

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

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

---

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

§  
§  
§  
§  
§  
§  
§  
§

**MDL NO. 2436**

**2:13-md-02436**

**HON. LAWRENCE F. STENGEL**

---

**PLAINTIFFS' STEERING COMMITTEE'S MOTION FOR AN ORDER  
ESTABLISHING MDL 2436 COMMON-BENEFIT FUND TO COMPENSATE AND  
REIMBURSE ATTORNEYS FOR SERVICES PERFORMED AND EXPENSES  
INCURRED FOR MDL ADMINISTRATION AND COMMON-BENEFIT**

Plaintiffs, by and through the Plaintiffs' Steering Committee (the "PSC") and Plaintiffs' Liaison Counsel, hereby submit the following *Motion and Memorandum of Law in Support of an Order Establishing an MDL 2436 Fund to Compensate and Reimburse Attorneys for Services Performed and Expenses Incurred for MDL Administration and Common-Benefit*.

On behalf of the Plaintiffs' Steering  
Committee

/s/ Michael M. Weinkowitz

Arnold Levin, Esquire

Laurence S. Berman, Esquire

Fred S. Longer, Esquire

Michael M. Weinkowitz, Esquire

LEVIN FISHBEIN SEDRAN & BERMAN

510 Walnut St., Suite 500

Philadelphia, PA 19106

215-592-1500

215-592-4663 (facsimile)

[ALevin@lfsblaw.com](mailto:ALevin@lfsblaw.com)

[LBerman@lfsblaw.com](mailto:LBerman@lfsblaw.com)

[FLonger@lfsblaw.com](mailto:FLonger@lfsblaw.com)

[MWeinkowitz@lfsblaw.com](mailto:MWeinkowitz@lfsblaw.com)

Dated: August 9, 2013

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

<b>IN RE: TYLENOL (ACETAMINOPHEN)</b>	§	<b>MDL NO. 2436</b>
<b>MARKETING, SALES PRACTICES AND</b>	§	
<b>PRODUCTS LIABILITY LITIGATION</b>	§	<b>2:13-md-02436</b>
<hr/>	§	
<b><i>THIS DOCUMENT RELATES TO ALL</i></b>	§	<b>HON. LAWRENCE F. STENGEL</b>
<b><i>CASES</i></b>	§	
	§	
	§	

---

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS’ STEERING  
COMMITTEE’S MOTION FOR AN ORDER ESTABLISHING MDL 2436 COMMON-  
BENEFIT FUND TO COMPENSATE AND REIMBURSE ATTORNEYS FOR  
SERVICES PERFORMED AND EXPENSES INCURRED FOR MDL  
ADMINISTRATION AND COMMON-BENEFIT**

**I. INTRODUCTION**

On April 1, 2013, the Judicial Panel on Multidistrict Litigation (“Panel”) created this multidistrict litigation (“MDL”). The MDL now involves approximately 81 filed cases and it is anticipated that there are a substantial number of additional claims that will be filed directly or transferred into this MDL. The PSC has worked diligently to create a cohesive, cooperative team of attorneys from across the nation to prosecute this over-the-counter mass tort litigation involving the drug acetaminophen.<sup>1</sup> To date this team of lawyers has, among other things:

- ✓ developed and served document requests, interrogatories and request for admissions some of which Defendants have answered;
- ✓ negotiated numerous pre-trial orders including a Protective Order which was the basis for the Protective Order (Case Management Order No. 1) entered by this Court on February 28, 2013 in the approximately 21 related cases assigned to this Court before transfer by the Judicial Panel on Multidistrict Litigation (“Panel”)(hereinafter “related actions”);

---

<sup>1</sup> See *Plaintiffs’ Response to Defendants’ Motion to Stay Proceedings Pending Entry of MDL 2436 Case Management Orders and Joint Cross-Application for the Appointment to the Plaintiffs’ Steering Committee* and the accompanying *Memorandum of Law* (hereinafter referred to as the “Application”).

