

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: TYLENOL (ACETAMINOPHEN)
MARKETING, SALES PRACTICES AND
PRODUCTS LIABILITY LITIGATION

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MDL NO. 2436

2:13-md-02436

HON. LAWRENCE F. STENGEL

JURY TRIAL DEMANDED

*THIS DOCUMENT RELATES TO:
ALL CASES*

ORDER GRANTING THE PSC’S MOTION TO MODIFY CMO 12 TO INCREASE
THE PERCENTAGE HOLDBACK TO BE PAID INTO THE
TYLENOL MDL 2436 COMMON BENEFIT ACCOUNT

AND NOW, TO WIT, THIS DAY OF , 2017, upon

consideration of the Motion of the Plaintiffs’ Steering Committee (“PSC”) to Modify CMO 12 to increase the percentage holdback to be paid into the Tylenol MDL 2436 Common Benefit Account, it is **HEREBY ORDERED AND DECREED** that said Motion is **GRANTED**, and the percentage holdback is provisionally **modified to be nineteen percent (19%) to be paid by the Johnson & Johnson (McNeil) Defendants (“Defendants”)** into the Tylenol MDL2436 Common Benefit Account at the time of funding of the Global Settlement between the PSC and Defendants. No disbursement from the MDL2436 Common Benefit Account shall be made without further Order of the Court authorizing the disbursement.

BY THE COURT:

HONORABLE LAWRENCE F. STENGEL

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

**IN RE: TYLENOL
(ACETAMINOPHEN)
MARKETING, SALES
PRACTICES AND PRODUCTS
LIABILITY LITIGATION**

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MDL NO. 2436

2:13-md-02436

HON. LAWRENCE F. STENGEL

JURY TRIAL DEMANDED

***THIS DOCUMENT RELATES TO:
ALL CASES***

**MOTION AND MEMORANDUM OF LAW OF THE PLAINTIFFS' STEERING
COMMITTEE TO MODIFY CMO 12 RELATING TO THE PERCENTAGE
HOLDBACK TO BE PAID INTO THE
TYLENOL MDL 2436 COMMON BENEFIT ACCOUNT**

I. INTRODUCTION

The Plaintiffs' Steering Committee ("PSC") respectfully moves the Court to modify CMO 12 by increasing the overall percentage assessment "holdback" for attorneys' fees and costs from ten percent (10%) to nineteen percent (19%). As the Court may recall, CMO 12 provisionally provides that of the present ten percent (10%) holdback, eight percent (8%) be allocated for attorneys' fees and two percent (2%) be allocated for costs. *See*, CMO 12 at ¶ 19 ("A total assessment of ten percent (10%) of the Gross Monetary Recovery (eight percent (8%) for common benefit attorneys' fees and two percent (2%) for costs) shall apply to all Covered Claims ("the Assessment"). CMO 12 also provides that "in the event of a global settlement (partial or full), or other settlement program with respect to MDL 2436 including a settlement program that also includes unfiled claims and/or cases filed in state court, such as a global private settlement program, a settlement class action or any other form of a global settlement, nothing in this Order

prohibits the PSC and Common-Benefit Attorneys to apply to this Court for attorneys' fees and reimbursement of expenses at a percentage that is different from (greater or lesser) than the Assessment percentage described herein and that the Court shall make a determination of the amount of fees and expenses to be awarded." CMO at ¶ 29.

A global private settlement¹ of the cases has been reached between the PSC and the Johnson & Johnson (McNeil) Defendants (the "Defendants"), subject to various conditions, one of which is that a specified percentage of cases/Claimants Opt-In to the settlement. Assuming the Opt-In percentage(s) are met (the opt-in percentage for the death and transplant cases is 95% while the opt-in percentage for the hospital cases is 85%) the settlement will then be funded by Defendants. The parties will not know if the settlement will be funded and that Defendants are not exercising their "walk-away" right until ten days (10) after the Opt-In deadline passes.

