UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

IN RE: ORTHO EVRA PRODUCTS LIABILITY LITIGATION	**N.D. Ohio Case No. 1:06-40000** **MDL Docket No. 1742**
This Document Relates To: **ALL CASES.**	**MOTION OF PLAINTIFFS' EXECUTIVE COMMITTEE FOR THIRD AMENDMENT TO CASE MANAGEMENT ORDER NO. 9**

Plaintiffs' Executive Committee respectfully requests that this Court enter a Third Amendment to Case Management Order No. 9, for the purpose of increasing the assessment on any cases that are resolved subsequent to February 1, 2009. This motion is supported by the accompanying memorandum of law.

MEMORANDUM OF LAW

On August 28, 2006, this Court entered Case Management Order No. 9. CMO 9 required an assessment of 3% on applicable cases in order to provide for the fair and equitable sharing among plaintiffs of the cost of services performed and expenses incurred by attorneys acting for MDL administration and common benefit of all plaintiffs in this complex litigation. The Court's authority for this order arose from the common benefit doctrine, recognized by the United States Supreme Court in *Trustees v. Greenough*, 105 U.S. 527 (1881); refined in, *inter alia*, *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1884); *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); and approved and implemented in the MDL context, in, *inter alia*, *In re MGM Grand Hotel Fire Litigation*, 660 F.Supp. 522, 525-29 (D. Nev. 1987); *In re Air*

Crash Disaster at Florida Everglades on December 29, 1972, 549 F.2d 1006, 1019-21 (5th Cir. 1977).

Since the establishment of CMO 9, several thousand cases in these multidistrict proceedings have been resolved, as have hundreds of cases pending in state court which have agreed to be bound by the MDL CMO 9 assessment order. While some cases have been dismissed without compensation, a significant number have been resolved, resulting in payments to the MDL common benefit fund, with 1.5% of the gross recovery allocated to common benefit fees, and 1.5 % allocated to common benefit expenses.[1] These common benefit assessments have been applied to offset costs incurred by Plaintiffs in conducting Science Day and paying costs for common benefit deposition transcripts. Additional applications for reimbursement from the common benefit fund for the enormous discovery and trial preparation tasks undertaken by the Plaintiffs' Steering Committee will be submitted in the near future. In addition to presenting Science Day, the PSC has conducted 67 depositions of corporate witnesses, reviewed over ten million pages of documents, identified 1,249 deposition exhibits, prepared or reviewed 25 expert reports, taken or defended 16 expert witness depositions, and fully prepared for a two week Daubert hearing. The PSC has also fully briefed significant issues of federal preemption, represented the common interests of plaintiffs at numerous pretrial status conferences, and helped shape an approach to individual case resolution that has resulted in the successful resolution of over 90% of the "pre-label change" cases. The 3% assessment offers only modest and partial compensation to the PSC for the significant and high quality work conducted to date.

The number of cases remaining unresolved in the MDL now numbers only 300-400, from over 2000 cases originally filed. While a few of these are "pre-label change" cases, i.e., cases in which the alleged injury arose before the company's first major label change announced in November of 2005, most are "post-label change" cases. Defendant has taken the position that it

[1] The late participation option provides for a 5% assessment, but that has not been applied to any counsel to date.

will not negotiate "post-label change" cases. Therefore, because Defendant refuses to consider settlement of "post-label" cases, plaintiffs and the PSC obviously must prepare these cases for trial.

The work involved to prepare the post-label cases for trial remains a daunting task. In 2008, at the point in which it became that Johnson & Johnson desired to engage in serious settlement negotiations, all parties and the Court agreed that the clients' best interest were served by halting rigorous trial preparation and focusing on negotiations. Therefore, in the spring of 2008, at the behest of all parties and the Court, the Daubert hearing scheduled to begin on April 14, 2008 was postponed and further Daubert briefing was held in abeyance. Similarly, the pending motions concerning preemption were deferred, as were pending motions for partial summary judgment. Pending depositions were cancelled, and further expenditures to advance the common benefit case were avoided in order to protect the assets of settling plaintiffs. However, all of this postponed work must now be done in order to prepare the remaining cases for trial. In short, while tremendous work was conducted to prepare the "pre-label" cases, which resulted in successful resolution of the vast majority of "pre-label" claims, much remains to be done to prepare the remaining "pre-label" and the "post-label" cases for trial. In fact, since the exchange of expert reports in January 2008, over one million pages of new documents have been produced, two more label changes have occurred, and new epidemiology and efficacy studies have been reported. All of this new information must be examined by the Plaintiffs' common benefit attorneys in order to prepare for trial in 2009.

While the work remaining to be done is significant, the number of cases still pending is much less so. Thus while the effort to prepare the common issues will continue unabated, the amount of cases available from which to compensate the laboring attorneys is significantly smaller. The current level of assessment of only 3% of settlement or judgment (with no contribution to date by Defendants), is by far one of the lowest ever reported in any recent MDL proceeding. This assessment is simply insufficient to compensate counsel for the work necessary

to prepare the remaining cases for trial. (For example, the assessment in Heparin is 6-8%, Ephedra 6%, Fen Phen 9% federal and 6% state cases - subsequently lowered to 6% and 4%, Baycol began at 4%, and was recently increased to 8% - 12%). With at least a million new pages of documents to be reviewed, Daubert hearings to be conducted, preemption to be argued and presumably subject to further briefing after the United States Supreme Court rules in *Levine*, and five label changes to investigate through discovery depositions, the Plaintiffs' Executive Committee and other involved plaintiffs' counsel cannot reasonably be compensated with a 3% assessment on several hundred cases.

Therefore, the Plaintiffs' Executive Committee respectfully requests that CMO #9 be amended to provide for an assessment of 2% for expenses, and 6% for attorneys' fees for any cases that resolve after February 1, 2009. Such an increase in the assessment will provide the opportunity for the common benefit counsel to have sufficient funds available for fair compensation and is consistent with or lower than the assessments ordered in many other comparable MDLs. Further, in the event that the Court determines that the common benefit fees and costs can reasonably be paid without use of the entire assessment, then money can be refunded and the assessment reduced, as has been done in other multidistrict litigations.

Such an increase in the assessment inures to the benefit of all remaining plaintiffs in the Ortho Evra MDL, because it assures that common benefit counsel will have adequate resources to proceed in this litigation and provides a fair incentive to counsel. The Plaintiffs' Executive Committee therefore respectfully requests that its motion to amend CMO 9 to increase the assessment from 3% to 8% be granted.

PLAINTIFFS' EXECUTIVE COMMITTEE

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this motion and memorandum of law has been served upon all counsel of record via the court's electronic filing service.

Janet G. Abaray