- ✓ negotiated an order governing the method of production (CMO-2);
- ✓ organized the approximately 1 million electronic documents produced by McNeil in a rolling production which is on-going in New Jersey;
- ✓ negotiated a Plaintiff Fact Sheet (a questionnaire to be answered without objection by Plaintiffs customarily adopted in lieu of interrogatories and document requests) (CMO-10) and records collection (CMO-10a);
- ✓ negotiated a case management order concerning privilege logs and challenges (CMO-9);
- ✓ are negotiating a Defense Fact Sheet;
- ✓ negotiated a Direct Filing, Master and Short Form Complaint Order (CMO-7);
- ✓ produced to McNeil's new counsel documents in Movants' possession previously produced to Plaintiffs in earlier TYLENOL® litigations including deposition and trial transcripts;
- ✓ retained Crivella-West, a leading on-line document management company to establish a secure on-line document depository accessible remotely over the internet;
- ✓ retained world-renowned experts in hepatology, pharmacology, epidemiology, regulatory affairs, marketing and other relevant fields;
- ✓ noticed and engaged in taking the depositions of McNeil corporate witnesses and third-parties; and,
- ✓ zealously pursued this litigation in an efficient and cooperative manner with opposing counsel;

These efforts have been accompanied by a significant monetary investment as well. The PSC and common-benefit attorneys have made significant financial contributions to facilitate the creation of a centralized document management and review system, permit compensation of expert witnesses, cover the costs of discovery and document production, and offset the ongoing litigation management costs. Moving forward, the PSC and its common-benefit attorneys will continue to zealously prosecute this case, including trying bellwether cases, if necessary. This will require the continued investment of significant resources, including time, effort and money. For example, it is anticipated that millions of additional pages of documents will be produced by

the defendants in the coming months. Substantial time and resources will be needed to re-organize and analyze from the re-scanning project<sup>2</sup> and the ongoing rolling-production. Dozens of fact and expert witness depositions will be scheduled and 30(b)(6) depositions are about to begin and the work of developing experts will continue.

Plaintiffs from across the United States, including those with cases filed in the MDL and those in federal or state courts in other jurisdictions, all have and will continue to benefit from the efforts of the PSC and its common-benefit attorneys. It is anticipated that the PSC will create a trial package so that Plaintiffs can be ready to try their cases if this Court remands the coordinated cases back to the transferer court.

Due to these efforts, investments and the future work that remains to be completed, the PSC respectfully submits that the litigation has advanced to the point that it is necessary and appropriate to establish an *MDL 2436 Fund* together with guidelines and processes to manage time-keeping and expense submission reimbursement, and related common-benefit issues. The PSC submits that establishing such procedures will assist the PSC in the efficient management of this litigation and provide for the fair and equitable sharing among plaintiffs of the cost of services performed and expenses incurred by attorneys acting for the MDL administration and common-benefit of all plaintiffs in this complex litigation. To that end, the PSC submits herewith proposed *Case Management Order No. 12*. (“CMO-12”).

---

<sup>2</sup> See *Application*, ftnt 11 for description of the “re-scanning project.”

## II. ARGUMENT

### A. The Court Has the Authority and Discretion to Create a Common-Benefit Fund for this MDL

A court has broad discretion and authority to coordinate and supervise complex multidistrict litigation. *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 644, 653 (E.D. Pa. 2003)(citing *In re Showa Denko K.K. L-Tryptophan Prods. Liab. Litig.*, 953 F.2d 162, 165 (4th Cir. 1992)). Indeed, a court’s success in dealing with multi-party, multi-case litigation is “largely dependent on its ability to uncomplicate matters.” *Id.* (quoting *In re Recticel Foam Corp.*, 859 F.2d 1000, 1004 (1st Cir. 1988)). To manage such complex litigation, the district court may, as this court has done, appoint lead and liaison counsel to coordinate discovery and other pretrial preparation. *See Manual for Complex Litigation (Fourth)*, § 22.62.

The “necessary corollary to court appointment of lead and liaison counsel . . . is the power to assure that these attorneys receive reasonable compensation for their work.” *In re Linerboard*, 292 F.Supp.2d at 653 (citing *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5th Cir. 1977)(hereinafter *Florida Everglades*)); *see also Smiley v. Sincoff*, 958 F.2d 498, 501 (2d Cir. 1992)(noting that district courts may exercise their power to establish fee structures designed to compensate committee members for their work on behalf of all plaintiffs involved in a consolidated litigation). As the court explained in *Florida Everglades*,

if lead counsel are to be an effective tool, the court must have means at its disposal to order appropriate compensation for them. The court’s power is illusory if it is dependent upon lead counsel’s performing the duties desired of them for no additional compensation.

