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

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

**ERIK WALKER'S SUBMISSION RE:**
**COURT'S INQUIRY ON COMMON BENEFIT FEE ALLOCATION**

My firm has reached an agreement with the majority of the CBFC (a 6-1 vote) for a supplemental payment from the Holdback Fund. I believe this payment will address the concern the Court expressed in its July 17, 2014 order. This agreement will also allow the Court to pay all applicant firms in the totals contained on Appendix C of the CBFC submission. Checks to all firms should be sent on August 1, 2014, barring any objections (none of which have been filed to date). The fee committee, Littlepage included, is unanimous that everyone should be promptly paid.

After, or simultaneously with, distributing the amounts identified in Appendix C to all firms, the Court should order an additional payment from the Holdback Fund that six of seven members of the CBFC have agreed to pay my firm in the amount of $ 2 million.[1]

[1] .The vote on this matter was 6-1 with Littlepage dissenting. The Court should give other firms notice to object to this additional allocation given that every firm has an interest in the residual of the Holdback Fund.

Contrary to Ms. Littlepage's claim otherwise, Judge Rosenbaum did not limit the use of the Holdback Fund. He ruled that one error in calculation, known to the parties before the CBFC moved for allocation, should not be corrected with Holdback Fund money. But he did not purport to limit future use of the Holdback Fund (which is undoubtedly why Littlepage failed to attach any order or cite any ruling in support of her claim otherwise.) In fact, by the express

I am authorized to represent that these are the CBFC's recommendations as well.[2] There are 32 firms that have applied for common benefit fees and the CBFC has recommended percentage allocations for these firms. Those allocations are reasonable and appropriate and are agreed to by everyone, including Littlepage and me. The Court should thus order the payments on Appendix C as soon as the deadline for objections (July 31, 2014) has passed. The money at issue belongs to all the other firms, including mine, since the amount my firm has already been allocated is not contested. And after adequate notice and time for objections, the Court should supplement my firm's payment with $2 million from the Holdback Fund. The remainder of the Holdback Fund will be just under $2 million.

**Should Erik Walker's work be subject to a multiplier?**

The term "multiplier" has a unique meaning in these matters. The CBFC's allocation of funds was not based on a mathematical formula (e.g., hours x hourly fee x multiplier). Rather, the committee took into account a variety of factors beyond hours worked in making its allocation. I do not take issue with the CBFC's process. However, regardless of the methodology, one can always look to see what "premium" on hours worked an individual is receiving.

The Court's comments and corresponding inquiry about multipliers are nonetheless astute and frankly a bit eerie given that I was promised precisely what the Court has indicated. Yet, my premium in the Common Benefit Fee Committee ("CBFC") recommendation was actually lower

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terms of the Settlement Agreement signed after Judge Rosenbaum's mediation, the fundamental use of the Holdback Fund is "to correct any errors made by the committee in its proposed awards of fees and expenses." (Document No. 3288, Ex. 1 at ¶ 10)

[2] That is, the CBFC recommends immediate payment on or around August 1, 2014 to all firms and recommends the additional $2 million allocation to my firm. The CBFC does not join in the rhetoric of this filing.

than Littlepage Booth's premium ("Littlepage") if you discount the hours that were in dispute. The difference was a premium on hours worked of 28.91 percent (a positive multiplier) versus a deficit for me of 34.2 percent (a negative multiplier). (Littlepage disputes the notion that any of its time should be discounted.)

Independent of whether my law firm is entitled to the same "multiplier" or "premium" as "lead counsel," I was promised exactly that in 2004 and multiple times thereafter. The Plaintiffs' Steering Committee ("PSC") began heaping briefing responsibilities upon me early in the litigation. When I initially expressed reservations about taking on such an active role because my firm's involvement in the litigation had not yet become substantial, "lead counsel" assured me that the PSC would recommend that I receive the highest multiplier when fee applications were ultimately made to the Court.

The PSC made a similar representation before the *Reeves* trial, the first case tried to this Court. The Court may recall that plaintiff counsel in that trial other than me were from the firms managed by Zoe Littlepage, Mike Williams and Jim Morris, all current or former PSC members (with Littlepage and Williams also being CBFC members). Littlepage, Williams and Morris split the fee interest in the *Reeves* case among their firms. I was offered no fee interest of any kind, contingent or hourly. But I participated in the trial from beginning to end. In fact, I arrived in Little Rock six weeks before trial and handled briefing and argument before, during and after trial. In lieu of a fee interest (which "lead counsel" indicated had been already been "chopped up" too much to accommodate anyone else), Littlepage again reassured me that I was due "the highest multiplier" when the litigation ended.

