

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO

**IN RE: ORTHO EVRA PRODUCTS  
LIABILITY LITIGATION**

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**N.D. Ohio Case No. 1:06-40000**

**MDL Docket No. 1742**

This Document Relates To:

ALL CASES.

**MEMORANDUM IN SUPPORT OF**

**MOTION TO INTERVENE and  
MOTION TO ENFORCE CMO 9  
CASE ASSESSMENT PROVISION**

Synbar Cumar, Martha Diaz, Melissa Dyer, Renee Fitzgerald, Laura Gyenes, Shell Hadnot, Ilonda Hulett, Crystal Lanphere, Paula Lawber, Natira Lyons, Elizabeth McCalvy, Kennee Moore, Mary Munsey, Allison Pace, Felicia Perez, Keisah Perrenoud, JoAnn Pfeiffer, Francesca Pizzarello, Deanna Rock, Jacqueline Simpkins, Candice Sommerfeld, Katie Swisher, Ann Thomas, Michelle Thompson and Linda Topczewski ("State Court Plaintiffs") seek leave to intervene in these proceedings to challenge an unauthorized and unwarranted assessment of settlements reached in their state court cases by the MDL Plaintiffs' Steering Committee ("PSC").<sup>1</sup> State Court Plaintiffs ask this Court to overrule the assessment and instruct Defendant, Johnson & Johnson ("J&J") to refrain from withholding any money from these settlements for the MDL plaintiffs' Common Benefit Fund.

<sup>1</sup> State Court Plaintiffs seek to intervene solely for resolution of the instant dispute. They are not consenting to jurisdiction for any other purpose.

## SUMMARY OF RELEVANT FACTS

State Court Plaintiffs recently settled their Ortho Evra lawsuits. All of those lawsuits are part of the consolidated California proceedings styled *In re Ortho Evra Litigation*, Case No. JCCP 4506, in the Superior Court of the State of California for the County of Los Angeles, Central Civil West ("State Court"), Honorable Emilie Elias presiding ("State Court Proceedings"). State Court Plaintiffs are represented by the law firm of Hissey\*Kientz (H\*K) in Austin, Texas.

On December 9, 2008, PSC co-lead counsel, Janet G. Abaray sent a letter to Robert C. Tucker, counsel for J&J in these proceedings and the State Court Proceedings. The letter identified State Court Plaintiffs' settlements as subject to the three percent MDL assessment prescribed by Case Management Order No. 9 (CMO 9). On the attached Common Benefit Fund Confirmation form, Ms. Abaray indicated the assessment was appropriate because:

~~Plaintiff's Counsel of Record~~ -- [blank line] -- has entered into an agreement with the Plaintiffs' Steering Committee and agreed to a three percent (3%) assessment...

(Exhibit 1A, second page). As a result of this letter, J&J has insisted it is obliged to deduct the assessment and has refused to pay State Court Plaintiffs at all unless they sign a release in which they give up their claim to three percent of their recovery (Exhibit 2).

H\*K has never entered into an agreement with the PSC for an assessment of its state court cases. State Court Plaintiffs, and all but two of H\*K's other Ortho-Evra clients, filed their lawsuits in state court. Earlier in the litigation, H\*K gained confidence in the work of the executive committee and those acting on its behalf in the State Court

Proceedings. H\*K determined that it could obtain in the State Court Proceedings all the information, documents, testimony and other materials it needed to prosecute its clients' claims effectively. The firm thus decided that consenting to an MDL assessment would not be in the best interests of its clients. H\*K became a member firm of the California Plaintiff Executive Committee ("CA-PEC"). H\*K obtained all the evidence and discovery it possesses and has used to prosecute State Court Plaintiffs' lawsuits from work done in the State Court Proceedings. H\*K has never obtained or used any MDL work product (Exh. 2).

Ms. Abaray has indicated she believes H\*K is bound by an assessment agreement signed by Houston firm, Williams Bailey (now Williams Kherkher) ("WB"). That agreement states that it is between WB and the MDL PSC only. The agreement defines "the Participating Attorneys" as WB. It then says "the Participating Attorneys" shall deposit into the MDL Fee and Cost Account three percent of the recovery "[w]ith respect to each client who they represent" (Exh. 1B). The agreement is signed by Jim Doyle of WB. Nothing in the contents of the agreement can be interpreted as encompassing cases filed by H\*K.

During telephone conferences on the issue, Ms. Abaray indicated that her sole basis for concluding that the WB agreement encompasses H\*K cases is that former WB employee and associate, G. Erick Rosemond, decided to end his employment at WB and join H\*K on or around August 1, 2008 (Exhs. 1, 2). Ms. Abaray noticed Mr. Rosemond had switched firms when his name appeared on settlement papers for State Court Plaintiffs. Ms. Abaray claims that Mr. Rosemond was exposed to MDL work

product, hence the agreement his former employer signed (somehow) now extends to his current employer.

Mr. Rosemond was an employee at WB and is an employee at H\*K. He has no financial interest in any Ortho Evra cases. He brought no Ortho Evra cases to H\*K. Mr. Rosemond has testified that he never saw or reviewed any MDL work product. Mr. Rosemond's association with the MDL was limited to three events. First, in May, 2008, Ms. Abaray provided Mr. Rosemond with a password by which he could access the MDL website. Mr. Rosemond did so and noticed that the only substantive information available on the website consisted of deposition transcripts and deposition summaries. Mr. Rosemond did not download, review or read any deposition transcripts or deposition summaries from the website (Exhibit 1).

After joining H\*K, Mr. Rosemond did read the MDL depositions of Andrew Friedman, Jay Audet and Donna Skee. But he obtained the transcripts of that testimony from H\*K which, in turn, obtained them from lawyers in the State Court Proceedings. By this time, this Court had already ordered that deposition transcripts and accompanying exhibits are not "proprietary attorney work product of the PSC" (CMO 21 at 1). In fact, the Court had so held before Mr. Rosemond even accessed the MDL website. The MDL PSC had thus turned over the transcripts to lawyers in the State Court Proceedings with no expectation of an assessment as a result.

Second, also in May, Mr. Rosemond asked Ms. Abaray for the name of a particular expert the PSC had retained. Ms. Abaray provided the name and nothing more. She provided no report, summary of conclusions or any other document regarding the expert. She did not verbally describe or even mention the expert's



conclusions. Mr. Rosemond never contacted the expert. In fact, no one at H\*K ever contacted the expert. H\*K has not designated the individual as an expert in any of its state court cases (Exhibit 1).

Finally, Mr. Rosemond attended a meeting in Detroit on May 22, 2008. That meeting involved nothing more than a discussion of the status of the litigation and the general efforts of various PSC subcommittees. No work product was disseminated at the meeting.

Apparently unaware of CMO 21, when confronted with these facts, Ms. Abaray indicated that Mr. Rosemond's reading of the three MDL depositions alone entitled to the PSC to assess H\*K's cases.

#### **A NOTE ABOUT JURISDICTION AND REQUEST FOR HEARING**

State Court Plaintiffs find themselves in a legal quandary. They have struggled to determine which court is the appropriate venue in which to challenge the unwarranted assessment of their settlements. On the one hand, State Court Plaintiffs are presently subject solely to the jurisdiction of the State Court. They are parties in the State Court Proceedings. The settlement agreement they reached will be supervised and enforced by the State Court. They are not parties to these proceedings.

State Court Plaintiffs have moved to intervene in these proceedings because an action unilaterally taken by the PSC substantially affects a property right they possess. In fact, the PSC's action constitutes an attempt at unwarranted taking of property. This should provide State Court Plaintiffs' standing to intervene in these proceedings. But an MDL case is really not a lawsuit; rather, it is a collection of lawsuits transferred for

pretrial proceedings. Nevertheless, those non-MDL parties whose interests PSC actions may adversely affect must have recourse.

Barring this request for intervention (and other than seeking action in the State Court), State Court Plaintiffs' only alternative would be to sue the PSC directly. If the suit were filed in federal court, it would undoubtedly be transferred to this Court, which could then provide the relief requested. But even that solution is draught with difficulty. Ignoring for a moment that it would delay payment of State Court Plaintiffs by months (since J&J will not release any money without signed releases that waive entitlement to three percent of the settlement amounts), the lawsuit may not be within a federal court's subject matter jurisdiction. Though H\*K is unaware of the precise composition of the PSC, it is possible, if not likely, that at least one of the 25 State Court Plaintiffs resides in the same state as at least one PSC member.<sup>2</sup> If that is the case, State Court Plaintiffs would be compelled to sue the PSC in state court. The suit would not be subject to removal, hence a state court would be charged with evaluating the propriety of the actions by this Court's PSC.

State Court Plaintiffs contend that the above facts warrant an order permitting them to intervene in these proceedings, as shown below. But out of an abundance of caution, State Court Plaintiffs are likewise seeking redress from the State Court. At the very least, the State Court has jurisdiction over J&J. Thus, shortly after filing the instant motion, State Court Plaintiffs will file a motion to enforce the settlement agreement with

<sup>2</sup> Because the PSC is not a corporation or legally registered entity, the citizenship of each of its members would determine diversity. In fact, State Court Plaintiffs would be compelled to name each PSC member in any lawsuit.

the State Court. In the motion to the State Court, Plaintiffs will notify the court of the filing of this motion and memorandum with the MDL court.

State Court Plaintiffs ask for a hearing at the Court's earliest convenience, whether by telephone or in person (perhaps during the January 15, 2008 status conference which precedes the next State Court hearing). State Court Plaintiffs would welcome a joint telephone hearing with this Court and the State Court.

### **ARGUMENT**

The PSC was without authority to instruct J&J to withhold assessments from State Court Plaintiffs' settlements. These are state court cases that would be subject to an assessment only if H\*K had agreed in writing to such an assessment. H\*K did not sign an assessment agreement with the PSC for these cases or any other. There is no principle of law that states that an employee's movement from one law firm to another makes the latter firm bound by the agreements of his former employer. If the PSC believed (albeit erroneously) that H\*K's employment of Erick Rosemond unfairly provided MDL work product to H\*K, its only recourse under CMO 9 was to seek an order from this Court or the State Court that subjected State Court Plaintiffs' settlements to an "equitable" assessment. The PSC did not seek such an order from either court. Such a motion would have been without merit anyway, since H\*K has obtained no MDL work product from its employment of Erick Rosemond.