*Florida Everglades*, 549 F.2d at 1016.

Compensating lead plaintiffs’ attorneys for their efforts is based on the “common fund” doctrine” line of cases. *See In re Linerboard*, 292 F.Supp.2d at 654; *Central R.R. & Banking Co.*

*v. Pettus*, 113 U.S. 116 (1885); *Trustees v. Greenough*, 105 U.S. 527 (1882). Established over 125 years ago by the U.S. Supreme Court, the common fund doctrine recognizes that “a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The doctrine “rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant’s expense.” *Id.* at 478.

Although the common-benefit doctrine is most frequently applied in class actions, numerous courts have enforced the common-benefit doctrine in the context of multidistrict litigation. *See, e.g., In re Protegen Sling & Vesica Sys. Prods. Liab. Litig.*, MDL 1387, 2002 WL 31834446 (D. Md. Apr. 12, 2002); *In re Rezulin Prods. Liab. Litig.*, MDL 1348, 2002 WL 441342 (S.D.N.Y. March 20, 2002); *In re Diet Drugs (Phentermine/ Fenfluramine/ Dexfenfluramine) Prods. Liab. Litig.*, No., MDL 1203, 2001 WL 497313 (E.D. Pa. May 9, 2001) (hereinafter “the Fen/Phen litigation”); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, No. MDL 1014, 1998 WL 118060 (E.D. Pa. Jan. 12, 1998); *In re Vioxx Products Liability Litigation*, 802 F.Supp.2d 740 (E.D.La., 2011); *In re Genetically Modified Rice Litig.*, 2010 WL 716190, at \*4 (“An MDL court’s authority to establish a trust and to order compensations to compensate leadership counsel derives from its ‘managerial’ power over the consolidated litigation, and, to some extent, from its inherent equitable power.”); *In re Guidant*, 2008 WL 682174, at \*5; *In re Zyprexa Prods. Liab. Litig.*, 467 F.Supp.2d 256, 265–66 (E.D.N.Y.2006); *see also Manual for Complex Litigation* (Fourth) § 22.62 (2004); Restatement (Third) of Restitution § 30 Reporter’s Note b (Tentative Draft No. 3, 1994)(“In contrast to the standard view of class-action fees, which explains them as restitutionary, the leading accounts of fees to court-appointed counsel in

consolidated litigation properly emphasize factors independent of restitution to justify the imposition of a liability by court order”)(citing *Everglades, supra.*).

Indeed, the common-benefit doctrine is particularly useful in the MDL context. By allowing a small group of plaintiffs’ attorneys to litigate the MDL on behalf of all plaintiffs, significant benefit accrues to both parties, their counsel, and to the Court. Such benefit creation merits compensation for that work independent of any compensation those counsel may receive for representing their own individual clients. However, the only work entitled to compensation from a common-benefit fund is work that benefits the litigation as a whole — the common-benefit work. Counsel who perform common-benefit work are required to separate the time they devote for the common-benefit from the work they perform for their individual clients which is, of course, compensated only through an individual retainer arrangement.

After reviewing assessments in similar complex MDL actions, the PSC believes a 10% assessment (8% for common-benefit attorneys’ fees and 2% for common benefit costs) is both reasonable and appropriate for this particular MDL. MDL Courts in this district, as well as others, have ordered that similar percentages be withheld from any future award or payment.<sup>3</sup> For example, a 7% assessment was orderd in Avandia and in the Fen/Phen litigation; the court initially ordered the sequestration of 9% of all payments made by defendants in any settlement or satisfaction of a judgment. *In re Diet Drugs*, PTO 467, *infra*; see also 2001 WL 497313 at \*2.2. Similarly, in *In re Protegen Sling*, the court set aside 9% of the aggregate amount to be paid to

---

<sup>3</sup> 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, PEC/PSC and Common-Benefit Attorneys may apply to the Court for attorneys’ fees and reimbursement of expenses at a percentage that is different from (greater or lesser) than the Assessment percentage.

the plaintiffs in the future. *See* 2002 WL 31834446 at \*1 (D. Md. 2002), *infra*; *In re Rezulin*, 2002 WL 441342 at \*1 (assessing 6% of recovery on federal cases and 4% of recovery on state cases where the attorneys bound themselves to an agreement), *infra*.; *In re Yasmin and YAZ (Drospirenone)*, MDL No. 2100 (hereinafter “*In re Yaz*”)(assessment of 6%). Thus, assessing 10% of future recovery is well within the range established by other courts in similar MDL litigation.

