UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re: AVANDIA MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	:	AVANDIA MDL 1871 2007-MD-1871 HON. CYNTHIA M. RUFE
THIS DOCUMENT RELATES TO: ALL ACTIONS	:	

RENEWED MOTION OF GLAXOSMITHKLINE LLC TO SHOW CAUSE AS TO WHY THE COURT SHOULD NOT LIMIT PLAINTIFFS' ATTORNEYS' FEES

Defendant GlaxoSmithKline LLC ("GSK") hereby renews its motion that Plaintiffs show cause as to why the Court should not exercise its authority to limit the contingent fees of attorneys representing individual plaintiffs in the Avandia MDL. GSK initially filed this Motion on June 22, 2011. On August 19, 2011, the Court dismissed this motion as premature. In light of the Court's recently stated intent "to implement and ensure the effectiveness of the settlement and mediation tracks," (*see* Pretrial Order No. 146 ("PTO 146"), Nov. 7, 2011), GSK submits that this motion is now appropriately before the Court. In PTO 146, the Court expressly provided that GSK was permitted to renew this motion if it so chose, and that if it did, "the Plaintiffs' Steering Committee shall file a response and the Court shall schedule a hearing date to consider the motion." PTO 146, ¶ V.D.

In support of its motion, GSK incorporates the attached memorandum of law.

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Dated: December 22, 2011

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ORDER

Upon consideration of Defendant GlaxoSmithKline LLC's Renewed Motion to Show Cause, and of any response or reply thereto, it is hereby ORDERED that said motion is GRANTED. Plaintiffs are ORDERED to show cause as to why the Court should not exercise its authority to limit plaintiffs' attorneys' fees.

BY THE COURT:

Cynthia M. Rufe, J.

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MEMORANDUM OF LAW IN SUPPORT OF RENEWED MOTION OF GLAXOSMITHKLINE LLC TO SHOW CAUSE AS TO WHY THE COURT SHOULD NOT LIMIT PLAINTIFFS' ATTORNEYS' FEES

I. INTRODUCTION

Courts overseeing mass tort litigation "have an independent duty to review fees and specifically determine if they are reasonable . . . ." *See* Manual for Complex Litigation (Fourth) § 14.211 (2004). Limiting plaintiffs' attorneys' contingent fees is appropriate where, as here, attorneys representing individual plaintiffs "carried minimal burden with respect to discovery, trial preparation, or settlement processes, and in many instances, enjoyed significant economy of effort as a result of case volume . . . ." *In re: Medtronic, Inc.*, 2008 U.S. Dist. LEXIS 110259, *29 (D. Minn. Oct. 20, 2008), o*pinion of magistrate judge adopted by* 2008 U.S. Dist. LEXIS 110214 (D. Minn. Nov. 10, 2008). Accordingly, GSK moves that plaintiffs show cause as to why the Court should not limit contingent fee agreements between attorneys and individual plaintiffs in the Avandia MDL to a reasonable amount.

II. THE COURT'S AUTHORITY TO LIMIT CONTINGENT FEE AGREEMENTS

Courts have "well-established authority to exercise ethical supervision of the bar," which "includes the power to review contingent fee contracts for fairness." *In re: Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 492 (E.D.N.Y. 2006); *accord In re: Vioxx Prods. Liab.*

Litig., 74 F. Supp. 2d 606, 612 (E.D. La. 2008); *In re: Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 2008 U.S. Dist. LEXIS 17535, *60 (D. Minn. Mar. 7, 2008). A "court may address the reasonableness of contingent fee contracts even if the parties have not raised the issue." *In re: Vioxx*, 74 F. Supp. 2d at 612. A court may limit individual plaintiffs' attorneys' fees where, as here, the attorneys did not perform a substantial portion of the work, but rather benefited from coordinated discovery and other work performed by the Plaintiffs' Steering Committee. *See id.* at 610-11 ("Contingent fees may be disallowed . . where the amount becomes large enough to be out of all proportion to the value of the professional services rendered.").

In addition, the Court has established a master settlement and mediation program in this litigation, and judicial review of plaintiffs' attorneys' fees is consistent with the Court's stated intent "to implement and ensure the effectiveness of the settlement and mediation tracks," Pretrial Order No. 146, Nov. 7, 2011; *see also In re: Vioxx*, 74 F. Supp. 2d at 611-12 (holding that court had equitable authority to review attorneys' fees in light of its administration of a global settlement program).