CMO 12 contemplates that the holdback Assessment shall be applied to the gross amount of the settlement. Upon information and belief, the PSC has determined that when the current ten percent (10%) total holdback percentage provided for by CMO 12 is applied to the gross amount of the settlement, without regard to how that holdback is allocated between common benefit costs and attorneys' fees, the MDL 2436 Common Benefit Account will not receive sufficient funds to reimburse the common benefit attorneys for the costs they have advanced to litigate the case. In other words, were the full ten percent (10%) holdback to be allocated solely to reimburse the costs

¹ The Settlement is governed by a confidentiality requirement that prevents the PSC from disclosing the aggregate amount of the settlement on the record. Similarly, the amount of costs and attorneys' time incurred by the PSC is confidential as to the Defendants, because disclosure of such information could reveal attorney work product. Since the Settlement is subject to a participation requirement and will not be funded until the "walk-away" period expires, the PSC requires that its costs and time information remain protected. In the future, in the event the Settlement is confirmed and funded, the PSC will file a formal petition for the release of the assessment fund where the information about the time and expenses in the case will be published. Accordingly, if the Court requires more information about the PSC's time and expenses now, prior to ruling on this Motion, the PSC respectfully requests that it be permitted to make an *in camera* submission under seal for the Court's review, only.

of the PSC with no portion allocated for common benefit attorneys' fees, the PSC will not be fully reimbursed their costs.

Thus, to be fair to the common benefit attorneys who advanced substantial amounts of money to litigate this case, the PSC requests an increase in the aggregate holdback percentage so that the common benefit costs advanced for this litigation can be fully reimbursed.

The precise amount of the costs advanced that qualify as common benefit costs that are eligible for reimbursement from the MDL 2436 Common Benefit Account will not be known until the Court appointed MDL2436 Administrator, Alan B. Winikur CPA, performs an audit pursuant to CMO 12 of all of the costs submitted, to determine which of the submitted costs qualify as common benefit costs and which do not. But, because the PSC funded virtually 100% of the costs of this litigation, and they know how much they funded in the aggregate, they are in a position to estimate at this time that the present ten percent (10%) holdback not only will not be sufficient to reimburse all of the costs incurred, but will be woefully insufficient, even before the formal audit to be performed by Mr. Winikur.

The reason the PSC requests this relief now, is so that an Order will be in place to govern how Defendants shall allocate the settlement funds when funding is to occur. Essentially, there will be two "buckets" to receive a share of the aggregate gross settlement amount. Aside from the MDL2436 Common Benefit Account that is to receive a share of the settlement funds, the Master Settlement Agreement also provides for the creation of a Qualified Settlement Fund² that will receive a portion of the aggregate settlement, which will be the source of the funds that will be available to pay to Claimants who are eligible and qualified to receive a settlement payment. The amount of money to be paid into the Qualified Settlement Fund depends on how much is first

² The PSC is filing a Motion for the creation of the Qualified Settlement Fund.

“taken off the top” from the aggregate settlement amount to be paid into the MDL2436 Common Benefit Account for common benefit expenses (and fees). The ratio of the allocation of the aggregate settlement fund in part to the Qualified Settlement Fund and in part to the MDL2436 Common Benefit Account should occur at the time that Defendants are to fund the settlement. A portion of Defendants’ payment will be paid into the Qualified Settlement Fund and a portion will be paid into the MDL 2436 Common Benefit Account.

Defendants should know how to allocate the aggregate settlement amount between the Qualified Settlement Fund and the MDL 2436 Common Benefit Account so that there will not be a need for an adjustment after the settlement is funded, particularly to account for a shortfall in the holdback payment into the MDL 2436 Common Benefit Account that the PSC knows will exist in light of the fact that when the present ten percent (10%) holdback is applied to the gross amount of the settlement, the amount of the holdback will not be sufficient to reimburse common benefit costs advanced. In the event the proposed revised holdback amount of nineteen percent (19%) creates a fund that is more than is necessary, or more than the Court determines to approve in ruling on the petition for an award from the MDL 2436 Common Benefit Account, any excess can be transferred to the Qualified Settlement Fund in order to provide a pro rata increase in the amounts to be paid to each Claimants. However, were an insufficient amount to be held back at the outset that is paid into the MDL2436 Common Benefit Account, it may be more difficult to transfer money from the Qualified Settlement Fund into the MDL2436 Common Benefit Account, as that would affect the estimates of the value of Claimants’ cases that might be calculated and could impact lien resolution.

Since the holdback payment into the MDL 2436 Common Benefit Account is a payment being made into escrow, to be held pending further Order of the Court, holding back the good faith

estimate of the amount needed to satisfy the costs incurred will protect the common benefit attorneys against there being insufficient funds in the MDL 2436 Common Benefit Account with which to reimburse their common benefit expenses.

Again, if this percent amount requested, nineteen percent (19%), is too large or an amount that ultimately the Court does not award, a refund or spillover into the Qualified Settlement Fund can occur for pro rata distribution to the Claimants.

