

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

**WESTERN DIVISION**

<b>In re:</b>	§	<b>MDL Docket No. 4:03-CV-1507-BRW</b>
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	§	
<b>PREMPRO PRODUCTS LIABILITY</b>	§	<b>ALL CASES</b>
<b>LITIGATION</b>	§	
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**MEMORANDUM IN SUPPORT OF**

**THE CBFC’S UNANIMOUS MOTION FOR PERCENTAGE ALLOCATION OF  
COMMON BENEFIT FUND AND FOR SECOND DISBURSEMENT OF FUNDS**

The Common Benefit Fee Committee (“CBFC”) unanimously asks the Court to adopt the recommendation for disbursement of common benefit fees identified in this memorandum. The CBFC’s original recommendation for fee allocation was supported by 32 firms and opposed by two.<sup>1</sup> The CBFC and the two objectors had an extensive mediation overseen by the Honorable James M. Rosenbaum and resolved their dispute.<sup>2</sup> The CBFC therefore asks the Court to implement the following recommendation that reconciles the original recommendation with the resolution of objections and is based on the amount of money presently available for distribution.

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<sup>1</sup> See, generally, Document Nos. 3237 (Nov. 6, 2013), 3250-53 (Nov. 22, 2013), 3259-60 (Dec. 9, 2013).

<sup>2</sup> The settlement agreement is attached as Exhibit 1.

The CBFC unanimously moves the Court to adopt, as attorney's fees for common benefit work, the percentage allocations of the Common Benefit Fund ("Fund") identified in Column 2 of Appendix A,<sup>3</sup> and to order the Trustee to make the payments identified on the first page of Appendix C. The percentages to each firm (Appendix A) and corresponding distribution amounts (Appendix C) reflect the settlement reached with Littlepage Booth ("Littlepage") and Wetherall Group, Ltd. ("Wetherall"),<sup>4</sup> the two law firms objecting to the CBFC's original recommendation.<sup>5</sup> It also reflects the total amount of the Fund now available for distribution of \$62,300,000.<sup>6</sup>

The recommended percentages for each firm are adjusted from the amounts that appear in the CBFC's prior recommendation to account for three events. First, the Honorable James M. Rosenbaum mediated a settlement among the CBFC and the objectors (Littlepage and Wetherall). Since the settlement amounts agreed to by the parties for Littlepage and Wetherall

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<sup>3</sup> The "Common Benefit Fund" or "Fund" is referred to as the "MDL 1507 Fee and Cost Trust Account" in Practice and Procedure Order No. 5 (Document No. 570, Mar. 30, 2005). The percentages identified in column 2 of Appendix A are subject to the limitations in Appendix B, as explained in detail below.

<sup>4</sup> Ex. 1. Littlepage Booth consists of all individual firms in which Zoe Littlepage and Rainey Booth are attorneys in light of the order denying their motion to be awarded separate fee allocations. *See* Order, Document No. 3286 (June 11, 2014).

<sup>5</sup> The original recommendation is embodied in Common Benefit Fee Committee's Recommendation for Fee and Expense Allocation, Document No. 3237 (Nov. 6, 2013) (hereafter "Orig. Rcmdtn."). That document and all supporting materials are fully incorporated herein by reference.

<sup>6</sup> This is the amount of the Fund minus the amount of the first distribution (for reimbursement of capital contributions and held expenses) presently being made and minus the amount of the Holdback Fund, as explained below. This amount is based on information obtained from the Trustee. To the extent the actual number available for disbursement is less than this amount, the difference necessary to reach \$62.3 million will come from the Holdback Fund. To the extent the actual number available for disbursement is more than this amount, the extra amount will remain in the Fund for future disbursements.

are greater than the amounts the CBFC had originally recommended for those firms, pursuant to the settlement agreement, every law firm submitting a fee petition, other than Littlepage, is to share in the adjustments to the objectors' allocations on a *pro rata* basis.<sup>7</sup>

Second, the Cory Watson firm, originally allocated 0.04 percent, withdrew its fee request. Thus, that firm's 0.04 percent was added to the amount available for allocation to all firms.

