned in a common fund case."); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993)(percentage of the fund recovered is the *only* permissible measure of awarding fees in common fund cases).

[18] Similar analyses are provided in *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 2008 WL 4178130, *31 (S.D.Tex. 2008) and *In re Diet Drugs Products Liability* (continued...)

Case	Fund Value	Percentage Award	Lodestar Multiplier
In re Enron Corp. Securities, Derivative & ERISA Litigation, 2008 WL 4178130 (S.D.Tex. 2008)	$7.2 billion	9.52%	5.2
In re Nasdaq Market-Makers Antitrust Litigation,. 187 F.R.D. 465 (S.D.N.Y. 1998)	$1.07 billion	14%	3.97
Shaw v. Toshiba Am. Info. Sys., Inc., 91 F.Supp. 2d 942 (E.D.Tex. 2000)	$1 to $1.1 billion	15%	not available
In re Sulzer Hip Prosthesis and Knee Prosthesis liability Litigation, 268 F.Supp. 2d 907 (N.D.Ohio 2003)	$1.045 billion	4.8%	2.4
DeLoach v. Philip Morris Cos., 2003 WL 23094907 (M.D.N.C. Dec. 19, 2003)	>$1 billion	5.9%	4.45
Visa Check/Mastermoney, 297 F.Supp. 2d 503 (E.D.N.Y. 2003), *aff'd, Wal-Mart Stores, Inc. v. Visa, U.S.A., Inc.*, 396 F.3d 96 (2nd Cir. 2005)	$3.383 billion	6.5%	3.5
In re WorldCom, Inc. Sec. Litig., 388 F.Supp. 2d 319 (S.D.N.Y. 2005)	$6.133 billion	5.5%	4

[18](...continued)
Litigation, 553 F.Supp.2d 442, 480 (E.D.Pa. Apr. 9, 2008). As the petitioners have the burden of demonstrating that the proposed percentage fee is fair and reasonable, our summary chart demonstrates that the average percentage award is 9.125%. Since Petitioner's 8% request is below the average percentage award it should be deemed presumptively fair and reasonable. *See Murphy Oil*, 472 F.Supp.2d at 864 n. 31 (To establish benchmark percentage, the Court considered empirical studies, including Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 27 (2004) and Stuart J. Logan, et al., *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Rep. 169 (2003). Under the "reported data set"percentage awards of 3.9% to 20.1% are presumptively reasonable. Under the "CAR data set" percentage awards of 7% to 28.2% are presumptively reasonable.) Employing either data set referenced by *Murphy Oil*, reveals that the proposed 8% fee request is presumptively reasonable.

In re AOL Time Warner, Inc. Sec. & ERISA Litig., 2006 WL 3057232 (S.D.N.Y. 2006)	$2.65 billion	5.9%	3.69
In re Royal Ahold N.V. Sec. & ERISA Litig., 461 F.Supp. 2d 383 (D.Md. 2006)	$1.1 billion	12%	2.57
In re Tyco Int'l, Ltd., 535 F.Supp 2d 249 (D.N.H. Dec. 19, 2007)	$3.3 billion	14.5%	2.697
In re Diet Drugs Products Liability Litigation, 553 F.Supp.2d 442 (E.D.Pa. Apr. 9, 2008)	$6.44 billion	6.75%	2.6
AVERAGE	$3.129 billion	9.125%	3.5

These courts realize the efficiencies and practicalities that accompany the percentage method. Indeed, in *Blum*, 465 U.S. at 900 n.16, the landmark decision that began the trend towards percentage awards, the United States Supreme Court indicated that "under the common fund doctrine . . . a reasonable fee is based on a percentage of the fund bestowed upon the class . . ." Several positive externalities are generated by the percentage method. Notably, lawyers have no incentive to work excessive hours. *See Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000)("the lodestar method . . . arguably encourages lawyers to run up their billable hours"). More importantly, courts are relieved of the time-consuming burden of reviewing fee applications and evaluating billing records. *See Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 48-49 (2d Cir. 2000)("the primary source of dissatisfaction [with the lodestar method] was that it resurrected the ghost of Ebenezer Scrooge, compelling district courts to engage in gimlet-eyed review of line item fee audits. There was an inevitable waste of judicial resources."); *In re Educational Testing Service, Etc.*, 447 F.Supp.2d 612, 628 (E.D.La. 2006)("The method has been called difficult to apply, time-consuming to administer, inconsistent in result, and capable of

manipulation.").

In class action settlements generating a common fund, the Fifth Circuit adheres to the more traditional lodestar analysis set forth in *Johnson*, 488 F.2d at 717-19. *See In re High Sulfur*, 517 F.3d at 227-28. Even in class cases, however, the Fifth Circuit "seems to allow considerable flexibility in approving combined percentage and lodestar approaches." MCL §14.121 at 187. *See Strong*, 137 F.3d at 852 & n.5; *Longden*, 979 F.2d at 1099-1100; *In re Enron,* 2008 WL 4178130, *10 - *11.[19] And where, as here, there is a private, mass tort settlement that does not employ the class action device, district courts in this Circuit facing novel situations are not reluctant to employ

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[19]Anticipating the trend away from the lodestar method, Judge Vance of the Fifth Circuit stated in his separate opinion in *Foster v Boise-Cascade, Inc.*, 577 F.2d 335, 337 n.1 (5th Cir. 1978):

> [I]f mechanically applied, the hourly rate approach almost inevitably leads to an unsatisfactory result in this type of litigation. 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.

In fact, "since *Blum* was decided [in 1984], 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*." *In re Prudential-Bache Energy Income Partnership Securities Litigation*, 1994 WL 150742, *4 (E.D.La. April 13, 1994); *see also Batchelder v. Kerr-McGee Corp.*, 246 F.Supp. 2d 525, 531 (N.D. Miss. 2003)("A percentage fee approach, as opposed to a lodestar computation, is the preferred method for determining awards of attorneys' fees in common fund, or class action, cases."); *Shaw*, 91 F.Supp. 2d at 967 n. 15 ("the Fifth Circuit has *never*... reversed a district court judge's decision to award a fee as a percentage")(emphasis in original); *Longden*, 979 F2d at 1100 N. 11 (affirming district court's percentage fee award in securities class action, noting that the district court stated its preference for the percentage of recovery approach "as a matter of policy").

percentage fee awards, provided that some reference to the more traditional lodestar analysis is employed. *See Murphy Oil*, 472 F.Supp.2d at 860 ("Likewise, though the Fifth Circuit has not explicitly accepted the percentage method, it does appear to be amenable to its use, so long as the *Johnson* framework is utilized to ensure that the fee awarded is reasonable.")(citing cases).[20] *Compare Camden I Condominium Assoc., Inc. v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991)(establishing 20% - 30% as a benchmark when awarding a common fund fee).

In the *Murphy Oil* case, the plaintiffs' steering committee ("PSC") negotiated a class settlement resulting in a common fund valued at approximately $195 million. The settlement agreement provided, however, that the defendant would pay attorneys fee separate and apart from the common fund, pursuant to an award to be determined by the court. *Murphy Oil*, 472 F.Supp.2d at 856. The court decided that the proper methodology for calculating attorneys fees would be based upon a blended percentage approach. Under the blended percentage approach an initial benchmark percentage was selected, followed by adjustments based upon the *Johnston* factors.[21] The Court also conducted a rough lodestar analysis to cross-check the reasonableness of its percentage award. *Id.* at 861.

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[20] Following the adjudication of the 17% award, this Court appointed a special master to recommend the proper allocation of the award to the petitioning counsel. Upon review of that report and recommendation, the Court made determinations of specific allocations in *Murphy Oil*, *supra*, 2008 WL 4661806.

[21] The twelve *Johnston* factors are well known to courts in this circuit: (1) The time and labor required. (2) The novelty and difficulty of the questions. (3) The skill requisite to perform the legal service properly. (4) The preclusion of other employment by the attorney due to acceptance of the case. (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. (12) Awards in similar cases. *Johnson*, 488 F.2d at 717-19.