III. THE COURT'S EXERCISE OF ITS AUTHORITY TO LIMIT CONTINGENT FEE AGREEMENTS IS APPROPRIATE IN THE AVANDIA MDL

In the Avandia MDL, the Court's exercise of its authority to limit plaintiffs' attorneys' fee arrangements is appropriate for several reasons.[1] First, limiting contingent fee contracts between attorneys and individual plaintiffs is "particularly appropriate," where, as here, "much of the discovery work the attorneys would have normally done on a retail basis in individual cases has been done at a reduced cost on a wholesale basis by the plaintiffs' steering

[1] The first step in the Court's review would be to require that all attorneys with claims subject to Pretrial Order No. 70 (regarding the Common Benefit Fund) to disclose their fee arrangements.

committee." *In re: Zyprexa*, 424 F. Supp. 2d at 490; *see also In re: Guidant*, 2008 U.S. Dist. LEXIS 17535, *63 ("Because of the mass nature of this MDL, the fact that several firms/attorneys benefited from economies of scale, and the fact that many did or should have benefited in different degrees from the coordinated discovery, motion practice, and/or global settlement negotiations, there is a high likelihood that the previously negotiated contingency fee contracts would result in excessive fees."); *In re: Rio Hair Naturalizer Prods. Liab. Litig.*, 1996 U.S. Dist. LEXIS 20440, 64-65 (E.D. Mich. Dec. 20, 1996) ("In light of . . . the limited amount of work done by the individual attorneys in this case . . . , the Court finds that the amount of contingency fees that individual attorneys may collect from their individual clients must be severely limited."). In the Avandia litigation, many of the attorneys who have individual pending or tolled cases have been content to let the Plaintiffs' Steering Committee perform the heavy lifting on discovery, motion practice, and other work benefiting their cases.[2]

Courts have also been concerned that "many of the individual Plaintiffs are both physically ill and aging and, understandably, do not have the strength or knowledge to negotiate fair fees for themselves." *In re: Guidant*, 2008 U.S. Dist. LEXIS 17535, *62; *see also In re: Vioxx*, 574 F. Supp. 2d at 613 ("many of the Vioxx claimants are elderly and in poor health, making it more difficult for them to negotiate fair contingent fee contracts . . ."). Here, Avandia plaintiffs allege serious injuries, such as heart attack, heart failure, and stroke. Accordingly, the Court's review of contingent fee contracts will ensure that vulnerable plaintiffs are not unfairly charged excessive fees by counsel who "have a built-in conflict of interest that is directly opposed to that of their clients." *In re: Guidant*, 2008 U.S. Dist. LEXIS 17535, *62.

[2] In light of the fact that this MDL has been ongoing for over four years, GSK respectfully suggests that for plaintiffs' counsel who have merely collected cases, an appropriate fee would be no more than 25%.

Finally, limitation of plaintiffs' attorneys' contingent fee arrangements will help promote public perception of fairness of mass tort litigation. As the district court in the Zyprexa MDL observed:

> The risk of excessive fees is a matter of special concern here because of the mass nature of the case . . . . excessive fees can create a sense of overcompensation and reflect poorly on the court and its bar . . . . These considerations are enhanced where, as here, the Judicial Panel on Multidistrict Litigation has assembled all related federal cases for coordinated or consolidated pretrial proceedings to promote the just and efficient conduct of such actions.

In re: Zyprexa, 424 F. Supp. 2d at 493 (citing 28 U.S.C. § 1407) (internal citations and quotations omitted); *see also In re: Guidant*, 2008 U.S. Dist. LEXIS 17535, *59 ("Courts have a vested interest in attorney fee contracts. The fairness of the terms of such agreements reflects directly on the Court and the legal profession.").

In other pharmaceutical and medical device MDLs, district courts have capped contingent fees for plaintiffs' attorneys who did not perform substantial individualized work on their cases at amounts ranging from 20-35%. *See, e.g., In re: Medtronic*, 2008 U.S. Dist. LEXIS 110259, *26 (limiting contingent fees at $33^{1/3}$%); *In re: Vioxx*, 574 F. Supp. 2d at 607 (limiting contingent fees at 32% plus reasonable costs), *modified by* 650 F. Supp. 2d 549 (E.D. La. 2009) (holding that in the rare case where a departure from the cap might be warranted, such evidence could be submitted to the court for its consideration); *In re: Guidant*, 2008 U.S. Dist. LEXIS 17535, *59 (limiting contingent fees at 20%, subject to increase upon petition); *In re: Zyprexa*, 424 F. Supp. 2d at 491 (limiting contingent fees at 35%, subject to revision upwards to 37.5% or downwards to 30% under special circumstances).

IV. CONCLUSION

For the foregoing reasons, GSK respectfully requests that the Court grant its motion and order that plaintiffs show cause as to why the Court should not exercise its authority to limit the contingent fees of attorneys representing individual plaintiffs in the Avandia MDL.

Respectfully submitted,

/s/ Nina M. Gussack

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Dated: December 22, 2011

CERTIFICATE OF SERVICE

I herby certify that a copy of the foregoing Motion to Show Cause was served upon all counsel of record via ECF and via email and first class mail upon plaintiffs' counsel as follows:

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Mary Margaret Spence

Dated: December 22, 2011