
IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In re: Genetically Modified Rice Litigation

THE PHIPPS GROUP,
Appellants/Cross-Appellees,

v.

DON M. DOWNING & ADAM J. LEVITT, ETC.,
Appellees/Cross-Appellants.

Appeal from the United States District Court
For the Eastern District of Missouri
District Court MDL No. 4:06-MD-1811-CDP

APPELLEES/CROSS-APPELLANTS' BRIEF

Don M. Downing
Gretchen Garrison
GRAY, RITTER & GRAHAM, P.C.
701 Market Street, Suite 800
St. Louis, Missouri 63101
Telephone: (314) 241-5620

Adam J. Levitt
GRANT & EISENHOFER P.A.
30 North LaSalle Street, Suite 1200
Chicago, Illinois 60602
Telephone: (312) 214-0000

Stacey Kelly Breen
WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLC
55 West Monroe Street, Suite 1111
Chicago, Illinois 60603
Telephone: (312) 984-0000

SUMMARY OF THE CASE

This appeal presents a fee dispute among attorneys who took the laboring oar on behalf of all plaintiffs in the complex multidistrict litigation below, and those who did not. The farmers joining in this appeal did not pay the common benefit contributions at issue, and the lawyers who paid the contributions were not ordered by the court to do so. Appellants also expressly agreed to the contributions at the time they entered into settlement. Appellants' arguments, if properly before this Court at all, are meritless. Neither the issues nor the context are new. To the contrary, the court below relied on well-settled law uniformly recognizing that counsel providing services and incurring expenses for the benefit of others are entitled to fees and expenses from those benefitting by their labor. Appellants' legal contentions are contrary to Supreme Court jurisprudence, which has been applied to consolidated and multidistrict proceedings for decades. All other matters are squarely within the trial court's discretion. Appellants neglect to mention, let alone demonstrate clear error regarding, factual findings predicate to conclusions about which they complain.

Oral argument should be heard to address any legal or factual questions the Court may have. Thirty minutes per side as requested by Appellants is appropriate.

CORPORATE DISCLOSURE STATEMENT

Don M. Downing is an attorney with Gray, Ritter & Graham, P.C., a professional corporation. Adam J. Levitt is an attorney formerly with Wolf Haldenstein Adler Freeman & Herz LLC, a limited liability company, and now with Grant & Eisenhofer, a professional association. There are no parent corporations or publicly held corporations owning 10% or more stock in any of these entities.

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JURISDICTIONAL STATEMENT

Appellees/Cross-Appellants agree that subject matter jurisdiction below was based on 28 U.S.C. §1332, in cases consolidated and centralized pursuant to 28 U.S.C. §1407. Appellees/Cross-Appellants also agree that review of the district court's February 24, 2010 order, which merged into the order of December 6, 2012, are final expressions of the matters decided, making review appropriate under 28 U.S.C. §1291, but assert that Appellants lack standing to appeal. Appellants timely filed their notice of cross-appeal on December 19, 2012 after Appellants' December 6, 2012 notice of appeal.

STATEMENT OF ISSUES

I. Whether Appellants have standing to appeal where (**A.)** the common benefit contributions at issue was not paid by clients but attorneys who were not ordered to do so, and **(B.)** Appellants agreed to the 8%-fee and 3%-expense contributions for attorneys providing common benefit services when they entered into settlement.

U.S. v. Northshore Min. Co., 576 F.3d 840 (8th Cir. 2009); *Reuter v. Jax Lit., Inc.*, 711 F.3d 918 (8th Cir. 2013).

Assuming standing, whether:

II. (**A. B. F.)** the court had authority to establish a common benefit fund under well-recognized equitable and managerial powers of federal courts in consolidated proceedings, which are unaffected by *Erie* (**C.)** and are necessary to effectuating congressional goals of 28 U.S.C. §1407, (**D.)** there was no "double payment," and (**E.)** Appellants concededly received substantial benefit from Appellees' work.

Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939); *Walitalo v. Iacocca*, 968 F.2d 741 (8th Cir. 1992); *Hanna v. Plumer*, 380 U.S. 460 (1965); Fed.R.Civ.P. 42.

III. the court acted within its wide discretion by awarding common benefit fees to attorneys performing services benefitting all plaintiffs where (**A.)** the award was based on approved methods and factors, (**B.)** was reasonable as a percentage of the

fund, and (**C.)** the lodestar was based on extensive documentation including audit by lead counsel and numerous sworn declarations.

Fox v. Vice, __U.S.__, 131 S.Ct.2205, 180 L.Ed.2d 45 (2011); *Westcott Agri-Products, Inc. v. Sterling State Bank, Inc.*, 682 F.3d 1091 (8th Cir. 2012); *Moore v. City of Des Moines, Iowa*, 766 F.2d 343 (8th Cir. 1985).

IV. the court acted within its wide discretion by rejecting a common fund fee award to Appellants who, among other things, did not perform common benefit services.

In re Genetically Modified Rice Litigation, Order dated 4/18/2007 Appointing Leadership Counsel (Addm.1-8); *In re Genetically Modified Rice Litigation*, Memorandum And Order dated 2/24/2010 (Addm.22-44).

Cross-Appeal

I. Whether a court has jurisdiction to order common benefit contribution with respect to non-MDL recoveries of claimants represented by attorneys in the MDL who benefitted from MDL work.

In re Air Crash Disaster at Florida Everglades, 549 F.2d 1006 (5th Cir. 1977); *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico*, MDL 2179, 2011 WL 6817982 (E.D. La. Dec. 28, 2011); Fed. Judicial Ctr., Managing Multidistrict Litigation in Products Liability Cases, A Pocket Guide for Transferee Judges 14-15 (2011).

STATEMENT OF FACTS

Appellants dispute contribution toward fees and expenses of court-appointed and collaborating counsel who, for more than five years, expended enormous time and resources prosecuting thousands of claims against Bayer CropScience L.P and related entities ("Bayer") after contamination of the U.S. rice supply. Appellees are the court-appointed Co-Lead counsel who spearheaded the litigation, coordinated services of all assisting counsel on behalf of all plaintiffs, obtained a settlement on their behalf, and sought common benefit fees/expenses for themselves and thirty-two (32) other common benefit counsel. Appellants are plaintiffs who shared in the settlement ("Producers") and their lawyers ("Attorneys") (collectively "Appellants").[1]

The Litigation

On August 18, 2006, the USDA announced that Bayer's unapproved, genetically modified LLRICE601 was found in the U.S. rice supply. Two of the most heavily-used U.S. rice seed varieties–Cheniere and Clearfield 131–were contaminated. Global markets reacted swiftly and severely. *See* Resp.Appx.718-726. Rice prices plunged. In early 2007, Bayer's other experimental trait–LLRICE 604–also was found in the rice supply, further affecting prices.

[1] Appellees refer to "Appellants" generally without concession as to standing (*infra*, Section I), and to "Attorneys" or "Producers" as context dictates.

Resp.Appx.727-730. Loss of market price was universally suffered by long-grain rice producers, located primarily in Arkansas, Louisiana, Mississippi, Missouri, and Texas. Thousands of rice farmers and businesses sued Bayer entities in federal and state courts, asserting claims involving the same core issues of fact and law including: how the contamination occurred; the scope of Bayer's regulatory responsibilities for preventing it; whether Bayer was civilly liable for damages; and whether Bayer's defenses barred any claims.

In order to "eliminate duplicative discovery, prevent inconsistent pretrial rulings," and "conserve the resources of the parties, their counsel and the judiciary," the Judicial Panel on Multidistrict Litigation ("JPML") consolidated and transferred all federal actions to the Eastern District of Missouri pursuant to 28 U.S.C. §1407. *In re LLRICE 601 Contamination Litig.*, 466 F.Supp.2d 1351, 1352 (Jud. Pan. Mult. Lit. 2006). The actions were centralized before the Honorable Catherine D. Perry. In all, lawsuits involving over 11,000 rice farmers ("producers"), exporters, importers, mills and dealers ("non-producers") were combined in the federal multidistrict litigation ("MDL"), while non-removed state cases proceeded in state courts.

The Leadership Order

A number of plaintiffs' counsel applied for leadership positions in the MDL. *See, e.g.*, Resp.Appx.625-638, 639-693; *see also* D.I. 103, 104, 128-129, 145, 146.[2] The predecessor firm of the Phipps Appellants (Adami Goldman) advocated for a leadership slate. *See* Resp.Appx.686.[3] Upon consideration of, *e.g.*, qualification, prior experience, and interests represented, the court on April 18, 2007 appointed Don Downing and Adam Levitt as Co-Lead Counsel, as well as a six-member Executive Committee (collectively "Leadership" or "Leadership Counsel"). Addm.2-8 ("Leadership Order"); *see also* D.I.253 (Transcript).

