

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

In re:	§	MDL Docket No. 4:03-CV-1507-BRW
	§	
	§	
PREMPRO PRODUCTS LIABILITY LITIGATION	§	ALL CASES
	§	
	§	

**LEAD COUNSELS’ RECOMMENDED ALLOCATION
FOR COMMON BENEFIT TIME**

Today, the Common Benefit Fee Committee (CBFC) provided its recommended allocation for common benefit time. The undersigned counsel, as Lead Counsel and a CBFC member, does not agree with the CBFC’s recommended allocations.¹ In the *Albuterol* MDL, involving a similar situation where Lead Counsel disagreed with the recommendations of the fee committee, Lead Counsel provided a separate “Lead Counsel Recommended Allocation” for the court’s consideration.² The *Albuterol* MDL court considered that allocation recommendation particularly helpful because it was Lead Counsel “who managed the plaintiff’s case” and best understood the big picture including the responsibilities or tasks assigned to each applicant firm, the quality of their work and the level of commitment.³ The undersigned Lead Counsel thus provides this Court with a similar analysis for the Court’s consideration.

¹ The CBFC consists of seven members: Tobias Millrood (Chair), Zoe Littlepage, Erik Walker, Michael Williams, Ralph Cloar, Rob Jenner (in place of his partner Ken Suggs) and Irwin Levin. For virtually every vote on the allocation issues, six of the seven members have voted as a block. Zoe Littlepage has opposed almost all of those votes.

² *In re Copley* (Albuterol litigation), 50 F.Supp.2d 1141 (D. Wyoming 1999).

³ *In re Copley* (Albuterol litigation), 50 F.Supp.2d at 1149.

It is not unusual for courts to rely on such guidance since Lead Counsel is generally “better able to decide the weight and merit of each [firm’s] contributions.”⁴ As the MDL court in *In Re Diet Drugs* noted, “There is ample authority for a court making an award of attorneys’ fees out of a common fund to permit lead counsel to allocate fees among all counsel entitled to share in the award.”⁵ Especially when a litigation goes on for many years, “such a procedure makes sense because it relieves the court of the difficult task of assessing counsels’ relative contributions” and Lead Counsel is best equipped to accurately appreciate “the internal distribution of work, responsibility and risk.”⁶ In many instances, courts solely assign lead counsel the job of distributing attorney fees “among the participating counsel based on their respective contributions to the litigation.”⁷

Background

In total, 35 law firms applied for compensation for their common benefit time. Pursuant to PPO # 5, each applicant firm had to submit a summary of its time as well as back-up detail explaining why such time was for the common benefit of all plaintiffs. Lead Counsel thus set up an electronic DropBox system where each applicant law firm had its own individual DropBox folder. Applicant firms were instructed to upload summary sheets as well as all back-up data to their individual folders. CBFC members were given access to all of the DropBox folders so that each committee member could review all submissions before voting on allocations.

⁴ In re *Guidant Corp.*, 2008 WL 682174 at *16 (D.Minn. March 7, 2008).

⁵ In re *Diet Drugs*, 2002 WL 32154197 at * 22 (E.D.Pa. Oct. 3, 2002).

⁶ *Id.* at * 22-23 (E.D.Pa. Oct. 3, 2002).

⁷ In re *Indigo Securities Litigation*, 995 F.Supp. 233 (D. Mass., March 5, 1998).

On July 12, 2013, each CBFC member was assigned a discrete number of law firms for which he or she had primary auditing responsibility.⁸ A uniform audit form was circulated on August 14, 2013 for use by the CBFC members.⁹ Once completed, the audit forms were circulated to all members of the CBFC. Through comparing her review of the actual submitted time with the circulated audits, Lead Counsel immediately noted a number of discrepancies and errors with the audit process.¹⁰ Firms were not being audited in a consistent manner. The same criteria was not applied to all firms. There was wide disparity in the level of review and detail. Glaring errors in submissions were being ignored for some firms while other firms were being held to rigorous standards. Lead Counsel called for a re-audit. The CBFC refused.

On September 17, 2013 the CBFC voted on a proposed allocation for every applicant firm.¹¹ By that date, there had been no detailed discussion of the audit errors noted by Lead Counsel.¹² There had also been no discussion of the respective value or contributions of various firms' contributions. Because there was variation in the votes, the CBFC then scheduled another conference call for September 29, 2013. During that follow-up call, six of the seven CBFC members voted to just average the prior committee's votes for each applicant firm (after

⁸ Ex. 1 - Email from T. Millrood re: audit assignments.

⁹ Ex. 2 - Blank audit form

¹⁰ See Doc. No. 3215, Motion for Independent Auditor for further detail on the issues raised about the audit process.

¹¹ Ex. 3 - 9-17-13 Cover letter from T. Millrood to all CBFC members; Ex. 4 - 9-17-13 Spreadsheet of each committee member's vote for each applicant firm.

¹² Ex. 56 - 9-19-13 minutes of CBFC conference call on September 16, 2013. Although the Chair of the CBFC agreed on this conference call that "the audits were not perfect" because "everyone on the CBFC were busy lawyers," the voting block of the CBFC still voted to accept the audits as "adequate." As Mr. Millrood noted, "if the CBFC made a recommendation to a firm and it was accepted, the quality of the audit would be irrelevant and the only problem would be objectors." Such a position is not supported by the case law.

removing the high and the low vote). Again, there was no discussion of the respective contributions or value of any firm's common benefit work and no discussion of errors or mistakes noted in submissions. Indeed, there was little discussion on any issue, no attempt to cure issues raised by Lead Counsel and no brainstorming on how to best achieve a fair result. By this date, some CBFC members had still not accessed applicant DropBox folders, confirming that they never reviewed the submitted time upon which they voted.¹³ Nevertheless the CBFC voted to just accept an average.¹⁴

The CBFC then provided its recommendations to each applicant firm and the objection period started. Nine law firms objected to the allocations. The Fee Committee approached seven of the nine firms and offered them a higher allocation in order to void the objection.¹⁵ Six of those seven firms accepted the deal.¹⁶ That left only three objectors: The Wetherall Firm¹⁷ as well as Rainey C. Booth, P.A. and The Littlepage Firm. On October 29, 2013, the CBFC voted to

¹³ Ex. 5 - 10-3-13 documentation showing that Tobi Millrood accessed Rainey Booth's DropBox for the first time on 10-3-13 (4 days after the vote); Ex. 6 - 10-3-13 documentation showing that Mike Williams (the auditor for Rainey Booth) had not accessed Mr. Booth's DropBox folder before that date; Ex. 7 - 10-15-13 documentation showing that CBFC member Erik Walker had not accessed the DropBox folders for 18 applicant firms upon which Mr. Walker voted and Ralph Clear had not accessed the DropBox folder of one applicant firm upon which Mr. Clear voted.