Moreover, the PSC’s diligent and extensive efforts invested to date, coupled with those to be incurred in the future, more than support a 10%. Finally, to the extent that the *MDL 2436 Fund* ultimately exceeds the amount needed to make payments as provided in the Proposed Order, the Court may order a refund, on a *pro rata* basis, to those who contributed to the fund. *See* Proposed CMO-12, ¶ 40.

**B. Based on the Common and Tested Practice in Similar MDLs, Defendants Should Be Required To Deposit the Assessment Into the Common-Benefit Fund**

The defendants should be ordered to withhold the assessment from any future settlement or judgment and pay the amount directly into the Fund. This is the standard procedure that has been implemented by multiple courts around the country in similarly complex MDLs. Although there are likely many more, the PSC has located nineteen (19) common-benefit fund orders containing language requiring the defendant to deposit a common-benefit assessment directly into the fund. These orders include:

- *In re Avandia Prods. Liab. Litig.*, MDL 1871 (E.D.Pa.)(Exhibit “1”); “Defendant is directed to withhold the Assessment from amounts paid on any Covered Claim and to pay the Assessment directly into the Fund as a credit against the Settlement or Judgment. If for any reason the Assessment is not or has not been so withheld, the Defendant as well as the plaintiff and his or her counsel are jointly and severally responsible for paying the Assessment into the Fund promptly.”



- *In re Yaz Prods. Liabl. Litig.*, MDL 2100 (S.D.Ill.)(Exhibit “2”); “For cases subject to an assessment, defendants are directed to withhold the assessment from any and all amounts paid to plaintiffs and their counsel and to pay the assessment directly into the Funds as a credit against the settlement or judgment. No orders of dismissal of any plaintiff’s claim, subject to this Order, shall be entered unless accompanied by a certificate of plaintiff’s and defendant’s counsel that the assessment, where applicable, will be withheld and will be deposited into the Funds at the same time the settlement proceeds are paid to settling counsel. If for any reason the assessment is not or has not been so withheld, the plaintiff and his counsel are jointly responsible for paying the assessment into the Fund promptly.
- *In re Gadolinium Prods. Liab. Litig.*, MDL 1909 (N.D. Ohio)(Exhibit “3”) “For cases subject to an assessment, defendants are directed to withhold an assessment from any and all amounts paid to plaintiffs and their counsel and to pay the assessment directly into the Funds as a credit against the settlement or judgment.”
- *In re Bausch & Lomb Contact Lens Solution Prods. Liab. Litig.*, MDL 1785 (D.S.C)(Exhibit “4”) “For all cases in which a settlement was or is entered into, or a judgment was or is paid, beginning April 8, 2008 and going forward, defendant is directed to withhold this assessment from any amounts paid to a plaintiff and her counsel...”
- *In re Bextra and Celebrex Prods. Liab. Litig.*, MDL 1699 (N.D. Cal.)(Exhibit “5”). “Defendants are directed to withhold the amount of this assessment from any amounts paid to plaintiffs and their counsel, and to pay the assessment directly into the common-benefit fund as a credit against the settlement or judgment.”
- *In re Guidant Defibrillators Prods. Liab. Litig.*, MDL 1708 (D. Minn.)(Exhibit “6”) “Defendants are directed to withhold the amount of this assessment from any amounts paid to plaintiffs and their counsel, and to pay the assessment directly into the common-benefit fund as a credit against the settlement or judgment.”
- *In re Vioxx Prods. Liab. Litig.*, MDL 1657 (E.D. La.)(Exhibit “7”); “Defendants are directed to withhold this assessment from amounts paid to plaintiffs and their counsel, and to pay the assessment directly into the fund as a credit against the settlement or judgment.”
- *In re Prempro Prods. Liab. Litig. (HRT)*, MDL 1507 (E.D. Ark.)(Exhibit “8”) “Before making any claim to a personal injury plaintiff whose claim has been resolved in federal court, defendants shall deduct from the payment an amount equal to five percent (5%) of the gross amount and shall pay such sum as hereinafter provided for deposit into the MDL 1507 Fee and Cost Trust Account.”
- *In re Baycol Prods. Liab. Litig.*, MDL 1431 (D. Minn.)(Exhibit “9”) “Before making any claim payment to a plaintiff or claimant to whom this Order applies,

defendants shall deduct from such payments an amount equal to six percent (6%) of the aggregate amount being paid...”