The court directed all MDL plaintiffs to "act only through leadership counsel," and directed Leadership Counsel to act "on behalf of all plaintiffs" in all "matters concerning the prosecution or resolution of this litigation." Addm.5-6. The court instructed Co-Lead Counsel to seek "assistance of other plaintiffs' counsel. . .in performance of all work necessary." Addm.5. Leadership did as directed. They, and other Common Benefit Attorneys ("CBAs") at their request,

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[2] The record is extensive. *See* Resp.Appx.1-578 (docket). To avoid burdening the Court with the massive amount of motions, exhibits, transcripts and other materials reflecting the activities below, Appellees will sometimes refer to the Docket Index ("D.I.") number in the district court file. FRAP 10(a), 30(a)(2). Where particularly material, the document is included in the appendix.

[3] "Addm." refers to Appellants' Addendum. "Appx." refers to Appellants' Appendix and "Resp.Appx." to Appellees/Cross-Appellants Appendix.

invested monumental time and resources pursuing the claims against Bayer, which can only be summarized here.

Following substantial investigation, research, and consultation with prominent experts, CBAs filed a 97-page Master Consolidated Complaint asserting 33 claims under the laws of all 5 long-grain rice producing states and North Carolina. D.I.264. Service was accomplished domestically, and abroad under the Hague Convention. *See* Resp.Appx.805-808.

When the litigation began, little was known about how Bayer's genetic modification worked, the structure of and key players within various Bayer entities,[4] the complex regulatory framework for genetically-modified material, or how the contamination occurred. Relevant facts and issues were developed after many months of extensive document review, laying groundwork for depositions that followed. CBAs hired translators for foreign witnesses, paid for translation of foreign documents, and addressed foreign laws regarding discovery and related disputes. Appx.903. Successful opposition to foreign defendants' motion to dismiss for lack of personal jurisdiction (D.I.733) paved the way for discovery from them. CBAs examined and coded over 2.8M pages of document discovery,

[4] Bayer is a global, multi-layered organization. *See generally* Resp.Appx.1119-1169. Current and former Bayer employees were deposed in, *e.g.*, North Carolina, California, Pennsylvania, Delaware, Illinois, Tennessee, Amsterdam, and the Netherlands. Bayer's field testing agents were deposed in Louisiana, Puerto Rico, and Texas. Bayer's corporate structure is a complicated affair one employee likened to spaghetti. Resp.Appx.1179.

took or defended 167 depositions, and subpoenaed at least 21 third parties. Appx.902-904.

Evidence regarding Bayer's development and testing of LLRICE was common to all claims, federal and state. *See generally* Resp.Appx.1187-1191, 1210-1241. Bayer scientists and managers (*e.g.*, Kirk Johnson, Donna Mitten, Bernard Schreiber, Franz Eversheim, Sally Van Wert, Margaret Gadsby) and its primary agent Steve Linscombe, all deposed in the MDL, as well as documents obtained in the MDL, were the same key witnesses and documents, regardless of forum. *See* Appx.2328-2330, 2427-3399. Regulatory requirements and facts respecting Bayer's non-compliance were also the same. *See generally* Resp.Appx.1192-1199(regulatory requirements and facts). Leadership coordinated with state counsel regarding depositions, which could be cross-noticed in related state cases. *See* Addm.25. They obtained protective order amendments permitting MDL documents and experts to be used in state cases. D.I. 1202, 1203.

In early-mid 2009, Bayer sought to restrict or altogether bar plaintiffs' claims via federal preemption, Arkansas and Missouri economic loss doctrines, submissibility arguments, and its position that farmers could not recover on behalf of share-rent landlords as a matter of law. D.I.1053, 1165, 1434, 1435. CBAs opposed all these arguments. D.I.1125, 1127, 1528-1531, 1533. CBAs also filed their own motions to establish Bayer's successor, general partner, and agency

liability, defeat intervening and/or superseding cause, and establish Bayer's non-compliance with federal statutes and regulations. D.I.1431-1433, 1445-1449, 1452, 1457. They filed *Daubert* motions to limit or exclude testimony of Bayer's liability and damages experts. D.I.1438, 1440-1444, 1450-1451. On October 9, 2009, the court issued rulings favorable to plaintiffs. Resp.Appx.869-920; *see also* Appx.908-910. CBAs later briefed the same or similar issues under Mississippi, Louisiana, and Texas law with similarly favorable results. *See* Appx.910, 2075, 2981, 3495.

CBAs also engaged in extensive pre-trial activity for, and presentation of, MDL bellwether trials, the first (11/2/09-12/4/09) involving Missouri farmers, the second (1/11/10-2/10/10) Arkansas and Mississippi farmers, and the third (6/21/10-7/14/10) Louisiana farmers. Defense of post-trial motions from one trial was often concurrent with pre-trial and trial activity for the next. *See* Appx.911-912.

Each bellwether trial resulted in a plaintiffs' verdict. *See* App.Br.66. CBAs prepared for a fourth bellwether trial (Texas) that settled a week into trial. App.Br.67. MDL lawyers also went to trial in Arkansas with the state-court team in *Schafer v. Bayer CropScience, et al.*, which produced a $5,975,605 compensatory and $42,000,000 punitive verdict. App.Br.66. Bayer appealed the *Schafer* verdict, upheld by the Arkansas Supreme Court. *See Bayer CropScience*

LP v. Schafer, 385 S.W.3d 822 (Ark. 2011) (finding state punitive damages cap unconstitutional and rejecting economic loss doctrine). It also appealed all MDL judgments to this Court, Appeal Nos. 10-2701, 10-2703, 10-3755. Two were fully briefed, and a third substantially briefed when settlement with Bayer was finally reached.

All told, CBAs spent over 107,000 hours and incurred $5,468,450.20 in expenses prosecuting the MDL. Appx.981; Addm.75. They analyzed/coded 2.8M pages of document discovery, took/defended 167 depositions, subpoenaed 21 witnesses (Appx.894), researched, filed and responded to over 190 motions and attended 62 hearings and court conferences (Resp.Appx.1-578), winnowed down key testimony presented through numerous Bayer and other witnesses live or by video, cross-examined or presented testimony from 10 liability and damages experts, prepared for and presented 4 complete jury trials, and defended as many verdicts post-trial and on appeal. *See* Appx.898-915. They also negotiated settlement on behalf of all plaintiffs. Appx.915-925.

Appealing Attorneys

Appealing Attorneys had clients in both the MDL and state court. They were not among the CBAs who prosecuted the MDL on behalf of all plaintiffs. The work they recount to this Court was for individual clients and mostly in state cases. App.Br. 3-6, 29-31. They did not collaborate with, but "operated wholly

independently" of, and "separate and apart" from, MDL Leadership. Appx.1732-1733. This separation was their choice. Resp.Appx.1276-1343. Attorneys did, however, have access to all MDL documents, depositions, exhibits, legal arguments, rulings, and other work from which they benefitted in state cases. Addm.25-26, 33-34, 94-95; Appx.2327-2330, 2428-3399.

The Common Benefit Order

In August, 2009, Leadership moved to establish a common benefit fund trust ("CFBT") to compensate CBAs for their work. Appx.9-204. The motion sought contribution of 8% and 3% of gross producer recoveries for fees and expenses respectively, and a contribution of 7%-fee/3%-expense from non-producers. Appx.9-35. Leadership requested that these percentages be assessed on MDL recoveries, as well as non-MDL recoveries of claimants whose counsel had access to and benefitted from MDL work. *See* Appx.32.

A majority of MDL plaintiffs supported the motion. *See* Appx.463. Lawyers with clients in state cases also agreed to join the trust. Many submitted supporting briefs. Appx.205-261, 404-406, 443-454. Appellants, however, disputed the court's authority to establish the fund, and its jurisdiction to assess state-court recoveries. Appx.1689-1748.

On February 24, 2010, the court issued its common benefit order ("CBO"), granting the motion as to all federal cases at the contribution levels requested,

except European non-producers, whose fee set-aside was reduced to 6% in view of their differing claims. Addm.35-36. The court established the CBTF exercising inherent equitable and managerial authority under well-settled law. Addm.28-29. It also found that all producer and non-producer plaintiffs "have benefitted substantially, and will continue to do so, from the work performed by plaintiffs' leadership counsel." Addm.33. The court recognized that Leadership "shares the products of its labor with all of the plaintiffs." All depositions and discovery from Bayer defendants was "made available to all the plaintiffs in all the cases, state and federal." Addm.25. Further,

> the leadership group's work in discovery, motion practice, and the bellwether trials has provided a foundation for all of the cases involved in this litigation. Evidence about what Bayer did in developing and distributing the genetically modified rice is central to the proof on all the claims in this litigation. This evidence was exclusively within Bayer's control, and the only realistic way for the evidence to be developed was through the type of centralized discovery that the leadership group conducted. . .[and the then, two MDL bellwether trials]. . .essentially provided a preview for all other plaintiffs of the trial testimony they might expect from the Bayer witnesses and the types of cross-examination that their witnesses and clients might expect at trial from Bayer's counsel. . . .

Addm.33-34. The court particularized benefits to appealing Attorneys, who were trying their *Kyle v. Bayer* case in Arkansas:

> Although Phipps has used his own expert witnesses, he also used the depositions taken by the leadership group, and he has used the documents and other discovery from Bayer obtained by the leadership group. A member of the Phipps firm attended all depositions conducted by the leadership group and asked questions at the end. A representative of the Phipps firm was in daily attendance at the second bellwether trial. The

Phipps firm and other firms with state cases obtained large portions of the trial transcripts of the bellwether trials, including the examination and cross-examination of some of the same expert witnesses who Bayer will use in the current Arkansas trial and in other state trials.