¹⁴ Ex. 8 - 10-1-13 Minutes of CBFC conference call re: acceptance of average for initial allocation

¹⁵ The CBFC made no effort to void the objections of the Littlepage Firm or Rainey C. Booth, P.A.

¹⁶ Ex. 9 - 10-29-13 Spreadsheet detailing CBFC's negotiations with objector firms; Ex. 10 - 10-29-13 Email by Z. Littlepage circulating spreadsheet after 10-29-13 conference call.

¹⁷ Ex. 11 - 10-30-13 correspondence from Peter Wetherall to the CBFC. The Wetherall Firm was offered a higher allocation by the CBFC but declined.

make its averaged votes a final allocation recommendation with adjustments for additional money given to the seven objector firms.

In so doing, the CBFC entered the theater of the absurd. For example, the CBFC awarded a total of more than 100% to all firms, a mathematical impossibility.¹⁸ The CBFC voted for one lawyer's time to be paid at \$1,207 per hour for work involving participation in a few conference calls. No other common benefit work was done by this firm. In contrast, the CBFC approved an allocation that would generate an hourly rate of less than \$88 per hour for lawyers with key management responsibilities.¹⁹ The CBFC approved a 140% increase for a law firm that submitted **no** support or documentation for even one hour of its proposed common benefit time. Not a line item. Not a word of description. No back-up data at all.²⁰ Another firm did not submit any back-up documentation for almost 3,000 of its submitted hours but the auditor described this submission as "thorough and well-documented."²¹ The CBFC never audited one

¹⁸ The deal offered to objectors by the CBFC has fundamental flaws. After the CBFC voted to increase objector's percentages to void objections, the total allocated percentage exceeded 100%. To remedy this shortfall, the CBFC proposes to remove \$3 million from the HT Litigation Fund to pay – in actual cash dollars – any additional money needed to void objections. This process means that for objector firms, their hourly rate for each common benefit hour will be different – and higher – than a similar hour of a non-objecting firm. There is nothing remotely fair about that proposal.

¹⁹ The CBFC voted to allocate Roberta Ashkin 0.04% of the common benefit fund. This represents a 300% increase in her actual submitted time and works out to a minimum hourly rate of more than \$1,200 per hour.

²⁰ Ex. 12 - Annual Summary Spreadsheet for Bailey & Galyen as uploaded to DropBox folder; Ex. 13 - Back-up data for Bailey & Galyen time submission as uploaded to DropBox; Ex. 14 - CBFC audit of Bailey & Galyen; Ex. 15 - 9-16-13 spreadsheet by Z. Littlepage re: percentage of time submitted; Ex. 16 - Letter to Bailey & Galyen re: CBFC's recommended time allocation.

²¹ Ex. 17 - CBFC audit of Provost Umphreys; Ex. 18 - Lead counsel audit of Provost Umphreys; Ex. 19 - Annual Summary Spreadsheet for Provost Umphreys as uploaded to DropBox folder; Ex. 20 - Back-up data for Provost Umphreys time submission as uploaded to DropBox; Ex. 21 - Letter to Provost Umphreys re: CBFC's recommended time allocation.

firm at all.²² Another law firm submitted its time late so only one fee committee member had access to the materials before the final vote.²³ For one firm, the data provided by the auditor as to the total submitted hours was significantly inaccurate: by more than 1,000 hours.²⁴ And one CBFC member had still not accessed the DropBox Folder for more than half of the applicant firms and thus had no personal knowledge about their submissions.²⁵

But most startling was the CBFC's decisions as to itself. Every one of the six voting-block CBFC members voted in favor of a dramatic increase in the actual percentage time for every other voting-block member.

		<i>Actual percentage of time</i>	<i>Voted Allocation by CBFC</i>	
1	Cloar Law Firm	2.04%	3.6%	76% increase
2	Cohen Malad	3.36%	4.01%	19% increase
3	Hissey Kientz	9.28%	13.55%	46% increase
4	Janet Jenner & Suggs	5.46%	8.62%	58% increase
5	Pogust, Braslow & Millrood / Schiffirin Barroway	5.60%	10.72%	91% increase
6	Williams, Love, O'Leary & Powers, PC	7.92%	10.95%	38% increase
	Average percentage increase			54.7%

One Fee Committee firm, which was awarded a 91% increase in its actual hours presented, had glaring errors in its submission including dozens of days where the firm submitted more than 24

²² Ex. 22 - 10-8-13 correspondence re: failure to audit Klein Lyons

²³ Ex. 23 - 11-3-13 correspondence re: Ury & Moskow time submission

²⁴ Ex. 24 - 10-14-13 correspondence from Z. Littlepage to CBFC re: Finkelstein data

²⁵ Ex. 25 - 11-3-15 assessment of DropBox access.

hours worked in a day.²⁶ That same CBFC member billed time for events that were never attended.²⁷ The six voting block CBFC members voted themselves an average increase of more than 54%.

The increase assigned to the six block-voting Fee Committee members was squarely taken from three law firm's time: The Littlepage Firm, Rainey C. Booth, P.A. and the Wetherall Firm.

		<i>Actual percentage of time</i>	<i>Voted Allocation by CBFC</i>	
	Rainey Booth, P.A.	12.49%		
	Littlepage Firm	24.30%		
	Littlepage Booth	Combined 36.79%	Combined 23.82%	35% DECREASE

Even with the CBFC's proposed addition of time for the Wetherall Firm to cure his objection, Peter Wetherall was still assigned a significantly lowered percentage than his actual time justified.

		<i>Actual percentage of time</i>	<i>Percentage offered by CBFC</i>	
	Wetherall Firm	4.44%	1.26% (CBFC offered increase to 1.68%)	62% DECREASE

²⁶ Ex. 123 - Examples from submission of Pogust, Braslow & Millrood showing submissions of 25-34 hours.

²⁷ Ex. 63 - Email from T. Millrood re: unable to attend conference call on 4-20-09 and Time billed for T. Millrood's attendance of 4-20-09 conference call.