II. THE PSC'S PROPOSAL FOR HOW THE ASSESSMENT PERCENTAGE SHOULD BE ALLOCATED TO CLIENTS BETWEEN COSTS AND FEES

With regard to the new proposed nineteen percent (19%) holdback, the PSC proposes that for accounting purposes only with regard to reconciling the holdback with individual clients, that nine percent (9%) be provisionally allocated for common benefit costs and ten percent (10%) be provisionally allocated for common benefit fees. This accounting method will minimize the impact of the increased aggregate holdback percentage on the Claimants. This is because it is customary that in implementing a holdback percentage against the gross recovery of an individual Claimant, the portion of the holdback designated as a holdback for common benefit fees acts to reduce the private attorney's contingent fee percentage while the portion of the holdback designated for common benefit costs is borne directly by the individual Claimant. Thus by ordering an accounting methodology here that sets an allocation between common benefit fees and common benefit costs, this enables the Court to limit the amount of deduction from the individual Claimant.

To place this in perspective, and using round and merely assumed numbers, a typical Statement of Distribution that a Claimant would receive to show the net amount to be paid where there is an assumed gross settlement of \$100,000.00 and the Claimant had executed a contingent

fee agreement providing for a 40% contingent fee plus reimbursement of costs with his/her counsel, would read as follows:

Sample Statement of Distribution Calculation

Assumed Gross Settlement for Claimant	\$100,000.00
Assumed Private Attorney's Contingent Fee (40%):	
30% of fee payable to private counsel	(\$30,000.00)
10% of fee payable into common benefit fund	(\$10,000.00)
Assumed Private Attorney's individual costs	
for specific Claimant	(\$1,500.00)
MDL Common Benefit Costs (9%)	(\$9,000.00)
Less any Lien obligation	????????
Net to Claimant (excluding unknown Lien amount)	\$49,500.00

This scenario demonstrates that while a total of \$19,000.00 (19% of the assumed \$100,000.00 recovery) will be deposited into the MDL 2436 Common Benefit Account, that the Claimant bears \$9,000.00 of the holdback for common benefit costs and the private attorney bears \$10,000.00 of the holdback as common benefit attorney's fees. The proposed amount that is borne by the private counsel increases by two percent (2%) compared to the percent originally contemplated when CMO 12 was entered (original CMO 12 provided for eight percent (8%) to be allocated to fees), since the amount of the holdback being allocated to the Common Benefit Fee portion of the MDL 2436 Common Benefit Account is proposed to be ten percent (10%) compared to the original eight percent (8%). This ten percent (10%) amount attributable to Common Benefit Fees does not result in a reduction in the net amount to be received by the Claimant since the ten percent (10%) is encompassed within the private attorney's contingent fee percentage. The

Claimant's agreement to bear an overall 40% contingent fee remains the same. The only change is how the forty percent (40%) contingent fee is allocated between common benefit fees and private counsel fees. This motion proposes that ten percent (10%) of the forty percent (40%) be allocated to the common benefit fee and that the private attorney retains thirty percent (30%) of the fee. Were the private attorney's contingent fee percent to be 33 1/3%, the same approach would apply. The deduction for the common benefit fee portion would still be 10%, leaving 23 1/3% for the private attorney's fee. In no way does the common benefit fee portion of the deduction reduce the individual plaintiff's recovery. The individual plaintiff's recovery is reduced only by the cost portion of the common benefit deduction.

Assuming at a later date the Court approves disbursing to the Common Benefit Attorneys the entire amount withheld in the MDL 2436 Common Benefit Account as proposed herein, the PSC proposes that internally, they will allocate the money disbursed first to reimburse their common benefit costs, which likely will result in no "common benefit fee" being paid since the good faith estimate of common benefit costs incurred is believed to be about the amount that will be deposited into the MDL 2436 Common Benefit Account. Thus, while the PSC will receive nineteen percent (19%), it will be allocating all nineteen percent (19%) to reimburse its costs, even though the Order is technically providing for nine percent (9%) to be allocated to costs and ten percent (10%) to be allocated to fees.

III. THE ORIGINAL TEN PERCENT (10%) ASSESSMENT PERCENTAGE WAS BASED ON AN EXPECTATION THAT THE NUMBER OF CASES THAT WOULD JOIN THIS MDL WOULD BE GREATER THAN WHAT OCCURRED, YET THE AMOUNT OF WORK PERFORMED AND EXPENSES INCURRED WAS BONA FIDE AND WELL EXCEEDED THE VALUE OF THE TEN PERCENT (10%) ASSESSMENT PERCENTAGE

CMO 12 was signed by the Court on August 22, 2013. At that time, this MDL was in its infancy stage, and the thought was that a significant number of cases would be filed, such that the

holdback percentage set by CMO 12 of eight percent (8%) for fees and two percent (2%) for costs would be sufficient to reimburse all common benefit expenses incurred and provide for a common benefit fee. However, as the Court knows, the number of cases filed totals only slightly above 200, yet the amount of common benefit work performed and costs incurred was significant and necessary even though this MDL was not as large as anticipated.