Addm.26. The court reluctantly declined to extend the CBO to state recoveries, finding lack of jurisdiction to do so. Addm.23. Co-Lead Counsel established, and became Co-Trustees of, a qualified settlement fund trust created, and subsequently amended, by court order into which contributed amounts were to be, and later were, deposited. Resp.Appx.986; Appx.710-711.

The Settlement

Leadership Counsel engaged in prolonged, arduous negotiations with Bayer throughout the litigation, including numerous formal mediation sessions. *See* Appx.915-925. A global producer settlement was reached on July 1, 2011 providing $750,000,000 to resolve all producers' claims arising from the contamination. This global resolution was comprised of two separate agreements: (1) the MDL Settlement, covering claimants in the MDL and others agreeing to its terms; and (2) the "GMB Settlement," covering claims outside the MDL, executed by Martin Phipps, Mikal Watts and two other lawyers having clients within and without the MDL. *See* Resp.Appx.1005-1105; *see also generally* Appx.916-917.

The Allocation Order

In 2012, Co-Lead Counsel sought allocation and distribution of common benefit funds to themselves and 32 other CBAs who performed

services and incurred expenses for the benefit of all plaintiffs. Prior to the motion, lead counsel audited all billing records under standardized criteria, reducing excessive time and removing time spent solely in representation of individual clients. Appx.960-61(¶6); Appx.1147-48(¶6). They submitted 51 sworn declarations in support. Appx.885-950, 958-1457. Appellants opposed, moved to compel discovery, and sought a fee distribution of their own. Appx. 1655-2285. Appellees responded. Appx.2311-3640; Resp.Appx.1276-1343.

The court appointed the Honorable Stephen Limbaugh (ret.) to review all materials, "establish a process by which objectors may be heard," assess "the reasonableness of the protocols and processes used by Co-Lead Counsel in reaching the proposed allocations," as well as the "reasonableness of the fees and expenses proposed," and to issue a report and recommendation. Appx.881-82. The Special Master conducted an "in-depth review" of all motions and responses which, with the "array of exhibits were voluminous." Addm.50. He met with counsel, including appealing Attorneys. Addm.50; Appx.3873. After all review, he filed a 26-page report. Addm.45-71. Appellants filed an opposition, to which Appellees responded. Appx.3848-3897. After *de novo* review, the court adopted the report and recommendations, finding the process fair, the fees and expenses reasonable, and approving a small multiplier for six firms in view of their

extraordinary contribution. Addm.90-99. It denied appealing Attorneys' discovery request, finding in-depth examination of individual time sheets unnecessary given the sworn declarations of Co-Lead Counsel attesting to the procedures used in analyzing them, and because Attorneys "provided no reason that this court may not rely on those attorneys' sworn representations regarding that evidence." Addm.95. It also denied Attorneys' request for CBTF fees because they "did not coordinate with the plaintiffs' co-lead counsel at any time during this litigation," and "the work done by [Attorneys for their] own clients did not benefit the rest of the plaintiffs, while the work performed by the [CBAs] definitely benefitted [Attorneys] and [their] clients." Addm.95. This appeal followed.

SUMMARY OF ARGUMENT

I. Appellants lack standing to appeal. Producers did not pay the common benefit contributions at issue, and Attorneys who did were not ordered to do so by the court. Appellants also expressly agreed to the contributions, at the percentage levels ordered, at the time they entered into settlement.

II. District courts have well-established equitable and managerial authority to order contribution for fees and expenses to counsel acting on behalf of all plaintiffs. Such authority is uniformly recognized in consolidated proceedings, including those under 28 U.S.C. §1407, and necessarily exercised if congressional purposes of consolidation are to be fulfilled. Appellants demonstrate no substantial policy of any relevant state to preclude application of federal law and rules of civil procedure, which in any event are unaffected by the *Erie* Doctrine.

"The factual resolution of attorneys' fee cases. . .are peculiarly within the competence of the district courts, which are intimately familiar with their respective bars" and have "special understanding" of the litigation. *Moore v. City of Des Moines, Iowa*, 766 F.2d 343, 345 (8th Cir. 1985) (internal quotations and citations omitted). Factual findings are reviewed only for clear error, and "[w]here there are two permissible views of the evidence the factfinder's choice between them cannot be clearly erroneous." *Schaub v. Von Wold*, 638 F.3d 905, 915 (8th Cir. 2011). The court below found that Appellants substantially benefitted from

MDL work, which Appellants do not contend was clearly erroneous or indeed challenge at all. There is no "double payment" and Appellants, who were not active participants in the MDL and substantially benefitted from MDL work, were properly ordered to contribute payment for services rendered and expenses incurred on their behalf.

III. The court applied approved methods and factors in making its common fund award, and was well within its considerable discretion in determining the appropriate percentage assessment, as well as reasonableness of fees on both a percentage-of-fund and lodestar basis. The court properly relied on extensive documentation for the lodestar, including numerous sworn declarations. The process was fair, transparent, and consistent with Supreme Court directive that fee disputes not become a second major litigation.

IV. The court acted within its wide discretion in rejecting Attorneys' request for common benefit fees.

CROSS-APPEAL

I. The court erred in concluding that it lacks jurisdiction to order CBTF contributions from state court recoveries as all persons effecting, and paying, such contributions were/are before the court.

ARGUMENT

I. APPELLANTS LACK STANDING TO APPEAL

A. Appellants Are Not Aggrieved

Appellants challenge the court's authority to order CBTF contributions, but did and do not dispute the 3% expense level or award. They represented below that any expense refund would go to Attorneys rather than Producers. *See* Appx.3841(characterizing expense refund as taxable attorney income). They also expressly represented that "funds held back for attorney's fees under [the CBO] will come from [Attorneys'] share of the recovery, not the [Producers'] share." Appx.1660. In other words, while the court's assessment was on gross recoveries of producer and non-producer plaintiffs (Addm.41-42), Attorneys paid it from their fee portion of those recoveries.

Only parties "aggrieved by a judgment or order" have the right to appeal. *U.S. v. Northshore Min. Co.*, 576 F.3d 840, 846 (8th Cir. 2009) (quoting *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980)). If a party's interests are not adversely affected, it does not have standing. *Id.* at 848; *accord Dorsey v. Pinnacle Automation Co.*, 278 F.3d 830, 839 (8th Cir. 2002). Producers are not aggrieved by the assessments because they did not pay them. Attorneys paid the assessments, but not because the court required them to do it. Neither Producers nor Attorneys are aggrieved by the CBO.

B. Appellants Expressly Agreed To An 11% CBTF Contribution For Fees And Expenses To Common Benefit Attorneys

Appellants also expressly agreed to a common benefit reduction of their settlement recoveries from Bayer in the MDL. Producers entered into settlement by submitting an enrollment/claims package with a signed declaration of counsel. Resp.Appx.1016 (§2.3.1), 1018 (§2.3.4). Each "Enrolling Counsel [Attorneys] and each Eligible Claimant [Producers]. . .agree[d] to be bound by all of the terms and conditions of [the Settlement Agreement]." Resp.Appx.1018. The Agreement expressly states that settlement payments "shall be made as if Judge Perry's February 24, 2010 [CBO] applied," including the direction that 8% and 3% of gross recoveries be "directed to the [CBTF]" for fees and expenses, respectively, to "attorneys providing a common benefit." Resp.Appx.1059. Each Producer "underst[ood] and agree[d]" that payment would be after deduction of fees and expenses "in accordance with the terms of this Agreement" and court order. Resp.Appx.1060. The 11% assessment was in fact deducted. *See* App.Br.26, n.16.

This Court may affirm on any basis supported by the record. *Reuter v. Jax Lit., Inc.*, 711 F.3d 918, 923-24 (8th Cir. 2013). Appellants have waived arguments regarding, or cannot be aggrieved by, that to which they agreed including: establishment of the CBTF; the contribution levels of the assessment; the propriety of their contribution; and payment of fees and expenses to CBAs. *See, e.g., Storley v. Armour & Co.*, 107 F.2d 499, 504 (8th Cir. 1939) ("Accepting

the fruits of a judgment and thereafter appealing therefrom are totally inconsistent positions, and the election to pursue one course is deemed and abandonment of the other.") (internal quotations and citation omitted). At minimum, the Settlement Agreement soundly discredits all of Appellants' arguments on these subjects. They are otherwise meritless as discussed below.

II. THE COURT HAD AUTHORITY TO ESTABLISH THE CBTF

A. Equitable Power To Spread Litigation Costs To Beneficiaries Of A Fund Is Well Established

Equitable authority to spread costs of litigation among all who benefit from it has been recognized for over 130 years. *Trustees v. Greenough*, 105 U.S. 527 (1881); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885). The common benefit doctrine "reflects the traditional practice in courts of equity" to prevent unjust enrichment by "assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). While frequently applied in class actions, the doctrine was developed *independent* of that device and relies on the broader "original authority" of federal courts "to do equity in a particular situation." *Sprague v. Ticonic Nat'1 Bank*, 307 U.S. 161, 166 (1939).