1. **The Court should allow State Court Plaintiffs to intervene in the MDL proceedings because PSC action has adversely affected State Court Plaintiffs' legal interest in their settlements.**

Permitting a third party to intervene is mandatory when the party has an interest in property that may be adversely affected by the lawsuit in which intervention is sought.

As Rule 24 prescribes:

**Intervention of right.** On timely motion, the court must permit anyone to intervene who:

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

FED. R. CIV. P. 24(a)(2).

Each of these conditions exists here. The PSC has instructed J&J to take property to which State Court Plaintiffs claim ownership and ultimately provide it to MDL plaintiffs' attorneys by depositing it into the Common Benefit Fund. The ultimate resolution of this litigation would thus permanently deprive State Court Plaintiffs of the funds to which they claim entitlement. The PSC, for the reasons stated herein, is acting contrary to State Court Plaintiffs' interests rather than protecting them. Defendants certainly have no incentive to protect State Court Plaintiffs' interests. State Court Plaintiffs have timely sought relief by filing their motion approximately three weeks after being notified of the PSC's action and just days after conducting telephone conferences with PSC co-counsel Janet G. Abaray.

In the alternative, the Court should exercise its discretion to grant "permissive intervention" because State Court Plaintiffs have asserted claims that are intricately

intertwined with the claims being litigated in these proceedings, solely in light of the PSC's actions purportedly taken pursuant to CMO 9. See Fed. R. Civ. P. 24(b)(1)(b).

2. **The PSC had no legal basis for ordering J&J to withhold money for the MDL plaintiffs' Common Benefit Fund from State Court Plaintiffs' settlements because neither State Court Plaintiffs nor their counsel agreed to such an assessment.**

The only basis for withholding monies from State Court Plaintiffs' settlements was the PSC's erroneous claim that H\*K signed an assessment agreement with the PSC (Exhibit 1A, second page). H\*K never signed such an agreement, hence the PSC will not be able to produce one (Exhibit 2).

Ms. Abaray's belief that H\*K is bound by the WB agreement because one of WB's employees went to work for H\*K finds no support in law or logic. When an employee leaves one employer to work for another, the latter employer does not suddenly become encumbered by all the agreements of the former employer. Mr. Rosemond was an employee of WB and is an employee of H\*K. He had no financial interest in WB's Ortho Evra cases and he has no financial interest in H\*K's Ortho Evra cases. He did not bring any WB Ortho Evra cases to H\*K and no State Court Plaintiff has any association with WB (Exhibit 1). While Mr. Rosemond has authority to sign court pleadings on behalf of clients (as most associates do), his decision to switch jobs does not somehow create contracts where none existed before.

The WB agreement defines WB as the Participating Attorneys and states that the agreement binds only the Participating Attorneys' cases (Exhibit 1B). On its face, the agreement does not bind H\*K. Furthermore, nothing in CMO 9, or any other order of this Court, provides for the interpretation the PSC has taken. And no court has ever

held that employee movement from one employer to the next means that contracts binding the first employer then bind the second employer as well. State Court Plaintiffs' counsel has searched diligently but found no case even remotely suggesting such.

Any claim that H\*K somehow benefited from MDL work product by hiring Mr. Rosemond is extraneous to this issue. The sole basis given by Ms. Abaray for unilaterally deciding that J&J must withhold three percent of State Court Plaintiffs' settlements and deposit that money into the MDL Common Benefit Fund is her erroneous conclusion that Mr. Rosemond's move from WB to H\*K means H\*K is bound by WB's agreements (Exhibit 1A, second page).

3. **The PSC had no legal basis for ordering J&J to withhold money for the MDL plaintiff's Common Benefit Fund from State Court Plaintiffs' settlements because the PSC did not obtain leave of court for such withholding and cannot establish that H\*K benefited from, or even obtained, MDL work product.**

It defies reason to believe the PSC genuinely contends that Mr. Rosemond's movement from WB to H\*K means H\*K is bound by WB's contracts. The PSC undoubtedly made that claim to J&J because that was the only basis for insisting that J&J withhold money from State Court Plaintiffs without the PSC obtaining leave of court. The existence of an assessment agreement is the only basis for withholding that appears on the Common Benefit Fund Confirmation report that Ms. Abaray filled out, signed and sent to J&J.

This Court should not permit such an end run around its case management order. That order does not provide for an automatic assessment if the PSC believes a firm has obtained MDL work product. Rather, CMO 9 provides that the PSC may seek



such relief, presumably meaning the PSC must seek an assessment order from this Court or the state court in which the cases at issue are filed.

Nothing in this Order shall limit the PSC's right or ability to seek an equitable contribution against any state court case in which the Plaintiff's counsel was provided access to the MDL work product.

(CMO 9 at 6-7). The PSC did not "seek" an "equitable" contribution. Rather, the PSC erroneously claimed it was automatically entitled to the specific percentage assessed against cases that are covered by an assessment agreement between a plaintiff's attorney and the PSC, even though H\*K never entered into such an agreement.

Even if the PSC had moved this Court or the State Court for an equitable contribution, the PSC is not entitled to an assessment. Neither H\*K nor any State Court Plaintiff has benefited from, or even had access to, MDL work product. H\*K made a deliberate decision early in the litigation to work solely with the attorneys in the State Court Proceedings. To that end, H\*K sought and became a member of CA-PEC, the executive committee in charge of the State Court Proceedings. H\*K has obtained all of the information, documents and other materials it has utilized in prosecuting State Court Claimants' claims from the State Court Proceedings and has utilized no MDL work product (Exhibit 2).

Furthermore, Mr. Rosemond has provided H\*K with no such work product. Mr. Rosemond was exposed to MDL matters on three occasions. First, he requested and received from Ms. Abaray access to the MDL website in May, 2008. Upon visiting the website, he discovered that it contained deposition transcripts and summaries, and no other substantive information that he could see. He neither reviewed nor downloaded any of these materials. Eventually, after joining H\*K, he read the deposition transcripts



of three individuals (only) who were deposed in the MDL. But he obtained those transcripts from H\*K, which in turn obtained them from the CA-PEC. This occurred long after this Court held that such transcripts are not work product (CMO 21 at 1). Finally, he attended a May 22, 2008 meeting which involved nothing more than a discussion of what various subcommittees were doing. No work product was disseminated at the meeting (Exhibit 1).

In sum, H\*K worked up, prepared for trial and settled State Court Plaintiffs' claims based solely on work generated in the State Court Proceedings. Even if the PSC had sought leave to withhold monies from State Court Plaintiffs' settlements, as required by CMO 9, the motion would have been without merit.

### CONCLUSION

The PSC has undoubtedly worked diligently to prosecute the MDL litigation. Likewise, the CA-PEC has worked diligently to prosecute the State Court Proceedings. H\*K has supported the latter with money, extensive attorney and support staff time and continuous work precisely so that it could prepare its cases independently of the MDL efforts and therefore not subject its clients to an assessment against their recoveries. This is not a situation in which a law firm has been riding the coattails of others. Under the express terms of CMO 9, the PSC is not entitled to assess State Court Plaintiffs' settlements. Certainly, it was not entitled to circumvent CMO 9 by erroneously claiming H\*K had agreed to an assessment.

For these reasons, State Court Plaintiffs, Synbar Cumar, Martha Diaz, Melissa Dyer, Renee Fitzgerald, Laura Gyenes, Shell Hadnot, Ilonda Hulett, Crystal Lanphere,

Paula Lawber, Natira Lyons, Elizabeth McCalvy, Kennee Moore, Mary Munsey, Allison Pace, Felicia Perez, Keisah Perrenoud, JoAnn Pfeiffer, Francesca Pizzarello, Deanna Rock, Jacqueline Simpkins, Candice Sommerfeld, Katie Swisher, Ann Thomas, Michelle Thompson and Linda Topczewski respectfully request that the Court:

- (a) Permit them to intervene in these proceedings for the limited purpose of presenting this motion;
- (b) Order that their lawsuits are not subject to MDL assessment; and
- (c) Provide any additional or alternative relief to which they are entitled.

Respectfully submitted,

/s/ Erik B. Walker  
Erik B. Walker  
Texas Bar No. 00792104

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**CERTIFICATE OF SERVICE**

On December 24, 2008, I served the following Motion to Intervene and Motion to Enforce CMO 9 Case Assessment Provisions on the following parties via e-mail:

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Respectfully submitted,

/s/ Erik B. Walker  
Erik B. Walker

**AFFIDAVIT OF G. ERICK ROSEMOND**

STATE OF TEXAS

§

COUNTY OF HARRIS

§

§

BEFORE ME, the undersigned authority, personally appeared G. ERICK ROSEMOND, who, upon his oath, deposed and stated:

"My name is G. Erick Rosemond. I am over the age of 21 years, am of sound mind and body and have never been convicted of a crime. I have personal knowledge of all matters stated herein and all are true and correct.

"I am an employee and associate attorney at the law firm of Hissey\*Kientz, LLP of Austin, Texas ("H\*K"). I am paid a salary and have no financial interest in any Ortho Evra case. I joined H\*K on or around August 1, 2008. I am one of several attorneys involved in prosecuting various Ortho Evra cases for H\*K that are part of *In re Ortho Evra Litigation*, Case No. JCCP 4506, in the Superior Court of the State of California for the County of Los Angeles, Central Civil West ("the state proceedings").

"Prior to joining H\*K, I was an employee and associate attorney at the law firm of Williams Bailey (now Williams Kherkher) in Houston, Texas ("WB"). I had no financial interest in any of that firm's Ortho Evra cases. WB has cases in the federal multidistrict litigation proceedings ("MDL") of *In re Ortho Evra Products Liability Litigation*, Case No. 3:06 CV 40000, in the United States District Court for the Northern District of Ohio ("the MDL proceedings"). I understand that, on February 28, 2007, WB signed an agreement allowing the Plaintiff's Steering Committee ("PSC") of the MDL to assess any recovery in WB cases in return for the right to use MDL work product in the prosecution of those cases. H\*K requested that PSC co-lead counsel, Janet G. Abaray, provide a copy of that agreement so H\*K could determine if it purported to bind H\*K based on my employment, as Ms. Abaray has claimed. Ms. Abaray e-mailed a copy of the agreement to H\*K on December 10, 2008. A true and correct copy of Ms. Abaray's e-mail and the attachment to the e-mail are attached as Exhibit A herein. I voluntarily left WB on or around July 25, 2008.

