

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:

**FOSAMAX PRODUCTS LIABILITY
LITIGATION**

**MASTER FILE
No. 1:06-md-01789-JFK-JCF**

**PLAINTIFFS' STEERING COMMITTEE'S MEMORANDUM IN SUPPORT OF ITS
CONSENT MOTION FOR DISTRIBUTION OF COMMON BENEFIT FUNDS**

I. INTRODUCTION

The Plaintiffs' Steering Committee ("PSC") pursuant to Case Management Order No. 12 hereby moves this Court to enter an Order granting the distribution of common benefit funds. For the reasons that follow, it is now appropriate to release those funds currently being held in escrow for payment of common benefit time and expenses to those firms entitled to such remuneration. This motion is being presented without opposition from the Defendant and with consent from all members of the PSC, as well as all attorneys who performed common benefit work and submitted common benefit expense reports as required by Case Management Order No. 12.

II. ARGUMENT

**A. THE PSC HAS PERFORMED EXTENSIVE WORK IN SUPPORT OF
THIS LITIGATION AND NOW IS THE APPROPRIATE TIME TO
COMPENSATE THE PSC FOR THAT WORK.**

On September 18, 2007, the Court entered Case Management Order No. 12, which outlined the procedures for keeping and reporting common benefit time and expenses. On January 5, 2010, the Court entered Case Management Order No. 17, which established Plaintiffs'

common benefit fund for this litigation. As stated therein, this fund was established “to provide for the fair and equitable sharing among plaintiffs of the cost of litigation services and expenses incurred by attorneys acting for MDL 1789 administration and common benefit of all plaintiffs in this complex litigation.” (ECF Doc. No. 857; CMO No. 17 at 1).

As outlined in CMO 2, the PSC was charged with the following obligations as it pertained to this litigation:

- (1) Initiate, coordinate, and conduct all common benefit pretrial discovery on behalf of all plaintiffs in all actions which are consolidated with the instant MDL.
- (2) Develop and propose to the Court schedules for the commencement, executions, and completion of all discovery on behalf of all plaintiffs.
- (3) Cause to be issued in the name of all plaintiffs the necessary discovery requests, motions and subpoenas pertaining to any witnesses and documents needed to properly prepare for the pretrial of relevant issues found in the pleadings of this litigation.
- (4) Conduct all discovery in a coordinated and consolidated manner on behalf of and for the benefit of all MDL plaintiffs.
- (5) Examine witnesses and introduce evidence at hearings on behalf of plaintiffs.
- (6) Act as spokesperson for all plaintiffs at pretrial proceedings and in response to any inquiries by the Court.
- (7) Submit and argue any motions to the Court, and file any briefs in opposition to motions, on behalf of all plaintiffs, which involve matters within the sphere of the responsibilities of the Plaintiffs’ Steering Committee.

- (8) Explore, develop, and pursue all settlement options pertaining to the common benefit of all plaintiffs.
- (9) Maintain adequate files of all pretrial matters, including establishing and maintaining a document depository, and having those documents available, under reasonable terms and conditions, for examination by all MDL Plaintiffs or their attorneys.
- (10) Perform any task necessary and proper for the Plaintiffs' Steering Committee to accomplish its responsibilities as defined by the Court's orders, including organizing sub-committees comprised of plaintiffs' attorneys both on the PSC and not on the PSC and assigning them tasks consistent with the duties of the Plaintiffs' Steering Committee.
- (11) Perform such other functions as may be expressly authorized or directed by further orders of this Court.

(ECF Doc. No. 5; CMO No. 2 at 24-6).

As the Court noted at the time it executed CMO 17, "[t]he Court is satisfied that the PSC has faithfully executed the duties with which it was charged and that it is appropriate to order the establishment of a common benefit fund in order to remunerate the PSC for the expenses incurred and efforts conducted on behalf of all Fosamax plaintiffs in this MDL." (ECF Doc. No. 857; CMO No. 17 at 3). As such, CMO 17 requires each plaintiff settling a case in this MDL to pay a percentage of the gross monetary recovery to be held in escrow for later re-distribution for compensable common benefit time and expenses.