Exercise of equitable authority is just as appropriate in non-class MDLs as it is in class actions, and for the same reason–to prevent unjust enrichment and to spread the time and expense advanced by the few who benefit the many. It is

standard practice to appoint leadership to undertake responsibilities for all plaintiffs in consolidated proceedings. *Infra*, Sections II B, C. Here, Co-Lead Counsel were directed to act "on behalf of all plaintiffs" and to enlist others "in performance of all work necessary for the prosecution of the case." Addm.5-6. They did so for more than five years. The court found that all parties benefitted from that work and associated expenses. Addm.25-26, 33, 95. Appellants *do not contest* those findings. While Attorneys contend that they were not "free-riders" because of their work for individual clients (App.Br.9, 27; *infra* Section III E), they do not and cannot dispute that it was Leadership who collaboratively prosecuted the MDL on all plaintiffs' behalf. And they have never denied access to and use of MDL work.

The "overarching principles of the common benefit doctrine" and their applicability to MDLs were well articulated by Appellant Watts who, along with other Steering Committee members in *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, MDL 2179 (E.D. La) ("*BP Oil*"), also sought a fund, and observed that the common benefit system:

> 1) . . .spreads the necessary costs of litigation equitably among all who receive a benefit from the litigation, but only if and when the benefit is realized by a recovery;
>
> 2) . . .incentivizes designated counsel to undertake the substantial risk of advancing such necessary costs and time at their own expense, on a contingent basis, for the benefit of all, on the prospect of recouping it later, if and when these efforts are successful; and

> 3) . . .produces a net benefit to all participants by eliminating duplication of cost and effort, and most fully realizing the potential economies of scale inherent in mass tort/mass disaster litigation.

Appx.2408. These observations are correct and underscore the soundness of common benefit principles in mass tort litigation.[5]

If equitable authority to distribute responsibility for fees and expenses is *not* recognized, counsel like Attorneys can ride the coattails of others until settlement, at which point their clients collect a share without contributing to the work that obtained it, and Attorneys collect a fee on that share having done little to earn it. By contrast, Leadership Counsel would be relegated to their private fee contracts and not recoup what they expended. This situation "would not only be unjust. . .but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage." *Trustees*, 105 U.S. at 532. A charge on the fund "is the most equitable way" to secure contribution. *Id*.

Appellants make a vague contention that two of the common benefit doctrine elements articulated in *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 265 (1975) were unsatisfied. How that is so, Appellants do not say. App.Br.18, 26-27. Clearly, both are met. The Supreme Court has explained what it meant in *Alyeska* that the benefits "be traced with some accuracy" and the costs

[5] Mr. Watts has occupied leadership roles in other MDLs in which a CBTF was established to pay attorneys in that position. In *BP Oil*, Watts advocated the same positions as Appellees on virtually every issue he now appeals. Appx.2383-2426.

"shifted with some exactitude." *Boeing*, 444 U.S. at 478-79 (quoting *Alyeska*, 421 U.S. at 265 n.39). These characteristics may be absent "where litigants simply vindicate a general social grievance," but are present when each class member has a "mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf." *Id.* at 79. "This benefit devolves with certainty upon. . .identifiable persons" and an award against the judgment shifts the costs of litigation to each "in the exact proportion that the value of his claim bears to the total recovery." *Id.* Appellants do not and cannot contest that the settlement here was of ascertainable amount, the identity of claimants known, each claimant's portion mathematically calculated, and the assessment imposed in proportionate share. *See* Resp.Appx.1005-1105.

Appellants' attempt to distinguish MDLs from class actions based on client consent is disingenuous. App.Br.24-25. Relying on commentary from a *draft* Restatement section, Appellants suggest that class members who do not opt out "are impliedly agreeing to pay fees." *Id.* at 24. Here, Appellants chose to enter into settlement, and agreed to an 11% reduction for "attorneys providing a common benefit." Resp.Appx.1059-1060. Appellants' consent was not implied but express. Appellants' other contention that compensation for benefits conferred on another "must ordinarily [be founded]. . .on an agreement with the recipient" (App.Br.25) also is meritless. Here, there *was* such an agreement. Even without

one, equitable authority remains. *Sprague*, 307 U.S. 161.

Power to create a common benefit fund is proper and necessary in mass litigation. *See* Manual for Complex Litigation ("MCL") 4th §14.11; *In re Diet Drugs*, 582 F.3d 524 (3d Cir. 2009); *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006, 1017-20 (5th Cir. 1977); *In re Diet Drugs Prods. Liab. Litig.*, 553 F.Supp.2d 442, 457-58 (E.D. Pa. 2008); *In re MGM Grand Hotel Fire Litig.*, 660 F.Supp. 522 (D. Nev. 1982); *In re Zyprexa Prods. Liab. Litig.*, 467 F.Supp.2d 256, 265 (E.D.N.Y. 2006). Appellants seek support from academic or partisan commentary[6] and a draft Restatement,[7] but cite no countervailing authority.

B. Managerial Authority Is Well-Established And Necessary

It also is well established that "[c]ertain implied powers must necessarily

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[6] Professors Silver and Miller are paid consultants supporting settlement and fee objectors. *See In re Vioxx Prods. Liab. Litig.*, 760 F. Supp.2d 640, 649 n.16 (E.D. La. 2010).

[7] The draft Restatement commentary has changed over the years. In 1994, it noted that "leading accounts of fees to court-appointed counsel in consolidated litigation *properly emphasize* factors independent of restitution to justify" imposing fees. *Vioxx*, 760 F. Supp.2d at 649 (quoting Restatement (Third) Restitution §30 comment b (TD No.3, 1994)) (emphasis added). The 2004 draft quoted by Appellants used the "frequently appear inconsistent" language. App.Br.24. The Restatement as adopted deletes that language, more neutrally stating that fees to appointed counsel "cannot be explained entirely by restitution principles," and that whether these fees are so "authorized" is "probably irrelevant" in view of administrative convenience. Restatement (Third) Restitution §30 (TD No.3 2004), comment b; *compare* Restatement (Third) Restitution §29 (2011), comment b.

result to our Courts of justice from the nature of their institution. . .because they are necessary to the exercise of all others." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)(quoting *United States v. Hudson*, 7 Cranch 32, 34, 3 L.Ed. 259 (1812)). Such powers are found in "the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id*. (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630-631, (1962)). This authority is recognized in Federal Rules of Civil Procedure ("FRCP") including Rule 42, which grants broad discretion to "issue any. . .orders to avoid unnecessary cost or delay" in consolidated proceedings. FRCP 42(a)(3); *see also* FRCP 16(c)(2)(L)(court may adopt "special procedures for managing potentially difficult or protracted actions" involving complex issues and multiple parties). Courts "must have authority to manage their dockets, especially during massive litigation." *In re Fannie Mae Sec. Litig*., 552 F.3d 814, 822-23 (D.C.Cir. 2009).

A seminal case recognizing appropriate use of managerial authority in such cases was decided some 35 years ago in *Air Crash Disaster*. The district court awarded fees to lead and liaison counsel in a consolidated multidistrict case arising from an air crash. 549 F.2d at 1008. Affirming, the Fifth Circuit emphasized the judicial strains and public policies particular to this type of action (*id.* at 1011-1012), and "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for

litigants." *Id*. at 1012 (quoting *Landis v. North American Co*., 299 U.S. 248, 254 (1936)). It also recognized that "[m]anagerial power is not merely desirable. It is a critical necessity." *Id.* "Certainly, overlapping duplication in motion practices and pre-trial procedures occasioned by competing counsel representing different plaintiffs. . .constitute the waste and inefficiency sought to be avoided by the lucid direction contained in [Rule 42]." *Id*. at 1014. "[A]ppointment of a general counsel may. . .prove the only effective means of channeling the efforts of counsel along constructive lines and its implementation must be considered within the clear contemplation of the rule." *Id.* (quoting *MacAlister v. Guterma*, 263 F.2d 65, 68-69 (2nd Cir. 1958)).

Power to appoint such counsel carries, and requires, corollary power to pay them. *See Air Crash Disaster*, 549 F.2d at 1016 (power to appoint leadership counsel illusory if they are expected to perform desired duties without compensation); *accord Diet Drugs*, 582 F.2d at 546-47; *In re Linerboard Antitrust Litig*., 292 F.Supp.2d 644, 654, 654 (E.D. Pa. 2003); *Turner v. Murphy Oil*, 422 F. Supp.2d 676, 681 (E.D. La. 2006); *see also Smiley v. Sincoff*, 958 F.2d 498, 500-502 (2d Cir.1992) (affirming enforcement of committee fee structure). Accordingly, authority to "select and empower. . .one or more attorneys to act on behalf of other counsel and parties in handling particular aspects of [consolidated] litigation," and to "impose liability for court-appointed counsel's fees on all

plaintiffs benefitting from their services" is well recognized. *Walitalo v. Iacocca*, 968 F.2d 741, 743, 747 (8th Cir. 1992).[8]

The court below followed standard procedure for the good of the public, the judiciary, and the litigants. Indeed, the common benefit doctrine "has become a staple of effective case management in modern complex litigation, especially contemporary multidistrict. . .litigation." Appx.2411; *accord* MCL 4th §20.312 ("MDL judges generally issue orders directing that. . .a fixed percentage of the settlement [be contributed] to a general fund to pay national counsel."); *see also* App.Br.53-57 (citing cases); *In re Pradaxa Prods. Liab. Litig.*, MDL 2385, 2012 U.S. Dist LEXIS 162110 (S.D. Ill. Nov. 13, 2012); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, MDL 1407, 2009 U.S. Dist. LEXIS 126729 (W.D. Wash. Sept. 18, 2009).