"While at WB, I received information from Ms. Abaray on two occasions. First, in May, 2008, I asked for and received access to the MDL website. At the time, the only substantive materials relating to the litigation on the website that I saw were MDL deposition transcripts and deposition summaries. I never downloaded, opened or read



any of this material. To the extent other substantive materials were on the website, I never saw them. To the extent other substantive materials have since been added to the website, they were added after the last time I visited the site. I never accessed the website after joining H\*K. While I have read the MDL deposition transcripts of Andrew Friedman, Jay Audet, and Donna Skee (and no other MDL transcripts), I did not access those transcripts from the MDL website. I read those transcripts after arriving at H\*K, and in fact, those transcripts were provided to me by H\*K staff. Initially, the MDL lawyers had objected to producing these transcripts to non-assessed plaintiff's lawyers in the state proceedings on the ground they are work product. The PSC ultimately abandoned that claim and produced the MDL deposition transcripts I have read to the state court litigants without requiring payment of an assessment. The executive committee of the state proceedings has prepared its own deposition summaries.

"Also in May, 2008, I requested and received from Ms. Abaray the identity of an expert the PSC was consulting. I am not identifying the expert here because I do not know whether the expert's identity has been disclosed to defendants in this litigation. I was provided only a name. I was not provided with a report, a summary of conclusions, a resume or any other written materials (or oral information) regarding this expert. I have never contacted that expert. No one from H\*K has contacted the expert. H\*K has never identified the individual as an expert in any H\*K cases.

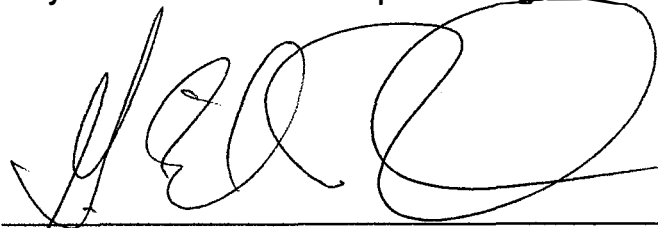
"The information above is the only information I have ever received from the MDL PSC or any other plaintiff's lawyer involved in MDL pretrial work. In short, I have never been exposed to any MDL work product.

"On May 22, 2007, I attended an MDL PSC meeting on behalf of my firm at the time, Williams Kherkher. All that was discussed at the meeting was the status of the litigation and the efforts and progress of the various PSC subcommittees. No work product was distributed at the meeting.

"H\*K has settled a number of cases in the state proceedings, including the cases identified on Exhibit B to this affidavit. Exhibit B is a true and correct copy of a letter Ms. Abaray sent to Robert C. Tucker, counsel for Johnson & Johnson ("J&J"), a defendant with whom we recently settled cases in the state proceedings, a copy of which Mr. Tucker sent to H\*K via fax. The letter identifies the names of the plaintiffs who recently settled their claims. The letter instructs J&J's counsel to withhold a three percent assessment from each case on the ground that Plaintiff's counsel of record entered into an assessment agreement with the PSC. Neither H\*K nor any attorney acting on behalf of H\*K or its clients has ever signed an assessment agreement with the PSC. I have spoken with Mr. Tucker and he has indicated he will honor Ms. Abaray's instruction.

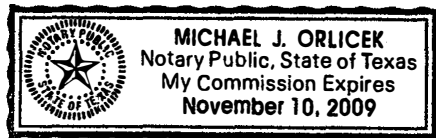
"None of the documents, information, materials or knowledge used to work up the cases identified on Exhibit B contain, or are in any way the result of, any MDL work product. All of the documents, information, materials and knowledge were generated solely by joint efforts of the plaintiffs' attorneys involved in the state proceedings.

"Further, affiant sayeth not."



G. Erick Rosemond

23<sup>rd</sup>  
SUBSCRIBED AND SWORN TO BEFORE ME by G. Erick Rosemond on the  
\_ day of December, 2008.



Notary Public, State of Texas



FROM : MAR-02-2007 08:41 FAX NO. : 3035343833 Mar. 05 2007 11:04AM P2/5  
FROM : WILLIAMS BAILEY LAW FIRM 7136436226 P.04/11  
FAX NO. : 3035343833 Mar. 01 2007 01:46PM P4/11

Case 1:06-cv-40000-DAK Document 44 Filed 08/28/2006 Page 16 of 23

**AGREEMENT  
(60-DAY PARTICIPATION OPTION)**

This Agreement is made this 2<sup>nd</sup> day of Feb, 2007, by and between the Plaintiffs' Steering Committee ("PSC") appointed by the United States District Court for the Northern District of Ohio in MDL No. 1742 and Williams Bailey **(FILL IN THE NAME OF THE FIRM EXECUTING THE AGREEMENT)** (hereinafter "the Participating Attorneys").

WHEREAS, the United States District Court for the Northern District of Ohio has appointed Janet Abaray, Michael Burg, Ellen Reikin, Jerold Parker, Monica Gant, Michael London, Christopher Seeger, Michelle Parfat, Thomas Rogers, Matthew Lundy, Robert Blanchard and Lori Andrus to serve as members of the PSC to facilitate the conduct of pretrial proceedings in the federal actions relating to the Ortho Evra.

WHEREAS, the PSC in association with other attorneys working for the common benefit of plaintiffs have developed and are in the process of developing work product which will be valuable in the litigation of state court proceedings involving Ortho Evra-induced injuries (the "PSC Work Product") and

WHEREAS, the Participating Attorneys are desirous of acquiring the PSC Work Product and establishing an amicable, working relationship with the PSC for the mutual benefit of their clients:

NOW, THEREFORE, in consideration of the covenants and promises contained herein, and intending to be legally bound hereby, the parties agree as follows:

1. With respect to each client who they represent in connection with an Ortho Evra related claim, whether currently with a filed claim in state or federal court or unfiled or on a tolling agreement, each of the Participating Attorneys shall deposit or cause to be deposited in an MDL Fee and Cost Account established by the District Court in the MDL a percentage proportion of the gross amount recovered by each such client which is equal to three percent (3%) of the gross amount of recovery of each such client (1 1/2% fees; 1 1/2% costs). For purposes





FROM :

MAR-22-2007 08:42

FROM :

FAX NO. : 3035343833

WILLIAMS BAILEY LAW FIRM

FAX NO. : 3035343833

Mar. 05 2007 11:05AM P3/5

7135436226 P.05/11

Mar. 01 2007 01:46PM P5/11

Case 1:06-cv-40000-DAK Document 44 Filed 08/28/2006 Page 17 of 23

of this Agreement, the gross amount of recovery shall include the present value of any fixed and certain payments to be made to the plaintiff or claimant in the future. It is the intention of the parties that such assessment shall be in full and final satisfaction of any present or future obligation on the part of each Plaintiff and/or Participating Attorney to contribute to any fund for the payment or reimbursement of any legal fees, services or expenses incurred by, or due to, the MDL and/or any Common Benefit Attorneys.

2. The Participating Attorneys, on behalf of themselves, their affiliated counsel, and their clients, hereby grant and convey to the PSC a lien upon and/or a security interest in any recovery by any client who they represent in connection with any Ortho Evra induced injury, to the full extent permitted by law, in order to secure payment in accordance with the provisions of paragraph 1 of this Agreement. The Participating Attorneys will undertake all actions and execute all documents which are reasonably necessary to effectuate and/or perfect this lien and/or security interest.

3. The amounts deposited in the MDL Common Benefit Fund shall be available for distribution to attorneys who have performed professional services or incurred expenses for the benefit of the plaintiffs in MDL 1742 and any coordinated state court litigation pursuant to written authorization from Co-Lead Counsel of the PSC. Such sums shall be distributed only upon an Order of the Court in MDL 1742, which will be issued in accordance with applicable law governing the award of fees and costs in cases involving the creation of a common benefit. Appropriate consideration will be given to the experience, talent and contribution made by all of those authorized to perform activities for the common benefit, including the Participating Attorneys.

4. As the litigation progresses and work product of the same type and kind continues to be generated, the PSC will provide Participating Attorneys with such work product and will otherwise cooperate with the Participating Attorneys to coordinate the MDL litigation and the state litigation for the benefit of the plaintiffs.

FROM : MAR-02-2007 08:42 FAX NO. : 3035343833 WILLIAMS BAILEY LAW FIRM 7136436226 P.06/11  
FROM : FAX NO. : 3035343833 Mar. 01 2007 01:46PM P5/11 <sup>WV</sup>

Case 1:06-cv-40000-DAK Document 44 Filed 08/28/2008 Page 18 of 23

5. No assessment will be paid by the Participating Attorneys on any recovery resulting from a medical malpractice claim against a treating physician.

6. It is understood and agreed that the PSC and Common Benefit Attorneys may also apply to the Court for class action attorneys' fees (including any multiplier) and reimbursement of expenses, if appropriate, and this Agreement is without prejudice to the amount of fees or costs to which the PSC and Common Benefit Attorneys may be entitled in such an event.

7. Upon execution of this Agreement, the PSC will provide to the Participating Attorneys, to the extent developed, the PSC Work Product, including access to the PSC's depository.

8. The Participating Attorneys shall have the following rights:

- a. Full participation in discovery matters and appropriate committee assignments with full recognition of the participation of the Participating Attorneys;
- b. Appropriate participation and consultation in settlement negotiations;
- c. Appropriate participation in trials, class action matters, management, fund administration and allocation of fees and costs.

9. The Participating Attorneys represent that the list appended hereto as Exhibit "A" correctly sets forth the name of each client represented by them who has filed a civil action arising from the use of Ortho Evra, together with the Court and docket number of each such case, and that the list attached hereto as Exhibit "B" contains the name and Date of Birth of each client represented by them who has not yet filed a civil action arising from the use marketing and sales of Ortho Evra.

10. The Participating Attorneys shall supplement the lists appended hereto as Exhibit "A" and "B" on a quarterly basis.

FROM :

MAR-02-2007 08:42

FROM :

FAX NO. :3035343833

WILLIAMS BAILEY LAW FIRM

FAX NO. :3035343833

Mar. 05 2007 11:05AM P5/5

7136436226 P.07/11

Mar. 01 2007 01:47PM P7/11

Case 1:06-cv-40000-DAK Document 44 Filed 08/28/2006 Page 19 of 23

11. This Agreement shall apply to each and every claim or action (whether state or federal, filed or unfiled) arising from the use, marketing or sales of Ortho Evra in which the Participating Attorneys have a right to a fee recovery beginning the date the MDL was assigned by the MDL Panel to this Court.

