

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

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

-----X	
	:
This Document Relates to:	:
All cases	:
	:

**THE PLAINTIFFS' STEERING COMMITTEE'S
MEMORANDUM IN SUPPORT OF MOTION FOR DISTRIBUTION
OF SPECIFIC ATTORNEY'S FEES AWARDS AND FOR
EXPENSES AND REIMBURSEMENTS
(RE: MDL SETTLEMENT PROGRAM I)**

The Plaintiffs' Steering Committee ("PSC") hereby submits this memorandum in support of the motion for distribution of specific attorney's fees awards derived from the Propulsid MDL Settlement Program I. No request is made for any amounts, at this time, from the PTO No. 16 Litigation Fund. The Settlement Program was developed and created by the PSC along with the defendants, Johnson & Johnson and Janssen Pharmaceutica, Inc., under the guidance and supervision of the Court.¹

On May 3, 2005, the PSC filed a Motion for Award of Attorney's Fees and Reimbursement of Costs. By Order dated May 27, 2005, the Court found that the award of \$22,500,000.00 negotiated by the parties for attorney's fees and reimbursement of costs in the matter fairly compensates the attorneys for their labors and efforts in the case. The Court further ordered that

¹ No fee or cost request is made in this motion regarding the Propulsid Settlement Program II.

costs shall be reimbursed from this fund first, and the attorney's fees be disbursed later upon approval of the Court, following the protocol described by counsel during the hearing in Court on May 25, 2005. Regarding the separate fees described in the Court's Pre-Trial Order No. 16, the Court denied this issue, without prejudice to the rights of the parties to re-urge the issue at the appropriate time, if it becomes relevant.

Thereafter, on October 3, 2005, an Emergency Motion and Incorporated Memorandum for Distribution of Attorney's Fees With Full Reservation of Rights of All Attorneys Who May Claim Any Rights to Common Fees and Expense Reimbursements was filed with the Court. That motion was filed as a result of the emergency circumstances that existed as a result of Hurricane Katrina. Following extensive consultation and review by Special Master, Patrick A. Juneau, and having input from the independent CPA of the Plaintiffs' Steering Committee, Phillip Garrett of the Wegmann-Dazet accounting firm, a request was then made for an interim distribution for legal fees and costs from the fund of MDL 1355. The distribution requested was for partial distributions subject to later adjustment of claims by all attorneys with full reservation of rights of all attorneys who may claim any right to common fees and expense reimbursements and they may file any such claim by affidavit with the Special Master for future consideration. Order and Reasons dated November 23, 2005, was entered by the Court. (The Capital Contribution Balance Report was subsequently replaced and substituted by Order dated December 2, 2005.) The Order and Reasons of November 23, 2005 provided a first distribution that was fair and reasonable. The Court ordered that held costs of \$1,515,215.98 and capital contributions of \$1,005,394.63 were to be reimbursed from the Attorney Fee Fund, and further that a distribution of attorney's fees in the amount of \$12,380,000.00 was to be made. Thus, total distributions made in the initial distribution from the Fund were

\$14,900,610.61.

On February 16, 2006, a Motion of the Plaintiffs' Steering Committee for Release and Disbursement of Funds from Deposit Made to the Registry of the Court Pursuant to Pre-Trial Order No. 16 was filed. The motion sought the release of \$150,000.00 of principal funds from the deposit in the registry of the Court pursuant to Pre-Trial Order No. 16 to pay for costs and expenses incurred in connection with the multi-district litigation matter, as well as \$100,000.00 to pay depository rental. By Order dated May 2, 2006, \$150,000.00 was distributed.

On October 11, 2007, a Motion and Incorporated Memorandum of Distribution of Funds for Expenses and Reimbursements was filed with the Court. That motion sought the release of funds solely for purposes of payment of expenses and costs in this matter. By Order dated October 26, 2007, the Court authorized an additional interim distribution of \$200,000.00 from the fund presently on deposit with Deutsch Bank for payment of costs and expenses in this matter.