C. Such Authorities Have Particular Importance to 28 U.S.C. § 1407

Appellants' suggestion that by not expressly providing for attorneys' fees, Section 1407 somehow *prevents* application of managerial or common benefit authority is incorrect. App.Br.14-15, 23. Unquestionably, Congress has enacted statutes providing for attorneys' fees to prevailing parties.[9] Such fee-shifting

[8] Appellants' criticism that Judge Perry relied on the MCL as "authority" is ill made. App.Br.15-16. The court cited judicial precedent from Circuits including this one. Addm.29.

[9] Statutory fee-shifting and common benefit awards are different exceptions to the American Rule and supported by different rationales. "Fee-shifting" occurs "when

statutes, however, have never been to the exclusion of a court's inherent authority, which exists *independent* of statute. *Chambers*, 501 U.S. at 45.

A MDL transferee judge has the same powers as any district court. *In re Phenylpropanolamine Prods. Liab. Litig*, 460 F.3d 1217, 1230 (9th Cir. 2006). While Congress can limit judicial power, it is "'not lightly assume[d] that Congress has intended to depart from established principles' such as the scope of a court's inherent power." *Chambers*, 501 U.S. at 47 (quoting *Weinberger v. Romero–Barcelo,* 456 U.S. 305, 313 (1982)). There is no indication that by enacting Section 1407, Congress intended to repeal or modify the existing and long-held inherent powers of federal courts. Just the reverse.

"Section 1407 arose out of federal courts' experience with massive prosecution of electrical equipment manufacturers for antitrust violations. . . rendered manageable only by conducting joint pretrial proceedings." *Phenylpropanolamine*, 460 F.3d at 1229. Congress "saw a need to create a mandatory version of that procedure" for mass torts. Thus, it created the JPML "to consolidate pretrial proceedings for such cases and to assign them to a single judge who would coordinate them." *Id.* at 1229-30 (citing H.R.Rep. No. 1130, 90th

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one party is compelled to bear the opposing party's fees." *In re Diet Drugs,* 582 F.3d 524, 540 (3d Cir. 2009). The common benefit doctrine does not exact a penalty from the loser, but contribution from the winner for services on his behalf. *Id*. No fee shifting, as traditionally understood, occurred here. Addm.39.

Cong., 2d Sess. 1 (1968), reprinted in 1968 U.S.C.C.A.N. 1898, 1899, 1900-01). This procedure "assure[s] uniform and expeditious treatment in the pretrial procedures in multidistrict litigation." *Id.* (quoting *id.* at 1901).

Among other things, the transferee judge is expected to "establish a national unified discovery program to avoid delay, repetition and duplication and to insure that the litigation is processed as efficiently and economically as possible." *Id*. at 1330 (quoting John T. McDermott, "The Judicial Panel on Multidistrict Litigation," 57 F.R.D. 215, 217 (1973)).[10] In addition to the problems of discovery, the transferee court is confronted by hundreds or thousands of claimants in diverse geographic locations, represented by scores of attorneys. These cases "would become chaotic and totally unmanageable" if each counsel was allowed to pursue his own discovery, file his own motions, and "present his position or theory of the case." *In re Air Crash Disaster at Detroit Metropolitan Airport*, 737 F. Supp. 396, 338 (E.D. Mich. 1989).

Multidistrict litigation "is a special breed of complex litigation" and district courts need "broad discretion to administer the proceeding as a whole." *Phenylpropanolamine*, 460 F.3d at 1232. "For it all to work, multidistrict litigation assumes cooperation by counsel and macro-, rather than micro-, judicial

[10] Here, "[i]t would not have been possible for thousands of plaintiffs to separately obtain discovery from Bayer, and that, of course, is part of the reason the cases were combined in this MDL." Addm.33.

management because otherwise, it would be an impossible task for a single district judge to accomplish." *Id.* Appointment of leadership counsel is a necessary tool "provid[ing] order and structure to multidistrict proceedings." *Linerboard*, 292 F.Supp.2d at 667.

Appellants do not challenge the court's authority to appoint leadership, only its means of paying them. However, "if lead counsel are to be an effective tool the court must have means at its disposal to order appropriate compensation for them." *Air Crash Disaster*, 549 F.2d at 1016. "The interests to be served are too important to be left to volunteers (or draftees)." *Id.* "The limitations of relying upon unpaid. . .counsel are demonstrated by the history of the application of complex litigation techniques to air disaster cases." *Id.* One specific criticism was that the lack of compensation "might lead to inadequate discovery and incomplete flow of information. *Id.* at 1016-17. Denying payment would also create strong disincentive to continue meritorious claims in cases not certified as class actions, and would surely quell application for lead counsel appointment.

D. There Is No "Double Payment"

Just as in *Air Crash Disaster*, "Appellants ask, 'why pay them for doing what they would have done anyhow on behalf of their own clients?" 549 F.2d at 1017; *see also* App.Br. iii, 9. As the Fifth Circuit recognized, this "is too simplistic" a view. *Id.* First, it disregards that leadership counsel are directed to

act on behalf of *all* plaintiffs. The massive amount of work undertaken is for everyone, not just their own clients. *Id.* at 1011; *accord* Addm.5-6, 25, 33-34. Second, this argument assumes that each counsel has sufficient clients to make all the work he is expected to perform economically feasible if looking only to them for payment. App.Br.23. That often is not the case. *Air Crash Disaster*, 549 F.2d at 1017. Nor should it be. *See Vioxx*, 760 F.Supp.2d at 643 n.4 (large number of clients may "indicate skill at advertising, but does not guarantee the best lawyering" or suitability for cooperative endeavors crucial to MDLs).

Saying that leadership "are paid twice for the same work" also overlooks "the broader responsibilities that [they] bear and the larger interests that they serve. . .By making manageable litigation that otherwise would run out of control, they serve interests of the court, the litigants, the other counsel, and the bar, and of the public at large, who are entitled to their chance at access to unimpacted courts." *Air Crash Disaster*, 549 F.2d at 1017. Here, Appellants' refrain that CBAs received "double payment" (App.Br. iii, 9, 13, 17, 48-49) also is incorrect for the very practical reasons that: (1) *everyone* contributed to the fund; (2) all CBAs reduced their fee arrangements by 8% so that total fees paid by clients did not exceed the contracted amount; and (3) CBAs' time was segregated into work solely for individual clients versus common benefit work. Any time in the former category was removed from the fee request. Appx.960-961, 932 (n.24), 1147-

1148, 3405-3406; Addm.60.

Proceeding under a coordinated system led by appointed counsel for the collective prosecution of the MDL is proper and necessary to the goals of Section 1407. Likewise, payment for these services secures qualified counsel willing to undertake responsibilities for the benefit of all.

E. Appellants Were Properly Ordered To Contribute

Appellants contend that they should have been exempted from contribution. App.Br.26-31. Of course, Appellants *agreed* to that contribution as part of the settlement. Appellants' argument is meritless for other reasons as well.

According to Attorneys, they had 872 plaintiffs in the MDL and 4,128 other clients, 2,978 of whom filed suit in state court. *See* App.Br.3 & n.2, 29 & n.18. Lawsuits filed on the latters' behalf, discovery, motions, trials, and defense of judgments were all, admittedly, in Attorneys' *state* cases. App.Br.3-6, 29-31. Attorneys used their own experts in those *state* cases. *See* Appx.1732. MDL depositions "could be cross-noticed with *state* cases" and "used in the *state* suits." Addm.25 (emphasis added). The only work Attorneys actually claim in the MDL was filing individual lawsuits and preparing individual plaintiff fact sheets. App.Br.29 & n.19.[11] Those tasks were for Producers alone. Attorneys also

[11] Not all these lawsuits were even filed in federal court. For example, the Phipps firm filed cases for 159 plaintiffs in Texas state court. Resp.Appx.809-822. Bayer removed, asserting fraudulent joinder. Phipps moved to remand. The court

attended mediation/settlement sessions. App.Br.5. Here too, they pressed their own interests. Resp.Appx.1276-1301. Lead counsel negotiated the MDL settlement as Appellants admit. *See* Addm.6 (¶6); App.Br.5.