It is precisely to avoid this type of back-room deals (unsupported by data, discussion or objective criteria) that MDL courts must “closely scrutinize the attorneys' fee allocation, especially when the attorneys recommending the allocation have a financial interest in the resulting awards.”²⁸

A. Formula for Calculation of Common Benefit Time

The case law is clear that the proper calculation for common benefit fee awards is an easy formula.²⁹

Hourly Rate X Hours Submitted X Value of Contribution = Percentage Allocation
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Application of this formula is sometimes not as easy. Indeed, “allocating a limited pot of common benefit fees among numerous counsel, all of whom are talented and capable attorneys and many of whom have made a significant contribution to the ultimate success of this case, is an unenviable task that is sure to lead to hurt feelings and bruised egos.”³⁰ In this litigation, the difficulty is even greater because the HT Litigation Fund does not have enough money to pay the significant number of common benefit hours submitted. The money available must thus be fairly allocated on a percentage basis according to as objective a process as possible. A percentage

²⁸ *In re High Sulfur I*, 517 F.3d at 227; *In Re Vioxx Products Liability Litigation*, 802 F. Supp. 740, 773-774 (E. D. Louisiana 2011).

²⁹ *In re Copley* (Guidant litigation), 50 F.Supp.2d 1141, 1145 (D. Wyoming 1999) (Lead Counsel not only considered the number of hours billed, but also the quality of a given lawyer's efforts); *In re High Sulfur*, 577 F.3d 220, 228 (5th Cir. 2008) (Court “must first determine the reasonable number of hours expended on the litigation and the reasonable hourly rate for the participating attorney” and then adjust the calculation “upward or downward” depending upon review of value factors); *Turner v. Murphy Oil*, 582 F.Supp.2d 797, 812 (E.D.La.2008) (Allocation of common benefit fees is “largely dependent on an analysis of the amount, nature, and significance of the work of each counsel and how it relates to the work of the other counsel”).

³⁰ *Turner v. Murphy Oil*, 582 F.Supp.2d 797, 812 (E.D.La.2008) citing *In re Copley Pharm. Inc.*, MDL No. 94-1013, 50 F.Supp.2d 1141, 1148 (D. Wyo.1999).

allocation allows each firm to be proportionately recognized for its efforts while placing an identical burden of a proportionate discount (depending on the eventual size of the HT Litigation fund) on each firm. A percentage allocation also means that each applicant firm's submission must be closely evaluated because to assign one law firm even .01% more in time means that this percentage of time must be taken from another firm's submission.

B. Hourly Rates

The Court's first – and probably easiest - role will be to assess a reasonable hourly rate for the various categories of legal professionals involved in the common benefit projects. PPO #5 notes that “[b]ecause this litigation is national in scope and is not concentrated in only a few transferor federal courts, uniform hourly rates shall be established by the CBFC for various levels of experience, success and professional standing of lawyers involved in this litigation.”³¹ To decide on a uniform rate in a nationwide case like this, courts typically look beyond the hourly rates in the prevailing local community whose “rates might not be sufficient to attract experienced counsel in a specialized legal field.”³² However, in this case, there is insufficient funds in the HT Litigation Fund to pay for all of the hours expended on common benefit matters even at a lower than market rate. There is thus no need to do a comprehensive nationwide review of comparable hourly rates. Plus, since all of the lawyers associated with the HRT case were substantially qualified, Lead Counsel does not recommend any difference in hourly rates for the various lawyers in the same category, such as partners from different states or cities. Lead Counsel suggests the following hourly rates for each category:

³¹ PPO # 5 at p. 9.

³² *Little Rock School District v. State of Arkansas*, 674 F.3d 990, 997 (8th Cir. 2012) citing *Casey v. City of Cabool*, 12 F.3d 799, 805 (8th Cir.1993).

1. Lead Counsel: \$300³³

Case law repeatedly supports a higher hourly rate for lead counsel to compensate for the additional responsibility and commitment required of that position.³⁴

2. Partners: \$250³⁵

3. Associates: \$150³⁶

4. Special Paralegals: \$75³⁷

This category is reserved for four specific legal assistants who spent a substantial amount of their time working on the litigation and whose efforts were above and beyond the call of duty.³⁸

³³ *Hill v. City of Missouri*, 371 S.W.3d 66, 81 (Mo.Ct.App.2012) (Hourly rates approved of \$350 for lead counsel, \$300 to \$100 for other lawyers); *In re Gould Securities, Litigation*, 727 F.Supp. 1201, 1206 (N.D.Ill. 1989) (Rate of \$325 per hour approved for lead counsel as this figure is “reasonably commensurate with [counsel’s] primary role in this litigation”); *In re Bank of America Corp. Securities Litigation*, 2013 WL 3212514 at *6 (E.D. Mo. 2013) (Lead counsel awarded \$309 per hour or \$98,114.34 for 317.30 hours of services); *Turner v. Murphy Oil*, 472 F.Supp.2d 830, 868-69 (E.D.La.2007) (Court approved \$300 to \$400 per hour for main lawyers); *Little Rock School District v. State of Arkansas*, 674 F.3d 990 (8th Cir. 2012) (Counsel’s hourly rate of \$325-\$400 per hour was not challenged).

³⁴ *El Tabech v. Gunter*, 869 F. Supp. 1446 (D. Neb 1994) (Appropriate to award a higher hourly rate to Lead Counsel “because of the disproportionate responsibility assumed by lead counsel”); *In re Gould Securities, Litigation*, 727 F.Supp. 1201, 1206-1207 (N.D.Ill. 1989) (Highest rate awarded for lead counsel to compensate for counsel’s primary role in the litigation)

³⁵ *In re Gould Securities, Litigation*, 727 F.Supp. 1201, 1205 (N.D.Ill. 1989) (Court approves \$285 to \$220 per hour for partners); *Williams v. County of Dakota, Nebraska*, 657 F.3d 1064, 1066 (8th Cir. 2012) (\$250 per hour found to be a reasonably hourly attorney rate).

³⁶ *Little Rock School District v. State of Arkansas*, 674 F.3d 990 (8th Cir. 2012) (Hourly rate of \$175 per hour approved for an associate); *Turner v. Murphy Oil*, 472 F.Supp.2d 830, 868-69 (E.D.La.2007) (Court approved \$100 to \$200 per hour for associates); *In re Gould Securities, Litigation*, 727 F.Supp. 1201, 1205 (N.D.Ill. 1989) (Court approves \$150.00 per hour for services performed by associates).

³⁷ *In re Gould Securities, Litigation*, 727 F.Supp. 1201, 1206 (N.D.Ill. 1989) (Court approves \$75 per hour as the high end paralegal hourly rates).

³⁸ The approved special paralegals are: Kelly Casey, April Cowgill, Scott Graham and Heather Hill.

5. Paralegals: \$50³⁹
6. Law clerks: \$40

The law clerk hours submitted are predominantly for University of Arkansas Little Rock law students who worked in the Little Rock depository as well as at the Plaintiff's Work Space reviewing documents (first round selection), removing duplications (de-duplication project) and second and third round coding of documents according to provided themes).

