

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

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IN RE: YASMIN AND YAZ)	MDL Docket No. 3:09-md-02100-DRH-
(DROSPIRENONE)MARKETING,)	PMF
SALES PRACTICES AND)	
RELEVANT PRODUCTS)	
LIABILITY LITIGATION)	HONORABLE DAVID R. HERNDON
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This Document Relates to:
ALL CASES

THE PLAINTIFFS’ STEERING COMMITTEE’S MOTION TO MODIFY CMO 14

The PSC is requesting that the Court modify CMO 14 for the arterial thrombosis injury (“ATE”) cases by increasing the attorney’s fee holdback. CMO 14 reserved the right for the PSC to seek such a modification. This motion has been unanimously been approved by the PSC. In addition, we have conferred with state court liaison counsel from Pennsylvania, New Jersey and California, and they have no objection to this motion. As such, the PSC submits that the increase for attorneys’ fee holdback under CMO 14 is appropriate for the reasons set-forth in this motion.

I. Introduction

As this Court is well-aware, MDL-2100, commenced by transfer of the Judicial Panel on Multi District Litigation ("JPML") to this Court by order dated October 1, 2009. Since that time, the PSC engaged in 26 months of intense discovery, including over 90 million pages of documents produced, well over 150 depositions taken by the parties, expert reports, expert discovery, *Daubert* motions (and rulings on the same), summary judgment motions (and rulings on the same), Bellwether trial preparations, motions *in limine* (including oral argument and

rulings on the same), and just days before the first MDL trial was set to commence, the parties agreed (with the Court's assistance) that settlement options should be pursued. (*See* CMOs 53 and 54).

Since January 2012, Bayer has resolved approximately 8,000 venous thromboembolism (“VTE”) injury cases and there remains between 1,000 and 2,000 VTE cases for which settlement negotiations are still ongoing. In addition, the PSC, along with the cooperating state court leadership, were able to reach a global settlement with Bayer with respect to over 8,000 plaintiffs claiming gallbladder injury as a result of their Yasmin/Yaz/Ocella use. (*See* CMOs 59, 60, 61). Unfortunately, after extended discussions which included the help of the Special Master, the parties have not been able to come to any resolution regarding the ATE injury cases and therefore the cases must be prepared for trial.

As noted above, while a massive and substantial amount of general discovery work has already taken place to advance the VTE cases, there is still significant work needed to prepare the approximately 1,000 to 1,200 ATE cases – both general discovery against Bayer and, of course, case-specific work when the parties get to the stage of selecting bellwether cases.

To this end, the PSC respectfully submits that it is prudent at this time to amend CMO 14 to modify the holdback for common benefit attorneys’ fee for ATE cases from a 4% (early participation) and 8% (late participation) holdback on the Gross Recovery Amount to a 9% holdback on the Gross Recovery Amount for all ATE cases (and only ATE cases) – VTE cases that should resolve in the future will still be subject to the original amount identified in CMO 14 of 4% for early participation and 8% for late participation. The instant motion applies only to the attorneys’ fee piece of the holdback – the cost piece (2%) should remain unchanged.

Given the amount of substantial and necessary work performed to date, and the significant additional work that will be required to litigate the ATE cases to conclusion, coupled with the relatively small number of ATE cases (it is currently estimated that there are approximately 1,000 to 1,200 ATE cases) and Bayer's indication of its plans to not settle the ATE cases, the PSC anticipates that the original holdback amounts will be insufficient to provide for the fair and equitable sharing among the Plaintiffs of the costs of services performed by attorneys acting for MDL administration and common benefit of all Plaintiffs.

The PSC believes there will be a tremendous amount of work needed to bring the ATE cases through generic discovery work-up, expert work-up, a Bellwether process, and whatever additional work will be necessary to conclude this litigation. The PSC therefore requests a holdback of 9% for common benefit attorneys' fees on Gross Recovery Amounts only on all ATE cases, which will be subject to later requests for common benefit attorney fee awards made according to the procedure provided in CMO 14.

CMO 14 specifically addresses the possibility of modifying the holdback amount and establishes a procedure for doing so (*See* CMO 14, page 6). Per the requirements of CMO 14, the entire PSC has been consulted, given an opportunity to be heard, and has voted *unanimously* to approve this proposed amendment to the common benefit attorney fees for the ATE cases only. The PSC has also consulted the state court appointed liaisons for the three of the consolidated state court venues (Pennsylvania, New Jersey and California) with which the PSC has been cooperating; those state court jurisdictions have no objection to this amendment to CMO 14.

II. The Additional Work that is Required to Litigate the ATE Cases Justifies an Increased Holdback for Common Benefit Attorney Fees.

Given the significant amount of time and effort already committed to this litigation, and the extraordinary amount of discovery, pretrial, and trial work anticipated in order to litigate the

ATE cases, the PSC's is concerned that a 4% holdback will not be adequate to compensate the attorneys who have committed to vigorously prosecute the ATE cases (especially in light of the relatively small number of ATE cases). Accordingly, the PSC believes that a 9% attorneys' fee holdback is necessary to ensure fair compensation for common benefit attorneys' fees incurred to date and going forward to prosecute the ATE cases in like manner as was performed with the VTE cases. The PSC anticipates completion of discovery, disclosure of experts, bellwether trials as well as trial remand packages will be prepared and accessible to all participating plaintiffs' counsel.

III. The Court has the Authority to Modify the Holdback and a 9% Holdback for ATE Cases is in Line with Assessments in Other MDLs.