In all consolidated actions, different lawyers represent individual clients. Rarely does leadership perform 100% of the work for every plaintiff. Addm.34-35. And CBAs did not ask for 100% of the fees. They did, however, perform services common to all plaintiffs, and for that they should be compensated. *Walitalo*, 968 F.2d at 743.[12] The court found that all producer and non-producer plaintiffs benefitted from Leadership's work and "definitely benefitted" Appellants. Addm.33, 95; *see also* Addm.65.[13] These findings are unopposed. Thus, under Appellants' view, if attorneys do *any* work for *individual* clients, they are not "free-riders" and thus immune from paying others who *concededly bear* the vast bulk of it *for the benefit of all*. App.Br.27-29. This argument is unsupportable as a matter of law and policy.

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found no basis to hold resident defendants liable. Resp.Appx.827, 831-835. Three more remand motions were also denied. Resp.Appx.945-961.

[12] Even Appellants' Professor Rubenstein advocates that lead counsel receive a fee for common benefit work. *See* Appx.301-302.

[13] Appellants' representations that they "orchestrated" the global settlement terms and achieved the highest per-acre verdict (App.Br.5, 30, 66) are untrue. *Infra*, Section IV.

The common fund doctrine "prevent[s]. . .inequity" by proportionately spreading payment among those who benefit from the labor of others. *Boeing* 444 U.S. at 478. Appellants concede the lower court's findings of benefit and their argument must fail. And Attorneys *removed themselves* from collaborative efforts on behalf of all plaintiffs. The free-lance system they advocate is contrary to the unchallenged Leadership Order and defeats the purpose of appointing leadership in the first place. *Smiley*, 958 F.2d at 502. If Appellants are exempt, so are all others and what then is left? Answer: the unwieldy system existing before Section 1407.

The untenable character of Appellants' position is exemplified by the cases they cite. None support their position and most are counter to it.

In *Nolte v. Hudson*, 47 F.2d 166, 168 (2d Cir. 1931) the Second Circuit held that the petitioning attorneys who represented 12% of unsecured creditor claims *could* seek fees under the common benefit theory. The only entities the Court held should not contribute were bondholders, who were *adversaries* and thus received no benefit from petitioning counsel's work.

In *Linderboard*, the court ordered contribution from settlement and judgments in tag-along actions because the plaintiffs "benefitted from the work of designated counsel in this case." 292 F.Supp.2d at 663. The language Appellants quote responded to an argument that this unduly burdened the right to opt out. *Id*.; App.Br.27. The Court followed up: "Although plaintiffs in the tag-along actions

contend that they. . .intend to contribute to all aspects of the case against defendants, that argument fails to address the benefit they have already received through the work of designated counsel." *Id.*

In *Air Crash Disaster*, counsel who "actively participated" in pre-trial activities were not required to contribute. 549 F.2d at 1008.[14] But Appellants did not "actively participate" in the MDL. And in another of Appellants' cases, the Ninth Circuit squarely considered whether plaintiffs could "purchase immunity" from contribution by "hiring their own attorneys and participating in the litigation," concluding they could not "where the contributions of the original or lead attorneys and [non-lead attorneys] are unequal." *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 770, 771-72 (9th Cir. 1977). This, it said, is consistent with the purpose of the common benefit doctrine: avoiding unjust enrichment. *Id.* at 772.

Cogently, the Ninth Circuit recognized that "the disparity in effort between lead counsel and nonlead counsel was compelled by the district court's order. . . Nevertheless, the fact remains that lead counsel, according to the district court's findings, engaged in substantial work. . .[benefitting] all claimants." *Id.* On that basis, the Court approved the common fund order. *Id.* The same finding was

[14] The court's *power* to order contribution was not at issue. *Id*. at 1019.

made here. Addm.33-34, 95. The Court otherwise affirmed the power to do so, citing the important role of MDL leadership. *Id.* at 773-75.[15]

While Attorneys may resent their non-leadership status, it is not their desires but a management system at stake. *See Walitalo*, 968 F.2d at 747 n.11 (if responsibility for court-appointed counsels' fees could be avoided by stipulated dismissal, court's "power to appoint attorneys to act on behalf of other attorneys and parties in complex litigation would be meaningless" and attorneys "would be unwilling to assume [leadership] position[s]"); *Air Crash Disaster*, 549 F.2d at 1014 (management needs "take precedence over desires of counsel.").

F. Appellants' *Erie* Doctrine Arguments Are Meritless

Appellants' invocation of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) also is meritless. Appellants largely rely on the same incorrect "free-riding" arguments discussed above, and their state-based arguments fail for the same reasons.

[15] Appellants' citation to *Diet Drugs* is from the dissent and does not support immunity in any event. App.Br.31. *Polonski v. Trum Taj Mahal Associates*, 137 F.3d 139 (3d Cir. 1998) reversed a fee award where not all plaintiffs received a substantial benefit. That is not true here as found below. Appellants' Annotation (App.Br.28-29) recognizes well-established bases for the common fund doctrine, which is applied *despite* the general rule that counsel are paid by their own clients. Annotation, *Construction and Application of 'Common Fund' Doctrine in Allocating Attorney's Fees Among Multiple Attorneys Whose Efforts Were Unequal in Benefiting Multiple Claimants*, 42 A.L.R. Fed. 134, ¶¶2(a), (b) (2005).

App.Br.22 & n.11.[16] Put simply, Appellants were not "active participants" in the MDL. Appellants' other "fee-shifting" argument relies on exactly one Arkansas case to say that "states in which Appellants' suits were brought prohibit fee-shifting absent an attorney-client contract and/or client consent." App.Br.21.[17] That case is inapposite.

Fox v. AAA U-Rent It started as a class action for recovery of corporate income tax refunds. Certification was reversed based on sovereign immunity. 17 S.W.3d 481,485-86 (Ark. 2000). Nevertheless, the state agency decided to issue refunds. *Id.* The Court declined to apply the common benefit doctrine without a

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[16] *None* of the cases Appellants cite are from Arkansas, Louisiana, Missouri, Mississippi, or Texas. *Id*. n.11. Some support Appellees. *See Blue Cross & Blue Shield v. Freeman*, 447 So. 2d 757 (Ala. 1983) (insurer ordered to pay share of insured's attorney's fees because it benefitted from attorney's efforts); *Steinberg v. Allstate Ins. Co*., 226 Cal. App. 3d 216 (Cal. App. 1990) (insurer's counsel ordered to pay share of plaintiffs' attorneys fees in subrogation action, despite argument that insurer was "active" participant in creating settlement); *Means v. Montana Power Company*, 625 P.2d 32 (Mont. 1981) (upholding fees to lead counsel from not only passive but active attorneys, since lead counsel made greater contribution). Some are inapplicable. *See Draper v. Aceto*, 33 P.3d 479 (Cal. 2001) (worker's compensation case; no lead counsel appointed); *Travelers Ins. Co. v. Williams*, 541 S.W. 2d 587 (Tenn. 1976) (insurer told insured's attorney it would handle its own subrogation claim); *Valder v. Keenan*, 129 P.3d 966, 972 (Ariz. 2006) (Arizona statutory wrongful death action); *DuPont v. Shackelford*, 369 S.E.2d 673 (Va. 1988) (will contest); *In re Estate of Kierstead*, 237 N.W.299 (Neb. 1931) (will contest; insufficient evidence that intervenors authorized to act for defendants); *Estate of Korthe*, 9 Cal. App. 3d 572 (Cal. App. 1970) (will contest; *contra Vincent*, 557 F.2d at 772).

[17] Below, Appellants argued that the CBO was precluded by state ethical rules against fee-splitting. Appx.429-430. They do not raise that argument here.

fund on which to assess fees. *Id.* at 485-86. It also rejected attorneys' argument for fees under the class-action settlement agreement. Because of the decertification, that agreement was nullified and, in the Court's view, any attorney-client relationship. *Id.* at 487-88. "[T]here was no class action and no named entity or agent acting on behalf of the nonpaying corporations." *Id.* at 487.

Here, there *was* a fund (deposited in court-approved trust), and there *were* lawyers acting on behalf of Appellants in obtaining it. The Arkansas Supreme Court has many times held that a party creating or preserving a fund is entitled to fees and expenses from those benefitting from it.[18] There also *was* a settlement under which Appellants agreed to fees and expenses for common benefit work. Resp.Appx.1059-1060. Appellants' argument is meritless.[19]

Appellants' non-analytical invocation of the *Erie* Doctrine also is misguiding. Its application does not depend on procedure-substance labels or whether "substantive" rights are affected. App.Br.19-20; *contra Shady Grove*

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[18] *E.g.*, *Lake View School Dist. No. 25 of Phillips County v. Huckabee*, 10 S.W.3d 892 (Ark. 2000) (school district entitled to attorney fees from state, which benefitted from school funding challenge); *Millsap v. Lane*, 706 S.W.2d 378 (Ark. 1986) (attorneys entitled to fees and expenses from corporation in derivative suit not limited to benefit in percentage of plaintiff's stock ownership); *Crittenden County v. Williford*, 675 S.W.2d 631, 634 (Ark. 1984) (taxpayer entitled to attorney fees and expenses "out of a common fund established because of his efforts in behalf of the other taxpayers of the county.").