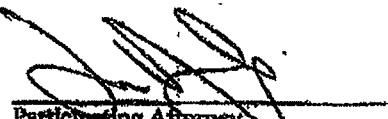
PLAINTIFFS' STEERING COMMITTEE

By:

  
Janet G. Abaray, Esq.  
Plaintiffs' Co-Lead Counsel

AND

By:

  
Participating Attorney  
(Firm Name & Address)

**Burg Simpson Eldredge Hersh Jardine PC**

312 WALNUT STREET, SUITE 2090, CINCINNATI, OHIO 45202  
TELEPHONE / 513.852-5600 . FACSIMILE / 513.852-5611

**FACSIMILE TRANSMITTAL SHEET**

**TO:** Robert C. Tucker, Esq.  
Tucker, Ellis & West, LLP

**Fax No.:** 216-592-5009

**FROM:** Janet G. Abaray, Esq.  
Burg Simpson Eldredge Hersh Jardine, PC

**RE:** *MDL Docket No. 1742 – In re Ortho Evra Products Liability Litigation*

**Date:** December 9, 2008

**TOTAL NO. OF PAGES (including cover page)** ~~4~~ 5

**MESSAGE:**

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Suite 700  
Phoenix, AZ 85016  
P: 602.508.6110

December 9, 2008

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## Via Facsimile and regular mail

Robert C. Tucker  
Tucker Ellis & West LLP  
1150 Huntington Bldg.  
925 Euclid Avenue  
Cleveland OH 44115-1414

In Re: Common Benefit Fund Confirmation forms

Dear Mr. Tucker:

Enclosed please find the *Common Benefit Fund Confirmation* form for the following cases settled by G. Erik Rosemond of the Hissey Kientz firm:

Saynab Cumar  
Martha Diaz  
Melissa Dyer  
Renee Fitzgerald  
Laura Gyenes  
Shell Hadnot  
Ilonda Hulett  
Crystal Lanphere  
Paula Lawber  
Natira Lyons  
Elizabeth McCalvy  
Kenée Moore  
Mary Munsey

Allison Pace  
Fejicia Perez  
Keisha Perrenoud  
JoAnn Pfeiffer  
Francesca Pizzarello  
Deanna Rock  
Jacqueline Simpkins  
Candice Sommerfeld  
Katie Swisher  
Ann Thomas  
Michelle Thompson  
Linda Topczewski

Very truly yours,

  
Deborah E. Klaene

## Enclosures

cc: Susan Sharko, Esq. w/o enclosure

Michael S. Burg  
Peter W. Burg  
Hon. Alan K. Simpson\*  
Scott J. Eldredge  
David P. Hersh  
Kerry N. Jardine  
Thomas W. Henderson

Holly Baer Kammerer  
William L. Simpson\*  
Collin M. Simpson\*  
Rosemary Orsini  
Chris Edwards\*  
Diane Vaksdal Smith  
David K. TeSelle

Seth A. Katz  
Janet G. Abaray\*  
John M. Restaino, Jr.\*  
Brian K. Matise  
Larry Jones\*  
Calvin S. Tregre, Jr.\*  
Steven D. Laman

Jeffrey Pederson  
Sarah Van Arsdale Berry  
Stephen M. Johnson  
Max Yefimenko  
Melanie S. Bailey\*  
Jennifer L. Thompson  
Lauren M. DeLong\*

Daniel E. McKenzie  
Meghan Quinlivan  
Stephen J. Burg  
Jennifer Gardner  
Kevin M. Bemis  
Reeves D. Whalen  
Kelth Jackson\*

Milward L. Simpson  
1897-1993  
Joseph J. Branney  
1938-2001  
Irwin L. Sandler  
1945-2006

**OF COUNSEL**  
Dale J. Coplan, P.C.  
Charles G. Kepler\*  
Perry L. Goodman  
Jerry R. Dunn

**SPECIAL COUNSEL**  
Richard A. Lewins\*  
Steven G. Greenlee

Ohio attorneys designated with a \*  
**STATE LICENSES:** Arizona, California, Colorado, District of Columbia, Florida, Illinois, Maryland, Minnesota, Nebraska, New Mexico, New York, Texas, Wyoming.

\*LICENSED only in Wyoming \*LICENSED only in Texas \*LICENSED also in Kentucky \*LICENSED only in California \*LICENSED only in Illinois

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**COMMON BENEFIT FUND CONFIRMATION**

WHEREAS, the Second Amended Case Management Order No. 9 in MDL No. 1742, *In Re: Ortho Evra Products Liability Litigation*, United States District Court, Northern District of Ohio, Case No. 1:06-40000, established a Common Benefit Fund and provides for a three percent (3%) or five percent (5%) assessment of the "gross monetary recovery" (as defined by the Order) to be paid into the Fund, by agreement between the Plaintiffs' Steering Committee and any Plaintiff's Counsel as a "Participating Attorney";

WHEREAS, the parties have agreed to a confidential settlement in:

**Case Caption:**

[Case Name, Case No., Jurisdiction]

SEE ATTACHED EXHIBIT A

MDL: ☐ YES

☒ NO

**Plaintiff's Counsel of Record:**

[Name, Firm, and Address]

G. Erik Rosemond, Esq.

Hissey Kientz, LLP

9442 North Capital of Texas Hwy., Suite 400, Austin, TX 78759-7262

NOW, THEREFORE, Plaintiffs' Steering Committee hereby discloses and confirms as follows:

- ☒ **(3% ASSESSMENT)** Plaintiff's Counsel of Record, [\_\_\_\_\_] has entered into an agreement with the Plaintiffs' Steering Committee and agreed to a three percent (3%) assessment of the "gross monetary recovery" to be withheld and paid directly to the Common Benefit Fund as a credit against the confidential settlement in the above-referenced case.
- ☐ **(5% ASSESSMENT)** Plaintiff's Counsel of Record, [\_\_\_\_\_] has entered into an agreement with the Plaintiffs' Steering Committee and agreed to a five percent (5%) assessment of the "gross monetary recovery" to be withheld and paid directly to the Common Benefit Fund as a credit against the confidential settlement in the above-referenced case.
- ☐ **(NO ASSESSMENT)** Plaintiff's Counsel of Record, [\_\_\_\_\_] has not entered into an agreement with the Plaintiffs' Steering Committee and therefore, Defendants are not obligated to withhold any assessment in the above-referenced case.

**PLAINTIFFS' STEERING COMMITTEE**

*Janet G. Abaray*  
JANET G. ABARAY (0002943)

jabaray@burgsimpson.com

BURG, SIMPSON, ELDREDGE,

HERSH & JARDINE, P.C.

312 Walnut Street, Suite 2090

Cincinnati, OH 45202

(513) 852-5600 (telephone) (513) 852-5611 (fax)

*Dec. 8, 2008*

Date

**Plaintiffs' Co-Lead and Liaison Counsel**



## HISSEY KIENTZ SETTLEMENTS

1	Cumar	Saynab	Superior Court of California, Los Angeles County Case No. BC393357 [filed under <i>Dominique Bell</i> ]
2	Diaz	Martha	Superior Court of California, Los Angeles County Case No. BC382047 [filed under <i>Janis Brown</i> ]
3	Dyer	Melissa	Superior Court of California, Los Angeles County Case No. BC380477
4	Fitzgerald	Renee	Superior Court of California, Los Angeles County Case No. BC398688
5	Gyenes	Laura	Superior Court of California, Los Angeles County Case No. BC393357 [filed under <i>Dominique Bell</i> ]
6	Hadnot	Shell	Superior Court of California, Los Angeles County Case No. BC398688 [filed under <i>Renee Fitzgerald</i> ]
7	Hulett	Ilonda	Superior Court of California, Los Angeles County Case No. BC398688 [filed under <i>Renee Fitzgerald</i> ]
8	Lanphere	Crystal	Superior Court of California, Los Angeles County Case No. BC393357 [filed under <i>Dominique Bell</i> ]
9	Lawber	Paula	Superior Court of California, Los Angeles County Case No. BC372340 [filed under <i>Nichole King</i> ]
10	Lyons	Natira	Superior Court of California, Los Angeles County Case No. BC372341 [filed under <i>Jaime Pierson</i> ]
11	McCalvy	Elizabeth	Superior Court of California, Los Angeles County Case No. BC380477 [filed under <i>Melissa Dyer</i> ]
12	Moore	Kennee	Superior Court of California, Los Angeles County Case No. BC393357 [filed under <i>Dominique Bell</i> ]



13	Munsey	Mary	Superior Court of California, Los Angeles County Case No. BC372340 (filed under <i>Nichole King</i> )
14	Pace	Allison	Superior Court of California, Los Angeles County Case No. BC380477 (filed under <i>Melissa Dyer</i> )
15	Perez	Felicia	Superior Court of California, San Francisco Case No. CGC-07-463002 (filed under <i>Mary Monroe</i> )
16	Perrenoud	Keisha	Superior Court of California, San Francisco Case No. CGC-06-458689 (filed under <i>Gloria Sanchez</i> )
17	Pfeiffer	JoAnn	Superior Court of California, San Francisco Case No. CGC-07-463002 (filed under <i>Mary Monroe</i> )
18	Pizzarello	Francesca	Superior Court of California, Los Angeles County Case No. BC393357 (filed under <i>Dominique Bell</i> )
19	Rock	Deanna	Superior Court of California, Los Angeles County Case No. BC398688 (filed under <i>Renee Fitzgerald</i> )
20	Simpkins	Jacqueline	Superior Court of California, Los Angeles County Case No. BC372340 (filed under <i>Nichole King</i> )
21	Sommerfeld	Candice	Superior Court of California, Los Angeles County Case No. BC380477 (filed under <i>Melissa Dyer</i> )
22	Swisher	Katie	Superior Court of California, Los Angeles County Case No. BC393357 (filed under <i>Dominique Bell</i> )
23	Thomas	Ann	Superior Court of California, San Francisco Case No. CGC-07-463002 (filed under <i>Mary Monroe</i> )
24	Thompson	Michelle	Superior Court of California, Los Angeles County Case No. BC380477 (filed under <i>Melissa Dyer</i> )
25	Topczewski	Linda	Superior Court of California, Los Angeles County Case No. BC380477 (filed under <i>Melissa Dyer</i> )

EXHIBIT A

**AFFIDAVIT OF ROBERT E. KIENTZ**

STATE OF TEXAS

COUNTY OF TRAVIS

§  
§  
§

BEFORE ME, the undersigned authority, personally appeared ROBERT E. KIENTZ, who, upon his oath, deposed and stated:

"My name is Robert E. Kientz. I am over the age of 21 years, am of sound mind and body and have never been convicted of a crime. I have personal knowledge of all matters stated herein and all are true and correct.