Following the execution of CMO 17, the PSC remained steadfastly focused on fulfilling its responsibilities outlined in CMO 2. Although it is impossible to provide an exhaustive list of litigation activities performed by the PSC, a summary of those tasks follows.

The PSC was solely responsible for initiating, coordinating, and conducting all pretrial common benefit discovery for the plaintiffs in this MDL. (O'Brien decl., ¶ 3.) This was no small task. The PSC created a document depository used to house and organize millions of pages of documents produced by defendant Merck Sharp & Dohme Corp., ("Merck"), the United States Food & Drug Administration, and numerous third parties in the common benefit litigation. (O'Brien decl., ¶ 3.) Further, the PSC took 28 depositions of current or former Merck employees. (O'Brien decl., ¶ 3.) Portions of many of these depositions were utilized during each of the trials that took place in this litigation, as well as in cases tried in state court jurisdictions. (O'Brien decl., ¶ 3.) Countless fact witness depositions also were taken by the PSC on behalf of plaintiffs as part of the bellwether process. (O'Brien decl., ¶ 3.) The PSC was actively involved in providing assistance to counsel responsible for taking and defending these depositions. (O'Brien decl., ¶ 3.) The PSC also completed extensive written discovery for the common benefit. (O'Brien decl., ¶ 3.)

Additionally, this MDL necessitated the PSC's active management in extensive expert discovery. (O'Brien decl., ¶ 4.) The PSC hired and prepared a pool of qualified litigation experts, most of whom testified at various MDL bellwether trials. (O'Brien decl., ¶ 4.) These experts faced extensive *Daubert* challenges by Defendant and the PSC worked diligently to ensure that the experts met the sound methodology and bases requirements of *Daubert*. (O'Brien decl., ¶ 4.) Without the testimony of these experts, this litigation could not have proceeded successfully. (O'Brien decl., ¶ 4.) The PSC also was tasked with very complex discovery of

Defendant's considerable stable of retained experts, which required the expenditure of great financial and time resources. (O'Brien decl., ¶ 4.)

Over the course of the several year MDL, the PSC prepared and file hundreds of legal memoranda on behalf of plaintiffs and in opposition to motions filed by Merck. (O'Brien decl., ¶ 5.) The PSC handled the oral arguments on scores of contested legal issues before this Court. (O'Brien decl., ¶ 5.)

The PSC's pretrial common benefit work was conducted and completed so that cases could be tried in this MDL and, in the event of a remand of the cases in this MDL, cases could be tried in transferor courts upon remand. (O'Brien decl., ¶ 6.) This Court presided over six lengthy trials in five bellwether cases with the *Boles*¹ and *Scheinberg* cases ultimately resulting in verdicts for the Plaintiffs, and the *Maley*, *Graves* and *Secrest* trials resulting in verdicts for the Defendant. (O'Brien decl., ¶ 6.) The PSC was responsible for coordinating efforts for these trials and members of the PSC served as trial counsel during each of the cases which proceeded to trial. (O'Brien decl., ¶ 6.) Each trial lasted approximately one month and required extensive time and out-of-pocket costs to be expended by PSC and its member firms. (O'Brien decl., ¶ 6.) All told, the PSC devoted more than 40,000 combined attorney hours to ensure that this litigation was handled thoroughly and properly. (O'Brien decl., ¶ 6.)

On March 24, 2014, the PSC entered into a Master Settlement Agreement with Defendant Merck, which definitively resolved claims brought by more than 1,100 plaintiffs for the gross sum of \$27,327,500.00. (O'Brien decl., ¶ 7.) This settlement was secured nearly eight years of hard-fought and difficult litigation by members of the PSC. (O'Brien decl., ¶ 7.) Following the

¹ *Boles* actually proceeded to trial on two different occasions. The first trial resulted in a mistrial and the second resulted in a verdict for the plaintiff.

execution of the settlement agreement, the PSC continued to work diligently to ensure that the settlement claimants received their settlement funds expeditiously. (O'Brien decl., ¶ 7.)