Third, an allocation to Ury Moskow of 0.35 percent had to be shared by all firms other than Littlepage. Due to miscommunication, this firm's submission was not timely evaluated by the committee. Judge Rosenbaum ultimately ruled that this allocation must be taken from the percentage allocations for all firms (other than Littlepage) rather than from the Holdback Fund (discussed below).<sup>8</sup>

In addition to the settlement agreements reached with Littlepage and Wetherall, the committee had previously worked out specific agreements with six firms that had lodged objections by email to the committee's initial proposed recommendation. Those specific agreements were incorporated into the CBFC's original recommendation to this Court. No firm objected to these specific agreements or the recommended allocations they yielded. The current recommendation is based on these arrangements and discussions with the firms involved.<sup>9</sup>

Column 2 of Appendix A (subject to the prescriptions of Appendix B) contains the new, adjusted allocation for each firm that the CBFC unanimously recommends be used in making the first distribution for fees. In particular, each firm's percentage allocation is the basis for the

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<sup>7</sup> Ex. 1 at ¶ 9. Wetherall's new allocation was likewise adjusted downward to account for the Littlepage allocation.

<sup>8</sup> E-Mail Order from Judge Rosenbaum (Apr. 11, 2014) (Ex. 2).

<sup>9</sup> There are five arrangements that involve compensation other than a straight percentage of available funds. These arrangements are identified in Appendix B to this memorandum and are incorporated fully herein by reference.

proposed distribution contained in Appendix C that the CBFC recommends the Court order at this time.<sup>10</sup> For future allocations, each firm other than certain ones identified in Appendix B will receive slightly higher allocations, specifically, those contained in column 3 of Appendix A. Thus, should this Court withdraw from the litigation, the new Court overseeing the proceedings will simply have to verify the amounts requested by the CBFC in future motions to ensure they reflect the appropriate percentages of the amount available for distribution.<sup>11</sup> No additional adjudication will be necessary.

The settlement agreement between the CBFC and objectors (as well as the CBFC's original recommendation to the Court) provides for a Holdback Fund of \$ 4,000,000.00.<sup>12</sup> The Holdback Fund is to pay any further fees of Judge Rosenbaum, to pay any other expenses associated with these proceedings, to reimburse the CBFC firms for their work and to make adjustments in firms' original fee allocations, as explained above. The adjustments in original fee allocations have reduced the Holdback Fund such that it is now at \$ 3,718,907.<sup>13</sup> The Trustee should release money from the Holdback Fund only when asked to do so by Ralph Cloar on

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<sup>10</sup> The money amounts in the first page of Appendix C – the amounts to be disbursed to all firms – are based on the two calculations revealed in the spreadsheet which follows within that appendix. Because each firm's percentage share was rounded off to three numbers to the right of the decimal point, the first calculation yielded a residual of \$1,246.00. The second calculation allocated this residual among all firms. The two sets of calculations were added to yield the total to be paid to each firm. The second residual of \$5.75 will simply remain in the Fund for future distribution.

<sup>11</sup> The percentage shares for future distributions are those identified in column 3 of Appendix A. Each participating firm has a slightly higher percentage than it had for the first distribution because three firms identified in Appendix B will not share in future distributions unless and until approximately \$15 million in new money is deposited into the Fund. In the unlikely event that occurs, the CBFC will file the appropriate motion to adjust the percentages.

<sup>12</sup> Ex. 1 at ¶ 10; Orig. Rcmdtn. at 23-24.