C. Hours Submitted

This MDL Court must do its own independent analysis of each applicant firm's time submission, regardless of the recommendations from the CBFC or Lead Counsel.⁴⁰ As the Vioxx MDL Judge Eldon E. Fallon noted, this process requires "creating a sufficient record, making sufficient factual findings, considering the time worked and the *Johnson* factors, providing an opportunity to be heard to all the applicants, and exercising independent judgment in allocating those fees rather than simply rubber-stamping a committee recommendation."⁴¹ As described in

³⁹ *Turner v. Murphy Oil*, 472 F.Supp.2d 830, 868-69 (E.D.La.2007) (Court approved \$50 to \$80 per hour for paralegal services).

⁴⁰ *In re High Sulfur*, 577 F.3d at 228 (MDL court's fee allocation order vacated for failure to conduct independent judicial review. The Fifth Circuit held that to fulfill its duty, the district court must not "cursorily approve" a fee allocation request or "delegate that duty to the parties." (Citing to *Strong v. BellSouth Telecomms., Inc.*, 137 F.3d 844, 850 (5th Cir.1998). "Although exacting judicial review of fee applications may be burdensome, it is "necessary to discharge the [court's] obligation to award fees that are reasonable and consistent with governing law." Citing to Manual for Complex Litigation § 14.231 (4th ed. 2004)). The Fifth Circuit noted that the district court abdicated its responsibility to ensure that the individual awards recommended by the Fee Committee were fair and reasonable and used flawed fee allocation procedures that were inconsistent with basic judicial standards of transparency and fairness. *Id.* at 227.

⁴¹ *In Re Vioxx Products Liability Litigation*, 802 F. Supp. 740, 742 (E. D. La 2011). *See also In re High Sulfur*, 577 F.3d at 228-229 (The district court must first determine the reasonable number of hours expended on the litigation and the reasonable hourly rate for the participating attorney. The court should then multiple the number of hours reasonably expended by the reasonable hourly rate and adjust this calculation upward or downward after a review of the twelve factors set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th

Lead Counsel's Motion for Independent Auditor,⁴² a thorough review of the time submitted in this litigation will be a laborious and time-consuming process. The HRT litigation lasted almost 11 years, involved an epic number of discovery disputes, pretrial hearings and trials and applicant firms submitted close to 370,000 common benefit hours. Lead Counsel could not find another MDL litigation with even close to the same number of submitted hours. For litigations of this size and length, court appointed special masters or independent auditors are the norm.⁴³

The first step must be an audit process in which the submitted time is reviewed according to specific, detailed and consistently applied criteria. It is clear that not all auditors applied the established criteria uniformly. As even the Chair of the CBFC admitted, there was "wide disparity in detail" provided by the audits.⁴⁴ Such disparity creates a fundamentally flawed foundation for the allocation process. Until an actual uniform audit is performed, it is impossible to say how many actually compensable hours were submitted.

Cir.1974). After the court does this analysis, it must scrutinize a fee award and not merely "ratify a pre-arranged compact." *Piambino v. Bailey*, 610 F.2d 1306, 1328 (5th Cir.1980) (holding that by summarily approving attorneys' fees presented in an unopposed settlement agreement, the district court "abdicated its responsibility to assess the reasonableness of the attorneys' fees proposed under a settlement of a class action, and its approval of the settlement must be reversed on this ground alone").... The MDL court should "closely scrutinize" the Fee Committee's allocation and cannot just rubber-stamp the committee's recommendation.

⁴² See Doc. No. 3214, Motion for Independent Auditor (9/23/13).

⁴³ *In re Genetically Modified Rice Litigation*, 2012 WL 6085153 at *8 (E.D.Mo.2012) (Special Master appointed by the court because the "MDL litigation was exhaustive. It spanned a period in excess of five years. Resistance to plaintiffs' claims was monumental and the time spent included many 18-hour days and seven-day weeks... Legal, personal and financial resources were on occasion stretched to the limit... Common benefit attorneys spent 107,023 hours for the common benefit").

⁴⁴ Ex. 26 - Email from T. Millrood re: wide disparity in audits, 8/30/13.

To prepare for this proposed allocation, Lead Counsel created a spreadsheet outlining the actual submitted time. This spreadsheet does not account for the discrepancies and errors noted in the submissions, however it does provide the court with some insight into the breadth of the submissions.⁴⁵

D. Value of Common Benefit Work

There is obviously a wide variation in value for time spent on common benefit work. While all work may be necessary, an hour spent reviewing documents at one's office or an hour on a conference call from the comfort of one's armchair cannot be valued equally to an hour spent in the heat of a trial battle in a courtroom far from home. For that reason, courts note that "there is a hierarchy of value for work that tends to have a greater impact on the litigation and generates more "common benefit." Such work deserves greater compensation.⁴⁶ As Judge Fallon explained

"...not all types of work are created equal. Hours spent taking depositions, participating in hearings, or trials, actively participating in developing the appropriate litigation strategies and tactics (through moot court presentations or similar practices), drafting briefs, actively participating in Court conferences, arguing motions, negotiating with opposing counsel to reach a settlement, and actively managing and organizing the administrative aspects of the case are some of the more significant types of work that a case of this sort requires and deserves the most recognition. This, of course, is not the only type of work that such a case requires. Documents must be reviewed, categorized, and analyzed; e-mails must be read and responded to; claimants must be kept advised; meetings must be attended and in general the litigation must be monitored. This work, while necessary and often time consuming does not deserve equal treatment when allotting fees.⁴⁷