"I am an equity partner in the law firm of Hissey\*Kientz, LLP in Austin, Texas. H\*K is a member-firm of the California Plaintiff Executive Committee ("CA-PEC") involved in prosecuting Ortho Evra cases that are part of *In re Ortho Evra Litigation*, Case No. JCCP 4506, in the Superior Court of the State of California for the County of Los Angeles, Central Civil West ("the state proceedings"). H\*K has never consented to, and no one acting on behalf of HK has ever signed, any agreement by which HK's state court cases would be subject to an assessment by the Plaintiffs' Steering Committee ("PSC") in the federal multidistrict litigation proceedings ("MDL") of *In re Ortho Evra Products Liability Litigation*, Case No. 3:06 CV 40000, in the United States District Court for the Northern District of Ohio ("the MDL proceedings").

H\*K began filing Ortho Evra cases in California state court in December, 2006. Initially, along with other member firms, H\*K obtained prior liability documents and deposition transcripts from prior litigation in California, and not from the work product of the PSC. Beginning early in the litigation, the CA-PEC and the MDL Plaintiffs' Steering Committee ("PSC") both developed their cases separately.

"Like several firms, H\*K was eventually confronted with various options for prosecuting our Ortho Evra clients' claims: (a) consent to the PSC MDL assessment fee, and in return, utilize MDL work product in developing and trying the suits, or (b) refuse to consent to the MDL assessment for our state court cases and utilize only our own work product and that of other lawyers in the state proceedings. We chose the latter option. We have deliberately and diligently refrained from obtaining or utilizing any MDL work product precisely to avoid assessment of our state court cases. H\*K did not agree to and did not sign on to MDL CMO No. 9.

"None of the H\*K cases that have been worked up and settled in the state proceedings involved any information, documents, materials or knowledge that were the result of, in whole or in part, MDL plaintiff work product, whether by PSC members or others acting on the PSC's behalf. This includes the cases identified by Janet Abaray,



co-lead counsel of the MDL proceedings, in the letter attached as Exhibit B to Erick Rosemond's affidavit of December 23, 2008. No MDL work product was involved in any of those cases.

"MDL PSC co-lead counsel, Janet Abaray has instructed Johnson & Johnson ("J&J") to deduct a three percent assessment from the settlement monies it owes the plaintiffs whose cases were identified in the preceding paragraph. J&J has insisted that those plaintiffs sign releases that waive their right to three percent of their settlements before J&J will release any settlement funds.

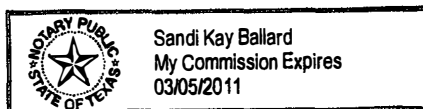
"HK hired Erick Rosemond as an associate attorney and employee on or around August 1, 2008. We hired Mr. Rosemond based on his extensive experience in pharmaceutical litigation and positive reviews of his work that we received. At the time, and even now, we are unaware of any MDL plaintiff work product to which Mr. Rosemond has been exposed. Mr. Rosemond has told us he has not reviewed or copied any MDL plaintiff work product. We never asked Mr. Rosemond to provide us with any MDL plaintiff work product, and Mr. Rosemond has never provided us with any MDL plaintiff work product.

"Exhibit 'A' to this affidavit is a true and correct copy of Case Management Order ("CMO") No. 9 that was entered by the MDL judge on or around the date indicated at the end of the document. Exhibit 'B' to this affidavit is a true and correct copy of CMO No. 12 that was entered by the MDL judge on or around the date indicated at the end of the document.

"Further, affiant sayeth not."

  
Robert E. Kientz.

SUBSCRIBED AND SWORN TO BEFORE ME by Robert E. Kientz on the 24<sup>th</sup>  
day of December, 2008.



  
Notary Public, State of Texas

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**

**SECOND AMENDED**

**This Document Relates To:**

**ALL CASES.**

**CASE MANAGEMENT ORDER NO. 9  
COMMON BENEFIT ORDER  
(ESTABLISHING COMMON BENEFIT  
FUND TO COMPENSATE AND  
REIMBURSE ATTORNEYS FOR  
SERVICES PERFORMED AND EXPENSES  
INCURRED FOR MDL ADMINISTRATION  
AND OTHERWISE FOR PLAINTIFFS'  
GENERAL BENEFIT)**

This Order is entered 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. This Court's authority in this regard derives from the Supreme Court's common benefit doctrine, as established 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). Any disputes arising under this Order which cannot be resolved by agreement of Counsel, will be resolved by this Court in the exercise of its jurisdiction under the equitable principles of the common fund/common benefit doctrine.



The Court Orders as follows:

**A. Common Benefit Fund For Expenses to be Established**

Plaintiffs' Co-Lead Counsel (Janet Abaray, Esq.) is directed to establish an interest-bearing account at Key Bank, in Cincinnati, Ohio to receive and disburse funds as provided in this Order. Janet G. Abaray, Esq. is hereby appointed as escrow agent for this purpose. These funds will be held as funds subject to the direction of the Court and are hereinafter referred to as the "Common Benefit Fund." No party or attorney has any individual right to any of these funds except to the extent of amounts directed to be disbursed to such person by order of the Court. These funds do not constitute the separate property of any party or attorney and are not subject to garnishment or attachment for the debts of any party or attorney except when and as directed to be disbursed to a specific person as provided by court order.

By subsequent Order of the Court, the Court may appoint a qualified certified public accountant (the "CPA") to keep detailed records of all deposits and withdrawals and to prepare tax returns and other tax filings. Such subsequent Order shall specify the hourly rates to be charged by the CPA and for the CPA's assistants, who shall be utilized where appropriate to control costs. The CPA shall submit quarterly detailed bills to the Court and to Plaintiff's Co-Lead Counsel. Upon approval, the CPA's bills shall be paid from the Ortho Evra MDL PSC Fund and shall be considered a shared cost in accordance with ¶ B.2.c, below.

**1. Assessments for the Common Benefit Expense Fund.**

- a. After October 28, 2006 all plaintiffs and their attorneys who either agree or have agreed to settle, compromise, dismiss, or reduce the amount of a claim or, with or without trial, recover a judgment for monetary damages or other monetary relief, including compensatory and punitive damages, with respect to any Ortho Evra claims are subject to an assessment of the "gross monetary recovery," to be withheld by defendants and paid into the Common Benefit Fund by defendants, as provided herein.



b. Defendants are directed to withhold the amount of this assessment from any amounts paid to plaintiffs and their counsel for any case being handled by a plaintiff's attorney with at least one case pending in federal court and/or any state court or unfiled case where the plaintiff's counsel has executed an agreement to cooperate with the MDL (Exhibit A or B hereto), and to pay the assessment directly into the Common Benefit Fund as a credit against the settlement or judgment. If for any reason the assessment is not or has not been so withheld, the plaintiff and her counsel are deemed jointly responsible for paying the assessment into the Common Benefit Fund promptly.

c. No orders of dismissal of any plaintiff's claim in which any recovery is received, and which is subject to this Order, shall be filed unless accompanied by a certificate of plaintiff's and defendants' counsel that the assessment has been withheld and deposited into the Common Benefit Fund or, alternatively, a certification that the assessment order does not apply to the action.

d. The Plaintiffs' Steering Committee on a quarterly basis shall provide Defendants' Liaison Counsel and the Court or its designee with a list of cases and/or counsel who have entered into written agreements with the Plaintiff's Steering Committee. Upon request, the Plaintiffs' Steering Committee shall provide to each plaintiffs' counsel a list of his or her own firm's cases that are subject to an assessment under this Order. In the event there is a dispute as to whether a case should be on the list, the Plaintiffs' Steering Committee shall resolve the matter with the particular plaintiff's counsel either informally or upon motion.

e. In measuring the "gross monetary recovery":

- (1) Court costs that are to be paid by the defendant shall be excluded.
- (2) The present value of any fixed and certain payments to be made in the future shall be included.

(3) Nothing in this Order shall be deemed to modify, alter, or change the terms of any fee contracts between any plaintiffs' counsel and their individual clients.

f. This obligation attaches in the following instances:

- (1) 60-Day Participation Option. For all cases whose counsel have agreed within 60 days of the date of this Order to cooperate with the MDL by signing the appropriate agreement [attached hereto as Exhibit A], the assessment in such cases shall be one and one-half percent (1½%) as fees and one and one-half percent (1½%) as costs (a total of three percent (3%)) of the "gross monetary recovery." The assessment shall apply to all Ortho Evra cases involving any full participation counsel, now pending or later filed in, transferred to, or removed to, this Court as well as all unfiled and tolled cases and claims treated as part of the coordinated proceeding known as *In re: Ortho Evra Products Liability Litigation*, MDL 1742, and resolved after the date this Order is signed, including cases later remanded to a state court or any cases on tolling agreements, filed in any state court, or clients whose cases are as yet unfiled. As noted above, one and one-half percent (1½%) shall be deemed fees to be subtracted from the attorneys' fees portions of individual fee contracts, and one and one-half percent (1½%) shall be deemed costs to be subtracted from the client portion of individual fee contracts. This option shall be required on all cases (state, federal, filed or unfiled) by all members of the PSC, any PSC sub-committee members, and any Court approved State Liaison Committee.



(2) Post 60-Day Assessment Options.

(a) Later participation by attorneys with no prior filed Ortho Evra cases. Following the 60-Day period in the preceding paragraph, any counsel who files for the first time a case involving a personal injury claim relating to Ortho Evra that becomes part of this MDL shall have 30 days from the date the claim receives a docket number in the Northern District of Ohio to cooperate with the MDL by signing an appropriate agreement [attached hereto as Exhibit A]; the assessment in such cases shall be one and one-half percent (1½%) as fees and one and one-half percent (1½%) as costs (a total of three percent (3%)) of the "gross monetary recovery." The assessment shall apply to all Ortho Evra cases involving any full participation counsel, now pending or later filed in, transferred to, or removed to, this Court as well as all unfiled and tolled cases and claims treated as part of the coordinated proceeding known as *In re: Ortho Evra Products Liability Litigation*, MDL 1742, and resolved after the date of this Order, including cases later remanded to a state court or any cases on tolling agreements, filed in any state court, or clients whose cases are as yet unfiled. One and one-half percent (1½%) shall be deemed fees to be subtracted from the attorneys' fees portions of individual fee contracts, and one and one-half percent (1½%) shall be deemed costs to be subtracted from the client portion of individual fee contracts.