In fact, I was told that the highest multiplier at the end would be my compensation for work on nearly all the early bellwether trials. No fee interest. Sometimes, not even

reimbursement of expenses. But a promise of the maximum at the end. Simultaneously with the *Reeves* trial, the *Nelson* case was tried in Philadelphia. I handled much of the pretrial briefing and pretrial argument to the judge in that case. In fact, I flew to Philadelphia to argue motions before both the first and second phases of trial. The firms of the two attorneys in charge split the contingent fee interest. I had no hourly or contingent fee interest in the case. The same situation occurred in other early bellwether trials, including *Rush* (the second MDL case tried), *Simon* (Philly) and *Coleman* (Philly).[3]

All the while, I was performing nearly all the briefing on substantive issues in the MDL proceedings. And beginning in early 2006, I handled the bulk of oral argument on key issues. The PSC originally asked me to co-chair the Law & Briefing Subcommittee with CBFC member, Irwin Levin. In 2004, the subcommittee had two dozen members from firms around the country. By the time the bellwether trial process began less than two years later, I represented most of the efforts of the subcommittee, with occasional, though important, assistance from other firms on the PSC. I attended and argued the key substantive issues at almost every MDL hearing from the time the personal injury lawyers joined the litigation in December, 2003 until the time my firm settled its cases at the end of Spring, 2012. I missed only three status conferences in nine years. I handled almost every negotiation with defense lead counsel. I handled all appeals of

[3] For several Philly cases, I drafted the motion for reconsideration of a summary judgment on the defendants' limitations defense that served as the basis for the appellate brief on the same issue in all these cases and in *Coleman*. The appellate lawyer received a fee for his work; I did not. (I do not represent that I was alone in this effort, as other Philadelphia firms contributed to the *Coleman* effort.)

MDL orders to the Eighth Circuit.[4] I acknowledge, however, that I never officially held the title of lead counsel.[5]

I also acknowledge that I voted for the allocation of fees at issue. However, the vote was a blind one, with the majority of the CBFC, myself included, agreeing to accept the average of the votes of committee members *with the high and low votes for each firm dropped*. I voted for a 20 percent allocation to my law firm. Frankly, I thought (and still think) that would be a conservative allocation. It reflected the fact that many firms had applied for fees. In the end, the CBFC voted to award my firm less than 14 percent (13.551 percent). That allocation was reduced to approximately 11 percent after the settlement with Littlepage Booth (11.433 percent).

In the end, the determination of how to allocate fees rests solely with this Court. The CBFC can only make recommendations. Any agreements plaintiff lawyers reach among themselves are nothing more than suggestions to the Court. Indeed, the settlement agreement with the objectors states that it contains only "recommendations" that are "subject to the Court's approval."[6] The responsibility for allocation always rests with the Court, subject only to the

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[4] While I also handled the *Scroggin* trial appeal and *Kuhn/Davidson* short-term use appeals to the Eighth Circuit, there were case-specific orders I did not handle, including the appeal of the *Rush* judgment.

[5] Any suggestion that Littlepage Booth had many personnel working on hormone therapy and Hissey Kientz had only Erik Walker is not just irrelevant, it is false. The other attorneys employed by Hissey Kientz who worked on hormone therapy, including doing common benefit work, were Troy Chandler (partner), Steve Faries (former Jim Morris associate), Chris Nichols (former Littlepage associate), Christopher Paris (former Littlepage associate), Shamus Mulderig, David Friend and Carlos Rodriguez. Support staff employees dedicated to hormone therapy, including doing common benefit work, included Ann Erickson, Amanda Gonzales, Cheri Ferguson, Tina Hardin, Tricia Long and Jane Lewis.

[6] Settlement Agreement, Memorandum in Support of CBFC's Motion for Percentage Allocation of Common Benefit Fund and for Second Disbursement of Funds, Document 3288, Ex. 1, at ¶ 4.

requirement that the Court's decisions be based on the contributions counsel made to the litigation.[7]

But for now, the Court should do that which will benefit all other firms and is not contested. I urge the Court to order the Trustee to distribute the funds identified on Appendix C of the CBFC's original filing on this matter to all firms, assuming no one objects by July 31, 2014. No one on the CBFC, including Littlepage, is opposed to this action. To my knowledge, there will be no objectors. Second, I urge the Court to accept the CBFC's recommendation (notwithstanding Littlepage's lone dissenting vote) to award my firm $2 million from the Holdback Fund. The Court should provide an opportunity for other firms to object to that, if they choose. Finally, I request all other relief to which my law firm and any other firm applying for fees is entitled.

DATED this 23rd day of July, 2014.

Respectfully submitted,

**HISSEY KIENTZ, L.L.P.**
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[7] *See, e.g., In re Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 229 (5th Cir. 2008) (the district court "failed to fulfill its further duty to monitor legal fees by its perfunctory approval of the allocation determined by the Fee Committee."); *In re World Trade Ctr. Disaster Site Litig.*, No. 11-4021-CV (L), 2014 WL 2565821, at *9 (2d Cir. June 9, 2014) ("[C]ourts may review a fee arrangement for reasonableness even if it has not been challenged by the parties.").

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd 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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