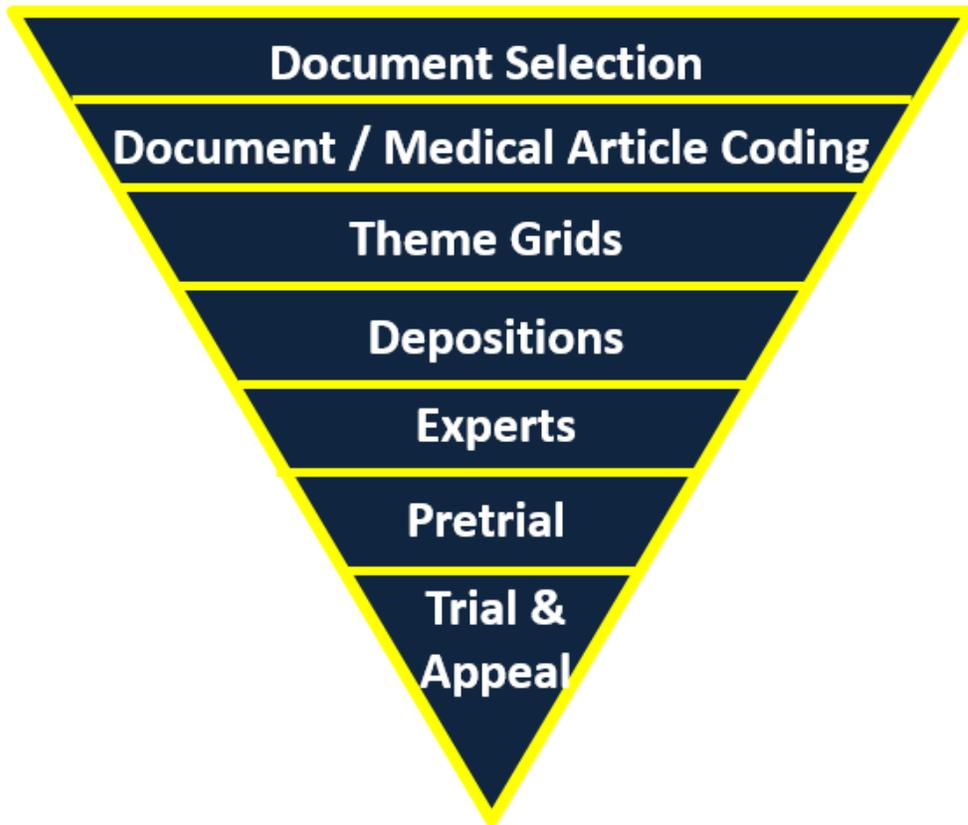
The inverted pyramid graphic below details the various common benefit tasks undertaken in this

⁴⁵ Ex. 27 - 11-4-13- Summary spreadsheet of submitted time.

⁴⁶ *In Re Vioxx Products Liability Litigation*, 802 F. Supp. 740, 772 (E. D. La. 2011)

⁴⁷ *Turner v. Murphy Oil*, 472 F.Supp.2d 830, 862–63 (E.D.La.2007).

litigation and the increased value of the work at the point of the pyramid (i.e. trial related activities) versus the predominantly law clerk related work of document selection in the Little Rock depository.



In appreciation of this distinction, Lead Counsel thus looked at the specific types of contributions made by each applicant firms. As the MDL court in *Vioxx* noted, “it is necessary to drill down on the hours and prioritize them, consistent with the facts of each MDL.”⁴⁸ Lead

⁴⁸ *In Re Vioxx Products Liability Litigation*, 802 F. Supp. 740, 773 (E. D. La. 2011).

Counsel thus developed an objective value system to evaluate the contribution of each applicant firm to the common benefit effort.⁴⁹

Under Lead Counsel's system, law firms who took leadership roles, headed up depositions, developed experts, wrote and argued pleadings and participated at trials would be valued at a higher rate than law firms whose primary role was reviewing documents, attending meetings or reading emails.⁵⁰ Courts recognize such a value determination as important "to provide an incentive to experienced lawyers to engage in speculative litigation on the contingency basis when the risks are great" and to ensure that "highly resolved and experienced lawyers" agree to take on difficult assignments in complex, lengthy claims.⁵¹

When considering multipliers, case law supports a layered multiplier or "value-added" system with lead counsel and lawyers with significant responsibility receiving a higher value award than lawyers with minimal responsibility.⁵² As the *In re Gould Securities Litigation* court

⁴⁹ Ex. 28 - 2-21-13 correspondence from Z. Littlepage to CBFC. In contrast, the CBFC voted to use a purely subjective system which allowed the highest increases to be awarded to themselves.

⁵⁰ See *In Re Vioxx Products Liability Litigation*, 802 F. Supp. 740, 773 (E. D. La. 2011) (Additional value added for lawyers who participated in higher level assignments including "trials and the preparation involved therein" since such activity played "a substantial role in creating an environment in which settlement could be spawned, birthed, and nurtured. Therefore, in this case the attorneys who took up the cudgels and participated in those trials deserve an appropriate recognition for their efforts").

⁵¹ *In re Genetically Modified Rice Litigation*, 2012 WL 6085153 at *13 (E.D.Mo.2012).

⁵² *In re Gould Securities, Litigation*, 727 F.Supp. 1201, 1206-1207 (N.D.Ill. 1989) (Highest multiplier of 1.9, applied to lead counsel and multiplier of 1.3 to non-lead counsel hours. Higher multiplier for lead counsel was justified because of "the disproportionate share of the risk, work and expense" borne by lead counsel as "it would be unfair to award [lead counsel] the same multiple as those who did not play any appreciable role in the management of the litigation" especially since lead counsel's responsibilities resulted "from carrying out their duties under Pretrial order No. 1, and they should be compensated for shouldering that burden."

explained, “an enhancement to the multiplier is the best way to factor in and to preserve the incentive for counsel to act as lead counsel in complex cases such as this, and consequently to bear the risk of losing a significantly greater stake in time and effort and expense.”⁵³ Certainly when lead counsel actually functions as the head of the litigation and produces a significant common benefit work product, it would be “irrational and arbitrary” to not reward that commitment with a higher multiplier.⁵⁴

Other factors that Lead Counsel took into account when developing and applying her proposed objective multipliers include:

- Level of assistance provided to the litigation (i.e. did the law firm provide dedicated partner level assistance or merely assign a part-time associate);
- Type of work performed (i.e. was the law firm’s submitted time predominantly “observing hours” such as assisting with depositions or attending meetings as a participant or did the laws firm take the lead at depositions or present at meetings);
- Length of time and commitment to the litigation (with heavier emphasis for firms that entered the litigation early on and stayed with the litigation throughout the years as opposed to moving on to other, potentially more lucrative, projects);
- Willingness to share work product (with an emphasis on law firms who helped other MDL firms without any percentage interest in the cases or freely shared information or experts developed by that firm instead of taking a proprietary approach); and
- Acceptance of high level or difficult work assignments (including willingness to conduct trials or take the lead on important hearings).

Based upon a full analysis of each law firm’s contributions over the years, Lead Counsel’s proposed objective multipliers are as follows:

⁵³ *In re Gould Securities, Litigation*, 727 F.Supp. 1201, 1207 (N.D.Ill. 1989).

⁵⁴ *In re Vitamins Antitrust Litigation*, 398 F.Supp.2d 209, 234 (D.D.C. 2005).