(b) Non-participation in MDL. Any Counsel who has cases in State court and who determines not to participate with the MDL PSC and execute a participation agreement with the PSC, may

seek access to MDL and/or PSC non-work-product materials from the PSC by contacting the Executive Committee in writing; however, the MDL PSC shall be under no obligation to allow such counsel access to any MDL materials.

(c) Later Participation. Other than as identified in paragraph A.1.f.(2)(a) above, following the initial 60-day period to permit counsel to consider the 60-Day Participation Option, Counsel with at least one case in the MDL and/or counsel with cases only pending in State court, tolled or otherwise unfilled cases who sign an appropriate agreement [Attached hereto as Exhibit B], the assessment in such cases shall be three percent (3%) as fees and two percent (2%) as costs (a total of five percent (5%)) of the "gross monetary recovery" on all Ortho Evra cases now pending, or later filed in, transferred to, or removed to, this court and treated as part of the coordinated proceeding known as *In re: Ortho Evra Products Liability Litigation*, MDL 1742, as well as unfilled, tolled, or cases filed in State court. As noted above, three percent (3%) shall be deemed fees to be subtracted from the attorneys' fees portions of individual fee contracts, and one and two percent (2%) shall be deemed costs to be subtracted from the client portion of individual fee contracts.

i. Any case pending in the MDL, in which counsel fails to timely make an election under the preceding paragraphs, shall be assessed three percent (3%) as fees and two percent (2%) as costs (a total of five percent (5%)) of the "gross monetary recovery." Nothing in this Order shall limit the PSC's right or ability to seek an equitable contribution against any state court case in which the

Plaintiff's counsel was provided access to the MDL work product.

**2. Disbursements from Common Benefit Expense Fund.**

- a. Upon subsequent Order of the Court, payments may be made from the Common Benefit Fund to attorneys who provide services or incur expenses for the joint and common benefit of plaintiffs in addition to their own client or clients. Attorneys eligible thereto are limited to Plaintiffs' Co-Lead Counsel, members of the Plaintiffs' Steering Committee, Plaintiffs' Federal Court Liaison, attorneys who are member of a sub-committee established by the Plaintiffs' Steering Committee who are called upon by them to assist in performing their responsibilities, Plaintiffs' State Liaison Counsel, and other attorneys performing PSC-approved responsibilities in MDL or state court actions. Such attorneys who maintain actions in state court and obtain rulings that inure to the benefit of all plaintiffs in the MDL shall be permitted to submit for common benefit treatment the time and costs associated with obtaining such rulings. All time and expenses are subject to proper and timely submission of contemporaneous records certified to have been timely received.
- b. Payments will be allowed only to entities for special services performed, and to reimburse for special expenses incurred, for the joint and common benefit of all plaintiffs, which have been specifically authorized by the PSC.
- c. Payment may, for example, be made for services and expenses related to the obtaining, reviewing, indexing, and payment for hard copies of computerized images of documents for the defendants; to conducting depositions; and to activities connected with the coordination of federal and state litigation. The Common Benefit Fund will not, however, be used to pay for services and expenses related to a particular case, such as the deposition of a treating physician, even if such activity results in some incidental and/or

consequential benefit to other plaintiffs, or for an attorney to "learn the case."

d. Payments will not exceed the fair value of the services performed (plus any court approved multiplier) or the reasonable amount of the expenses incurred, and, depending upon the amount of the fund, may be limited to a part of the value of such services and expenses.

e. No amounts will be disbursed without review and approval by the Court or such other mechanism as the Court may deem just and proper under the circumstances. Defense Counsel shall provide at least quarterly notice to the Court or its designee and Plaintiffs' Co-Lead Counsel of the names and docket numbers of the cases for which it has withheld an assessment. Details of any individual settlement agreement, individual settlement amount and individual amounts deposited into escrow shall be confidential and shall not be disclosed to the Plaintiffs' Steering Committee. Monthly statements from the escrow agent shall be provided to Plaintiffs' Co-Lead Counsel, Defense Liaison Counsel, the Court, and the Court's designee showing, with respect to the funds controlled by the escrow agent, only the aggregate of the monthly deposits, disbursements, interest earned, financial institution charges, if any, and current balance.

f. If the Common Benefit Fund exceeds the amount needed to make all payments as provided in this order (for court approved costs, fees, and any court approved multiplier on any fees), the Court may order a refund to those who have contributed to the Common Benefit Fund. Any such refund will be made in proportion to the amount of the contributions.

**3. Incorporation by Reference**

The individual attorney agreements attached hereto as Exhibits A and B are incorporated by reference and have the same effect as if fully set forth in the body of this Order.

**B. Plaintiffs' Common Cost Fund and Submission of Time and Expense.**

**1. Plaintiffs' Counsel's Time and Expense Submissions**

Reimbursement for costs and/or fees for services of all Plaintiffs' counsel performing functions in accordance with this Order will be set at a time and in a manner established by the Court, after due notice to all counsel. The Court shall receive and consider recommendations of Plaintiffs' Executive Committee concerning the distribution of the Common Benefit Fund. The following standards and procedures are to be utilized by any counsel who seeks fees and/or expense reimbursement.

a. General Standards

- (1) All time and expenses submitted must be incurred only for work authorized by the Plaintiffs' Steering Committee.
- (2) These Time and Expense Guidelines are intended for all activities performed and expenses incurred by counsel that relate to matters common to all claimants in MDL 1742.
- (3) Time and expense submissions must be made on forms authorized by Plaintiffs' Executive Committee.
- (4) Time and expense submissions must be submitted on a quarterly basis (on the first of the month) to Plaintiffs' Co-Lead Counsel so they can be compiled and submitted to the CPA. It is therefore essential that each firm timely submit its records for the preceding three-month period.
- (5) All submissions shall be transmitted electronically to Plaintiffs' Co-Lead Counsel by 30 days after the end of any quarterly period.
- (6) The first submission is due on November 1, 2006 and should include all time beginning with the date the MDL was assigned by the MDL Panel to this Court, through September 30, 2006.

b. Time Reporting

- (1) Only time spent on matters common to all claimants in MDL 1742 that has been authorized by the PSC ("common benefit work") will be considered in determining fees. No time spent on developing or

processing individual issues in any case for an individual client (claimant) will be considered or should be submitted, except as set forth in ¶ B.2.a., above.

(2) All time records shall be accurately and contemporaneously maintained. Time shall be kept according to these guidelines. All counsel shall keep a daily record of their time spent in connection with common benefit work on this litigation, indicating with specificity the hours, location and particular activity (such as "conducted deposition of John Doe."). Time entries that are not sufficiently detailed may not be considered for common benefit payments.

(3) All common benefit work time for each firm shall be maintained in a tenth-of-an-hour increment.

(4) All time records for common benefit work shall be summarized by accumulated total of all time incurred by the attorney(s) during the particular reporting period and in prior periods. The summary report form may then be obtained from Plaintiffs' Co-Lead or Federal Liaison Counsel by participating firms.

## **2. Expense Reporting: Shared and Held Costs**

a. Advanced costs will be deemed as either "Shared" or "Held."

(1) Shared Costs are costs that will be paid out of a separate Ortho Evra MDL Plaintiffs' Steering Committee Fund account which has already been established by Plaintiffs' Co-Lead counsel at Key Bank, and to be funded by all members of the PSC and others as determined by the PSC. The Ortho Evra MDL PSC Fund account will be administered by Janet Abaray, Esq.

(2) Held Costs are those that will be carried by each attorney in MDL 1742 and reimbursed as and when determined by the PSC.



b. Each member of the PSC shall contribute to the Ortho Evra MDL PSC Fund at times and in amounts sufficient to cover Plaintiffs' expenses for the administration of the MDL. The timing and amount of each assessment will be determined by the Executive Committee, and each assessment will be paid within 15 days to Plaintiffs' Co-Lead Counsel. Failure to pay assessments will be grounds for removal from the PSC.

c. Shared Costs

(1) Shared Costs are costs incurred for the common benefit of the MDL as a whole. No client-related costs shall be considered as Shared Costs, unless exceptional circumstances exist and are approved by later Order of this Court. All costs of a substantial nature that meet these requirements and fall under the following categories shall be considered Shared Costs and qualify to be submitted and paid directly from the MDL account. All Shared Costs must be approved by Plaintiffs' Co-Lead Counsel and the Executive Committee prior to payment. Shared Costs include:

- (a) Certain court, filing and service costs;
- (b) Deposition and court reporter costs for non case-specific depositions;
- (c) Document Depository: creation, operation, staffing, equipment and administration;
- (d) Plaintiffs' Co-Lead, Federal Liaison, and State Court Liaison Counsel administrative matters (e.g., expenses for equipment, technology, courier services, long distance, telecopier, electronic service, photocopy and printing, secretarial/temporary staff, etc.);
- (e) PSC group administration matters, such as meetings and conference calls;

- (c) Legal and accountant fees;
  - (d) Expert witness and consultant fees and expenses;
  - (e) Printing, copying, coding, scanning (out-of-house or extraordinary firm cost);
  - (f) Research by outside third-party vendors/consultants/attorneys;
  - (g) Common witness expenses, including travel;
  - (h) Translation costs;
  - (i) Bank or financial institution charges; and
  - (j) Investigative service.
- (2) Plaintiffs' Co-Lead Counsel shall prepare and be responsible for distributing to the appropriate plaintiffs' counsel and the PSC reimbursement procedures and the forms associated therewith. Request for payments from the Ortho Evra MDL PSC Fund for common benefit incurred expenses shall include sufficient information to permit Plaintiffs' Co-Lead Counsel and the CPA to account properly for costs and to provide adequate detail to the Court. All requests shall be subject to review and approval by Plaintiffs' Co-Lead Counsel and the Executive Committee.

d. Held Costs

- (1) Held Costs are costs incurred for the global benefit of the MDL. Held Costs are those that do not fall into the above Shared Costs categories but are incurred for the benefit of all plaintiffs in general. No specific client-related costs can be considered as Held Costs. All costs of a substantial nature that meet these requirements and fall under the following categories shall be considered Held Costs and qualify to be

submitted for consideration by the PSC and the Court for future reimbursement from the Common Benefit Fund.