Employing this methodology, the Court looked to what customary fees and awards existed in similar cases. The court utilized an empirical study of attorneys' fees in class action settlements in a effort to mimick the market for attorneys fees. *Id.* at 863-64, *citing*, Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 21 (2004). Based upon that study's findings, the court concluded that a benchmark of 15% would be the appropriate percentage to apply to the common fund. *Id* This percentage was adjusted upward by the court after finding that six of the twelve *Johnson* factors favored such an increase. The court was impressed by the intensive efforts, expedited priority and pace of counsel and favorable results obtained. Based upon its findings, the court increased the benchmark upward to 17%. *Id.* at 869.

Other district courts in the Fifth Circuit have employed similar analyses in class action settlements to arrive at varying percentage awards in cases involving common funds of varying sizes compared to that presented here. *See e.g., Enron,* 2008 WL 4178130 at * 6-*7; *In re: Bayou Sorrel Class Action*, 2006 WL 3230771 (W.D.La. Oct. 31, 2006)(36% of $28 million common fund); *In re Educational Testing Service*, 447 F.Supp.2d at 633 (29% of $11.1 million common fund); *In re Catfish Antitrust Litigation*, 939 F.Supp. 493, 504 (N.D.Miss. 1996)(25% of $27.5 million common fund).

The opinion in *Enron* is especially helpful in this regard. After the financial collapse of the Enron Corporation, affected investors, led by the Regents of the University of California, instituted a barrage of litigation against Enron, its auditors and other agents. Following 6 years of extensive litigation, settlements were obtained in excess of $7.2 billion, representing the largest recovery ever in a class action. *Enron*, 2008 WL 4178130 at *1 n.3. When petitioning for attorneys fees for all counsel, lead Plaintiff's counsel requested fees consistent with its contingent fee agreement with

the lead plaintiff. That fee agreement contained an increasing fee schedule which provided that counsel could seek 8% from the first billion obtained, 9% from the second billion and 10% of the balance. Considering the size of the recovery, the fee schedule resulted in a blended rate of 9.52%. *Id.* at *26. Finding that the "percentage method is properly applied here as a matter of law," the district court sustained the request. *Id.* at *23.[22]

Notably, the *Enron* court also engaged in a hybrid analysis that evaluated the *Johnson* factors and a lodestar cross-check to arrive at a percentage fee award. The court considered each of the *Johnson* factors to conclude that the work performed by lead counsel was exceptional. Throughout its analysis, the court focused on the skill of counsel and the "unparalleled results" obtained. *Id.* at *40. After expending over 289,500 hours over 6 years at a blended hourly rate of $456 based upon current billing rates, counsel's lodestar was $131,971,583.20, and reasonably supported the 9.52% award requested. *Id.* at 32-33, 37. The lodestar cross-check proved the reasonableness of the award as the multiplier of 5.2, "only marginally higher than the 4.50 average multiplier in settlements over $100 million." *Id.* at *48 (quoting Affidavit of John Coffee and noting that "there has been a general recognition that multipliers in the range of 3 to 4.5 have become relatively common in cases with recoveries over $1 billion." *Id., citing In re NASDAQ*, 187 F.R.D. at 489.

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[22]The *Enron* court eschewed the application of a sliding scale that diminishes the permissible percentage fee award as the value of the recovery increases. The court acknowledged that other courts in "megafund" cases capped fee percentages at low figures as recoveries became quite large. *Id.* at *12, *citing, In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001). Nevertheless, the court rejected a mechanical, *per se* application of a "megafund rule." The court was instead persuaded that "the megafund rule is contrary to the Fifth Circuit's approach that the district court scrutinize each case for the particular facts that will determine what constitutes a reasonable fee award." *Id, citing In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 302 (3d Cir. 2005); *Allapattah Services, Inc. v. Exxon Corp.*, 454 F.Supp.2d 1185 (S.D.Fla. 2006); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, 2005 WL 1213926 (E.D.Pa. May 10, 2005).

Elsewhere, in the *Guidant* case, the court addressed the application of a common benefit assessment in a setting similar to that presented by this case. In *Guidant*, the Judicial Panel for Multidistrict litigation consolidated litigation involving several implantable defibrillator products. The district court appointed a PSC to undertake the administrative and substantive tasks of pretrial activities. Several months after the transfer order, the court issued a pretrial order establishing a common benefit fund to compensate the PSC. The court created a regime whereby assessments of 2% for fees and 2% for costs would be subtracted from any recovery in the individual cases. The MDL then proceeded through discovery and substantive motions practice in contemplation of bellwether trials. As the bellwether trials' starting dates approached, the parties announced that a non-class global settlement had been obtained under judicial supervision.[23] The settlement contemplated that a $240 million fund would be created to compensate 8,550 plaintiffs, as well as the common benefit attorneys' fees.

To evaluate the appropriate common benefit fees, the *Guidant* court chose to employ a blended percentage approach, much like this Court did in *Murphy Oil*. *Id.* at *6 ("Here the Court will exercise its discretion to utilize both the percentage of the fund method and the lodestar method, each cross-checking the other"). The court reviewed the common benefit doctrine and its modern interface with complex MDL litigation. *Id.* at *5, *citing, In re Diet Drugs Products Liability Litigation*, 2002 WL 32154197, *17 (E.D.Pa. Oct. 3, 2002)(noting that the appointment of a PSC necessarily correlates with the authority to compensate that committee). It then engaged in an extensive analysis of the *Johnson* factors to arrive at a 15% percentage factor award. The court

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[23]The negotiations were supervised by Magistrate Judge Boylan and a Special Master, Patrick Juneau.

noted the extensive efforts that were applied by common benefit attorneys in a relatively compressed time frame and the favorable results achieved. Id. at *7-*10. The court later determined through a lodestar cross-check that its percentage award was well supported since the calculated lodestar required only a minimal 1.19 multiplier enhancement. Id. at *14-*16.

While there are obvious differences between these cases and the Vioxx litigation, *Enron, Murphy Oil*, and *Guidant* establish a range of common benefit awards between 9.52 and 17 percent. Based upon this established range, the potential awards would reflect the following:

Billion	8%	10%	12%	15%	17%
$4.85	$388 million	$485 million	$582 million	$727.5 million	$824.5 million

The NPC submits that the smaller 8% award requested is presumptively fair, especially in light of our further analysis, which follows.

B. THE PRESENT CASE IS APPROPRIATE FOR A COMMON BENEFIT FEE AWARD

Pursuant to PTO No. 19, the amount of the common benefit fee imposed upon certain federal cases that have been part of MDL 1657 and those coordinated state court cases is 3% of the gross recoveries by the plaintiffs. This assessment was imposed to provide a mechanism to compensate the PSC and other common benefit attorneys for services performed and expenses incurred for MDL administration and common benefit services for cases that were being prepared for trial. Aside from the global fund created here, there is ample authority for awarding a fee to the plaintiffs' management structure appointed by the court[24] payable out of the fees derived from the

[24] In conformity with the Manual for Complex Litigation, the management structure appointed by an MDL Transferee court usually includes liaison counsel, lead counsel, and a (continued...)

representation of the individual litigants whose cases are subject to coordinated pretrial proceedings in the MDL transferee court. *See Vincent v. Hughes Air West, Inc.*, 557 F.2d 759,769 (9th Cir. 1977); *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5th Cir. 1977); *In re MGM, supra*; *In re Orthopedic Bone Screw Product Liability Litigation*, 1996 WL 900349 (E.D. Pa. Jun. 17, 1996); *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 Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1296, 1317 (E.D.N.Y. 1985), *mod'd on other grounds*, 818 F.2d 226 (2nd Cir. 1987); *In re Diet Drugs Products Liability Litigation*, 1999 WL 124414 (E.D.Pa. Feb. 10, 1999); *In re Ephedra Products Liability Litigation*, MDL No. 1598, Case Management Order No. 7 (S.D.N.Y. Nov. 29, 2004);[25] *In re Zyprexa Products Liability Litigation,* 2007 WL 2340790 (E.D.N.Y. Aug. 17, 2007); *In re Propulsid Products Liability Litigation,* MDL No. 1355, PTO No. 16 (E.D.La. Dec. 26, 2001)[26]; MANUAL FOR COMPLEX LITIGATION (FOURTH), § 14.215 at 202. Such "common benefit" fee awards have, in fact, become commonplace in mass tort litigation. *Id.* Two distinct doctrinal grounds support this "assessment power" and serve to inform its exercise.