Participating Firm

Proposed multiplier: 1

A firm that participated in the litigation by observing, attending meetings, keeping up with the issues but only produced minimal common benefit work product.⁵⁵

Participating Firm (Major)

Proposed multiplier: 1.5

A participating law firm who also produced some common benefit work product.⁵⁶

Contributing Firm

Proposed multiplier: 2.0

A law firm that produced relevant common benefit work including taking the lead for specific depositions, undertaking a specific project or projects and / or accepting leadership responsibilities for some period of time.⁵⁷

Contributing Firm (Major)

Proposed multiplier: 2.5

A law firm that produced important common benefit work including work on multiple common benefit projects and / or undertaking leadership responsibilities.⁵⁸

Leadership Firm

Proposed multiplier: 3.0

A law firm that produced significant common benefit work (including a lead role in a number of depositions, expert selection and preparation, pretrial matters and / or trials) as well as undertook a leadership role in the litigation.⁵⁹

⁵⁵ Participating law firms are Alley Clark, Roberta Ashkin, Aylstock Witkin, Bailey & Galyen, Bush Lewis, Calwell Firm, Cory Watson, Eisenberg Rothweiler, Fenner & Boles, Gary Holt, Khorrami, Klein Lyons, Leeseburg & Valentine, Pittman Hooks, Pollack & Flanders, Ury & Moskow, Ed Williamson

⁵⁶ Major participating law firms are Bubalo Rottman, Cohen & Malad and the Wetherall Group.

⁵⁷ Contributing firms are Beasley Allen, Brooks Law Firm, The Finkelstein firm, Jim Szaller of Brown & Szaller and the Weisbrod law firm.

⁵⁸ Major contributing firms are Cloar Law Firm and Provost Umphreys.

⁵⁹ Leadership firms are Hausfeld, Janet, Jenner & Suggs, Jim Morris, Rainey Booth, P.A., Pogust, Braslow & Millrood and Williams Love.

Dedicated Firm

Proposed multiplier: 3.5

This category is reserved for Mr. Erik Walker whose contributions to the common benefit effort was substantial. Mr. Walker undertook an important leadership role in the litigation and he dedicated years of his life to the litigation. The Plaintiff's Steering Committee promised Mr. Walker that his time would be valued at a very high level (second only to Lead Counsel) and Mr. Walker certainly deserves for that promise to be met.

Lead Counsel

Proposed multiplier: 4.0

Multipliers in this range "from one to four" are frequently awarded in common fund cases⁶⁰ and Lead Counsel agrees with this range for this litigation.

E. Lead Counsel's Recommendations

After review of all submitted materials from the applicant firms, as well as reflection on the work conducted by each law firm, Lead Counsel proposes the following allocations (assuming that all submitted hours survive the Court's or Special Master's audit). A detailed chart that shows the back-up calculations for this analysis is also attached.⁶¹ As shown, for some applicant firms Lead Counsel's recommendation matches the CBFC's recommended allocation. For some applicant firms, Lead Counsel's recommendation is higher than the CBFC's recommended allocation and, if the law firm has already agreed to accept a lower allocation, Lead Counsel would encourage the Court to accept that law firm's decision.

⁶⁰ *In re Prudential*, 148 F.3d 283, 341 (3d Cir.1998).

⁶¹ Ex. 27 - 11-4-13 Total Summary Spreadsheet of all time.

		CBFC Allocation Percentage	Actual raw percentage of time	Multiplier / Value assessment	Lead Counsel Allocation Percentage
1	Alley Clark ⁶²	0.09%	0.26%	1	0.09%
2	Ashkin, Roberta ⁶³	0.04%	0.01%	1	0.01%
3	Aylstock Witkin ⁶⁴	0.30%	0.11%	1	0.04%
4	Bailey & Galyen ⁶⁵	0.12%	0.05%	1	0.02%
5	Beasley Allen ⁶⁶	3.69%	2.59%	2	1.75%
6	Booth, Rainey ⁶⁷	None provided	12.21%	3	12.40%
7	Brooks Law Firm ⁶⁸	1.06%	0.99%	2	0.67%

⁶² Ex. 29 - Annual Summary Spreadsheet for Alley Clark as uploaded to DropBox folder (revised 7-13); Ex. 30 - CBFC audit of Alley Clark; Ex. 31 - Lead counsel audit of Alley Clark; Ex. 32 - Letter to Alley Clark law firm re: CBFC's recommended time allocation.

⁶³ Ex. 33 - Annual Summary Spreadsheet for Roberta Ashkin as uploaded to DropBox folder; Ex. 34 - Back-up data for Ashkin time submission as uploaded to DropBox; Ex. 35 - CBFC audit of Roberta Ashkin; Ex. 36 - Letter to Roberta Ashkin re: CBFC's recommended time allocation.

⁶⁴ Ex. 37 - Annual Summary Spreadsheet for Aylstock Witkin as uploaded to DropBox folder; Ex. 38 - CBFC audit of Aylstock Witkin; Ex. 39 - Lead counsel audit of Aylstock Witkin; Ex. 40 - Letter to Aylstock Witkin law firm re: CBFC's recommended time allocation; Ex. 41 - 10-19-13 correspondence by Mike Williams re: Aylstock Witkin submission.

⁶⁵ Ex. 12 - Annual Summary Spreadsheet for Bailey & Galyen as uploaded to DropBox folder; Ex. 13 - Back-up data for Bailey & Galyen time submission as uploaded to DropBox; Ex. 14 - CBFC audit of Bailey & Galyen; Ex. 42 - Lead counsel audit of Bailey & Galyen; Ex. 16 - Letter to Bailey & Galyen re: CBFC's recommended time allocation.

⁶⁶ Ex. 43 - Annual Summary Spreadsheet for Beasley Allen as uploaded to DropBox folder; Ex. 44 - CBFC audit of Beasley Allen; Ex. 45 - Lead counsel audit of Beasley Allen; Ex. 46 - Letter to Beasley Allen re: CBFC's recommended time allocation.

⁶⁷ The CBFC refused to provide any allocation for Mr. Booth separate from its allocation for Littlepage Booth (*See* Rainey Booth's Motion for Allocation from Plaintiff's Common Benefit Fee Committee, Doc. No. 3223); Ex. 47 - Annual Summary Spreadsheet for Rainey C. Booth as uploaded to DropBox folder.

8	Bubalo Rothman / Becker Law Firm ⁶⁹	0.41%	0.12%	1.5	0.06%
9	Bush Lewis ⁷⁰	0.07%	0.11%	1	0.04%
10	Calwell Firm ⁷¹	0.20%	0.77%	1	0.26%
11	Cloar Law Firm ⁷²	3.60%	2.00%	2.5	1.69%
12	Cohen & Malad ⁷³	4.01%	3.28%	1.5	1.67%
13	Cory Watson Crowder & DeGaris ⁷⁴	0.04%	0.04%	1	0.01%
14	Eisenberg Rothweiler ⁷⁵	0.04%	0.04%	1	0.01%
15	Fenner, Diane	0.63%	0.44%	1	0.15%

⁶⁸ Ex. 48 - Annual Summary Spreadsheet for Brooks Law Firm as uploaded to DropBox folder; Ex. 49 - CBFC audit of Brooks Law Firm; Ex. 50 - Letter to Brooks Law Firm re: CBFC's recommended time allocation.

