

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

In re:	§	MDL Docket No. 4:03CV1507WRW
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	§	
PREMPRO PRODUCTS LIABILITY LITIGATION	§	ALL CASES
	§	
	§	

**MEMORANDUM IN SUPPORT OF
PSC’S MOTION FOR RELEASE OF COMMON BENEFIT FUNDS**

PPO-6 requires defendants to deposit a portion of every settlement into a PPO-6 trust account to reimburse the Plaintiffs’ Steering Committee (“PSC”) for common benefit expenses incurred on behalf of all MDL plaintiffs. Significantly, the principal purpose of PPO-6 is to reimburse the PSC for the out-of-pocket costs common benefit lawyers incurred in prosecuting the litigation.¹ PPO-6 authorizes the Court to release these funds for any purpose it deems lawful.² The PSC thus respectfully requests that the Court release some of the money in the trust account to assist the PSC in continuing to fund common benefit obligations and to support further anticipated costs.

For the first eight years of these proceedings, the PSC funded common benefit efforts through assessments of PSC member law firms and other firms willing to contribute to a HT Litigation Fund. The PSC engaged in multiple assessments for the fund. Individual firms have contributed hundreds of thousands of dollars to the effort. The common benefit money in this fund was spent to compensate generic experts, to buy copies of documents produced by

¹ *Id.* at 7 ¶ 11.

² Practice and Procedure Order No. 6 (Mar. 30, 2005), Document No. 570 at 8 ¶ 15.

defendants into the depository, to pay for court reporters and conference rooms for depositions, etc. Mr. Ralph Cloar, as the HT Litigation treasurer, oversees the payment of all common benefit costs from this fund. But as this litigation enters its ninth year, the PSC needs an infusion of funds from the PPO-6 trust account to continue to meet these obligations. This is mainly because the expenses of this litigation, unlike every other MDL to the undersigned's knowledge, have gone up dramatically over time. The common benefit litigation costs over the past year alone exceeded the costs of any of the early years of the litigation. The PSC thus needs access to a portion of the money in PPO-6 trust account to continue its efforts.

The duration of these MDL proceedings is unprecedented. While many pharmaceutical MDL proceedings remain open for several years, they are generally resolved within two to four years. During that time frame, virtually all cases are resolved. For such litigations, it is not unreasonable to expect that the common benefit prosecution costs will be paid by participating plaintiff firms as the money spent on these expenses is returned to those firms from the PPO-6 type funds within a few years, as soon as the litigation is over. This litigation has extended longer than any other, and the end is not in sight. Since the Court began remanding cases just over a year ago (February 2010), less than 250 cases have been remanded.³ The Court has denied plaintiffs' motions for additional larger-scale remands. And the Court has made clear that it will not compel mediation unless all parties consent.

Wyeth and Pfizer have declined to consent to mediation while dramatically increasing their litigation efforts. For the first seven years of this litigation, these defendants filed *Daubert* motions solely in individual trial set cases. Beginning last year, the defendants began asserting *Daubert* motions independently of trials. And they have now suggested that they want this process to continue indefinitely. Ordinarily, an MDL court resolves one general causation

³ With almost 8,000 cases logged on the MDL docket, the remand path, at this rate, is long.

Daubert motion (deciding whether the drug can cause the illness at issue in any users) and one specific causation motion (deciding whether it is possible to ascertain causation in an individual case). All other *Daubert* issues, that impact a subset of cases, are handled by the transferor courts. In this litigation, the parties have gone through multiple *Daubert* motions on individual issues. And defendants promise to keep filing *Daubert* motions as long as the litigation lasts.⁴

Each of these motions is inordinately expensive to combat. For instance, plaintiffs asked this Court to have defendants determine whether they intended to challenge general causation on blood clot injuries. Defendants claimed that they did intend to raise such a challenge. This Court thus set a schedule for plaintiffs to produce expert reports establishing a causal link between hormone therapy and cardiac events/blood clots. The PSC did precisely that, retaining multiple experts to defend the link between the drug and the principal heart/blood clot injuries the literature established. Defendants responded by filing *Daubert* motions that failed to challenge a **single** one of the claims made by plaintiffs' experts. Defendants' motions conceded each of the injuries defended, instead attacking only "outlier" injury claims made by a handful of plaintiffs nationwide – claims none of plaintiffs' experts even defended.⁵ These were claims the PSC would have conceded outright if asked. The PSC spent a six-digit figure on experts whose reports and depositions ultimately went unchallenged.

The cost of experts for the HER2-neu and PR-negative challenges is exponentially higher than they were on the cardiac/blood clot issues. Plaintiffs have retained epidemiologists, cell

⁴ Exhibit 1- On May 12th, Defendants' lead counsel e-mailed this Court: "Needless to say, there are other *Daubert* issues on the front burner."

⁵ Defendants claimed they were reserving their challenges to all the injuries plaintiffs' experts defended for specific causation motions in individual cases. In other words, defendants conceded that the drug is capable of causing the injuries claimed (general causation) but suggested they might challenge whether it caused a particular plaintiff's injury (specific causation). But plaintiffs asked – up front – whether defendants intended to challenge general causation. It was based upon defendants' affirmative answer that the blood clot injury general *Daubert* issue went forward.

biologists, oncologists and a breast surgeon to defend general causation on those issues. If plaintiffs had retained any fewer experts, defendants would have cited the absence of an expert from a particular field as a reason to grant their *Daubert* motions, as they have consistently done to date.

There is no limit to the number of *Daubert* motions defendants could file on issues that have never been deemed relevant over the last 8 years or on re-visiting issues that have already been addressed. What is clear is that no party in this litigation should feel pressured because they cannot afford to continue what seems to be an unending fight. Arkansas law historically disfavors victory based on superior resources alone. For instance, Arkansas courts frequently order a husband to pay his wife's "suit money" in divorce cases. *See, e.g., In re Smith*, 39 S.W.2d 703, 703 (Ark. 1931); *accord Lenser v. McGowan*, 191 S.W. 3d 506, 510 (Ark. 2004). Yet, here, the money at issue already belongs to the PSC. The PSC is simply asking that the Court release it now to help pay for expenses being incurred currently.

The defendants have no standing to object to this request. Under PPO-6, defendants have already fully satisfied their obligation by depositing the PSC's money into the trust account each time a case settles. Defendants cannot be held liable for how that money is used.⁶ This motion simply asks that plaintiffs be allowed access to resources to put them on less of an unequal footing in continuing to handle this litigation. Any complaint about that would be nothing more than advocacy of wallet-whipping as a means to end litigation.

To enable the PSC to continue to fund the common benefit issues of this litigation, the PSC respectfully requests that the Court release \$600,000 from the PPO-6 trust account for litigation expenses. The PSC further requests all other relief to which it is entitled.

⁶ Practice and Procedure Order No. 6 (Mar. 30, 2005), Document No. 570 at 3 ¶ 4.

Dated this 27 day of May, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May, 2011, a true and correct copy of the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system, and a true and correct copy was forwarded by e-mail to the following parties:

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