This is not to say that the PSC acted frivolously by expending costs and time that was unnecessary for the common benefit. To the contrary, all work performed by the PSC and all costs incurred was bona fide, necessary and for the common benefit. Nevertheless, with a small number of cases filed, thereby affecting the aggregate global settlement amount, the original percentage holdback approved in CMO 12 became woefully inadequate to reimburse the common benefit expenses since the holdback percentage is applied against the aggregate settlement amount. Presumably if this MDL was larger, the aggregate settlement may have been larger such that the original holdback percentage may have better aligned with the costs incurred and common benefit time expended. Alas, that was not the case here.

As this Court is well aware, MDL 2436 commenced by transfer by the Judicial Panel on Multidistrict Litigation ("JPML") to this Court by Order dated April 1, 2013. Since that time until the settlement, the PSC engaged in approximately 36 months of intense discovery, including the review of millions pages of documents produced, took significant depositions, engaged in expert discovery and produced expert reports, briefed *Daubert* and summary judgment motions, engaged in Bellwether trial preparations, litigated motions *in limine* (including oral argument and rulings on the same), tried a case in the coordinated New Jersey state court, and then shortly before the first MDL trial was set to commence, negotiated a proposed settlement.

With the assistance of Magistrate Judge Timothy Rice, the parties reached a memorandum of understanding in September 2016 for the resolution of cases pending in this MDL and in the coordinated New Jersey state court litigation. Since that date, the terms of the settlement have been negotiated, and as noted above, the settlement was accomplished only after the expenditure of thousands of hours of time and a significant amount of common benefit costs that exceed what the present ten percent (10%) holdback will provide.

To this end, presuming that Defendants will not exercise their walk away right, the PSC respectfully submits that it is prudent at this time to amend CMO 12 to modify the holdback for common benefit attorneys' fees and costs, so that the payment Defendants make into the Tylenol MDL 2436 Common Benefit Account will be at the nineteen percent (19%) holdback rate to be held in escrow. The modification proposed here is a "placeholder" pending the Court making a final determination of an award of attorneys' fees and costs.

Given the amount of substantial and necessary work performed to date, and the amount of the settlement reached, it is clear that the present amount of the holdback will be insufficient to provide for the fair and equitable sharing among the Plaintiffs of the costs incurred and for the services performed by attorneys acting for the administration and common benefit of all Plaintiffs. The PSC is certainly accepting the burden of the shortfall by essentially waiving any common benefit fee since the amount of the proposed holdback will be applied first to the common benefit costs incurred, which will virtually equal the entire nineteen percent (19%) holdback.

IV. THE COURT HAS THE AUTHORITY AND POWER TO MODIFY THE ASSESSMENT PERCENTAGE

This case did not resolve as a "super-mega-fund" case, i.e., a case with a settlement of \$1 Billion or more, so the percentage holdback necessarily needs to be at a higher percentage than may be customary for such super-mega-fund cases.

This Court has the authority to modify the holdback amount based upon the terms of CMO 12 that reserved that right, the terms of the settlement agreement entered into with Defendants that makes provision for the possibility of an amendment to CMO 12, and pursuant to substantial judicial precedent that is 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). 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).

As the Court also knows, the Participation Agreement discussed in CMO 12 provides that assessment amounts be withheld from case recoveries and grants this Court the authority to effectuate these holdbacks (*See* CMO 12 at §IV. discussing the Participation Agreement attached to CMO 12 as Exhibit A).

The PSC's requested increase, to a total nineteen percent (19%) assessment holdback for attorneys' fees and costs with a provisional allocation of ten percent (10%) for fees and nine percent (9%) for costs, has been voted on and approved by the PSC.

