

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

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<b>IN RE: PROPULSID PRODUCTS</b>	:	<b>MDL NO. 1355</b>
<b>LIABILITY LITIGATION</b>	:	
	:	<b>SECTION: L</b>
	:	<b>JUDGE FALLON</b>

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<b>This Document Relates to:</b>	:	
<b>All cases</b>	:	
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**MEMORANDUM IN SUPPORT OF MOTION FOR DISTRIBUTION  
OF ATTORNEY’S FEES (RE: MDL SETTLEMENT PROGRAM II)**

Russ M. Herman, Plaintiffs’ Liaison Counsel (“PLC”) hereby submits this motion for an award of attorney’s fees derived from the Propulsid MDL Settlement Program II. The Settlement Program was developed and created following the creation of MDL Settlement Program I with the defendants, Johnson & Johnson and Janssen Pharmaceutica, Inc., under the guidance and supervision of the Court. As the Court is aware, on February 4, 2004, the original Settlement Agreement in MDL No. 1355 was reached with the defendants. Since that time, numerous claims in Settlement Program I have been processed. Thereafter, in an effort to wind up the litigation and to resolve additional state court claims, MDL Settlement Program II was created. MDL Settlement Program II is nearing conclusion and all claims will have been reviewed and processed. No request for distribution of attorney’s fees in connection with MDL Settlement Program II has previously been made. Therefore, because the MDL Settlement Program II is concluding, it is time to now

conclude the matter by making a distribution of attorney's fees and costs.<sup>1</sup>

To date no distributions have been made from the Propulsid II Attorneys' Fee Fund presently being held at Deutsche Bank. As of the 06/30/12 statement the funds being held by Deutsch Bank total \$4,128,693.22.

A total of 5 claimants have been found eligible for compensation awards in the Propulsid II Settlement Program totaling \$2,852,070.00 allocations by the Special Master. Now that the Program is now or at its conclusion, PLC hereby submits that the total funds available for distribution of attorney's fees should now be ordered by the Court.

In cases involving the creation of a fund of money for the collective benefit of similarly situated litigants, fees are to be awarded to plaintiffs' counsel pursuant to the "common fund doctrine." 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.

In *Boeing*, the Supreme Court recognized that common benefit fees should be awarded based

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<sup>1</sup> Funds are presently and have been held at Deutsch Bank in an account named "Propulsid II Attorneys' Fee Fund" and such funds were provided pursuant to the Settlement Agreement. The most current financial statement for the account is attached as Exhibit "A".

on the entire amount of the fund, including any unclaimed portion thereof. *Boeing*, 444 U.S. at 480. *Accord, e.g., Waters v. Int'l Precious Metals, Corp.*, 190 F.3d 1291, 1294-98 (11<sup>th</sup> Cir. 1999), *cert. denied*, 530 U.S. 1223 (2000) (class counsel were entitled to a fee determined as a percentage of a \$40 million settlement fund even though the “estimated actual payment to class members [was only] \$6,485,362.15.”); *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9<sup>th</sup> Cir. 1997) (the “district court abused its discretion by basing the fee on the class members’ claims against the [settlement] fund rather than on a percentage of the entire fund,” even where the actual payout from a \$4.5 million settlement fund was only \$10,000); *In re Copley Pharm., Inc.*, 1 F. Supp. 2d 1407, 1412, 1416 (D. Wyo. 1998) (in a pharmaceutical products liability class action, court overruled defendant’s objection that the fee should be awarded as a percentage of the amounts claimed under a class settlement).

It is also widely recognized by courts presiding over complex litigation that the efforts of lead counsel, especially steering committees appointed by MDL courts, provide a public benefit that is itself worthy of compensation. In this case, the services of the PSC are deserving of compensation independent of that provided from the PTO 16 funds as the money is not coming from the settlement fund but is being separately provided by the defendants. As recently as the *Diet Drugs* litigation, this precept has been recognized:

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. *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 773-74 (9<sup>th</sup> Cir. 1977); *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1014-15 (5<sup>th</sup> Cir. 1977); MANUAL FOR COMPLEX LITIGATION, THIRD (1995) §20.221 at 27. As a corollary to this appointment, the court must be permitted to compensate fairly the attorneys who serve on such a committee. As the court explained in *Florida Everglades*: “if 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." *Id.* at 1016.

*See In re Diet Drugs Products Liability Litig.*, 2002 WL 32154197, \*17 (E.D.Pa. Oct. 3, 2002), *aff'd* 582 F.3d 524 (3<sup>rd</sup> Cir. 2009).

