UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

IN RE YASMIN AND YAZ (DROSPIRENONE) MARKETING, SALES PRACTICES AND RELEVANT PRODUCTS LIABILITY LITIGATION	:	**3:09-md-02100-DRH-PMF** MDL No. 2100 Hon. David R. Herndon
This Document Applies To All Actions	:	

PSC'S MOTION FOR AN ORDER SECURING AN EQUITABLE ALLOCATION OF COUNSEL FEES AND COSTS FOR MDL ADMINISTRATION AND COMMON BENEFIT WORK

The Plaintiffs' Steering Committee ("PSC") respectfully moves this Court for an Order in the form appended hereto as Exhibit A, securing an equitable allocation of counsel fees and costs for MDL administration and common benefit work.

In support of this Petition, the PSC relies upon the attached Memorandum of Law and exhibits thereto.

Dated: March 4, 2010

Respectfully submitted,

PLAINTIFFS' STEERING COMMITTEE

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MEMORANDUM OF LAW IN SUPPORT OF THE PSC'S MOTION FOR AN ORDER SECURING AN EQUITABLE ALLOCATION OF COUNSEL FEES AND COSTS FOR MDL ADMINISTRATION AND COMMON BENEFIT WORK

I. PROCEDURAL HISTORY AND STATEMENT OF THE FACTS

This multidistrict litigation involves hundreds, and potentially thousands, of individual lawsuits brought by women who were injured by the prescription drugs Yaz, Yasmin and Ocella.[1] In these cases Plaintiffs allege, *inter alia*, that these products cause a significant increased risk of an adverse event that the defendants have failed to adequately disclose to them and several of other theories of liability. The injuries at issue in this litigation include, but are not limited to, strokes, sudden cardiac death, myocardial infarction, pulmonary embolism, deep vein thrombosis, and gallbladder removal.

On October 1, 2009, the Judicial Panel for Multidistrict Litigation entered an Order transferring all federal cases involving such claims this Court for coordinated discovery and consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. On November 10, 2009, this

1 Yasmin was first approved by the FDA in 2001. Yaz was approved by the FDA in 2006. Ocella is the generic version of Yasmin. All three products are manufactured by Bayer or one of its subsidiaries or holding companies. These three drugs are

Court, as the transferee court, entered Order No. 2, which created the Plaintiffs' Steering Committee ("PSC").[2] *See* Order No. 2 and No. 6. This Order set forth certain duties and responsibilities of the PSC, including the preparation and completion of pleadings; the filing of motions; responding to motions; discovery; pretrial preparation; the establishment and administration of a document depository; communication with individual plaintiffs and their counsel; liaison with defendants; and court appearances. *See* Order No. 2.

From its inception, the PSC has represented the plaintiffs at this Court's status conferences and has begun the task of managing this litigation through the negotiation and entry of multiple case management orders; have served written discovery on the defendants; have created a document depository; and, have created various committees to develop the case against the Defendants. Over the coming months, the PSC will review the millions of pages of documents produced by the defendants, serve additional discovery, and take the depositions of key witnesses including employees and agents of the Defendants, third parties, and possibly officials of the United States Food and Drug Administration. In addition, the PSC has retained leading physicians and scientists with knowledge in fields such as pharmacology, epidemiology, hematology and the like to provide expert testimony regarding the causal relationship between exposure to Yaz, Yasmin, and/or Ocella and the alleged injuries, as well as liability theories which will benefit all the plaintiffs in this litigation.

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all combination oral contraceptives that contain ethinyl estrodiol as their estrogen component and drospirenone as their progestin.

2 Order Number 2 appointed Michael S. Burg (Co-Lead Counsel), Michael London (Co-Lead Counsel), Mark Niemeyer (Co-Lead Counsel), Roger Denton (Liaison Counsel), Andy Alonso, Mark Robinson, Trent Miracle, Tom Girardi, Arnold Levin, Jeff Lowe, A.J. DeBartolomeo, Steven Maher, Daniel Becnel, and Roopal Luhana. Order Number 6 added Christopher Seeger, Paul Pennock and Tim O'Brien to the PSC.

Accordingly, the purpose of this motion is to seek an order creating a "fund" consisting of a percentage of the recoveries in the federal court cases and state cases of other Participating Counsel from which the PSC and other Participating Counsel who are performing "common benefit work" for plaintiffs may obtain compensation for the benefits which they confer on all plaintiffs. It is the intent of the PSC to share all common benefit work product with all counsel who elect to be Participating Counsel.

For the reasons that follow, such relief is appropriate.