In sum, the PSC has made great efforts to ensure that plaintiff's common interests were represented in a fair and zealous manner. Although the common benefit funds available for disbursement will not come close to compensating the PSC member firms for their time and financial expenditures, those funds will be useful in offsetting some of these costs.

B. THE COURT POSSESSES THE AUTHORITY TO COMPENSATE THE PSC FROM THE COMMON BENEFIT FUND.

Moreover, it is appropriate for the Court to exercise its inherent authority to manage this litigation and award common benefit assessments in favor of the PSC. Utilizing the common fund doctrine, MDL courts have consistently and routinely assessed "common benefit fees in favor of attorneys who render legal services beneficial to all MDL plaintiffs." *In re Vioxx Prods. Liab. Litig.*, 760 F.Supp.2d 640, 647 (E.D.La. 2010); *E.g.*, *In re Genetically Modified Rice Litig.*, 2010 WL 9716190, *4 (E.D.Mo. Feb. 24, 2010) (relying on common fund doctrine to support common benefit fee award); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 2008 WL 682174, *4 (D.Minn. Mar. 7, 2008).

In addition to the aforementioned judicial precedent, this Court possesses the inherent managerial authority over this MDL to award common benefit assessments in favor of the PSC. *In re Vioxx Prods. Liab. Litig.*, 760 F.Supp.2d at 648 (E.D.La. 2010). Stated another way, the inherent managerial authority to appoint a PSC necessarily implies the authority to compensate the PSC for its work. *Id.*

C. THIS COURT SHOULD ORDER THE PSC TO DIRECT THE ESCROW AGENT TO DISBURSE FUNDS FROM THE COMMON BENEFIT FUND AS OUTLINED IN THE CONSENTED-TO DISBURSEMENT SCHEDULE.

Of the more than 1,100 claims processed by the Fosamax claims facility, all but 277 have been paid, and the remainder are in process. (O'Brien decl., ¶ 7.) As of November 5, 2015, \$1,747,865.60 has been deposited into the common benefit account. (O'Brien decl., ¶ 8.) Once all claims have been distributed from the Escrow Account, the Escrow Agent will have deposited \$2,077,066.63 into the common benefit fund account. (O'Brien decl., ¶ 8.) The total amount of litigation fund contributions, loans to the PSC by PSC member firms, and allowable common benefit held costs total \$2,428,879.41. (O'Brien decl., ¶ 9.) For each of the loans to the PSC, no interest has been charged and the loans were conferred for expense items that were obligations of the PSC to pay and in lieu of a further litigation fund contribution call; no such loans were made by non-PSC firms. (O'Brien decl., ¶ 10.) All of the held costs have been reviewed by the PSC and are costs which are for the common benefit and are not case-specific costs. (O'Brien decl., ¶ 11.) All of those firms' case-specific costs have been paid for by the clients in those cases or, if written off, paid for by those law firms. (O'Brien decl., ¶ 11.) No legal fees are being paid from the common benefit fund. (O'Brien decl., ¶ 12.)

Because the total amount of the PSC litigation fund contributions, loans to the PSC by PSC member firms, and common benefit held costs exceed the total amount of the common benefit fund, the PSC has agreed to resolve the liabilities of the PSC in full by paying back 100% of the litigation fund contributions and retiring all loans to the PSC by PSC member firms at 100%, and then paying the held costs back on a pro rata basis, based upon the amount of money left in the common benefit fund after the liabilities of the PSC are paid in full. (O'Brien decl., ¶ 13.) Thus, for example, if a firm has 12% of the held costs, that firm will be reimbursed 12% from the remaining funds available for distribution after the PSC's liabilities are paid in full. (O'Brien decl., ¶ 13.) Based upon the current projections of the remaining funds available for

distribution after the PSC's liabilities are paid in full, it is expected that approximately 39.3% of each firm's approved and held costs for common benefit work will be reimbursed by the common benefit fund which would then zero out the common benefit fund. (O'Brien decl., ¶ 14.)