[19] Appellants' other cases address the methods of calculating a fee award App.Br.20-21. Appellants did and do not claim that the lodestar or percentage methods utilized below were incorrect.

Orthopedic Assoc, P.A., 599 U.S. 393, 130 S.Ct. 1431, 1442-43, 1176 L.Ed.2d 311 (2010). The initial question is whether the doctrine applies at all. It does not.

First, the source of right, not the basis of federal jurisdiction, determines controlling law. *Pope & Talbot v. Hawn*, 346 U.S. 406, 410-11 (1953). While plaintiffs asserted state-law claims against Bayer, the source of Appellants' recovery was settlement. *See Vioxx*, 760 F.Supp.2d at 650 n.17 ("global settlement of these claims ensures that state law has supplied no rule of decision."). The source of claim to attorney compensation was the equitable and management power of the federal court established by federal law.

Second, *Erie* may not be invoked to void a federal rule. *Hanna v. Plumer*, 380 U.S. 460, 470 (1965); *accord Hiatt v. Mazda Motor Corp.*, 75 F.3d 1252, 1258 n.5 (8th Cir. 1996) (federal court neither required nor permitted to apply state law to matter covered by federal rule). Federal courts apply federal rules "without regard to whether the matter might arguably be labeled as substantive or procedural." *In re Baycol Prods Liab. Litig.*, 616 F.3d 778, 786 (8th Cir. 2010) (quoting *Hiatt*, 75 F.3d at 1258). Rule 42 confers broad power to "issue any. . .orders to avoid unnecessary cost or delay" in consolidated actions. FRCP 42(a)(3). This authority relates directly "to the administration of legal proceedings, an area in which federal courts have traditionally exerted strong inherent power. . . The purpose of the Erie doctrine. . .was never to bottle up federal courts. . .when

there are 'affirmative countervailing (federal) considerations' and when there is a Congressional mandate (the Rules) supported by constitutional authority.'" *Hanna*, 380 U.S. at 472-73 (quoting *Lumbermen's Mutual Casualty Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963)).

Third, *Erie* is inapplicable where a federal statute—or judicial decisions applying it—dictate the result. *Sola Elec. Co. v. Jefferson Elec*. Co., 317 U.S. 173, 174 (1942). Congress directed that federal actions be consolidated where doing so will "promote [their] just and efficient conduct." 28 U.S.C. §1407(a). Section 1407's silence on fees or choice-of-law is "no reason for limiting the reach of federal law." *U.S. v. Little Lake Misere Land Co., Inc*., 412 U.S. 580, 593 (1973). "To the contrary, the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts." *Id.* (quotations and citation omitted). Federal courts have filled in the gaps of Section 1407 and have done so in furtherance of federal interests. Those interests are of dominating policy unaffected by *Erie*. *Id.* at 596-97; *Sola*, 317 U.S. at 174.

Fourth, "[t]he power of a federal court to award fees is limited by [*Erie*] only in those cases in which state law requires. . .or prohibits such an award as a matter of state policy." *Kelly v. Golden*, 352 F.3d 344, 353 (8th Cir. 2003). Appellants' citation to *Alyeska*'s footnote 31 regarding "substantial" state policies regarding attorneys' fees adds nothing. App.Br.20. Appellants have not demonstrated that

the policy of any relevant state prohibits contribution to attorneys' fees in cases like this one. If covered by federal rule or statute, the significance of state interests is immaterial in any event. *Hiatt*, 75 F.3d at 1258 n.5.

Even assuming that an *Erie* analysis applies, it is undertaken under at least two approaches–the "outcome determinative" test, and the "federal interest" test. The first is read by "reference to the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of laws." *Hanna*, 380 U.S. at 468. The second asks whether federal interests in applying federal law are such to overcome conflicting state law. *Baycol*, 616 F.3d at 787. This test selects federal law, regardless of *Erie* concerns, as "federal reference to state law will not obtain, of course, in situations in which the state law is incompatible with federal interests." *Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 509 (2001). Federal interests in effectuating the goals of Section 1407 are compelling.

There also is a federal interest in preserving authority to avoid unjust enrichment. If Appellants' argument that entitlement to attorneys' fees must, as a matter of state law, arise from a fee agreement or not at all (App.Br.21), the common benefit doctrine is nullified even in its application to class actions. Appellants' citation to "implied consent" from failure to opt out (App.Br.24) is hollow for the settlement here was an *opt-in* requiring express consent to contribution for fees to attorneys acting for the benefit of all plaintiffs.

III. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN AWARDING COMMON BENEFIT FEES

"The decision to award or deny attorney fees and the amount of any award rests within the sound discretion of the [district] court and [this Court] will not disturb [the district court's decision] absent a clear abuse of that discretion." *Wescott Agri–Products, Inc. v. Sterling State Bank, Inc.*, 682 F.3d 1091, 1094 (8th Cir. 2012) (internal quotations and citation omitted). "The trial court knows the case best. It knows what the lawyers have done, and how well they have done it. It knows what these efforts are worth. It knows how to balance portions of the case together to reach a just and reasonable award." *Id.* (quoting *Young v. City of Little Rock,* 249 F.3d 730, 737 (8th Cir.2001)). Disputes over attorneys' fees are within the special competence of district courts and accordingly, appeals "should be taken only where the district court allegedly has misapplied the applicable law." *Moore*, 766 F.2d at 346.

Here, the court below relied on approved methods and factors in awarding fees. There is no "law" setting a certain percentage contribution level or fee award, which is determined in accordance with the circumstances of each case and the court's informed discretion. Appellants complain that they were not permitted to take discovery and

that the court did not hold a hearing/trial (App.Br.2) but demonstrate none of this to be required (or even appropriate) as a matter of law. App.Br.34-36. Appellants suggest that the court should have reviewed the thousands of billing records audited by Co-Lead Counsel (App.Br.35-36) but did not, and do not, argue that the court *was required* to do so or was precluded from relying on the sworn declaration of counsel. Appellants themselves acknowledge that testimony in that form is appropriate. App.Br.36; *see also Moore*, 766 F.2d at 346 (directing that affidavits be submitted from attorneys regarding fees on appeal). The notion that the court relied on "*ipse dixit*" (App.Br.31) or solely upon a simple spreadsheet (App.Br.8-9, 11, 31-33) is simply unfounded.

Co-Lead Counsel submitted a 58-page memorandum, along with 56 exhibits in support of fees and expenses for themselves and 31 other law firms (7 of which requested expenses only). *See* Appx.893-1478; Addm.74. Three more were added, bringing the total to 34 firms. Addm.49-50, 75. They requested an initial distribution of $51,584,012.54 (the court-approved lodestar) and approval for up to $72,000,000 if and

when additional money comes into the fund. Appx.945; Addm.57.[20] They provided detailed account of common benefit services provided, addressing all approved factors to assess reasonableness on a percentage and lodestar basis. Appx.900-918, 922-944. They attested to their audit of billing statements and the resulting detailed listing of hours and rates by firm and timekeeper. Appx.896-897, 942-944, 960-961(¶¶5, 7), 972-981, 1147-1148 (¶¶5, 7); Addm.77-86. Each CBA attested to the hours expended and that the rates are typical for similarly qualified attorneys in similar cases. Appx.958-1285. Additional declarations from independent counsel confirmed reasonableness of the rates. Appx.1310-1457. All submissions were examined by Special Master Limbaugh who also met with the parties to hear their positions. Addm.50. After *de novo* review, the court found the process fair, the

[20] At the time of the motion, there was $918,000,000 in settlements with Bayer—$750,000,000 from the two producer settlements, and $168,000,000 in additional settlements. Appx.894-895, 2323, 3406; Addm.51-52. Multiplying the respective assessment percentages by the settlement amounts for each claimant category (8%-producers; 7%-non-producers; 6%-European non-producers) resulted in approximately $72,000,000. Appx.944-945, 2323-2324, 3406-3407, 3510-3511. That is the amount *up to which* Appellees sought approval, representing 7.8% of aggregate *possible* recoveries (*Id.)* and an aggregate maximum potential multiplier of approximately 1.38 based on all lodestars. Appx.944-945, 2323-2324, 3406-3410, 3881-3882.

fees and expenses[21] reasonable, and approved a multiplier to six firms for extraordinary contribution.[22] Addm.94-95, 97-98. There was no legal error, and all findings were within the court's considerable discretion.

A. Applicable Standards Were Applied

The "percentage" and "lodestar" are both approved methods and a matter of discretion. *Johnston v. Comerica Mortgage Co*., 83 F.3d 241, 246 (8th Cir. 1996). The first utilizes a percentage of the fund recovered. *In re U.S. Bancorp Litig*., 291 F.3d 1035, 1038 (8th Cir. 2002). This method is "well established." *In re Xcel Energy, Inc.*, 364 F. Supp.2d 980, 991 (D. Minn. 2005) (citing *Petrovic v. Amoco Oil Co*, 200 F.3d 1140, 1157 (8th Cir. 1999)). Indeed it is preferred in common fund cases. *See* 4 Newburg on Class Actions §14:6 (4th ed. 2010) ("in recent years a majority of the Circuit courts have approved the percentage-of-the-fund method"); MCL 4th §14.121 ("[T]he vast majority of courts. . .use the percentage-fee method in common-fund cases"); *In re Chrysler Motors Corp. Overnight Eval. Prog. Litig*., 736 F.Supp. 1007, 1008-09 (E.D.Mo. 1990) (percentage method "is a more appropriate and efficient means of calculating an attorneys' fee award" than lodestar). Courts also may, but are not required to, use the lodestar as a cross-

[21] Appellants do not challenge expenses. App.Br.62, n.31. They theorize that paralegal and other non-attorney time might have been duplicated within "fees" and "expenses" (*id.*) but all time and expenses were separately itemized and described. *See* Appx.962-1309; Addm.77-86.