The first basis for the exercise of a district court's assessment prerogative derives from the court's docket management powers. As the Supreme Court said nearly half a century ago, a federal court has inherent power "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254

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[24](...continued)
"management," "legal" or "steering" committee. *See* MANUAL FOR COMPLEX LITIGATION (THIRD), §20.22.

[25]Attached hereto as Exhibit "B".

[26]Available at http://propulsid.laed.uscourts.gov/Orders/order16.pdf.

(1936). Given the pressing demands imposed on federal courts by civil litigation of increasing volume and complexity, such "[m]anagerial power is not merely desirable. It is a critical necessity." *Florida Everglades,* 549 F.2d at 1012. The crucial need for the intensive exercise of the federal court's docket management powers was explicitly recognized by Congress when it enacted 28 U.S.C. § 1407, which created the Judicial Panel on Multidistrict Litigation and empowered it to transfer all federal cases involving "common questions of law or fact" to a single federal district judge for "coordinated or consolidated pretrial proceedings." Such a transfer would accomplish little in terms of economy or efficiency if counsel for thousands of individual plaintiffs in the transferred cases engaged in pretrial activities in whatever manner they saw fit.

Therefore, the creation and appointment of a plaintiffs' leadership structure to coordinate discovery and other pretrial activities has long been considered an essential element in the proper management of MDL litigation. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH), § 10.221; *Vincent*, 557 F.2d at 774 (noting "[t]he benefits achieved by consolidation and the appointment of general counsel, i.e., elimination of duplication and repetition and in effect the creation of a coordinator of diffuse plaintiffs through whom motions and discovery proceedings will be channeled"); *MacAlister v. Guterma,* 263 F.2d 65, 68 (2nd Cir. 1958)("Certainly, overlapping duplication in motion practices and pre-trial procedures occasioned by competing counsel representing different plaintiffs in separate . . . actions constitute the waste and inefficiency sought to be avoided by [the Federal Rules of Civil Procedure] . . . An order consolidating . . . actions during the pre-trial stages, together with the appointment of a general counsel [for the plaintiffs] may in many instances prove the only effective means of channeling the efforts of counsel along constructive lines and its implementation must be considered within the clear contemplation of the

rule[s]"); *Smiley*, 958 F.3d at 499 ("Plaintiffs' Committee formed to avoid duplicate discovery and widely varying pretrial rulings"); *Nineteen Appeals*, 982 F.2d at 605 ("Court appointed a plaintiffs' committee to organize the plaintiffs' side of the litigation"); *In re Bendectin Litig.*, 857 F.2d 290, 297 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989) ("in complex case judge may create a plaintiffs' committee for lead counsel"). The members of such a leadership structure assume a quasi-public function similar to court-appointed masters, arbitrators and experts:

> To a degree, lead attorneys become officers of the court. By making manageable litigation that otherwise would run out of control they serve interests of the court, the litigants, the other counsel, and the bar, and of the public at large, who are entitled to their chance at access to unimpacted courts.

Florida Everglades, 549 F.2d at 1017.

The inherent power of the federal courts to appoint a plaintiffs' management structure in complex litigation necessarily includes the power to provide a means of compensation for the services provided by the members of the management structure separate and apart from the private fee arrangements with their individual clients:

> [I]f lead counsel are to be an effective tool the court must have means at its disposal to order appropriate compensation for them. The court's power is illusory if it is dependent upon lead counsel's performing the duties desired of them for no additional compensation. *** The interests to be served are too important to be left to volunteers (or draftees) who are unpaid in the sense that they get nothing additional. The limitations of relying upon unpaid lead or liaison counsel are demonstrated by...history....

Florida Everglades, 549 F.2d at 1016. *Accord, e.g., Vincent*, 557 F.2d at 774-75; *Smiley*, 958 F.2d at 499 ("Court can establish fee structure to compensate members of plaintiffs' committee for their work on behalf of all plaintiffs"); *In re Swine Flu Immunization Prod. Liab. Litig.*, 89 F.R.D. 695,

699 n.3 (D.D.C. 1980) (court's authority to appoint and compensate steering committee is "beyond question"); *Nineteen Appeals*, 982 F.2d at 607 (Court may devise way to compensate steering committee); *In re Diet Drugs* , 2002 WL 32154197 at *17 ("It is now commonly accepted in complex multiparty litigation that a court can and in fact should appoint a committee such as the PMC to coordinate the litigation and ease the administrative burden on the court. As a corollary to this appointment, the court must be permitted to compensate fairly the attorneys who serve on such a committee.").

The second basis for the exercise of federal court power to access recoveries by individual plaintiffs' counsel in order to compensate the members of a court-appointed management structure derives from the equitable powers of the courts to prevent unjust enrichment through application of the same common fund doctrine that supports the award of counsel fees in class actions. Absent an order shifting payment of fees to those who actually perform the work that is common to all cases in a mass tort MDL, each of the individual plaintiffs' attorneys has an "incentive to rely on others to do the needed work, letting those others bear all the costs of attaining the parties' congruent goals." *Nineteen Appeals*, 982 F.2d at 606. Federal courts may properly bring the common fund doctrine to bear to remedy this "incipient free rider" problem. *Id.* at 607 (court essentially used common fund fee award in trying to avoid free-rider problem); *Seaman v. Spring Lake Park Indep. Sch. Dist. No. 16*, 387 F. Supp. 1168, 1173 (D. Minn. 1974) (purpose of common fund doctrine is to apportion fees among beneficiaries and thereby prevent free-riding). This procedure now has become the established normative practice in pharmaceutical liability litigation. *See Vioxx, supra; Orthopedic Bone Screws, supra; Diet Drugs, supra; Propulsid, supra; Zyprexa, supra*; and *In re Copley Pharmaceutical, Inc.*, MDL 1013, 158 F.R.D. 485 (D.Wyoming 1994).

C. UNDER ALL CIRCUMSTANCES AN 8% FEE IS JUSTIFIED

With the advent of the global settlement with Merck, the ability of the Court to award compensation to common benefit counsel is facilitated by access to a common fund. At the initiation of the litigation, when access to such a common fund was purely speculative, the PSC anticipated that the compensation scheme may need to be altered in the event circumstances changed. On June 29, 2005, at the time the PSC petitioned the Court for such an MDL assessment, the PSC stated, "It is not intended that the Court's Order be applied to any global or class action settlement reached in the litigation." *In re Vioxx Products Liability Litigation*, MDL No. 1657, Memorandum of Law in Support of the PSC's Petition for an Order Securing and Equitable Allocation of Counsel Fees and Costs for MDL Administration and Common Benefit Work at 3 n. 2 (E.D.La. June 29, 2005). In light of Merck's contention that it would try every case, the original assessment of PTO No. 19 contemplated that the PSC would be compensated to the extent that its work-product for as many as 30,000 trials would be available. The Order did not contemplate that a global settlement would inure to the benefit of common benefit counsel and their 60,000 clients. Nor did it contemplate that, if such an alternative by Global settlement existed, it would assure substantial and prompt payment of legitimate claims without the necessity of spending millions of dollars in expenses, in thousands of trials in which ultimate resolution would be substantially more expensive and less certain for claimants. Thus, the PSC's perspicacious reservation – that the MDL assessment may require revision in the event that a global fund was created that resolved the litigation – is appropriately addressed by the terms of the Settlement Agreement which provides for

a larger award of up to 8%.[27]

It is not uncommon, therefore, that Courts revisit common benefit assessments when circumstances warrant, especially in light of a global settlement. *See, e.g., Guidant,* 2008 WL 682174 at *12 (increasing assessment from 4% to 15% percent of fund award); *In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation*, MDL No. 1699, Pretrial Order No. 8A: Amendment to Order Establishing Common Benefit Fund (N.D. Cal. July 7, 2008)(court allowed assessment to be increased between 8% fee/2% costs and 10% fee/2% costs, "[g]iven the extensive work, including discovery, expert, and bellwether trial preparation, that has been conducted by Court-designated counsel, including Plaintiffs' Liaison Counsel and the members of the PSC (including its subcommittees), and given the size and length of the litigation, the Court finds that the current 2% costs and 2% fees assessment is inadequate to properly reimburse members of the PSC for their out-of-pocket costs and to pay for appropriate and necessary common benefit work.")[attached hereto as Exhibit "C"]. Employing similar reasoning, this Court initially imposed a 12% assessment in a local consolidated property damage litigation that later became a 17% percent of fund award. *See Turner v. Murphy Oil USA, Inc.*, 422 F.Supp.2d 676, 683 (E.D. La. Mar. 27, 2006)(PTO No. 8).