(2) Held Cost records shall be submitted to Plaintiffs' Co-Lead Counsel on a quarterly basis together with any time reports.

e. Travel Limitations

Except in extraordinary circumstances approved by Plaintiffs' Co-Lead Counsel or the Executive Committee, all travel reimbursements are subject to the following limitations:

(3) Airfare. Only the price of a coach seat for a reasonable itinerary will be reimbursed. First Class Airfare will not be reimbursed.

(4) Hotel. Hotel room charges above the average available room rate of the Hyatt, Hilton, and Marriott hotels in the city in which the stay occurred will be closely scrutinized by the Court and be subject to disallowance or reduction.

(5) Meals. Meal expenses must be reasonable.

(6) Cash Expenses. Miscellaneous cash expenses for which receipts generally are not available (tips, luggage handling, pay telephone, etc.) will be reimbursed up to \$50.00 per trip, as long as the expenses are properly itemized.

(7) Rental Automobiles. Luxury automobile rentals will not be fully reimbursed, unless only luxury automobiles were available. If luxury automobiles are selected when non-luxury vehicles are available, then the difference between the luxury and non-luxury vehicle rates must be shown on the travel reimbursement form, and only the non-luxury rate may be claimed, unless such larger sized vehicle is needed to accommodate several counsel.

(8) Mileage. Mileage claims must be documented by stating origination point, destination, total actual miles for each trip, and the rate

per mile paid by the member's firm. The maximum allowable rate will be the maximum rate allowed by the IRS (currently 40.5 cents per mile).

b. Non-Travel Limitations

The following apply:

- (1) Long Distance and Cellular Telephone: Long distance and cellular telephone charges must be documented. Copies of the telephone bills must be submitted with notations as to which charges relate to the Ortho Evra MDL litigation.
- (2) Shipping, Courier, and Delivery Charges: All claimed expenses must be documented with bills showing the sender, origin of the package, recipient, and destination of the package.
- (3) Postage Charges: A contemporaneous postage log or other supporting documentation must be maintained and submitted. Postage charges are to be reported at actual cost.
- (4) Telefax Charges: Contemporaneous records should be maintained and submitted showing faxes sent and received. The per-fax charge shall not exceed \$1.00 per page.
- (5) In-House Photocopy: A contemporaneous photocopy log or other supporting documentation must be maintained and submitted. The maximum copy charge is 20¢ per page.
- (6) Secretarial and Clerical time: Submission of secretarial or clerical time must be pre-approved by the Executive Committee. An itemized description of the task and time spent must be submitted for secretarial and clerical time. All overtime must be approved before submission by Plaintiffs' Co-Lead Counsel or the Executive Committee.

- (7) Computerized Research – Lexis/Westlaw: Claims for Lexis, Westlaw, and other computerized legal research expenses should be in the exact amount charged to or allocated by the firm for these research services.

**3. Procedures To Be Established by Plaintiffs' Co-Lead Counsel for Cost and Time Submission**

Plaintiffs' Co-Lead Counsel shall establish forms and procedures to implement and carry out any time and expense submissions required by the Court and for reimbursement from the Ortho Evra MDL PSC Fund for shared costs. Once developed, these forms may be obtained from Plaintiffs' Co-Lead Counsel or Federal Liaison Counsel. The forms shall be certified by a senior partner in each firm attesting to the accuracy and correctness for the submissions.

Questions regarding the guidelines or procedures or the completion of any forms should be directed to Plaintiffs' Co-Lead Counsel, the CPA, or the Court.

Date: August 28, 2006

S/ David A. Katz  
Judge David A. Katz  
United States District Court

**AGREEMENT**  
**(60-DAY PARTICIPATION OPTION)**

This Agreement is made this \_\_\_\_ day of \_\_\_\_\_, 200\_\_, by and between the Plaintiffs' Steering Committee ("PSC") appointed by the United States District Court for the Northern District of Ohio in MDL No. 1742 and \_\_\_\_\_ **[FILL IN THE NAME OF THE FIRM EXECUTING THE AGREEMENT]** (hereinafter "the Participating Attorneys").

WHEREAS, the United States District Court for the Northern District of Ohio has appointed Janet Abaray, Michael Burg, Ellen Relkin, Jerold Parker, Monica Gant, Michael London, Christopher Seeger, Michelle Parfitt, Thomas Rogers, Matthew Lundy, Robert Blanchard and Lori Andrus to serve as members of the PSC to facilitate the conduct of pretrial proceedings in the federal actions relating to the Ortho Evra.

WHEREAS, the PSC in association with other attorneys working for the common benefit of plaintiffs have developed and are in the process of developing work product which will be valuable in the litigation of state court proceedings involving Ortho Evra-induced injuries (the "PSC Work Product") and

WHEREAS, the Participating Attorneys are desirous of acquiring the PSC Work Product and establishing an amicable, working relationship with the PSC for the mutual benefit of their clients;

NOW, THEREFORE, in consideration of the covenants and promises contained herein, and intending to be legally bound hereby, the parties agree as follows:

1. With respect to each client who they represent in connection with an Ortho Evra related claim, whether currently with a filed claim in state or federal court or unfiled or on a tolling agreement, each of the Participating Attorneys shall deposit or cause to be deposited in an MDL Fee and Cost Account established by the District Court in the MDL a percentage proportion of the gross amount recovered by each such client which is equal to three percent (3%) of the gross amount of recovery of each such client (1½% fees; 1½% costs). For purposes



of this Agreement, the gross amount of recovery shall include the present value of any fixed and certain payments to be made to the plaintiff or claimant in the future. It is the intention of the parties that such assessment shall be in full and final satisfaction of any present or future obligation on the part of each Plaintiff and/or Participating Attorney to contribute to any fund for the payment or reimbursement of any legal fees, services or expenses incurred by, or due to, the MDL and/or any Common Benefit Attorneys.

2. The Participating Attorneys, on behalf of themselves, their affiliated counsel, and their clients, hereby grant and convey to the PSC a lien upon and/or a security interest in any recovery by any client who they represent in connection with any Ortho Evra induced injury, to the full extent permitted by law, in order to secure payment in accordance with the provisions of paragraph 1 of this Agreement. The Participating Attorneys will undertake all actions and execute all documents which are reasonably necessary to effectuate and/or perfect this lien and/or security interest.

3. The amounts deposited in the MDL Common Benefit Fund shall be available for distribution to attorneys who have performed professional services or incurred expenses for the benefit of the plaintiffs in MDL 1742 and any coordinated state court litigation pursuant to written authorization from Co-Lead Counsel of the PSC. Such sums shall be distributed only upon an Order of the Court in MDL 1742, which will be issued in accordance with applicable law governing the award of fees and costs in cases involving the creation of a common benefit. Appropriate consideration will be given to the experience, talent and contribution made by all of those authorized to perform activities for the common benefit, including the Participating Attorneys.

4. As the litigation progresses and work product of the same type and kind continues to be generated, the PSC will provide Participating Attorneys with such work product and will otherwise cooperate with the Participating Attorneys to coordinate the MDL litigation and the state litigation for the benefit of the plaintiffs.

5. No assessment will be paid by the Participating Attorneys on any recovery resulting from a medical malpractice claim against a treating physician.

6. It is understood and agreed that the PSC and Common Benefit Attorneys may also apply to the Court for class action attorneys' fees (including any multiplier) and reimbursement of expenses, if appropriate, and this Agreement is without prejudice to the amount of fees or costs to which the PSC and Common Benefit Attorneys may be entitled in such an event.

7. Upon execution of this Agreement, the PSC will provide to the Participating Attorneys, to the extent developed, the PSC Work Product, including access to the PSC's depository.

8. The Participating Attorneys shall have the following rights:

- a. Full participation in discovery matters and appropriate committee assignments with full recognition of the participation of the Participating Attorneys;
- b. Appropriate participation and consultation in settlement negotiations;
- c. Appropriate participation in trials, class action matters, management, fund administration and allocation of fees and costs.

9. The Participating Attorneys represent that the list appended hereto as Exhibit "A" correctly sets forth the name of each client represented by them who has filed a civil action arising from the use of Ortho Evra, together with the Court and docket number of each such case, and that the list attached hereto as Exhibit "B" contains the name and Date of Birth of each client represented by them who has not yet filed a civil action arising from the use marketing and sales of Ortho Evra.

10. The Participating Attorneys shall supplement the lists appended hereto as Exhibit "A" and "B" on a quarterly basis.

11. This Agreement shall apply to each and every claim or action (whether state or federal, filed or unfiled) arising from the use, marketing or sales of Ortho Evra in which the Participating Attorneys have a right to a fee recovery beginning the date the MDL was assigned by the MDL Panel to this Court.

PLAINTIFFS' STEERING COMMITTEE

By:

Janet G. Abaray, Esq.  
Plaintiffs' Co-Lead Counsel

AND

By:

Participating Attorney  
[Firm Name & Address]

**AGREEMENT  
(POST 60-DAY ASSESSMENT OPTION)**

This Agreement is made this \_\_\_\_ day of \_\_\_\_\_, 200\_\_\_\_, by and between the Plaintiffs' Steering Committee ("PSC") appointed by the United States District Court for the Northern District of Ohio in MDL No. 1742 and \_\_\_\_\_**[FILL IN THE NAME OF THE FIRM EXECUTING THE AGREEMENT]** (hereinafter "the Participating Attorneys").

WHEREAS, the United States District Court for the Northern District of Ohio has appointed Janet Abaray, Michael Burg, Ellen Relkin, Jerold Parker, Monica Gant, Michael London, Christopher Seeger, Michelle Parfitt, Thomas Rogers, Matthew Lundy, Robert Blanchard and Lori Andrus to serve as members of the PSC to facilitate the conduct of pretrial proceedings in the federal actions relating to the use, marketing and sales of Ortho Evra.

WHEREAS, the PSC in association with other attorneys working for the common benefit of plaintiffs have developed and are in the process of developing work product which will be valuable in the litigation of state court proceedings involving Ortho Evra induced injuries (the "PSC Work Product") and

WHEREAS, the Participating Attorneys are desirous of acquiring the PSC Work Product and establishing an amicable, working relationship with the PSC for the mutual benefit of their clients;

NOW, THEREFORE, in consideration of the covenants and promises contained herein, and intending to be legally bound hereby, the parties agree as follows:

.With respect to each client who they represent in connection with a Ortho Evra related claim which is filed or pending in any Federal court, unfiled or subject to a tolling agreement, each of the Participating Attorneys shall deposit or cause to be deposited in an MDL Fee and Cost Account established by the District Court in the MDL, a percentage proportion of the gross amount recovered by each such client which is equal to five percent (5%) of the gross amount of

recovery by each such client (3% as fees and 2% as costs). For purposes of this Agreement, the gross amount of recovery shall include the present value of any fixed and certain payments to be made to the plaintiff or claimant in the future.