- *In re Silzone Heart Valves Prods. Liab. Litig.*, MDL 1396 (D. Minn)(Exhibit “10”) “Defendants are directed to withhold this assessment from amounts paid to plaintiffs and their counsel, and to pay the assessment directly into the fund as a credit against the settlement or judgment.”
- *In re Rezulin Prods. Liab. Litig.*, MDL 1348 (S.D.N.Y.)(Exhibit “11”) “Before making any Claim Payment, each paying defendant shall deduct therefrom and pay to the Clerk for deposit to the CRIS Account the Escrow Amount.”
- *In re Protegen Sling and Vesica Sys. Prods. Liab. Litig.*, MDL 1387 (N.D. Md.) (Exhibit “12”) “Defendants shall have primary responsibility for withholding nine percent (9%) of the claim payments and tendering such sums to the MDL 1387 Fee and Cost Account.”
- *In re Propulsid Prods. Liab. Litig.*, MDL 1355 (E.D. La.)(Exhibit “13”) “Defendants are directed to withhold this assessment from amounts paid to plaintiffs and their counsel, and to pay the assessment directly into the fund as a credit against the settlement or judgment.”
- *In re Diet Drug Prods. Liab. Litig. (Fen/Phen)*, MDL 1203 (E.D. Pa.)(Exhibit “14”) “Defendants shall have primary responsibility for withholding nine percent (9%) of the claim payments and tendering such sums to the MDL 1203 Fee and Cost Account.”
- *In re Latex Gloves Prods. Liab. Litig.*, MDL 1148 (E.D. Pa.)(Exhibit “15”) “Defendants are hereby authorized and directed to pay all withheld amounts promptly and directly into the Escrow Fund at the time of payment of the settlement or judgment or other recovery.”
- *In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL 1014 (E.D. Pa.)(Exhibit “16”) “Each MDL 1014 defendant, before making any claim payment to any plaintiff, shall deduct from such payment an amount equal to 5% of the aggregate amount being paid, and any amounts to be paid in the future; and shall pay such sum as hereinafter provided for deposit into the MDL 1014 PLC Costs Account.”
- *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, MDL 926 (N.D. Ala) (Exhibit “17”) “Defendants are directed to withhold this assessment from amounts paid to plaintiffs and their counsel, and to pay the assessment into the fund as a credit against the settlement or judgment.”
- *In re Pradaxa (Dabigatran Etexilate) Prods. Liab. Litig.*, MDL 2385 (S.D. Ill.)(Exhibit “18”) “For cases subject to an assessment, Defendants are directed to withhold an assessment from any and all amounts paid to plaintiffs and their

counsel and to pay the assessment directly into the Funds as a credit against the settlement or judgment.”

- *In re Zoloft (Sertraline Hydrochloride) Products Liab. Litig.*, MDL 2342 (E.D.Pa.)(Exhibit “19”)(Defendants are directed to withhold the Assessment from amounts paid on any Covered Claim and to pay the Assessment directly into the MDL 2342 Funds as a credit against the Settlement or Judgment).

In each of the above-referenced orders, the defendants are directed to withhold the assessment from amounts paid to any plaintiff and to deposit the assessment into a common-benefit fund.