An eight percent common benefit award falls well below the *Guidant, Bextra* and *Murphy Oil* assessment or award and puts us in a good standing with other MDL assessments in the mid-range of such fee awards in even non-global settlement, mass tort MDLs. *See Vincent*, 557 F.2d at 769 (5% assessment); *Florida Everglades*, 549 F.2d 1006 (8% assessment); *MGM,* 660 F. Supp. 522

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[27]The PTO No. 19 assessment remains in place for those cases not in the settlement program.

(7% assessment); *Orthopedic Bone Screw,* 1996 WL 900349 (12% fee/5% cost assessment); *Diet Drugs*, 1999 WL 124414 (9%/6% assessment), *modified by Diet Drugs*, 2002 WL 32154197 (6%/4% assessment); *In re Diet Drugs*, 2008 WL 942592 at *40 (E.D.Pa. April 8, 2008); *In re St. Jude Medical, Inc.*, MDL 1396, 2002 WL 1774232 (D.Minn. 2002) (6% assessment); *In re Protegen Sling and Vesica System Prods. Liab. Litig.*, MDL 1387, 2002 WL 31834446 (D.Md. 2002) (9%/6%); *In re Baycol Prods. Litig.*, MDL 1431, 2002 WL 32155266 (D.Minn. 2002) (6% assessment); *In re Rezulin Prods. Liab. Litig.*, MDL 1348, 2002 WL 441342 (S.D.N.Y. 2002) (6%/4% assessment); *Ephedra,* MDL No. 1598, Case Management Order No. 7 (S.D.N.Y. 2004) (6% assessment); *Zyprexa,* 2007 WL 2340790 (3% assessment); *Propulsid,* MDL No. 1355, PTO No. 16 (6%/4% assessment).[28]

The reasonableness of an eight percent common benefit award is underscored by the overwhelming agreement of 99.79% of Vioxx claimants and their counsel that voluntarily chose to participate in the Settlement Agreement with Merck, which agreement clearly denotes the 8% assessment. *See* Vioxx Settlement Agreement §9.2.1 (Noting that "the maximum 8% attorneys' fee assessment shall supersede the assessment provided to MDL common benefit attorneys pursuant to Pretrial Order No. 19.").[29] These counsel and claimants had an alternative to paying the 8% award provided for in the contract, *i.e.*, they could use the MDL work-product, pay the PTO No. 19 assessment of 3%, and take the chance of trying their case to verdict before a jury. The decision of these counsel and claimants to accept the terms of the Settlement Agreement justifies its

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[28] Available at http://propulsid.laed.uscourts.gov/Orders/order16.pdf.

[29] Available at http://www.officialvioxxsettlement.com/documents/Master%20Settlement%20Agreement%20-%20new.pdf

reasonableness. Indeed, it would be unreasonable to allow such counsel or claimants to accept the benefits of the Settlement Agreement while simultaneously disregarding the obligations that accompany the terms of the contract.[30]

In addition to being reasonable, the 8% assessment is also necessary to provide sufficient compensation to all of the common benefit counsel that are now being incorporated into this effort from the coordinated jurisdictions, *e.g.*, California, New Jersey and Texas. When motions practice was presented that resulted in PTO No. 19's MDL assessment of 3% of client recoveries, it was then contemplated that the award from any such assessment in a non-global settlement would be allocated only amongst the assemblage of counsel closely associated with the MDL. The appointment of the NPC and the development of the global Settlement Agreement greatly expanded the constituency of common benefit attorneys. Following the issuance of PTO No. 6C, this Court permitted open participation, by the reporting of contemporaneous and reconstructed time reports, of state court counsel from many jurisdictions other than the MDL that had not been appointed by this Court to perform common benefit. Philip A. Garrett's Affidavit reports these submissions and reveals that these state court counsel contributed over 130,976 common benefit hours with a collective lodestar value between $58,934,170.06 and $87,819,338.98, as compared with MDL-only time of over 372,208 hours and a lodestar value between $158,194,630.34 and $234,078,195.97. *See* Affidavit of Philip A. Garrett, C.P.A., ¶¶14-17 [hereafter "Garrett Affid., ¶__"]. These state court counsel will now share in the fees obtained by this multi-venue, global settlement. To accommodate this originally unaccounted for increase in billable hours, the Settlement Agreement acknowledged the

[30]Only one vocal group of lawyers challenged the terms of the Settlement Agreement by lodging an objection. That objection is not well founded. If their position was to be accepted, they would derive all the benefits of the settlement program but below its cost.

need for the assessment at 8%, and for the 8% assessment to supercede the original assessment of PTO No.19. Increasing the number of attorneys participating in common benefit work, the percentage fee for a successful common benefit result will naturally increase to fairly recognize the contribution of those lawyers not in a leadership position.

The circumstances here are informed by the court in the seminal *Florida Everglades* MDL, when it awarded an eight percent common benefit fee to the committee it appointed to manage that litigation:

> [T]he Court remains singularly unimpressed with the position that the Plaintiffs' Committee and its Authorized Counsel will be receiving a "bonus" or be unjustly enriched by this Court's awarding attorney fees of the type requested by appointed counsel. Delegated with the responsibility of preparing and prosecuting an action, on behalf of all plaintiffs, replete with complex case, statutory and regulatory law, and opposed by formidable defense counsel, the appointed counsel had to completely disassociate themselves from any responsibilities to other clients. Their initiation of proceedings for the production of, and consequent actual inspection of voluminous documents,...; their initiation and conduction of the examination of twenty-six (26) witnesses in liability depositions; their committee conferences to analyze the discovered information for use in pretrial proceedings and preparation for trial; their preparation of legal memoranda in support of the plaintiffs' position in opposition to defendants' motion; their diligently informing the Court of the status of the litigation and their recommendations for expediting it; their attendance at, and participation in, numerous judicial hearings; all of the foregoing activities on the part of the...counsel involved, are well documented.
>
> After careful scrutiny of such conscientious execution of appointed counsels' preparation of the plaintiffs' case, this Court is constrained to observe that if, in fact, an element of unjust enrichment exists in the Court's percentage award of attorneys fees, the beneficiaries are the attorneys whose time was not so consumed in the manner outlined above, but who shall receive all but eight percent (8%) of the attorneys fees originally contemplated by them.

Florida Everglades, 549 F.2d at 1011. This conclusion is entirely appropriate, especially in light of the valuable fund created by the common benefit counsel that will finance the assessments.

D. PRINCIPLES GOVERNING DETERMINATION OF AN APPROPRIATE FEE AWARD UNDER *JOHNSON*

The application of the *Johnson* Factors to the requested assessment supports the 8% award. This percentage represents a multiple of 1.21 to 1.79 times the composite lodestars of the several common benefit counsel participating in this petition (using the highest billing rate standard and actual billing rate standards, respectively). The award is especially proper and consistent with the Fifth Circuit edict where the attorneys have created a fund as was accomplished in this case *sub judice*. In recent experience, district courts within the Fifth Circuit allowed a 17% award in *Murphy Oil* where the common fund created was valued at $195 million, and in *Enron*, counsel were awarded 9.52% of a fund valued at $7.2 billion.[31] As demonstrated below, the requested award here is fully justified by an evaluation of each of the *Johnson* Factors, irrespective of whether it is viewed as a percentage of the fund or not.