The continuing hands-on management by a few law firms in this matter in the implementation of the Settlement Program is precisely the type of "invaluable services" courts find worthy of compensation in their own right. *See, In re: Diet Drugs Products Liability Litigation*, 553 F.Supp.2d 442, 496 (E.D. Pa. 2008) ("The Joint Fee Applicants created extraordinarily valuable work product for all those who chose to pursue their claims in the tort system. For the federal cases, they also provided invaluable management services.") *See generally, Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 773-74 (9<sup>th</sup> Cir. 1977); *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1014-16 & 1019 (5<sup>th</sup> Cir. 1977); MANUAL FOR COMPLEX LITIGATION (THIRD) §20.221 at 27 & §20.223 at 29 (1995); *In re Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litigation*, 982 F.2d 603, 606-07 (1<sup>st</sup> Cir. 1992); *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1296 (E.D.N.Y. 1985), *mod'd on other grounds*, 818 F.2d 226 (2<sup>nd</sup> Cir. 1987).

Since the implementation of MDL Propulsid Settlement Program II, considerable time and efforts have been dedicated to activities in connection with MDL Propulsid Settlement Program II by only a handful of law firms, primarily from the offices of Liaison Counsel, Russ M. Herman, the offices of Levin, Fishbein, Sedran & Berman, the law offices of Barrios, Kingsdorf & Casteix, the law offices of Neblett, Beard & Arsenault, the law offices of Hill, Toriseva & Williams, PLLC, and the law offices of Zimmer Reed, PLLP. Substantial work in connection with the ongoing Settlement Program in MDL Settlement Program II has taken place. According to the Special

Master, 3,826 claimants have been enrolled into the Program and 1,767 have submitted claim forms. As of July 25, 2012, 56 Tier I claims and 357 Tier II and III claims have been submitted to the Medical Panel for review. 1,311 medical record reimbursement forms have also been submitted to the Special Master.

As of July 25, 2012, five (5) of the Tiered claims submitted to the Panel have been judged to be eligible by the Panel and the Special Master has paid five (5) of the five (5) awards. As of July 25, 2012, 7 Tiered claims are still in review by the Panel. 2,059 claimants enrolled in the Program, but did not submit Claim Forms. In addition, as of July 17, 2012, \$281,125.00 was paid for 1,366 claimants through the Administrative Fund. From the Settlement Fund, \$2,852,070.00 has been allocated to five (5) eligible claimants. Further, the Special Master, Patrick Juneau, advises that a few remaining additional claims are in the process of review by the Medical Panel and the Special Master's Office in order to complete the process outlined in the Settlement Program and that the process will be fully completed within the next forty-five (45) days. No more claims are being submitted into the Settlement Program.

Some of the activities engaged in by select counsel in connection with MDL Propulsid Settlement Program II include an agreement to amend the Propulsid II Settlement Program which is set forth in a Supplemental Agreement re Propulsid MDL I and II, entered into in August, 2007. (This amendment enabled claimants, under certain limited conditions, to seek re-review of a claim processed by the Medical Review Panel. As of July 25, 2012, five (5) claimants had received a second review.) Propulsid II was developed and modeled after the Propulsid I Program so that state court claimants could participate in a second Propulsid Settlement Program. In connection with the Propulsid Settlement Programs, numerous orientation sessions occurred for the doctors who were

participants and nominated by the parties to the Medical Review Panel. The parties have also had and continue to have regularly scheduled meet and confer conferences with Special Master Juneau and continue to administer the Propulsid litigation with the goal of finalizing the matter and addressing dismissal motions. Further, the parties have continued to address financial issues.

All time reports have been submitted by counsel in MDL No. 1355 who participated in the MDL Propulsid Settlement Program II. PLC has reviewed the reports with Special Master Pastrick A. Juneau and Philip A. Garrett, of the Wegmann-Dazet accounting firm. *See In re High Sulphur Content Gasoline Products Liability Litigation*, 517 F.2d 220, 232 n. 18 (5<sup>th</sup> Cir. 2008)(approving use of special masters to oversee fee allocations as a means of providing procedural protection); *Turner v. Murphy Oil USA, Inc.*, 2008 WL4661806, \*8 (E.D.La. Oct. 6, 2008). Movant seeks an Order authorizing Russ M. Herman, PLC, to make a distribution from the Propulsid II Attorneys' Fee Fund in accordance with the scheduled detail of payout attached hereto as Exhibit "B".

Wherefore, movant respectfully requests that the instant Motion for Distribution of Attorney's Fees be granted.

Respectfully submitted,

/s/ Leonard A. Davis

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**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 1<sup>st</sup> day of August, 2012.

/s/ Leonard A. Davis

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