The commonality of this practice demonstrates that the procedure works to avoid complications rather than create further disputes. Under proposed CMO-12 the defendants would not be required to police the *MDL 2436 Fund* or incur any increased burden. Rather, the Order sets forth the following straight-forward process. Prior to disbursing any settlement to a Plaintiff’s counsel, Defendants will notify the PSC in writing regarding the existence of a settlement and the name of the individual plaintiff’s attorney. *See* Proposed CMO-12, ¶ 23 Plaintiff’s Liaison Counsel will then advise Defendants’ counsel in writing as to whether the individual Plaintiff’s attorney’s cases or claims are subject to the assessment. *Id.* If the Plaintiffs’ Liaison Counsel notifies a Defendant that the claim falls within the scope of the Order, the settling Defendant would deposit ten (10%) percent of the settlement into the *MDL 2436 Fund*. *Id.* Once the 10% assessment is deposited into the *MDL 2436 Fund*, a Defendant would be absolved of all liability with respect to the assessed amount. To the extent that the plaintiff or plaintiff’s attorney has any objection to the assessment, the proposed CMO directs the objecting party to seek recourse against the *MDL 2436 Fund*. Under the Proposed Order, Defendants will not be obligated to police, monitor, or bear any responsibility for assessments deposited in the *MDL 2436 Fund*. Rather, needless complication and dispute will be avoided by insuring that any legitimately assessed amounts need only travel from point A to B rather than from A to C to B.

Based on the common use of this procedure in many similarly complex products liability MDLs, the Court should be reassured that the process has been tested and approved, including in other MDLs transferred to the Eastern District of Pennsylvania. *In re Avandia Prods. Liab. Litig.*, MDL 1871 (E.D.Pa.)(PTO No. 70)(Exhibit “1”).

**C. This Court Has Authority to Assess a Common-Benefit Reimbursement Fee Against State Court Claimants and their Attorneys Who Have Benefited From the Work of the PSC and Who Have Consented to the Assessment**

Similar to the Assessment Order (PTO No. 70) entered in the *Avandia* MDL litigation and in the *Zoloft* MDL litigation (PTO No. 29), the proposed common-benefit assessment order proposed by the PSC in this case, applies to several types of claims: (1) those subject to the jurisdiction of the MDL and (2) any other claim where the plaintiff’s attorney has (a) signed the Protective Order; (b) signed the Attorney Participation Agreement; or (c) benefitted from the PSC work-product or the work performed by the PSC. *Compare Avandia PTO 70*, Exhibit “1” at ¶ 3; *Zoloft PTO 29*, ¶s 2-3, Exhibit “19” with PSC’s proposed CMO-12 at ¶ 17. There is no dispute with respect to the Court’s authority to assess claims subject to the jurisdiction of the MDL. *See In re Avandia PTO 70*, Exhibit “1”; *see also In re Yaz*, PTO 14, Exhibit “2”. The PSC submits the proposed order properly *applies* the common-benefit fund assessment to attorneys who receive common-benefit work product or otherwise benefit by the work performed by the PSC or common-benefit counsel working with the PSC. *See Proposed CMO-12*, at ¶18-16).

Attached as Exhibit “A” to proposed CMO-12 is an *Attorney Participation Agreement* which enables Plaintiff’s attorneys who desire to obtain the work product of the PEC/PSC and of others who perform common-benefit work (including participating state court attorneys) an opportunity to obtain such work. (Proposed CMO-12, ¶ 13). Attorneys who chose not to execute the *Attorney Participation Agreement* but file cases in the MDL are permitted to receive the

Common-Benefit Work Product and may utilize it in their MDL filed cases only. (Proposed CMO-12, ¶ 14). The MDL filed cases will be assessed regardless of whether the counsel executes the *Attorney Participation Agreement*. Counsel who choose not to execute the *MDL 2428 Attorney Participation Agreement*, and who have cases filed in state court only and/or unfiled cases are not entitled to receive Common-Benefit Work Product and will not be provided access to the Common-Benefit Work Product. However, in the event it is determined that such counsel in some or any fashion obtained the Common-Benefit Work Product and utilized same in any manner whatsoever, then all cases and claims of such counsel, whether filed or not, shall be subject to the Assessment regardless of whether the counsel executed the *Attorney Participation Agreement*. (Proposed CMO-2, ¶ 15). Attorneys who choose not to execute the *MDL 2436 Attorney Participation Agreement*, and who have cases filed in the MDL and in addition have cases filed either in state court and/or unfiled cases are permitted to utilize the Common-Benefit Work Product in their MDL filed cases only. However, in the event it is determined that such counsel in some fashion or in any manner utilized the Common-Benefit Work Product on behalf of cases and/or clients that are not filed cases in the MDL, in any manner whatsoever, then all cases and claims of such counsel, whether filed or not, shall be subject to the Assessment. (Proposed CMO-12, ¶ 16). The reason for this structure is that the Common-Benefit Work Product is, as the name connotes, “work product.” Accordingly, it is properly protected from “free” use.