2. The Participating Attorneys, on behalf of themselves, their affiliated counsel, and their clients, hereby grant and convey to the PSC a lien upon and/or a security interest in any recovery by any client who they represent in connection with any Ortho Evra induced injury and marketing and sales practices, to the full extent permitted by law, in order to secure payment in accordance with the provisions of paragraph 1 of this Agreement. The Participating Attorneys will undertake all actions and execute all documents which are reasonably necessary to effectuate and/or perfect this lien and/or security interest.

3. The amounts deposited in the Common Benefit Fund shall be available for distribution to attorneys who have performed professional services or incurred expenses for the benefit of the plaintiffs in MDL 1742 and any coordinated state court litigation pursuant to written authorization from Co-Lead counsel of the PSC. Such sums shall be distributed only upon an Order of the Court in MDL 1742 which will be issued in accordance with applicable law governing the award of fees and costs in cases involving the creation of a common benefit. Appropriate consideration will be given to the experience, talent and contribution made by all of those authorized to perform activities for the common benefit, including the Participating Attorneys.

4. As the litigation progresses and work product of the same type and kind continues to be generated, the PSC will provide Participating Attorneys with such work product and will otherwise cooperate with the Participating Attorneys to coordinate the MDL litigation and the state litigation for the benefit of the plaintiffs.

5. No assessment will be paid by the Participating Attorneys on any recovery resulting from a medical malpractice claim against a treating physician.

6. It is understood and agreed that the PSC and Common Benefit Attorneys may

also apply to the Court for class action attorneys' fees (including any multiplier) and reimbursement of costs, if appropriate, and this Agreement is without prejudice to the amount of fees and costs to which the PSC and Common Benefit Attorneys may be entitled to in such an event.

7. Upon execution of this Agreement, the PSC will provide to the Participating Attorneys, to the extent developed, the PSC Work Product, including access to the PSC's depository.

8. The Participating Attorneys shall have the following rights:

- a. Full participation in discovery matters and appropriate committee assignments with full recognition of the participation of the Participating Attorneys;
- b. Appropriate participation and consultation in settlement negotiations;
- c. Appropriate participation in trials, class action matters, management, fund administration and allocation of fees and costs.

9. The Participating Attorneys represent that the list appended hereto as Exhibit "A" correctly sets forth the name of each client represented by them who has filed a civil action arising from the use, marketing, and sale of Ortho Evra together with the Court and docket number of each such case and that the list attached hereto as Exhibit "B" contains the name and Date of Birth of each client represented by them who has not yet filed a civil action arising from the use, marketing, and sale of Ortho Evra.

10. The Participating Attorneys shall supplement the lists appended hereto as Exhibit "A" and "B" on a quarterly basis.



11. This Agreement shall apply to each and every claim or action arising from the use, marketing, or sale of Ortho Evra in which the Participating Attorneys have a right to a fee recovery.

PLAINTIFFS' STEERING COMMITTEE

By:

Janet G. Abaray, Esq.  
Plaintiffs' Co-Lead Counsel

AND

By:

Participating Attorney  
[Firm Name & Address]

1 TUCKER ELLIS & WEST LLP  
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5 Facsimile: 213.430.3409

6 DRINKER BIDDLE & REATH LLP  
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7 BRENDAN. BUONAIUTO-STATE BAR NO. 173919  
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8 San Francisco, CA 94105-2235  
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9 Facsimile: 415.591.7510

10  
Attorneys For Defendants  
11 JOHNSON & JOHNSON, JOHNSON &  
JOHNSON PHARMACEUTICAL RESEARCH &  
12 DEVELOPMENT, LLC, ALZA CORPORATION, AND  
ORTHO-MCNEIL PHARMACEUTICAL, INC.  
13

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
15 **FOR THE COUNTY OF LOS ANGELES**

16 IN RE: ORTHO EVRA® LITIGATION )  
17 ) JUDICIAL COUNCIL COORDINATION  
PROCEEDING NO. 4506  
18 This Document Relates To: )  
19 ALL CASES ) NOTICE OF CASE MANAGEMENT  
ORDER NO. 21 BY JUDGE DAVID A.  
20 ) KATZ FROM THE UNITED STATES  
DISTRICT COURT, NORTHERN  
21 ) DISTRICT OF OHIO DATED AUGUST  
30, 2007  
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1 **TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on August 30, 2007, the Honorable David A. Katz of the  
3 United States District Court, Northern District of Ohio entered the attached Case Management  
4 Order No. 21.

5 DATED: August 30, 2007

TUCKER ELLIS & WEST LLP

6  
7  
8 By: 

Su-Lyn Combs  
ATTORNEYS FOR DEFENDANTS  
JOHNSON & JOHNSON, JOHNSON &  
JOHNSON PHARMACEUTICAL  
RESEARCH & DEVELOPMENT, LLC,  
ALZA CORPORATION, AND ORTHO-  
MCNEIL PHARMACEUTICAL, INC.

Case 1:06-cv-40000-DAK Document 159 Filed 08/30/2007 Page 1 of 1

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:

**CASE MANAGEMENT ORDER NO. 21**

ALL CASES.

Pending before the Court is a discovery dispute on the issue of deposition transcripts taken in the MDL litigation and their characterization as "work product," thereby exempting them from disclosure to plaintiffs' counsel who have not signed onto the common benefit order as contained in Second Amended CMO 9 (Doc. No. 50).

It is the opinion of this Court that, "proprietary attorney work product" of the PSC shall not include depositions taken in these MDL proceedings, transcripts and videotapes thereof and/or exhibits thereto, and shall not include any documents produced in the Ortho Evra litigation by any party or by any non-party pursuant to any Notice or Subpoena or request for production of documents served in these MDL proceedings. *See In re Rezulin Products Liability Litigation*, Case No. 00 Civ. 2843, MDL-1348, Doc. No. 145 (S.D.N.Y. 2001).

Additionally, with regard to any protected documents used at the aforementioned depositions, unless counsel requesting such production has signed the Stipulated Protective Order incorporated into CMO 12 (Doc. No. 73), or a reasonable variation thereof, those documents shall not be produced.

IT IS SO ORDERED.

S/ David A. Katz  
DAVID A. KATZ  
U. S. DISTRICT JUDGE

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**PROOF OF SERVICE**

*In re: Ortho Evra® Litigation, JCCP No. 4506*

I, **Cynthia M. Harris** declare as follows:

I am employed with the law firm of Tucker Ellis & West LLP, whose address is 515 South Flower Street, 42<sup>nd</sup> Floor, Los Angeles, California 90071. I am over the age of eighteen years, and am not a party to the within action.

On August 30, 2007, I served the following: **NOTICE OF CASE MANAGEMENT ORDER NO. 21 BY JUDGE DAVID A. KATZ FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO DATED AUGUST 30, 2007** on the interested parties in this action by:

**U. S. MAIL:** I placed a copy in a separate envelope, with postage fully prepaid, for each address named on the attached service list for collection and mailing on the below indicated day following the ordinary business practices at Tucker Ellis & West LLP. I certify I am familiar with the ordinary business practices of my place of employment with regard to collection for mailing with the United States Postal Service. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit or mailing affidavit.

**OVERNIGHT MAIL:** I sent a copy via overnight mail, Airbill  
No. \_\_\_\_\_.

**OVERNIGHT COURIER SERVICE:** I placed a copy in a separate envelope addressed to each addressee as indicated below, and caused such envelope(s) to be delivered via \_\_\_\_\_.

**HAND DELIVERY:** I placed a copy in a separate envelope addressed to each addressee as indicated below, and delivered it to \_\_\_\_\_ for personal service.

**FACSIMILE:** I sent a copy via facsimile transmission to the telefax number(s) indicated below. The facsimile machine I used complied with California Rules of Court, Rule 2003 and no error was reported by machine. Pursuant to California Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

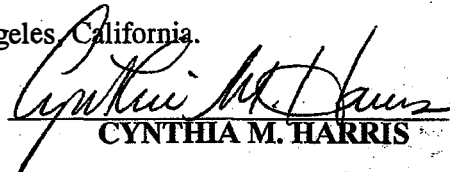
  X   **CASE HOME PAGE:** By submitting an electronic version of the above-referenced documents via file transfer protocol to the CaseHomePage.

**SEE ATTACHED SERVICE LIST**

  X   **(STATE):** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

**(FEDERAL):** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on August 30, 2007 at Los Angeles, California.

  
**CYNTHIA M. HARRIS**

1 **SERVICE LIST**

2 Chair, Judicial Council of California  
 3 Administrative Office of the Courts  
 4 Attn: Appellate & Trial Court Judicial Services  
 (Civil Case Coordination)  
 455 Golden Gate Avenue  
 5 San Francisco, CA 94102-3668  
 Telephone: 415.865.4200  
 6 Tel: (415) 865-4200

7 Steve Skikos  
 8 Lopez Hodes Restaino Milman & Skikos  
 625 Market Street, 11<sup>th</sup> Floor  
 9 San Francisco, CA 94105  
 Tel: (415) 956-5257  
 10 Fax: (415) 956-4416

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 LIZ ABLIN, et al. (LASC BC365729)

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 15 Fax: (949) 640-8294

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 17 Gianni & Petoyan  
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 No. GIC880407)

*Counsel for Plaintiff*  
 JEAN TAYLOR-RODRIGUEZ 9Stanislaus  
 Co. Sup. Ct. Case No. 613038)

24 Shawn Khorrami, Esq.  
 25 Sonia Tandon, Esq.  
 Law Offices of Shawn Khorrami  
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 26 Los Angeles, CA 90071  
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 27 Fax: (213) 596-6010

*Co-counsel for Plaintiff*  
 SARA BARNES, et al. (LASC BC366176)



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 2 Richard Kellner, Esq.  
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 4 Los Angeles, CA 90017  
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 5 Fax: (213) 217-5010

*Co-counsel for Plaintiff*  
 SARA BARNES, et al. (LASC BC366176)

6

Peter W. Burg, Esq.  
 Burg Simpson Eldredge Hersh & Ardine, P.C.  
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 Englewood, CO 80  
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