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[31] *See also Shaw v. Toshiba*, 91 F.Supp.2d at 972, where the court also found: "The evidence concerning fee awards in mega-fund cases is more limited since there are fewer such cases to study. However, this court is aware that awards of fifteen percent (15%) of the recovery or more are frequently awarded in these cases. Several mega-fund settlements in the Fifth Circuit and Texas have involved fees of fifteen percent (15%) or more. *See In re Shell Oil Refinery,* 155 F.R.D. 552 (E.D.La.1993) (eighteen percent (18%) of $170 million); *In re Combustion*, 968 F.Supp. 1116 (W.D.La.1997) (thirty-six percent (36%) percent of $127 million); *In re Lease Oil Antitrust Litigation (No. II),* 186 F.R.D. 403 (S.D.Tex.1999) (twenty-five percent (25%) of more than $190 million); *Weatherford Roofing Co. v. Employers National Insurance Co.*, No. 91-05637-F, 116th Judicial District (Dallas) (thirty percent (30%) of $140 million); *see also In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465 (S.D.N.Y.1998) (awarding fee of fourteen percent (14%) of $1 billion). Given these guiding principles and the size of the class settlement at issue in this case this Court concludes that fifteen percent (15%) is the appropriate percentage for application of the percentage method in this case."

1. The Time and Labor Required.

Assembling, administrating and successfully resolving an MDL of the magnitude of this case is a very tall order. As of the time of the settlement, approximately 8,800 cases were on file in the MDL, representing approximately 25,800 plaintiff groups, and 14,100 claimants were on Tolling Agreements with Merck with numerous counsel representing these litigants. Consequently, countless tasks existed that were necessary to marshal such a large, disparate group.[32] Indeed, given the adversary nature of this litigation, much attention had to be expended to manage the docket and develop the caseload for matters both expected and unexpected. Given so many moving parts, to direct the assemblage efficiently and effectively, the PSC was obliged to negotiate case management orders, engage in extensive discovery involving millions of documents from Merck and third parties, develop Plaintiff Profile Forms as well as Merck Profile forms, and expend tens of thousands of hours on pleadings and complex motions practice.

Early on, the PSC was responsible for preparing Master Class Action complaints, which required sweeping efforts to investigate and compile the material allegations. Extensive motions practice, including motions to dismiss, motions to strike class allegations, and actual class certification were briefed and argued.

Subsequently, summary judgment motions, including efforts to have claims dismissed on statute of limitations and the death-knell grounds of preemption, were comprehensively covered. Addressing the preemption defense became increasingly important as other courts were allowing such defenses. *See, e.g, Colaccico v. Apotex, Inc.,* 432 F.Supp.2d 514 (E.D. Pa. May 25, 2006),

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[32] *See* Joint Report No. 29 of Plaintiffs' and Defendants' Liaison Counsel at 8 (Doc #12888 Nov. 7, 2007). In the coordinated New Jersey litigation approximately 15,850 lawsuits had been filed. *Id.*

aff'd, 521 F3d 253 (3d Cir. Apr. 8, 2008), *reh'g denied*, 06-3107 (3rd Cir. May 5, 2008), *cert. pending*, 08-437 (U.S.). To defend against the preemption motion, the PSC filed a Rule 56(f) affidavit stating the need for additional discovery. The PSC subsequently engaged in that discovery against the FDA and other entities to find evidence controverting Merck's argument that the FDA's Preamble to the newly promulgated labeling regulations, 71 Fed.Reg. 3922 (Jan. 24, 2006), should be entitled to deference and its compliance with Executive Order No. 13132, 64 Fed. Reg. 43255 (1999). We are not aware of any other similar discovery or defense to such a motion of its kind. Coupled with the other arguments presented by the PSC, the motion was successfully defeated. *See In re Vioxx Products Liability Litigation*, 501 F.Supp.2d at 781 n.5. Absent this decision, the settlement would have likely been disrupted. Instead, the settlement proceeded. In order to avoid a premature appeal to the Fifth Circuit Court of Appeals, the aforementioned Rule 56(f) affidavit prevented the granting of a 28 U.S.C. §1292(b) appeal. *See* Herman Affid., ¶27.

As the bellwether trials approached, the PSC was constantly briefing and addressing motions. All told, the PSC expended over 26,000 hours performing pre-trial pleadings and motions practice. *See* Herman Affid., ¶51. When joined with the coordinated states, this number expands to 37,958 hours. *Id.*

In addition, the PSC was responsible for challenging the *bona fides* of one of the most respected pharmaceutical manufacturers in America, which manufacturer denied any liability and was insistent that each case would be tried individually to verdict. To meet this daunting challenge, the PSC had to assemble counsel with the incentive and abilities to develop and prosecute claims whose risks were at all times real. In short order, the PSC engaged in significant discovery of Merck to quickly get up to speed so that the MDL could catch up to the trial experience of other

jurisdictions where trials were scheduled or underway. Development of a trial package became a top priority of the PSC and approximately 72,521 hours of attorney time were devoted to discovering the material for the trial package. *Id.* The trial package was needed to provide to trial counsel a comprehensive guide to Merck's liability, a thorough overview of the science and medical issues in the case, an extraordinary amount of information on all witnesses (Merck employee, fact and expert), expert reports and depositions on every issue of general liability, together with a vast amount of important background information.

Remarkably, discovery of non-retained expert witnesses also played a vital role. *See* Herman Affid., ¶38. The PSC spearheaded the effort to depose some of the most prominent physicians in America, whose expertise had drawn them into the ambit of the Vioxx story. These witnesses provided some of the most compelling testimony in the litigation, at least in part because of the enormous amount of work done by MDL attorneys in preparing for their depositions. Among the most significant of these were:

> Gregory Curfinan, M.D., editor of the New England Journal of Medicine, who testified regarding Merck's attempts to understate the cardiovascular risks of Vioxx in the publication of the VIGOR study;
>
> James Fries, M.D., noted Stanford University professor and rheumatologist, who testified about the efforts Merck had taken to intimidate and "neutralize" him and his colleagues;
>
> David Graham, noted drug safety expert and FDA scientist who testified regarding Merck's manipulation of the regulatory process;
>
> Steve Nissen, M.D., the Chair of Cardiology at the Cleveland Clinic, the premier heart hospital in the world, who participated in two FDA Advisory Committees which considered the cardiovascular implications of VIGOR and the APPROVe trails respectively. Along with Eric Topol, MD, he wrote an important article in JAMA in 2001 which raised the specter of Cardiovascular risk associated with COX-2s;

> Eric Topol, M.D., former Chairman of Cardiovascular Medicine at the Cleveland Clinic, who testified regarding Merck's scientific misconduct and evidence that Vioxx increases the risk of heart attack. Dr. Topol also offered compelling testimony refuting the key Merck defense that naproxen's alleged cardioprotective effect explained the results seen in the VIGOR trial.

Once the discovery was completed, pressure was further brought to bear on Merck through the effective use of bellwether trials. Enormous resources were expended preparing for and conducting trials. Of the 19 trials that occurred, counsel expended over 108,345 hours. *Id.*, ¶51. Often this time was devoted in compressed intervals of intense effort reflecting the crucible of trial by jury.

Overall, counsel spent approximately 503,185 hours of attorney and para-professional time expended on Vioxx litigation as of January 14, 2009. The common benefit efforts will also continue for some time to come, thus necessitating the proposed reserve for such purposes. For purposes of the defined period in this fee petition, the lodestar is $217,128,800.40, using the actual billing rate standard, or $321,897,534.95, using the highest billing rate standard. *See* Garrett Affid., ¶15; Herman Affid., ¶¶54-55 Using both standards, the requested fee represents a multiplier of either 1.21 or 1.79, both of which are well within the norm of accepted multipliers. *See* discussion *supra* at 39-40.