⁶⁹ Ex. 51 - Annual Summary Spreadsheet for Bubalo Rotman Law Firm as uploaded to DropBox folder; Ex. 52 - CBFC audit of Bubalo Rotman; Ex. 53 - Letter to Bubalo Rotman re: CBFC's recommended time allocation.

⁷⁰ Ex. 54 - Annual Summary Spreadsheet for Bush Lewis as uploaded to DropBox folder; Ex. 55 - CBFC audit of Bush Lewis; Ex. 56 - Lead counsel audit of Bush Lewis; Ex. 57 - Letter to Bush Lewis law firm re: CBFC's recommended time allocation.

⁷¹ Ex. 58 - Annual Summary Spreadsheet for Calwell Firm as uploaded to DropBox folder; Ex. 59 - CBFC audit of Calwell Firm; Ex. 60 - Letter to Calwell law firm re: CBFC's recommended allocation.

⁷² Ex. 61 - Annual Summary Spreadsheet for Cloar Law Firm as uploaded to DropBox folder; Ex. 62 - CBFC audit of Cloar Law Firm; Ex. 63 - Lead counsel audit of Cloar Law Firm; Ex. 64 - Letter to Cloar Law Firm re: CBFC's recommended allocation.

⁷³ Ex. 65 - Annual Summary Spreadsheet for Cohen & Malad Law Firm as uploaded to DropBox folder; Ex. 66 - CBFC audit of Cohen & Malad Law Firm; Ex. 67 - Lead counsel audit of Cohen & Malad Law Firm; Ex. 68 - Letter to Cohen & Malad Law Firm re: CBFC's recommended allocation.

⁷⁴ Ex. 69 - Annual Summary Spreadsheet for Cory Watson firm as uploaded to DropBox folder; Ex. 70 - CBFC audit of Cory Watson firm; Ex. 71 - Letter to Cory Watson firm re: CBFC's recommended allocation.

⁷⁵ Ex. 72 - Annual Summary Spreadsheet for Eisenberg Rothweiler law firm as uploaded to DropBox folder; Ex. 73 - CBFC audit of Eisenberg Rothweiler law firm; Ex. 74 - Letter to Eisenberg Rothweiler law firm re: CBFC's recommended allocation.

	(Fenner & Boles) ⁷⁶	(increased from 0.39%)			
16	Finkelstein Firm ⁷⁷	2.00% (increased from 1.23%)	2.19%	2	1.48%
17	Hausfeld / Cohen Millstein ⁷⁸	3.15% (increased from 2.89%)	3.15%	3	3.17%
18	Hissey Kientz ⁷⁹	13.55%	9.07%	3.5	10.76%
19	Holt, Gary ⁸⁰ (Gary Eubanks)	0.62%	0.48%	1	0.16%
20	Janet, Jenner & Suggs ⁸¹	8.62%	5.33%	3	5.42%

⁷⁶ Ex. 75 - Annual Summary Spreadsheet for Fenner & Boles as uploaded to DropBox folder; Ex. 76 - Time submission for Fenner & Boles as uploaded to DropBox folder; Ex. 77 - CBFC audit of Fenner & Boles law firm; Ex. 78 - Letter to Fenner & Boles re: CBFC's recommended allocation; Ex. 79 - 10-9-13 correspondence re: Diane Fenner's objection to allocation; Ex. 80 - 10-27-13 correspondence by Fee Committee members re: Diane Fenner; Ex. 81 - 10-28-13 correspondence by Fee Committee members re: Diane Fenner; Exhs. 9 and 10 - 10-29-13 email and accompanying spreadsheet from CBFC 10-29-13 conference call in which 6 of 7 CBFC members voted to increase Fenner's allocation.

⁷⁷ Ex. 82 - Annual Summary Spreadsheet for Finkelstein Law Firm as uploaded to DropBox folder; Ex. 83 - CBFC audit of Finkelstein Law Firm; Ex. 84 - 9-9-13 correspondence among CBFC members re: Finkelstein; Ex. 85 - Letter to Finkelstein Law Firm re: CBFC's recommended allocation; Ex. 86 - 10-14-13 objection to allocation by Finkelstein law firm; Exhs. 9 and 10 - 10-29-13 email and accompanying spreadsheet from Z. Littlepage to CBFC after 10-29-13 conference call increasing Finkelstein allocation.

⁷⁸ Ex. 87 - Annual Summary Spreadsheet for Hausfeld as uploaded to DropBox folder; Ex. 88 - CBFC audit of Hausfeld; Ex. 89 - Letter to Hausfeld re: CBFC's recommended allocation; Ex. 90 - 10-10-13 correspondence from Rich Lewis of Hausfeld asking about basis of allocation; Exhs. 9 and 10 - 10-29-13 email and accompanying spreadsheet from Z. Littlepage to CBFC after October 29, 2013 conference call increasing Hausfeld allocation; Ex. 91 - 10-30-13 correspondence from Rich Lewis of Hausfeld accepting increased allocation.

⁷⁹ Ex. 92 - Annual Summary Spreadsheet for Hissey Keintz as uploaded to DropBox folder; Ex. 93 - CBFC audit of Hissey Keintz; Ex. 94 - Lead counsel audit of Hissey Keintz; Ex. 95 - Letter to Hissey Keintz re: CBFC's recommended allocation.

⁸⁰ Ex. 96 - Annual Summary Spreadsheet for Gary Holt as uploaded to DropBox folder; Ex. 97 - CBFC audit of Gary Holt; Ex. 98 - Letter to Gary Holt re: CBFC's recommended allocation.

⁸¹ Ex. 99 - Annual Summary Spreadsheet for Janet, Jenner & Suggs as uploaded to DropBox folder; Ex. 100 - CBFC audit of Janet, Jenner & Suggs; Ex. 101 - Lead counsel audit of

21	Khorrani Boucher Sumner Sanguinetti, LLP ⁸²	0.11% (increase offered in just money, not percentage)	0.39%	1	0.13%
22	Klein Lyons ⁸³	0.05%	0.04%	1	0.01%
23	Leeseburg Valentine ⁸⁴	0.08%	0.13%	1	0.04%
24	Littlepage Firm ⁸⁵	None provided	25.61%	4	34.70%
	Littlepage Booth ⁸⁶	23.83%			
25	Morris, Jim / Brent Coon ⁸⁷	4.27%	2.38%	3	2.42%
26	Pittman, Dutton & Hellums, P.C. ⁸⁸	0.30%	0.67%	1	0.23%

Janet, Jenner & Suggs; Ex. 102 - Letter to Janet, Jenner & Suggs re: CBFC's recommended allocation.