To date the total distributions made from the Propulsid Attorneys Fee Fund presently being held at Deutsche Bank, are as follows:

Attorney's Fees:		\$12,380,000.00
Costs:		
	\$1,515,215.98	
	\$1,005,394.63	
	\$ 150,000.00	
	\$ 200,000.00	
		<u>\$ 2,870,610.61</u>
TOTAL:		<u>\$15,250,610.61,</u>

On December 5, 2005, Daniel E. Becnel filed a motion to reconsider the Court's November 23, 2005 Order & Reasons. On March 2, 2006, Dumas & Associates Law Corporation filed a motion for common benefit fees and expenses reimbursements. These matters had been set for

hearing but, by agreement, any hearing was continued. On August 5, 2008, Robert J. Caluda and A.J. Rebennack filed a motion for leave to file motion for reimbursement of costs for common benefit to the class and committee. This matters was set for hearing on November 5, 2008, at which time the PSC was able to reach a resolution. Since then, all of these matters, including a disagreement with the Lockridge Grindal firm, have been resolved.

The Plaintiffs' Steering Committee now moves to allow specific awards of attorney's fees and reimbursement of costs consistent with the agreements reached by counsel to resolve their differences regarding the above disputes. The specific awards requested for these counsel are now as follows:

Daniel Becnel	\$650,000.00
Walter Dumas	\$300,000.00
A.J. Rebeneck	\$ 33,476.53
Richard Lockridge	\$ 50,000.00

Ample authority exists under the "common fund doctrine" to support the requested award of fee and reimbursement of costs in this instance involving the creation of a fund of money for the collective benefit of similarly situated litigants. See *Trustees v. Greenough*, 105 U.S. 527 (1881); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 123-27 (1885); *Sprague v Ticonic Nat'l Bank*, 307 U.S. 161, 164-66 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393 (1970); *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980) and *Blum v. Stenson*, 465 U.S. 886 (1984). This doctrine provides that a private plaintiff, or plaintiff's attorney, whose efforts create, discover, increase, or preserve a fund to which others also have a claim, is entitled to recover from the fund the costs of

his litigation, including attorneys' fees. It "reflects the traditional practice in courts of equity ... [and] rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Boeing*, 444 U.S. at 478.

This Court's previous awards of fees in this case reflect the reasoning of these cases and the application of the common benefit doctrine. The PSC asks that this Court extend its rulings to include the specific awards to counsel described above, whose fees and costs, were previously in dispute, but whose efforts have now been recognized to have contributed to the common benefit of the litigants in Propulsid MDL Settlement Program I.

In addition to the foregoing, considerable expenses have been incurred on an ongoing basis and the PSC continues to operate the Propulsid depository and incur other expenses on an ongoing basis, all of which require funding. Expense submissions and figures have been routinely submitted and which have been certified by the independent CPA of the Plaintiffs' Steering Committee, Philip Garrett. Movant seeks an Order authorizing Russ M. Herman on behalf of the Plaintiffs' Steering Committee to make an additional interim distribution of \$60,000.00 from the funds presently on deposit with Deutsch Bank for payment of expenses and costs in this matter which shall constitute a partial distribution to be used solely for the payment of expenses and costs incurred thus far and to be incurred in this matter.

Wherefore, movant respectfully requests that the instant Motion for Distribution of Specific Attorney Fees Awards and for Expenses and Reimbursements be granted.

Respectfully submitted,

/s/ Leonard A. Davis

RUSS M. HERMAN, T.A. (La. Bar #6819)

LEONARD A. DAVIS, #14190

JAMES C. KLICK, #7451

HERMAN GEREL, LLP

820 O'Keefe Avenue

New Orleans, Louisiana 70113

Phone: (504) 581-4892; Fax: (504) 561-6024

LIAISON COUNSEL FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing has been served on Liaison Counsel, James Irwin, by U. S. Mail and e-mail or by hand delivery and e-mail and upon all parties electronically by uploading the same to Lexis-Nexis File and Serve in accordance with Pre-Trial Order No. 4, 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 1355 on this 3rd day of April, 2009.

/s/ Leonard A. Davis

Leonard A. Davis (Bar No. 14190)

Herman Gerel LLP

820 O'Keefe Ave.

New Orleans, LA 70113

PH: (504) 581-4892

FAX: (504) 561-6024

ldavis@hhkc.com