II. ARGUMENT

The common fund doctrine is a principle of equity designed to prevent unjust enrichment by providing that "a litigant or a 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); *see also Sprague v. Ticonic National Bank*, 307 U.S. 161, 166 (1939); *Trustees v. Greenough*, 105 U.S. 527, 534-536 (1881); *In re SmithKline Beckman Corp. Securities Litigation*, 751 F. Supp. 525, 530 (E.D. Pa. 1990). As the Third Circuit stated in *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 165 (3d Cir. 1973):

> These equitable powers, may, under the equitable fund doctrine, be used to compensate individuals whose actions in commencing, pursuing or settling litigation, even if taken solely in their own name and for their own interest, benefit a class of persons not participating in the litigation. *See Sprague v. Ticonic National Bank*, 307 U.S. 161, 59 S. Ct. 777, 83 L.Ed. 1184 (1939).
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> The award of fees under the equitable doctrine fund is analogous to an action in quantum meruit: the individual seeking compensation

> has, by his actions, benefited another and seeks payment for the value of the service performed.

See also Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974); *Strong v. Bell South Telecommunications, Inc.*, 137 F.3d 844, 850 (5th Cir. 1998).

In order for the common fund doctrine to apply, the beneficiaries of the fund need not be members of a class and the benefit need not have been conferred in the context of a class action because the common fund principle is a long-standing principle of equity which predates modern class actions. *See Trustees v. Greenough*, 105 U.S. 527 (1881). As the court stated in *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759 (9th Cir. 1977):

> The common fund doctrine provides that a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees. The doctrine is "employed to realize the broadly defined purpose of recapturing unjust enrichment." I Dawson 1597. That is, the doctrine is designed to spread litigation costs proportionately among all the beneficiaries so that the active beneficiary does not bear the entire burden alone and the "stranger" beneficiaries do not receive their benefits at no cost to themselves.

Id. at 769. *See also In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5th Cir. 1977) (court awarded fees to lead counsel by ordering each other attorney representing a plaintiff to pay to lead counsel part of his fee from his client); *City of Klawock v. Gustafson*, 585 F.2d 428, 431 (9th Cir. 1978) (court held that attorneys whose litigation efforts benefited their client as well as other native towns may be entitled to attorneys' fees under the common benefit theory); *In re MGM Grand Hotel Fire Litigation*, 660 F. Supp. 522 (D. Nev. 1987)(Hon. Louis C. Bechtle)(court awarded legal committee seven percent of gross recovery of "global

settlement" funds to reasonably compensate committee for professional labors and for bearing considerable long-standing risks).[3]

Apart from application of the common fund doctrine as an equitable principle governing the payment of counsel fees and litigation expenses, it has consistently been recognized that by other district courts possess the inherent power to appoint counsel to coordinate and manage complex multiparty litigation and to require that such counsel be paid for discharging these duties out of the proceeds of the litigation generally. *See*, *e.g.*, *In re Propulsid Products Liability Litigation*, MDL No. 1355, PTO No. 16 (E.D.La. Dec. 26,2001)(Hon. Eldon E. Fallon)(set aside of 6% for federal cases and 4% for coordinating state cases); *In re Rezulin Products Liability Litigation*, MDL No. 1348, PTO No. 67 (S.D.N.Y. March 20, 2002)(Hon. Lewis A. Kaplan)(set aside of 6% for federal cases and 4% for coordinating state cases); *In re Gadolinium Based Contrast Agent Products Liability Litigation*, MDL 1909, PTO No. 2 (N.D. Ohio 2/20/09)(Hon. Dan A. Polster) (set aside of 6% entered; 5% for fees and 1% for costs); *In re Diet Drugs Products Liability Litigation*, 1999 WL 124414 (E.D. Pa. Feb. 10, 1999)(Hon. Harvey Bartle III) (PTO No. 467) (court set aside 9% of any recovery for cases in MDL to create fund for PMC members to be compensated)[4]; *In re Orthopedic Bone Screw Products Liability Litigation*, MDL No. 1014, 1996 WL 900349 (PTO 402) (E.D. Pa. June 17, 1996)(Hon. Louis C. Bechtle) (parties ordered to sequester 12% of recoveries for fees and 5% of recoveries for costs in order to create fund from which Court-appointed Plaintiffs' Legal Committee could seek reimbursement for the

3 Counsel is aware of this Court's instruction regarding avoiding citations to other U.S. District Court cases as authority for a particular proposition of law. This citation is not cited as binding precedent on this Court, but for the Court's reference to a District Court case involving the management of similar multidistrict litigation.