Courts have previously modified the assessment in other MDL litigations, raising the assessment for common benefit attorney fees where after the litigation of the case, it was determined that the initial holdback percentage was insufficient to reimburse expenses and award attorneys' fees. In the *Ortho Evra* litigation the Court increased the percentage from the initial percentage set. *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). In the *Vioxx* litigation the Court similarly increased the assessment. *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). *See also, In Re: DePuy Orthopaedics, Inc. ASR Hip Implant Products Liability Litigation*, MDL 2197, Order Amending CMO 13 (increasing attorney hold back) (N. D. Ohio, March 3, 2014).³

The portion of the holdback proposed for common benefit attorney fees here (10%) falls at the average range of the total percentage awards granted in other MDLs, which generally range from 5% to 12%, although the PSC recognizes that because of the unusual circumstances of this case, the portion proposed for expenses (9%) makes the total holdback higher than usual. *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. 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,

³ The PSC recognizes that the holdback percentage in the cases cited is less than the total holdback percentage requested here. However, the cited cases generally involved thousands of cases that were subject to the holdback, so through the economies of scale, a lower percentage holdback was sufficient to create a large enough assessment fund to reimburse the common benefit expenses incurred and to award a common benefit fee. But here, as noted, with only slightly more than 200 cases involved, there was no economy of scale, yet the amount of common benefit expenses and time still was large. Hence, a larger percentage holdback is needed.

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.Mo.) (11% assessment); *In re Kugel Mesh Hernia Patch Litig.*, MDL 1842, Amended PPO 22 1(C), (D.R.I. May 21, 2012) (12% assessment).

Nevertheless, it is also noted that the Master Settlement Agreement in the case contains specific provisions noting that the PSC might move to amend CMO 12 to change the holdback percentage. Defendants therefore are aware of the probability that this motion would likely be filed.

Finally, CMO 12 reserved the right for the PSC to seek a modification of the holdback percentage. Prior to the filing of this motion, the PSC held a meeting to consult about its filing, and voted in favor of the filing. See, CMO 12 at ¶ 25 (“This Assessment represents a hold-back (See, e.g., *In re Zyprexa Prods. Liab. Litig.*, 467 F.Supp.2d 256, 266 (2d. Cir. 2006)) and shall not be altered in any way unless each of the following occurs: (1) the entire PSC is consulted and provided an opportunity to be heard at a formally announced PSC meeting prior to the filing of any motion to change the assessment amount; (2) the PSC approves the proposed change to the assessment by a majority vote; (3) a noticed motion (including notice to Defendant's Liaison Counsel) with an opportunity to be heard is granted by the Court, and (4) this Court, upon good-cause shown, amends this Order.”)

The PSC has convened and has voted to increase the assessment percentage. As such, the PSC submits that the increase in the total holdback percentage under CMO 12 is appropriate for the reasons set-forth in this motion.

V. THE AMOUNT ASSESSED WILL REMAIN IN ESCROW PENDING FURTHER ORDER OF THIS COURT

The instant request is one that merely governs the amount that Defendants will pay into the Common Benefit Fund when the settlement is funded, to be held in escrow, still subject to the Court adjudicating a Fee and Cost Petition at a late date.

Certainly, if at the time the Court rules on the Fee and Cost Petition in this case the Court determines that the holdback in escrow was excessive, the Court can order a refund. However, to not provide for the escrow of the funds now, prior to when the settlement is funded, presents the problem that if the Court were to determine that a higher holdback should have been ordered, it could be difficult for the PSC Leadership to recover money that was already disbursed and not held in escrow.

VI. CONCLUSION

The PSC has satisfied the requirements of CMO12 for requesting modification of the common benefit holdback assessment, both by obtaining consent by the PSC as well as setting forth the reasons supporting an increase in the assessment to address the substantial costs incurred to litigate this case. This Court has the authority to modify its previous order and allow a nineteen percent (19%) total holdback which is appropriate and warranted here given the work and costs incurred by the PSC.

As such, the PSC respectfully requests that the Court modify the common benefit holdback in this case to nineteen percent (19%) with a provisional allocation of ten percent (10%) for attorneys' fees and nine percent (9%) for costs. The approval of this request will result in a deposit in the Tylenol MDL 2436 Common Benefit Account by Defendants of nineteen percent (19%) of the settlement when Defendants fund the settlement. Once again, this amount will be held in escrow pending a future Order from the Court concerning its disbursement.

Respectfully submitted,

/s/ Laurence S. Berman
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On behalf of the PSC

Dated: February 10, 2017

CERTIFICATE OF SERVICE

I, Laurence S. Berman, Esquire, do hereby certify that on the 10th day of February, 2017, a true and correct copy of the *Motion and Memorandum of Law of the Plaintiffs' Steering Committee to Modify CMO 12 Relating to the Percentage Holdback to be Paid into the Tylenol MDL 2436 Common Benefit Account* was delivered via e-mail to the following Counsel and *Pro Se* parties:

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