<sup>13</sup> As explained in Appendix B, the negotiated agreements with five firms required a \$281,093 pay-out from the Holdback Fund.

behalf of the CBFC (unless otherwise ordered by the Court), within these three constraints prescribed by the settlement agreement:

- (a) The Littlepage Booth Entities are capped at \$100,000 of reimbursement of fees and/or expenses incurred since January 1, 2013;
- (b) Other CBFC members must secure the approval of the Honorable James M. Rosenbaum before submission of any request for reimbursement of fees and/or expenses incurred since the start of 2013 that exceeds \$150,000.
- (c) Only CBFC members and their law firms will be entitled to reimbursement for fees and expenses associated with the resolution of this matter and CBFC work.<sup>14</sup>

Until the Trustee receives a request for disbursement from the Holdback Fund specifically, the Trustee should set aside \$ 3,718,907 for the Holdback Fund and make disbursements to each firm based on the remainder of the Common Benefit Fund.<sup>15</sup> When all work is completed and Judge Rosenbaum's services are no longer needed, the residual of the Holdback Fund will be returned to the Common Benefit Fund for distribution to all firms according to their percentages. This will be the subject of a future CBFC motion.

The Court has already ordered one disbursement from the Common Benefit Fund to reimburse firms for capital contributions and held expenses. This next disbursement should consist of the remainder of the Common Benefit Fund minus the Holdback Fund, as specified in Appendix C. The CBFC will move for additional disbursements at later times, as additional funds are deposited into the Common Benefit Fund and when it is time to disburse the residual of the Holdback Fund.

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<sup>14</sup> Settlement Agreement, Ex. 1 at ¶ 10.

<sup>15</sup> However, to the extent more funds are needed to make the distribution identified in Appendix C, those funds will come from the Holdback Fund.

The CBFC does not anticipate any objections to this recommendation. But it is possible a firm may object to the *pro rata* reduction needed to pay the objectors.<sup>16</sup> If any objection is filed, the CBFC will respond. In addition to electronically filing and thus serving this motion and memorandum, the CBFC has e-mailed a copy of both to each applicant firm responsible for handling this matter. In an accompanying e-mail letter, the CBFC has notified such firms that if they object to their allocations, they must respond to this motion in the time frame provided by Local Rule 7.2 of 17 days (14 days for a response plus the three days allowed by the mail rule). The CBFC has thus notified counsel that the motion will be ripe for a ruling by the Court on July 31, 2014.

For the foregoing reasons, the CBFC respectfully requests that the Court:

- (a) adopt the percentage allocations for common benefit attorney's fees for all applicant firms as identified in Column 2 of Appendix A for the first distribution of fees (second distribution of the Common Benefit Fund), subject to the limitations in Appendix B;
- (b) order the Trustee to disburse all funds in MDL 1507 Fee and Cost Trust Account (with the exception of the Holdback Fund described in subsection (c)) to the firms identified, and in the amounts provided, on the first page of Appendix C (using the firm names and addresses used in the Trustee's previous distribution from this account);
- (c) after disbursement, order the Trustee to set aside \$ 3,718,907.00 of the Fund (or the residual of the Fund after the disbursements in subsection (b) if the residual is less than \$3,718,907.00) into a "Holdback Fund" to be distributed only as described in subsection (d) unless and until ordered otherwise by the Court;
- (d) order the Trustee to make disbursements from the Holdback Fund solely as directed by Ralph Cloar acting on behalf of the CBFC, so long as: (i) The Littlepage Booth Entities are capped at \$100,000 of reimbursement of fees and/or expenses incurred since January 1, 2013; (ii) Other CBFC members must secure the approval of the Honorable James M. Rosenbaum before submission of any request for reimbursement of fees and/or expenses incurred since the start of 2013 that exceeds \$150,000; (iii) Only

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<sup>16</sup> Immediately after the settlement agreement was consummated, the CBFC notified each firm that its allocation would be reduced *pro rata* to accommodate the settlement with objectors.

CBFC members and their law firms will be entitled to reimbursement for fees and expenses associated with the resolution of this matter and CBFC work;

- (e) order the Trustee to disclose the amount and source of any future deposits to MDL 1507 Fee and Cost Trust Account to Ralph Cloar within 10 days of any such deposit;
- (f) grant the Common Benefit Fee Committee and any firm applying for common benefit fees all further relief to which they are entitled.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on this 14th day of July 2014, a true and correct copy of the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system, which forwarded a true and correct copy by e-mail to the following parties:

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