2. <u>The Novelty and Difficulty of the Questions Involved.</u>

As Merck strenuously defended the safety profile of Vioxx based upon published medical literature in highly regarded medical journals, the common benefit attorneys were confronted with a strong adversary that was well entrenched with powerful defenses. Undaunted by their adversary, common benefit counsel carefully dissected the clinical trial data and developed the complex scientific arguments necessary to controvert Merck's medical arguments. These arguments were

highly technical and difficult, yet due to the perseverance of common benefit counsel corrections to the public's knowledge of the flawed science created by Merck was accomplished. *See Correction*, N Engl J Med 2006; 355(2): 221.

Throughout this litigation, the Court has repeatedly been reminded of the complex nature of this prolix multi-district, multi-party, multi-state litigation. Although this Court presided over 6 trials in this MDL, at the conclusion of the first trial it noted how involved, complicated and "complex" these cases really were. *In re Vioxx Products Liability Litigation*, 489 F.Supp.2d 587, 591 (E.D.La. 2007). Moreover, the record in this case will attest that novel matters of law continually presented themselves throughout the duration of the litigation. *See, e.g., In re Vioxx Products Liability Litigation*, 239 F.R.D. 450, 454 n. 5 (E.D.La. 2006)(Commenting on plaintiffs' "novel" proposals involving class action procedure); *In re Vioxx Products Liability Litigation*, 2008 WL 3285912 at *7 (Recognizing the preliminary injunction sought by Avmed and 1199 SEIU presented "unique" claims of "first impression"); *In re Vioxx Products Liability Litigation*, 501 F.Supp.2d at 781 n. 4 ("The PSC went so far during argument as to equate the FDA's recent preemption statements with ancient attempts by various oligarchies and aristocracies to elevate property rights over the human rights of individuals. While, ultimately, the Court will rely on more contemporary sources, the PSC's voyage through the history of law in civilization as it relates to this ongoing struggle was nonetheless interesting."). Always at the ready, common benefit counsel were at the forefront of these developments to make cogent presentations to the Court through briefing, argument and evidential presentations.

Finally, the novel Settlement Agreement itself reflects the creativity of counsel who developed a platform by which this mass tort litigation could be resolved in the absence of a class

action vehicle. Following the Supreme Court's rulings in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1989), the availability of a Rule 23 class to individual personal injury claimants has proven to be a remote possibility. One need look no further than this Court's Order & Reasons addressing the national, personal injury class to see the trend away from personal injury class actions. *See In re Vioxx Products Liability Litigation*, 239 F.R.D. at 461-62 (denying that predominating common questions were present). Nevertheless, common benefit counsel marshaled the law and facts necessary to develop a "novel" means of accomplishing an aggregate private settlement while avoiding the pitfalls of class action jurisprudence. *See* Issacharoff, *Private Claims, Aggregate Rights,* 2008 Supreme Court Rev. at 31. Such original and innovative thinking was essential to achieve the tremendous accomplishment demonstrated by the Settlement Agreement.

Accordingly, this factor supports a favorable percentage award.

3. <u>The Skill Requisite to Perform the Legal Service Properly.</u>

The skill demonstrated by the common benefit counsel in this litigation is not established by *ipse dixit.* Rather, it has been acknowledged by the Court and its coordinated brothers and sisters of the bench and demonstrated by the common benefit counsel's success in confronting the difficult and complex issues presented by this litigation and in ultimately obtaining so much relief for so many individuals. At the presentation of the Settlement Agreement Judge Higbee favorably commented on the skill of plaintiffs' counsel:

> This is a resolution where people have sat down, some of the most intelligent lawyers in the country, have sat down and advocated for their client's position. . . . The plaintiffs' lawyers were some of the top lawyers in the country, have in fact fought hard for their clients, and in fact have done everything in their power to protect

> their clients and to advocate their client's positions. In the end, they came together and spent a long, long time coming to what they believe and what I believe, having looked it over, is a fair resolution of this huge dispute.

Status Conference Hearing Transcript at 31-32 (E.D.La. Nov. 9, 2007). The Court's comments were echoed and joined by Judge Chaney, *id.* at 36 ("I would like to acknowledge the incredible attorneys that I dealt with in California") and by this Court:

> Secondly, this successful conclusion was due to the work of the lawyers. I practiced law for 33 years as an active litigator before taking the bench 13 years ago. I know what it is to be in the foxhole during the trial of a lawsuit. I lived in those foxholes, and I know that it is harder work to be a lawyer than it is to be a judge. I also know that a large portion of the credit for resolving litigation belongs to the lawyer and not the judge.
>
> * * *
>
> It's important for judges to recognize that it is the workhorse, the lawyer, who get us through litigation, and all of us personally appreciate that in this case.

Id. at 40-41.

This litigation required considerable skill and experience to bring it to such a successful conclusion. In this regard, due respect is owed to the highly experienced counsel representing Merck. This litigation "was not conducted against mediocre adversaries" and the standing of opposing counsel should be factored into determining this *Johnson* factor because such standing reflects the challenge faced by plaintiffs' attorneys. *See In re King Resources Co. Sec. Litigation*, 420 F.Supp. 610, 634 (D.Colo. 1976). The ability of plaintiffs' counsel to obtain this innovative and "unparalleled" settlement for the Vioxx Claimants in the face of such formidable legal opposition confirms the superior quality of our representation. *See Enron,* 2008 WL 4178130 at *40. Accordingly, this factor supports the requested percentage.

4. The Preclusion of Other Employment by the Attorney Due to Acceptance of the Case.

Whether and to what extent counsel were precluded from other employment due to their commitments involved in litigating this case is an important factor in fixing the percentage award. Amongst the leadership of counsel in the MDL and coordinated states, the time spent on this case was plainly at the expense of time that counsel could have devoted to other matters. To say that common benefit counsel in this matter were committed to this litigation would be a gross understatement. Facing the crucible of trial, again and again, required enormous concentration of attention and time. As the time reports of Wegman-Dazet and common benefit counsel reflect, common benefit counsel dedicated a total of 503,185 hours of compensable time to this litigation. *See* Garrett Affid., ¶14. This enormous commitment amply supports the requested percentage.

5. The Customary Fee.

In *Murphy Oil*, this Court pronounced that the customary fee factor focuses on counsel's expectations at the outset of the case when measuring the risks attendant to the prospective litigation. *Murphy Oil,* 472 F. Supp. 2d at 866. There, the Court referenced *In re Shell Oil Refinery,* 155 F.R.D. 552, 571 (E.D.La. 1993), as support for class counsels' argument that personal injury suits, like those here, have customary fees between 33% and 40%. *Id.* Recently, this Court determined that reasonable fees for all counsel in this litigation would be subject to a 32% cap, while also noting that it was separately intending to address the common benefit award contemplated by this motion. *In re Vioxx Products Liability Litigation,* 574 F. Supp.2d 606, 607 (E.D.La. 2008).[33]

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[33]Certain counsel, including a member of the PSC, sought reconsideration of this Order and currently have sought mandamus relief from the 5th Circuit in connection with the Court's rulings on the matter. *See In re Vioxx Litigation Consortium*, Docket No. 08-31255 (5th

(continued...)

At the outset of this litigation, in PTO No. 19, the Court ruled that a 3% assessment would be sufficient to address the discovery and docket management obligations of the committee.[34] Even then, however, the PSC recognized that circumstances would change in the event that a global or class action resolution was obtained. *See* discussion *supra* at 46. And the circumstances, indeed, have changed as, not only has a global settlement been obtained, but common benefit counsel from all coordinated jurisdictions are now participating in the award provided by the Settlement Agreement. This aggregation of counsel and their collective work product and additional common benefit time necessarily demands a higher assessment to permit a reasonable fee to counsel. As previously discussed, in such circumstances courts have permitted increased assessments in the range of 10% to 17%. *See Guidant, supra; Bextra, supra; Murphy Oil, supra.*[35] Thus, this factor also supports the requested percentage.

6. Whether the Fee Is Fixed or Contingent.

Common benefit counsel undertook this litigation on a contingent fee basis, assuming a

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[33](...continued)
Cir.)(pending).