The Court derives the authority to modify the holdback amounts from the contractual agreement and substantial judicial precedent that supported by the principles of equity, quantum merit and the Court's inherent managerial authority. *See In re Vioxx Products Liab. Litig.*, 760 F. Supp. 2d 640, 649 (E.D. La. 2010).¹ The terms of the Participation Agreement specify the assessment amounts to be withheld from the Gross Recovery Amount and grant this Court the authority to effectuate these holdbacks (*See* Participation Agreement, Exhibit A to CMO 14 at p.4-5). Furthermore, the Court explicitly provided a mechanism for modifying the holdback for common benefit attorney fees in CMO 14. In addition, the PSC's requested increase, to a 9%

¹ In the *In re Vioxx Products Liability Litigation*, the court cited the *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*, and noted "the Court's equitable and managerial authority and duty to award fair common benefit fees or to adjust contingent fees" that existed independent of any contractual agreement. *In re Vioxx Products Liab. Litig.*, 760 F. Supp. 2d 640, 649 n. 15 (E.D. La. 2010).

assessment holdback for attorneys' fees: (a) has been voted on and unanimously approved by the PSC; and (b) is well in line with previous MDL assessments.²

Courts have previously modified the assessment in other MDL litigations, raising the assessment for common benefit attorney fees in the *Ortho Evra* litigation from 1.5% or 3% (depending on the time period in which the assessment was agreed to) to 4% or 6%, respectively. *See In re Ortho Evra Products Liability Litigation*, MDL No. 1742, Third Amended Case Management Order No. 9 (Amending Second Amended CMO No.9 and CMO No. 9A Regarding Common Benefit Fees and Expenses) (N.D.Ohio July, 23, 2009). The Court in the *Vioxx* litigation similarly increased the assessment, granting a 6.5% fee award. *In re Vioxx Products Liab. Litig.*, 760 F. Supp. 2d 640, 662 (E.D. La. 2010). In *In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation*, the Court allowed the assessment for common benefit attorney fees to be increased from 2% to between 8% and 10%. *In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation*, MDL No. 1699, Pretrial Order No. 8A: Amendment to Order Establishing Common Benefit Fund (N.D.Cal. July 7, 2008). More recently, on March 3, 2014 in the MDL court in the 8,000 plus plaintiff MDL involving the DePuy ASR metal-on-metal hip system, an order was entered raising the common benefit attorneys' fees holdback from 3% to 5% upon the announcement of a global settlement.

The 9% holdback for common benefit attorney fees requested here falls at the average range of fee awards granted in other MDLs, which generally range from 5% to 12%. *See In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1011 (5th Cir. 1977) (8% assessment); *In re MGM Grand Hotel Fire Litig.*, 660 F. Supp. 522, 529 (D. Nev. 1987) (increased to 7% assessment from 5%); *In re Orthopedic Bone Screw Products Liab.*

² As noted herein, the state court liaisons for Pennsylvania, New Jersey, and California were also consulted and they had no objection to this motion.

Litig., MDL 1014, 1996 WL 900349 at *4 (E.D. Pa. June 17, 1996) (12% fee assessment); *In re Diet Drugs*, 553 F. Supp. 2d. 442,485 (E.D.Pa 2008) (6.75% fee award); *In re Protegen Sling and Vesica System Prods. Liab. Litig.*, MDL 1387, 2002 WL 31834446 at *1, 3 (D. MD. 2002) (9%/6% assessment); *In re Fosamax Prods. Liab. Litig.*, MDL 1789, CMO 17 3(f)(3), (S.D.N.Y. Apr. 28, 2011(6% - 9% assessment); *In re St. Jude Med., Inc.*, MDL 1396, 2002 WL1774232, at *2 (D. Minn. Aug. 1, 2002) (6% assessment); *In re Baycol Prods. Litig.*, MDL 1431, 2002 WL 32155266, at *4 (D. Minn. June 14, 2002) (6% assessment); *In re NuvaRing® Products Liab. Litig.*, MDL 1964, Amended CMO 3, Dec. 9, 2011 (E.D.M.O.)(11% assessment). *In re Kugel Mesh Hernia Patch Litig.*, MDL 1842, Amended PPO 22 1(C), (D.R.I. May 21, 2012) (12% assessment). In addition, the extensive additional work that will be necessary to complete the work on the ATE cases supports an increase in the common benefit assessment in this case.

IV. Conclusion

The PSC has satisfied the requirements of CMO14 for requesting modification of the common benefit attorney fee holdback assessment, both by obtaining unanimous consent by the PSC and with consent of the state court jurisdictions, as well as setting forth the reasons supporting an increase in the assessment for the ATE cases. This Court has the authority to modify its previous order and allow a 9% holdback which is in line with similar MDLs and appropriate and warranted here given the work and commitment that lies ahead of the PSC. As such, the PSC unanimously and respectfully requests that the Court modify the common benefit attorney fee holdback for ATE cases to a 9% holdback for common benefit attorneys' fees on the Gross Recovery Amount to be applied only to ATE cases, leaving the common benefit costs at its current holdback rate of 2% and leaving the common benefit holdback on any future resolved VTE cases at their current rates.

Dated: April 23, 2014

Respectfully submitted,

PLAINTIFFS' STEERING COMMITTEE

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the Clerk of Court using the CM/ECF system and served on all counsel of record electronically as a result thereof on this 23rd Day of April, 2014.

/s/ Roger S. Denton_____