Below, this Court will find the schedule of contributions, loans, and held costs for common benefit work in this MDL, (O'Brien decl., ¶ 15.).

LITIGATION FUND CONTRIBUTIONS

LAW FIRM	AMOUNT
Andrus Wagstaff	\$115,000.00
Ashcraft & Gerel, LLP	\$140,000.00
Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.	\$140,000.00
Beatie & Osborn, LLP	\$50,000.00
Estate of Russell Beatie	\$50,000.00
Cory Watson Attorneys	\$140,000.00
F. Dulin Kelly, Esq.	\$25,000.00
Goforth Easterling LLP f/k/a Goforth Sanford & Lewis	\$50,000.00
Irpino Law Firm	\$100,000.00
Krupnick Campbell Firm	\$50,000.00
Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A.	\$165,000.00
Murray Law Firm	\$100,000.00
Pittman, Germany, Roberts & Welsh, LLP	\$75,000.00
Seeger Weiss LLP	\$140,000.00
Shelly A. Sanford, PLLC	\$50,000.00
LITIGATION FUND CONTRIBUTION TOTAL	\$1,390,000.00

LOANS TO THE PSC BY PSC MEMBER FIRMS

LAW FIRM	AMOUNT
Ashcraft & Gerel, LLP	\$16,452.37
Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A.	\$432,128.77
LOANS TO THE PSC BY MEMBER FIRMS TOTAL	\$448,581.14

ALLOWABLE HELD COSTS FOR THE COMMON BENEFIT

LAW FIRM	AMOUNT
Andrus Wagstaff	\$5,048.03
Ashcraft & Gerel, LLP	\$65,308.13
Cory Watson Attorneys	\$57,910.89
Fleming Nolen & Jez, LLP	\$1,241.58
Irpino Law Firm	\$5,398.88
Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A.	\$452,637.81
Pittman, Germany, Roberts & Welsh, LLP	\$2,752.95
HELD COSTS FOR COMMON BENEFIT WORK TOTAL	\$590,298.27

Accordingly, the PSC requests that the Court order the PSC to direct the Escrow Agent to release, on a funds-available basis, the common benefit fund monies as follows:

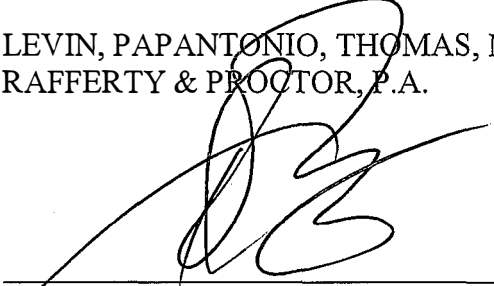
- (1) To pay all litigation fund contributions at 100%;
- (2) To retire all loans to the PSC by PSC member firms at 100%;
- (3) To pay the common benefit firms the allowable held costs on a pro rata basis, based upon the amount of money left in the common benefit fund after the liabilities of the PSC are retired in full.

III. CONCLUSION

Given that the great majority of the claims pending in this MDL have been resolved by way of settlement due to the efforts of the PSC, the entry of an Order regarding distribution of common benefit funds for reimbursement of common benefit expenses is appropriate at this juncture. Therefore, the PSC respectfully requests the Court order that the common benefit sums be released from escrow as provided herein.

RESPECTFULLY SUBMITTED, this 13th day of November, 2015.

LEVIN, PAPANTONIO, THOMAS, MITCHELL,
RAFFERTY & PROCTOR, P.A.



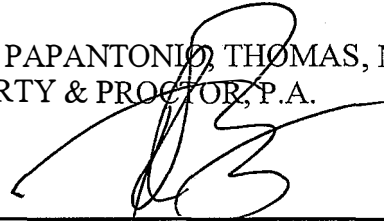
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CERTIFICATE OF SERVICE

I hereby certify that on November 13th, 2015, I caused to be served by electronic means via the Court's CM/ECF System a copy of the Notice of Plaintiffs' Steering Committee's Consent Memorandum in Support of Motion for Distribution of Common Benefit Funds on all counsel registered to receive electronic notices.

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