⁸² Ex. 103 - Annual Summary Spreadsheet for Khorrani as uploaded to DropBox folder; Ex. 104 - CBFC audit of Khorrani; Ex. 105 - Letter to Khorrani re: CBFC's recommended allocation; Exhs. 9 and 10 - email and accompanying spreadsheet from Z. Littlepage to CBFC after October 29, 2013 conference call discussing increasing Khorrani allocation.

⁸³ Ex. 106 - Annual Summary Spreadsheet for Klein Lyons as uploaded to DropBox folder; Ex. 22 - 10-8-13 correspondence re: failure to audit Klein Lyons; Ex. 108 - Letter to Klein Lyons re: CBFC's recommended allocation.

⁸⁴ Ex. 109 - Annual Summary Spreadsheet for Leeseburg Valentine as uploaded to DropBox folder; Ex. 110 - CBFC audit of Leeseburg Valentine; Ex. 111 - Letter to Leeseburg Valentine re: CBFC's recommended allocation.

⁸⁵ Ex. 112 - Annual Summary Spreadsheet for The Littlepage Firm as uploaded to DropBox folder; Ex. 113 - CBFC audit of Littlepage Booth and response to same; Ex. 114 - Letter to Littlepage Booth re: CBFC's recommended allocation.

⁸⁶ The CBFC has refused to provide separate allocations for Rainey C. Booth, PA and the Littlepage Firm.

⁸⁷ Ex. 115 - Annual Summary Spreadsheet for Jim Morris as uploaded to DropBox folder; Ex. 116 - CBFC audit of Jim Morris; Ex. 117 - Letter to Jim Morris re: CBFC's recommended time allocation.

27	Pogust Braslow & Millrood ⁸⁹	10.72%	5.48%	3	5.57%
28	Pollock & Flanders ⁹⁰	0.12%	0.14%	1	0.05%
29	Provost Umphreys ⁹¹	2.25% (increased from 1.89%)	2.44%	2.5	2.07%
30	Szaller (Brown & Szaller) ⁹²	3.37%	3.47%	2	2.35%
31	Ury & Moskow ⁹³	0.35%	0.40%	1	0.13%
32	Weisbrod / Miller & Curtis ⁹⁴	2.5% (increased from 1.96%)	3.38%	2	2.29%
33	Wetherall Group ⁹⁵	1.68%	4.34%	1.5	2.20%

⁸⁸ Ex. 118 - Annual Summary Spreadsheet for Pittman, Dutton & Hellums; Ex. 119 - CBFC audit of Pittman, Dutton & Hellums; Ex. 120 - Letter to Pittman, Dutton & Hellums re: CBFC's recommended time allocation.

⁸⁹ Ex. 121 - Annual Summary Spreadsheet for Pogust, Braslow & Millrood; Ex. 122 - CBFC audit of Pogust, Braslow & Millrood; Ex. 123 - Lead counsel audit of Pogust, Braslow & Millrood; Ex. 124 - Letter to Pogust, Braslow & Millrood re: CBFC's recommended time allocation.

⁹⁰ Ex. 125 - Annual Summary Spreadsheet for Pollack & Flanders; Ex. 126 - CBFC audit of Pollack & Flanders; Ex. 127 - Letter to Pollack & Flanders re: CBFC's recommended time allocation.

⁹¹ Ex. 19 - Annual Summary Spreadsheet for Provost Umphreys as uploaded to DropBox folder; Ex. 20 - Back-up data for Provost Umphreys time submission as uploaded to DropBox; Ex. 17 - CBFC audit of Provost Umphreys; Ex. 18 - Lead counsel audit of Provost Umphreys; Ex. 21 - Letter to Provost Umphreys re: CBFC's recommended time allocation.

⁹² Ex. 128 - Annual Summary Spreadsheet for Brown & Szaller; Ex. 129 - CBFC audit of Brown & Szaller; Ex. 130 - Letter to Brown & Szaller law firm re: CBFC's recommended time allocation.

⁹³ Ury & Moskow's time was submitted late and never uploaded to DropBox. No Fee Committee members reviewed its time except Rob Jenner. No audit form was circulated.

⁹⁴ Ex. 131 - Annual Summary Spreadsheet for Weisbrod law firm; Ex. 132 - CBFC audit of Weisbrod law firm; Ex. 133 - Letter to Weisbrod law firm re: CBFC's recommended time allocation; Ex. 134 - 10-7-13 correspondence from Les Weisbrod objecting to allocation; Exhs. 9 and 10 - 10-29-13 email and accompanying spreadsheet from Z. Littlepage to CBFC after October 29, 2013 conference call re increased allocation for Weisbrod.

		increased from 1.26%)			
34	Williams Love ⁹⁶	10.95%		7.74%	3 7.87%
35	Williamson, Ed ⁹⁷	0.08%		0.20%	1 0.07%
	TOTAL	102.9%		100%	100%

DATED: November 6, 2013.

Respectfully submitted,

/s/ Zoe Littlepage
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⁹⁵ Ex. 135 - Annual Summary Spreadsheet for Wetherall Group; Ex. 136 - CBFC audit of Wetherall Group; Ex. 137 - Letter to Wetherall Group re: CBFC's recommended time allocation; Ex. 138 - 10-14-13 correspondence re: Peter Wetherall submission; Ex. 139 - 10-30-13 correspondence from Peter Wetherall rejecting allocation.

⁹⁶ Ex. 140 - Annual Summary Spreadsheet for Williams Love law firm; Ex. 141 - CBFC audit of Williams Love law firm (revised); Ex. 142 - Letter to Williams Love law firm re: CBFC's recommended time allocation; Ex. 143 - 10-28-13 correspondence from Z. Littlepage to Williams Love detailing remaining issues with Williams Love's time submission.

⁹⁷ Ex. 144 - Time submission for Williamson Law Firm as uploaded to DropBox folder; Ex. 145 - Completed audit form for Williamson Law Firm; Ex. 146 - Letter to Williamson Law Firm re: CBFC's recommended time allocation.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 2013, a true and correct copy of the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system, which forwarded a true and correct copy by e-mail to the following parties:

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Plaintiffs' Steering Committee (Mike Williams, Ted Meadows, Zoe Littlepage)

MDL Fee Committee (Tobias Millrood, Zoe Littlepage, Erik Walker, Michael Williams, Ralph Cloar, Rob Jenner and Irwin Levin)

All Common Benefit Applicant Firms

/s/ Zoe Littlepage
Zoe Littlepage