IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re: Ortho Evra ® Products Liability Litigation	)	MDL Docket No. 1742
	)	
	)	N.D. Ohio Case No. 1:06-CV-40000
	)	JUDGE DAVID A. KATZ
	)	
	)	
This Document Applies to All Cases	)	
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	)	

BRIEF OF DEFENDANTS IN OPPOSITION TO MOTION OF PLAINTIFFS' EXECUTIVE COMMITTEE FOR THIRD AMENDMENT TO CASE MANAGEMENT ORDER NO. 9

Defendants oppose the Motion filed by Plaintiffs' Executive Committee to increase the Common Benefit Fund assessment from the 3%/5% set forth in the Second Amended Case Management Order No. 9 to an 8% assessment on any cases resolved subsequent to February 1, 2009.

At the very first MDL Hearing in May 2006, which followed more than a year of state court discovery preceding the MDL (completed depositions and the production of millions of pages of documents), defendants stated their willingness to evaluate individual cases for early resolution if they alleged venous or arterial clotting events occurring before the November 2005 label change. Some lawyers took advantage of this offer of early resolution by submitting plaintiffs' medical records for review; others did not. Some of the Plaintiffs' Executive

Committee opted to conduct a year and a half of "corporate" discovery until further involvement by the Court in April 2008 helped to prompt the individual case resolution process.

Over the past 7 months, this individual case resolution process has accomplished what the Court intended the parties to accomplish -- the settlement of cases, or dismissal of non-meritorious cases, filed in the MDL as well as in New Jersey and California and other state courts. As of December 2008, approximately 85% of **all** filed cases in the MDL and state courts have been settled, or dismissed as non-meritorious, or have been evaluated as non-meritorious and are awaiting dismissal (this 85% includes cases where dismissals of non-meritorious cases have been promised but have not yet been filed in the MDL, New Jersey and California). To date, approximately one-third of the cases have been dismissed voluntarily as non-meritorious after review. Approximately one-half of the remaining cases allege events which are "post-November 2005 label change." **All** of the remaining "pre-label change" filed cases are currently the subject of ongoing evaluation and either negotiation or requests for dismissal as non-meritorious.

A significant percentage of the settled cases in the MDL and New Jersey were filed by the MDL's Plaintiffs' Executive Committee who have paid the 3% assessment. Quite simply, defendants oppose their Motion to now increase the assessment to 8% out of fairness to those plaintiffs who, through no fault of their own, remain in the settlement queue and have not yet resolved their cases. It strikes defendants as neither fair nor consistent with the resolution process begun in 2006 when the 3% assessment was established that the remaining plaintiffs should have to pay an 8% assessment when the plaintiffs (and their lawyers) at the front of the

line paid only the 3% assessment set forth in the Second Amended Case Management Order No. 9.

Moreover, there has been no showing that the 3% assessment fund set aside under the Second Amended Case Management Order No. 9 is insufficient 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." (Second Amended Case Management Order No. 9, p. 1.)[1] Unlike many other MDL's where the lawyers in the MDL leadership do not have their own filed cases and need to look to the Common Benefit assessment to be compensated for their legal services, the members of the Plaintiffs' Executive Committee in this litigation had the largest number of filed cases -- and have resolved the largest number of cases -- for which they have received payment under contingent fee contracts. In short, at this point the Plaintiffs' Executive Committee has not met its burden to establish a factual basis to support an increase in the common benefit assessment to 8%. *See generally*, Manual for Complex Litigation, Fourth, § 14.223

Finally, defendants believe that Plaintiffs' Executive Committee request that this Court set an arbitrary date of February 1, 2009 as a "deadline" for resolution, after which the assessment will increase to 8%, will have the unintended consequence of chilling resolution, not promoting it. Defendants submit that if the Court is inclined to set such a resolution "deadline," that the date should be 60 days after the Supreme Court's decision in *Levine v. Wyeth*. Setting such a date in conjunction with the Supreme Court's resolution of *Levine v. Wyeth* will permit all

[1] Defendants will provide the Court, for its in camera review, with a copy of the year-end financial statement reflecting the amount on deposit in the Ortho Evra Common Benefit Fund when received from the court-appointed accountant.

parties to better inform themselves on the legal analysis that this and other courts will bring to both "pre-label" and "post-label" change cases.

Respectfully submitted,

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Dated: January 5, 2009

CERTIFICATE OF SERVICE

The foregoing ***Brief of Defendants in Opposition to Motion of Plaintiffs' Executive Committee for Third Amendment to Case Management Order No. 9*** was electronically filed with the Court this 5th day of January, 2009.

/s/ Robert C. Tucker
One of the Attorneys for Defendants
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