4 PTO No. 467 was later expanded by PTO No. 517 to include litigation in all coordinating states. Both orders were subsequently modified by PTO No. 2628 to reduce the assessment by 1/3 to 6% for federal cases and 4% for coordinating state cases.

work performed on behalf of all plaintiffs); *In re Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litigation*, 982 F.2d 603, 606-07 (1st Cir. 1992); *In re Air Crash Disaster at Florida Everglades*, 549 F.2d at 1011-17; *In re MGM Grand Hotel Fire Litigation*, 660 F. Supp. at 522, 524-26.[5]

Thus, in mass tort cases involving consolidated MDL proceedings, counsel who have been appointed by the Court to manage the litigation for the benefit of all plaintiffs should receive reimbursement for the costs expended in that effort and compensation for their services from all of the plaintiffs on a ratable basis. *In re Diet Drugs Products Liability Litigation*, *supra*; *In re Orthopedic Bone Screw Products Liability Litigation*, MDL No. 1014; *In re Nineteen Appeals*, 982 F.2d at 606-07; *Smiley v. Sincoff*, 958 F.2d 498, 501 (2d Cir. 1992); *In re Agent Orange Product Liability Litigation*, 611 F. Supp. 1296, 1317 (E.D.N.Y. 1985)(Hon. Jack B. Weinstein); *aff'd in part, rev'd in part*, 818 F.2d 226 (2d Cir. 1987); *In re Air Crash Disaster at Florida Everglades*, 549 F.2d at 1019-21.[6]

These principles were articulated in *Nineteen Appeals* as follows:

> Under standard American rule practice, each litigant pays his or her own attorneys' fees. *See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 245, 95 S. Ct. 1612, 1615, 44 L.Ed.2d 141 (1975). Yet, there are times when the rule must give way. For example, when a court consolidates a large number of cases, stony adherence to the American rule invites a serious free-rider problem. *See generally* Mancus Olson, *The Logic of Collective Action* (1071). If a court hews woodenly to the American rule under such circumstances, each attorney, rather than toiling for the common good and bearing the cost alone, will have an incentive to rely on others to do the needed work, letting those others bear all the costs of attaining the parties' congruent goals.

5 See Footnote 3.
6 See Footnote 3.

> A court supervising mass disaster litigation may intervene to prevent or minimize an incipient free-rider problem and to that end, may employ measures reasonably calculated to avoid "unjust enrichment of persons who benefit from a lawsuit without shouldering its costs." *Catullo v. Metzner*, 834 F.2d 1075, 1083 (1st Cir. 1987). Such courts will most often address the problem by specially compensating those who work for the collective good, chiefly through invocation of the so-called common fund doctrine.
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> Here, [the District Court's] decision to use a steering committee [to manage consolidated mass tort litigation on behalf of all plaintiffs] created an occasion for departure from the American rule. In apparent recognition of the free-rider problem, the judge served notice from the beginning that he would eventually make what he, relying in part one appellees' counsel, *see Fees Op.*, 768 F. Supp. at 924 n. 42, later termed a "common fund fee award" to remunerate PSC members for their efforts on behalf of communal interests. This was a proper exercise of judicial power. *See Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392 90 S. Ct. 616, 625, 24 L.Ed.2d 563 (1970); *see also In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 240 (2d Cir. 1987) (upholding a fee award to a plaintiffs' steering committee under the equitable fund doctrine); *Bebchick v. Washington Metro. Area Transit Comm'n*, 805 F.2d 396, 402 (D.C. Cir. 1986) (collecting cases); *In re MGM Grand Hotel Fire Litig.*, 660 F. Supp. 522, 526 (D. Nev. 1987).

In re Nineteen Appeals, 982 F.2d at 606-07.[7]

In order to protect the right of all Participating Counsel who are working for the common benefit to receive a fee from the proceeds of the litigation in which they have participated and diligently worked on behalf of plaintiffs, courts have consistently ruled that it is appropriate to direct that all or part of the counsel fees which may become payable in each action which was the subject of coordinated or consolidated proceedings be deposited in an escrow account for allocation by the court in accordance with appropriate legal standards. *In re Diet Drugs*

7 See Footnote 3.

Products Liability Litigation, *supra*; *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litigation*, 56 F.3d 295, 300 (1st Cir. 1995); *Smiley v. Sincoff*, 958 F.2d 498, 499 (2d Cir. 1992); *In re Orthopedic Bone Screw Products Liability Litigation*, MDL No. 1014, *In re Agent Orange Product Liability Litigation*, 611 F. Supp. 1296, 1317 (E.D.N.Y. 1985)(Hon. Jack B. Weinstein); *In re Silicone Gel Breast Implant Product Liability Litigation*, MDL 926, Pretrial Order Nos. 13 & 23 (N.D. Ala. July 23, 1993 and July 28, 1995) (Exhibit "1")(Hon. U.W. Clemon) [8]. Thus, this Court should properly enter an Order — in the form of the Proposed Order attached as Exhibit A hereto — requiring that some portion of the fees earned in each individual action that is the subject of these consolidated MDL 2100 proceedings and in those cases in which Participating Counsel have a fee interest be withheld for distribution to Participating Counsel acting for the benefit of all plaintiffs.