In the unique context of MDL proceedings, there are some instances in which the MDL Judge properly exercises authority that crosses standard jurisdictional lines. *See Avandia* PTO 70 (Exhibit “1”); *In re Yaz* PTO 14 (Exhibit “2”). For example, the federal MDL courts have administered global settlement agreements that apply to both federal and state plaintiffs. *See*,

e.g., *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL 1708 (D. Minn. 2008). In *Guidant*, the parties negotiated a \$240 million dollar settlement that applied to: plaintiffs whose cases had been filed in or transferred to the MDL; plaintiffs whose cases were filed outside the MDL in state court proceedings; and potential plaintiffs who had not yet filed their cases. See *In re Guidant*, MDL 1708, 2008 WL 682174, \*3 (D. Minn., March 7, 2008). The court ordered that \$10 million and \$34.5 million of the settlement be set aside for common-benefit costs and attorneys' fees. *Id.* at \*4, \*16. Some Plaintiffs objected on the basis that the Plaintiffs' Lead Liaison Counsel ("LLC") had failed to demonstrate that the state court plaintiffs had benefited from the LLC's work. *Id.* at \*13. The court held that the common-benefit assessment should apply to the state court plaintiffs. *Id.* The court reasoned:

[T]his argument does have some merit, especially in relation to those state court cases where a significant amount of work was done on behalf of individual Plaintiffs with little to no sharing of work product from the MDL attorneys. However, the state court Plaintiffs raising this objection fail to acknowledge that, at a minimum, the MDL common benefit attorneys' extreme efforts in negotiating the global settlement and reaching a favorable result for all Plaintiffs, including the state Plaintiffs who originally were proceeding on their own, benefited all Plaintiffs. *Therefore, the state Plaintiffs did benefit from the common benefit attorneys' work, and the common-benefit fund should apply to their clients as well.*

*Id.* (emphasis added). The court further noted that state court attorneys could petition for common-benefit funds themselves for work that advanced the interests of all plaintiffs. *Id.* In short, the federal MDL had authority to assess state court Plaintiffs for common-benefit work because those state court Plaintiffs and their attorneys did in fact benefit. *But see In re Showa Denko K.K. L-Tryptophan Prods. Liab. Litig.*, 953 F.2d 162, 165-66 (4th Cir. 1992)(holding that a transferee court's jurisdiction is limited to persons who are properly parties to the cases transferred); cf. *In re Zyprexa Prods. Liab. Litig.*, 467 F.Supp.2d 256, 267-69 (E.D.N.Y. 2006)

(deciding that the issue of assessing state cases with the costs of a discovery process that benefits all cases should be left, in the first instance, to the state court judges).

As a matter of equity, state court Plaintiffs and their attorneys should be assessed to the extent that they benefit from much of the work performed by the PSC and other common-benefit attorneys. As the court in *Zyprexa* noted, requiring state plaintiffs' attorneys to pay their proportionate share of the time and costs incurred by the PSC in its work for the benefit of all plaintiffs:

would avoid the troubling potential for attorney conflict of interests that otherwise would exist: Attorneys face distorted incentives to file cases in state courts without respect for the best interests of their clients because attorneys can use [the PSC's] work without paying for it out of their fees when in state court, but would have to pay their fair share if they were in federal court.

467 F.Supp.2d at 269. Thus, as a matter of equity, a state court attorney who benefits from the work of the common-benefit attorneys should contribute his or her proportionate share into the common-benefit fund.