[34]It should be noted that the 3% assessment applicable to the "Full Participation Option"(2% fee/1% cost) was designed to entice counsel to coordinate with the MDL by offering a lower assessment for a limited period of time of 90 days from the issuance of the order. *See* PTO No. 19 at 3. For those counsel not taking advantage of this selection, other options, including the "Traditional Assessment Option" (6% federal/4% state cases) and the "Limited Waiver Option" (6% federal cases), assessed counsel at the more common, *i.e.*, "traditional" rate of 6%. *Id.* at 4.

[35]In the *Toshiba* litigation, the court determined that this factor actually did not apply to the court's analysis. *Toshiba*, 91 F.Supp.2d at 970 ("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."). Ultimately, this same reasoning applied in *Murphy Oil*, as the court found that the customary fee was incorporated into the benchmark percentage analysis. *Murphy Oil,* 472 F.Supp.2d at 866.

substantial risk that the litigation would yield no recovery and leave them uncompensated. Courts have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys fees. *See, e.g, Enron,* 2008 WL 4178130 at *42.

The time in which to evaluate the risk is *ex ante, i.e.*, as of the time suit was initiated, not with the benefit of hindsight. *See Harman v. Lyphomed, Inc.*, 945 F.2d 969, 974 (7th Cir. 1991); *Diet Drugs*, 2002 WL 32154197 at *19. Indeed, as this litigation progressed the risk of non-recovery seemed to enlarge, not diminish. Merck was having tremendous success in the bellwether trials. Only one of the MDL trials resulted in a plaintiff's verdict. In the states trials, Merck won defense verdicts for most of the cases or, if a plaintiff received a verdict, Merck was successful in reversing the verdict on appeal. In addition, the litigation became endangered with the threat of Merck's Motion for summary judgement involving preemption. Fortunately, this Court disagreed with Merck. *See In re Vioxx Products Liability Litigation,* 501 F.Supp.2d 776 (E.D.La. 2007).[36] Nevertheless, the threat of preemption still looms large in this type of litigation given the pendency of *Wyeth v. Levine*, Docket No. 06-1249 (U.S. argued on Nov. 3, 2007) at the United States Supreme Court. *Cf. In re Vioxx Products Liability Litigation*, MDL No. 1657, Video Conference Transcript at 8 (E.D.La. Oct. 21, 2008) (Court advising persons not yet enrolled in the settlement program of the risks posed by *Wyeth v. Levine*). Where counsel face such substantial risks and recover significant compensation for their clients courts find this factor to favor the fee applicant. *See*

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[36]Many other courts have found claims like those presented here to have been preempted. *See, e.g., Dobbs v. Wyeth Pharmaceuticals,* 530 F.Supp.2d 1275 (W.D.Okla. 2008). Indeed, in its last term the Supreme Court issued an opinion finding preemption under the Medical Device Act that is having widespread repercussions. *See Riegel v. Medtronic, Inc.*, 128 S.Ct. 999 (U.S. Feb. 20, 2008). *See also In re Medtronic, Inc. Sprint Fidelis Leads Products Liability Litigation*, 2009 WL 35467 (D.Minn. Jan. 5, 2009).

Enron, 2008 WL 4178130 at *46 ("In sum, the risk factor not only supports the reasonableness of the 9.52% fee agreement, but warrants application of a significant multiplier for a lodestar analysis.").

Common benefit counsel have received no fee compensation to date and have incurred significant unreimbursed expenses. The present fee award has always been at risk and completely contingent upon the result achieved. Thus, the contingent nature of the litigation supports the requested percentage.

7. Time Limitations Imposed by the Client or the Circumstances.

This Court has frequently noted the potential for MDL litigation to become so bogged down as to warrant the appellation of a "black hole." Mindful of this potential morass, the Court has used every device available to it to avoid such a consequence. The Court has regularly held monthly status conferences and employed "hands on" management to see that discovery was being conducted promptly and that the litigation was progressing at an appropriate rate. As the state courts were initially ahead of the MDL, after the Court seized upon its plan to conduct bellwether trials in rapid succession, counsel's feet were held to the fire. The trials themselves were conducted under strict time constraints. Always, counsel worked extremely hard to meet the Court's deadlines. Although not on the expedited pace imposed upon counsel in the *Murphy Oil* litigation, counsel were always aware of this Court's fierce determination to force them to obtain trial verdicts, mature the litigation, and get to point where compromise could be accomplished.

The fact that millions of documents were reviewed, tens of thousands Plaintiff fact sheets prepared, thousands of depositions taken, six trials were conducted, and a global settlement was reached in the span of only three years (even in the face of natural disaster), speaks volumes about

the pace of this litigation. This factor therefore supports the requested percentage.

8. The Amount Involved and the Results Obtained.

The eighth Johnson factor – the amount involved and the results achieved – is entitled to significant weight when, as in this case, the efforts of counsel were instrumental in realizing a high recovery on behalf of the plaintiffs. As the Supreme Court has observed, " 'the most critical factor' in determining the reasonableness of a fee award is the degree of success obtained." *Hensley v Eckerhart*, 461 U.S. 424, 436 (1983). *See also Migis v. Pearle Vision, Inc*, 135 F.3d 1041, 1047 (5th Cir.1998) (". . . Where recovery of private damages is the purpose, . . . consideration to the amount of damages awarded as to the amount sought represents the primary means to evaluate that concern."). The Settlement Agreement provides funding of $4.85 billion to resolve thousands of victims' claims. It is the largest non-class personal injury resolution of any mass tort. By any measure, the settlement is an outstanding result. Given such an outstanding result, this, the most important factor, amply supports the requested percentage.

9. The Experience, Reputation, and Ability of the Attorneys.

When this MDL litigation began, the Court underwent an arduous vetting and selection process to obtain experienced, reputable and able counsel to participate on the PSC. The initial criteria focused upon counsels' "(a) willingness and availability to commit to a time-consuming project; (b) ability to work cooperatively with others; and (c) professional experience in this type of litigation." *See* PTO No. 1. In PTO No. 6, after careful consideration, this Court made its selections for the PSC. These selections proved themselves to be accurate. Recently, this Court, along with its coordinated state judges, recognized the high caliber of professionalism demonstrated by plaintiffs' counsel. *See* discussion *supra* at 57-59. Common benefit counsel used "impressive

legal skill and knowledge based on years of experience with similar-type cases." *Murphy Oil,* 472 F.Supp.2d at 866. This factor supports the requested percentage here.

10. The "Undesirability" of the Case.

The risks presented by taking on a pharmaceutical giant such as Merck were daunting at the inception of this litigation. Only the intrepid few were willing to institute litigation prior to the withdrawal of Vioxx from marketing. At that time, there were substantial risks presented which made the case undesirable.

Circumstances changed modestly for the better when the APPROVe results confirmed that Vioxx was sufficiently associated with causing thromboembolic events that the drug was taken off the market. At that point in time, with all of the attendant publicity, the number of cases filed and the number of applications for positions on the PSC reflected the increased desirability of the litigation. *See* Monthly Status Conference Transcript at 20 (E.D.La. March 18, 2005)(Clerk of court received more than 30 applications). Even then, the risks associated with the litigation were still great. This case was not a "slam dunk." Merck was well postured to defend itself and the Vioxx franchise, and, indeed, it vehemently defended itself by asserting that the company would try every case to verdict. With prosecution costs between $1 - 2 million per trial for some of the bellwether trials, Oct. 21, 2008 Video Conference Transcript at 8, the barriers to entry into Vioxx litigation were considerable.

At the outset of the litigation this Court cautioned counsel of the tremendous commitment they were taking on:

> I remind you that this is a case that will take considerable time and considerable resources. You have to go in this position with your eyes open and be willing to commit both time and resources into a

> project of this type. It's not going to be interminable, but it's not going to end in six months or a year, it will take a considerable period of time that you'll need to know.

See Monthly Status Conference Transcript at 18-19 (E.D.La. March 18, 2005). These comments correspond well with the "undesirability" factor. Given the undesirability and financial commitment involved, this factor supports the requested percentage. *See Enron,* 2008 WL 4178130 at *47.