A question then remains as to the proportion of plaintiffs' recoveries that should be subject to such sequestration. Ultimately, the amount of the fee to be awarded must be determined either under the lodestar approach or under the percentage of the fund approach based upon a judicial assessment of the amount and quality of work performed by the common benefit lawyers in relation to the size of the recoveries that have been generated. *See, e.g.*, *In re Diet Drugs Products Liability Litigation*, *supra*; *In re Orthopedic Bone Screw Product Liability Litigation*, MDL 1014, PTO 402 (12% for fees and 5% for costs sequestered); *Johnson*, 488 F.2d at 717-19; *In re Thirteen Appeals*, 56 F.3d at 304-07; *In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291, 1295 (9th Cir. 1994), *aff'd in part*, 19 F.3d 1306 (9th Cir. 1994); *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993);

8 See Footnote 3.

Harman v. Lyphomed, Inc., 945 F.2d 969, 975 (7th Cir. 1991); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir.), *cert. denied*, 488 U.S. 822 (1988).

Because the instant action is ongoing, it is impossible to ascertain the total amount of time that will have been expended by the PSC and Participating Counsel for the common benefit or to ascertain the amounts that will be generated, and therefore the precise percentage of plaintiffs' recoveries that should be subject to a common benefit order. However, there are good precedents to guide this Court's determination in this regard. The PSC has taken into consideration many variables including common benefit rulings in previous mass tort litigations of similar size and nature. This includes both its collective experience in previous PSC work and its knowledge of the complexity of this particular litigation. It is the PSC's unanimous recommendation that the appropriate hold-back for this litigation is: (a) 6% (4% for fees and 2% for costs) for those counsel who elect to be Early Participating counsel as that term is defined in the attached Order and Participation Agreement; and (b) 10% (8% for fees and 2% for costs) for those counsel who elect to be Late Participating counsel as that term is defined in the attached Order and Participation Agreement.

The assessment is intended to act only to preserve a *res* until an appropriate time arrives when this Court can make a determination of any appropriate award of either fees or costs for common benefit work. To assure that the *res* is preserved, the responsibility for paying the assessment into the fund established is on the Defendants, because they alone will have the intimate knowledge of sometimes confidential settlements and initial access to the funds themselves. This practice is common in mass tort litigation of this nature and has worked well in

other MDLs. *See, e.g., In re: Gadolinium Based contrast Agents Products Liability Litigation* MDL No.1909, Pretrial Order #2 ¶ II.B.3 (Hon. Dan A. Polster)(Exhibit B hereto).[9]

The PSC respectfully suggests that this Court implement an assessment, effective immediately, which allows counsel to choose to opt-in for all of their clients (whether filed in federal or state court, subject to a tolling agreement or unfiled, past, present or future).[10] Establishing the agreement now, gives attorneys knowledge before the end of the litigation to demine their desires whether to participate in the MDL common benefit work product. By agreeing to be Early Participation Counsel, attorneys understand that all of their cases and clients will be subject to an across-the-board assessment of 6% (4% fees and 2% costs) of any recovery made.

For all counsel, distribution of any funds sequestered will be pursuant to a subsequent Order by this Court in accordance with applicable principles of law governing fee awards. It is anticipated that in support of any award of fees and costs to the PSC and Participating Counsel, a motion will be made in the format and with appropriate documentation as this Court directs. Furthermore, it is respectfully suggested that the appropriate time this Court will appoint a Fee Committee consistent with the terms of the Proposed Order attached as Exhibit A hereto to make recommendations to the Court about any award of fees and expenses.

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9 See Footnote 3.

10 These mandatory assessments would apply to all counsel appointed by this Court to serve on the PSC and those counsel appointed by the Court to serve as State-Federal Liaison Counsel. Thus, the above-described counsel would be subject to a 6% assessment (4% fees and 2% costs) for all of the cases in which they have a fee interest, whether filed in federal court or state court, whether the cases are unfiled or are ever placed on a tolling agreement.

III. CONCLUSION

For the foregoing reasons, the PSC requests that its Motion be granted and the proposed Order and Participation Agreement thereto be entered by the Court.

Dated: March 4, 2010

Respectfully submitted,

PLAINTIFFS' STEERING COMMITTEE

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2010, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record, and I served the same on the following attorneys via U.S. Mail, postage prepaid, to:

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