Even if this Court determines that its authority cannot reach state court Plaintiffs solely on the basis of their having benefited from the PSC's work on behalf of all plaintiffs, there are other means by which the assessment can be ordered. At minimum, the MDL court has the authority to assess state court plaintiffs that have agreed to the assessment. This is the most common method by which federal courts have ordered that a common-benefit assessment be applied to state court cases. *See, e.g.*, May 21, 2008 Order, *In re Bausch & Lomb*, MDL 1785, (D.S.C. 2008) attached as Exhibit "4" (stating that common-benefit assessment applies to "any state court or unfiled case where the plaintiff's attorney and/or his or her firm has executed an agreement to cooperate with the MDL and to pay the assessment"); *see also In re Linerboard*

*Antitrust Litig.*, 292 F.Supp.2d 644, 665 n.12 (E.D. Pa. 2003)(noting *in dicta* that a common-benefit fund assessment could be applied to state court plaintiffs “by agreement of the parties”).

Finally, the PSC respectfully submits that the parties and the Court should continue to encourage coordination and cooperation between the state and federal courts. Such cooperation can provide an additional avenue by which to resolve the issue of assessing state court plaintiffs’ attorneys that benefit from the work of the common-benefit attorneys. For example, in the Fen/Phen litigation, the federal court issued a common-benefit assessment order that included a section regarding coordination between the MDL and similar state proceedings in California. *See* PTO No. 467 attached as Exhibit 1-n. The coordination section stated:

[u]pon approval by the [coordinating California state judge], each action involving diet drug which is now or hereafter pending in any California State Court shall be subject to this [common benefit fund] Pretrial Order to the following extent. Before making any claim payment to any plaintiff who has brought any action in any California State Court, defendants shall deduct from such payments an amount equal to six percent of the aggregate amount being paid . . . to the plaintiff.

*Id.* at 4-5. Thus, although not currently included in the Proposed Order, this Court may consider revising it to state that the assessment also applies to cases in a state court to the extent so ordered by the presiding judge of that court.

In sum, the PSC respectfully proposes that the common-benefit fund order retain section 11(a)(iii) which includes in the Covered Claims all “attorneys who receive common-benefit work product or otherwise benefit by the work performed by the PSC or common-benefit counsel working with the PSC.” If the Court determines that this provision should be removed from the Order, the PSC suggests that new language be added to extend the Covered Claims “to cases in state court to the extent so ordered by the presiding judge of that court.” Finally, in accordance



with the interest of this Court as expressed in the last hearing, the PSC submits that this Proposed Order be circulated to all attorneys on the ECF Service Registry prior to the Order's execution.

**III. CONCLUSION**

For the above reasons, Plaintiffs respectfully request that the Court grant the PSC's Motion to Establish an *MDL 2436 Fund* by executing the attached Proposed Order.

Respectfully submitted,

On behalf of the Plaintiffs' Steering Committee

/s/Michael M. Weinkowitz

Arnold Levin, Esquire

Laurence S. Berman, Esquire

Fred S. Longer, Esquire

Michael M. Weinkowitz, Esquire

LEVIN FISHBEIN SEDRAN & BERMAN

510 Walnut St., Suite 500

Philadelphia, PA 19106

215-592-1500

215-592-4663 (facsimile)

[ALevin@lfsblaw.com](mailto:ALevin@lfsblaw.com)

[LBerman@lfsblaw.com](mailto:LBerman@lfsblaw.com)

[FLonger@lfsblaw.com](mailto:FLonger@lfsblaw.com)

[MWeinkowitz@lfsblaw.com](mailto:MWeinkowitz@lfsblaw.com)

**CERTIFICATE OF SERVICE**

I, Michael M. Weinkowitz, Esquire, hereby certify that on this 9<sup>th</sup> day of August, 2013, I electronically filed the foregoing Plaintiffs' Steering Committee's *Motion in Support of an Order Establishing an MDL 2436 Fund to Compensate and Reimburse Attorneys For Services Performed and Expenses Incurred for MDL Administration and Common-Benefit*, the accompanying *Memorandum of Law* in support of the *Motion* and a *Proposed Pre-Trial Order* with the Clerk of Court using the CM/ECF system and that electronic notice and service will be completed through the ECF system. In addition, I have E-mailed a copy to Defendants' Liaison Counsel.

s/ Michael M. Weinkowitz  
Michael M. Weinkowitz  
LEVIN FISHBEIN SEDRAN & BERMAN  
510 Walnut St., Suite 500  
Philadelphia, PA 19106  
215-592-1500  
215-592-4663 (facsimile)  
[MWeinkowitz@lfsblaw.com](mailto:MWeinkowitz@lfsblaw.com)