11. The Nature and Length of the Professional Relationship with the Client.

This *Johnson* factor was designed to consider those instances when, "a lawyer in private practice may vary his fee for similar work in the light of the professional relationship of the client with his office." *Johnson,* 488 F.2d at 719. This factor is therefore neutral as it relates to the requested percentage since there are few, if any, longstanding client relations with the Vioxx Claimants. As this Court pointed out in *Murphy Oil*, "'the relationship did not antedate the litigation, nor will it likely continue beyond the closure of this case,' other than as it relates to this litigation." *Murphy Oil*, 472 F.Supp.2d at 866-67, *quoting, In re ETS*, 447 F.Supp.2d 612, 632 (E.D.La. 2006). Accordingly, little weight is to be afforded this factor.

12. Awards in Similar Cases.

All but two of the *Johnson* fee adjudication factors are abstract in that they do not purport to have any mathematical correlation to the computation of an appropriate percentage award. The final *Johnson* factor provides guidance as to how to concretize abstract consideration of the other factors into a definitive percentage award. That factor prescribes consideration of "awards in similar cases." *Johnson*, 448 F.2d at 719. Such consideration is a dominant feature of contemporary percentage-of-the-fund fee adjudication. *See, e.g., Enron, supra; Murphy Oil, supra.*

As demonstrated above, the requested percentage is significantly less than the percentages

that have been awarded by courts in this Circuit as well as numerous other courts throughout the country. *See* discussion *supra* at 31-41. Accordingly, the "awards in similar cases" factor powerfully argues in support of the reasonableness of the fee requested.

* * *

Because this Court must "scrutinize the fee award under the *Johnson* factors" consistent with *High Sulpher Content,* 517 F.3d at 228, there is no doubt that the percentage award requested is well within the range of awards established by other courts employing the same rigorous analysis. Indeed, the requested percentage award falls in the lower end of such awards. As the other *Johnson* factors fully endorse the requested fee, the percentage fee requested should be awarded.

E. A LODESTAR CROSS-CHECK ANALYSIS DEMONSTRATES THAT THE REQUESTED PERCENTAGE AWARD IS REASONABLE

Using the time submissions audited by Wegman-Dazet to perform the calculation of the total lodestar value of the time devoted by all common benefit counsel in MDL No. 1657 was between $217,128,800.40 and $321,897,534.95, as of January 14, 2009. *See* Herman Affid., ¶¶54-55; Garrett Affid., ¶15. The total fee award requested from the Settlement Fund of $4.85 billion is 8% or $388 million. Thus, the cross-check multiple applicable to the requested award for all eligible common benefit counsel is either 1.21 or 1.79.

A cross-check multiple of either 1.21 or 1.79 is soundly within the range of multiples that demonstrate a reasonable fee in novel, complex, risk-laden litigation such as this. As noted by the Court in *Murphy Oil*, the lodestar cross-check is an abbreviated review of the time and rates submitted by counsel:

> In recognition of the noted disadvantages of the lodestar method as the principle means for determining attorneys' fees, such as the taxing

> of judicial resources by examining every time entry and billing rate for each attorney, a lodestar analysis which is rough and more abbreviated is appropriate for a cross check:
>
> > The lodestar cross-check calculation need entail neither mathematical precision nor bean counting. For example, a court performing a lodestar cross-check need not scrutinize each time entry; reliance on representations by class counsel as to total hours may be sufficient.... Furthermore, the lodestar cross-check can be simplified by use of a blended hourly rate....

Murphy Oil, 472 F.Supp.2d at 867, *quoting* Vaughn R. Walker & Ben Horwich, *The Ethical Imperative of a Lodestar Cross-Check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases*, 18 Geo. J. Legal Ethics 1453, 1463-64 (2005).

Given the facts in *Murphy Oil*, this Court observed that "a lodestar multiplier range of 2.5 to 3.5 would be appropriate and reasonable in this case." *Id.* at 869. This lodestar multiplier range is consistent with the trending range found by other courts in recent mega-fund litigation. *See* Chart *supra* at 34-35. *See also Diet Drugs*, 553 F.Supp.2d at 486 (2.6 multiplier); *AOL Time Warner*, 2006 WL 3057232 at *28 (3.69 multiple), *citing VisaCheck/Mastermoney*, 297 F. Supp. 2d at 524 (3.5 multiple) and *WorldCom*, 388 F. Supp. 2d at 354 (4.0 multiple); *NASDAQ,* 187 F.R.D. at 489 (3.97 multiple; and observing that "multipliers of between 3 and 4.5 have become common"); *DeLoach*, 2003 WL 23094907 at *11 (4.45 multiple); *In re Rite Aid*, 396 F.3d at 303-04 (It is not an abuse of discretion for district courts to award fees that are at least four times the lodestar value).

The cross-check multiple of 1.21 or 1.79 that would result if the Court granted the instant Petition is, therefore, soundly within the range of all of the established cross-check parameters that signal a reasonable fee award.

F. COMMON BENEFIT COUNSEL SHOULD BE ENTITLED TO REIMBURSEMENT OF EXPENSES

The common fund doctrine authorizes reimbursement of the reasonable amounts paid out-of-pocket to achieve a common benefit recovery or to advance the common goals of plaintiffs' in MDL litigation. *See Sprague v. Ticonic*, 307 U.S. at 166-67 (recognizing a federal court's equity power to award costs from a common fund); *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d at 771 ("In accordance with the well-established common fund exception to the American Rule,...class counsel...are entitled to an award of their...expenses out of the fund that has been created for the class by their efforts"; *In re Quintus Sec. Litig.*, 148 F. Supp. 2d 967, 973 (N.D. Cal. 2001); *Orthopedic Bone Screw*, 2001 WL 1622741 at *9-*10 (awarding 5% of the gross recovery for reimbursement of litigation expenses); PTO No. 19 (authorizing 3% "assessment" in MDL 1657 for fees and repayment of costs and expenses).

The Settlement Agreement also provides for reimbursement of common benefit expenses from the clients' share of their recovery, as follows:

> In addition to those amounts provided in Section 9.2 above, Common Benefit Attorneys shall also be entitled to reimbursement of their reasonable common benefit expenses. Reimbursement of these expenses shall be deducted from the clients' net recovery. The PLC shall submit to the Claims Administrator the audited common benefit expenses of Common Benefit Attorneys,' which sum will be deducted on an equal percentage basis from the MI Settlement Fund and IS Settlement Fund.

Settlement Agreement §9.2.2. This provision was agreed to by all Vioxx claimants that registered and should be enforced by the Court in its administrative and oversight role over the Settlement program. *See* Settlement Agreement §9.2.3.

In the Vioxx litigation, the court-appointed auditor has reported that common benefit counsel

incurred $30,508,021.87 in properly documented[37] "held expenses" and $3,881,646.38 in properly documented "shared expenses" for the common benefit of all Vioxx Claimants in MDL 1657.[38] The sum of these expenses equals $34,389,668.25. This amount represents .71 percent of the gross amount of recoveries that are subject to a common benefit award here and is thus unquestionably reasonable. Accordingly, reimbursement of costs in this amount should be separately recognized and provided for in any common benefit award by the Court.

VI. CONCLUSION

For all the reasons set forth herein, Liaison Counsel respectfully submits on behalf of all Plaintiffs Common Benefit Counsel that this Motion for Award of Plaintiffs' Common Benefit Counsel Fees and Reimbursement of Expenses should be granted.

Respectfully submitted,

Date: January 20, 2009

By: /s/ Leonard A. Davis

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PLAINTIFFS' LIAISON COUNSEL

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[37] In order to be eligible for reimbursement, expenses were required to be within the limitations set forth in PTO 6 (as amended) and documented as required by the Order(s).

[38] *See* Garrett Affid., ¶¶18 - 21.

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing has been served on Liaison Counsel, Phillip Wittmann, by U.S. Mail and e-mail or by hand delivery and e-mail, and upon all parties by electronically uploading the same to LexisNexis File & Serve Advanced in accordance with PreTrial Order No. 8(B), and that the foregoing was electronically filed with the Clerk of Court of the United States District Court for the Eastern District of Louisiana by using the CM/ECF system which will send a Notice of Electronic Filing in accord with the procedures established in MDL 1657 on this 20th day of January, 2009.

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