[22] Appellants do not challenge approval of a multiplier.

check. *Petrovic*, 200 F.3d at 1157. Under either method, courts use various factors, sometimes called the "*Johnson*" factors, to evaluate the fee request.[23]

Here, both methods, and all applicable factors, were presented. Appx.900-918 (recounting work); Appx.922-940 (applying methods and factors). Approved factors were considered by the Special Master (Addm.58-59) whose report the court adopted. Fees were found reasonable on both a percentage, and lodestar, basis. Addm.58, 93, 94-95. Appellants lodge no challenge to the appropriateness of the methods or factors applied.

B. The Fees Are Reasonable As A Percentage Of The Fund

The percentage awarded is supported by each relevant *Johnson* factor. *See* Appx.925-933; Addm.58-59. The court found the percentage "reasonable based on case law and my own analysis of the complexity and amount of work performed by common benefit attorneys in this case." Addm.93.

Appellants advocate for a 4-6% assessment, citing Professor Rubenstein's 2009 declaration that some assessments fell within that range. Add.Br.57-58;

[23] The twelve factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974) have been approved in this Circuit. *Hardman v. Board of Education of Dollarway, Arkansas School Dist.*, 714 F.2d 823, 825 (8th Cir. 1983). The court has broad discretion regarding which factors to apply and their relative weight. *In re Xcel*, 364 F. Supp. 2d at 993.

Appx.1775-76.[24] Here, Appellants *agreed* to an 8% fee reduction under the MDL Settlement and that decision should not be second-guessed now. In any event, assessments by other courts in other cases simply "demonstrate that a reasonable common benefit assessment or award can vary from MDL to MDL and that there is no mathematical formula for deriving a 'correct' amount." *Vioxx*, 760 F. Supp. 2d at 654-55. The 8% assessment is within range of assessments in similar cases, as Appellants' own list, and chart, confirm. App.Br.53-56 (1%-10%); App.Br.57 (2%-17%+); *see also In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, MDL 1407, 2009 U.S. Dist. LEXIS 126729 at *3 n.1 (W.D. Wash. Sept. 18, 2009)(8% for certain claims); *Air Crash Disaster*, 549 F.2d at 1019-21 (8%); *Smiley*, 958 F.2d at 500 (8%).

Appellants also assert that the percentage requested was really 12.5% of the fund. App.Br.52-53. This assertion is based on a calculation using the total fee approved (*assuming* full contribution) but only the MDL Settlement of $577M rather than the $918M value of all settlements. *See* App.Br.52-53; Appx.1713, 2326-2330. As the court not merely "noted" but found, "[t]hose cases, including the [state] cases in which the Phipps Group was counsel, benefitted greatly from

[24] Appellants also rely on Rubenstein for the idea that this "small" 11,000-plaintiff litigation warrants a small percentage. App.Br.58-59; Appx.1776-1777. It is a gross misassumption that number of claimants correlates with complexity of work, difficulty of issues, or time and effort in discovery, research, motions, or trials.

the work performed by the common benefit attorneys" and thus, the whole amount was properly considered. Addm.93.[25] Appellants assert no error in that finding. *See* App.Br.53 n.27. When considered against all settlements, the percentage is up to 7.8%, not 12.5%. *See* Appx.923, 2323-2324, 2326-2330. Percentage awards have been higher than 7.8%, or even 12.5%, in similar cases. Addm.35 (9%-17%); Appx.2332 (n.23) (citing cases).[26]

Moreover, awards in similar cases are one factor among many. Appellants did not below, and do not now, contest that all other relevant factors support the award on a percentage basis. *See* Appx.925-933, 2332. They do. Addm.58-61, 93. The percentage approved is within the court's discretion. *U.S. Bancorp*, 291 F.3d at 1038. The award can and should be affirmed on that basis alone.

C. The Fees Are Reasonable As A Lodestar

Appellants' principal objection is with the lodestar. Again, this Court has expressed special reluctance to "substitute [its] judgment for that of the district court. . .[who] is in the best position to determine whether hours were reasonably expended and whether an attorney's hourly rates are reasonable within the context of the relevant community." *Arnold v. ADT Sec. Services, Inc.*, 627 F.3d 716, 720

[25] *See supra* note 20; *see also* Addm. 25-26, 95; Appx.2327-2330.

[26] Contrary to Appellants' assertion, CBAs actually cannot receive more than 8% of any recovery as that was the highest fee withholding ordered.

(8th Cir. 2010) (quoting *Collins v. Burg*, 169 F.3d 563, 565 (8th Cir.1999)). Having presided over the MDL for many years in all its particulars, the court below was intimately familiar with the litigation and the work performed.

1. The rates were reasonable

Appellants challenge the rates based solely on a spreadsheet comparison (App.Br.60-61;Appx.1862-71) based on: a 2009 Texas Bar Hourly Fact Sheet (2010); a Consumer Law Survey Report 1; and "Ratedriver" I-phone application. App.Br.60-62 & notes 29, 30; *compare* Appx.1718-1720(notes 24, 25). Even assuming reliability,[27] usefulness of these surveys is slim.

The Consumer Law Survey deals with "specialty" practices (*e.g.*, bankruptcy, fair credit reporting, lemon laws) not akin to the complex litigation here.[28] None of the surveys differentiate between, *e.g.*, routine and bet-the-company litigation. None report high, low, or actual rates, but only average or mean rates. Appx.2333-2334. None contain a category for complex litigation,

[27] Trustworthiness of surveys must be established by a number of factors, none of which Appellants demonstrated. *See* Appx.2333 (n.25) (citing *Lutheran Mut. Life Ins. Co. v. U.S.*, 816 F.2d 376, 378 (8th Cir. 1987)).

[28] *See* Resp.Appx.617. This survey forthrightly disclaims usefulness concerning reasonableness of a given attorneys' rate. Resp.Appx.623-624. It has been rejected by other courts. *E.g.*, *Levy v. Global Credit and Collection Corp.*, No. 10-4229, 2011 U.S. Dist. LEXIS 124226 (D.N.J. Oct. 27, 2011)(citing *Williams v. NCO Fin. Sys.*, No. 10-5766 2011 U.S. Dist. LEXIS 50635 (E.D. Pa. May 10, 2011)("The Court is not aware of any court within this Circuit that has relied upon" Consumer Law Survey).

mass torts or class actions, and none account for attorney skill, reputation, or expertise.[29]

By contrast, Appellees provided declarations not only from all CBAs but also from independent counsel with knowledge of prevailing rates in their communities, attesting that the rates are comparable to those typically charged by attorneys with comparable experience and skill in cases of this kind. Appx.936(n.26), 958-1457.[30] This market-based approach is proper and indeed used by Appellants to support their own fee request. Mr. Phipps attested that his team's rates "are within range of rates normally and customarily charged" in like cases. Appx.1859 (¶9). As found below, these rates were the same if not more than CBAs in Texas and other areas. *See* Addm.61, 94; Appx.1861-1871; *compare* Appx.972-981, 1198-1180, 3691-3692.

2. The hours were reasonable as found by appropriate process

[29] Standing, skill, experience and reputation are all considered in assessing value of legal services. *See* Robert L. Rossi, 1 Attorneys' Fees §5:10 (3d ed.2012) (collecting cases); *Johnson,* 488 F.2d at 718-19.

[30] Appellants do not object to use of local rates, as they did themselves. The rates also are consistent with those in Missouri (Appx.1311-1317 (¶¶14, 19)) and nationally (Appx.937). *See also, e.g., In re BankAmerica Corp. Sec. Litig*. 228 F. Supp.2d 1061, 1065 (E.D. Mo. 2002) (rates of $695 were, at the time, high for E.D. Mo. but reasonable in nationwide securities class action). The highest rates were from counsel in New York where fees often are over $800 per hour. *See* Appx.1445-1446.

Appellants' frontal attack is on the time submitted and the process by which it was evaluated. App.Br.8-9, 11, 31-33. The process, however, followed common procedure, including extensive audit by lead counsel. The hours were supported by extensive documentation and sworn declarations on which the court properly relied along with its own knowledge of the litigation and work involved.

Co-Lead Counsel rigorously reviewed billing records of all CBAs. They developed uniform standards applied to all submissions, including their own. Appx.960-961, 1147-1148. They disallowed time spent on individual versus common-benefit work, duplication and overstaffing, intra-firm status conferences and other activities not associated with proper work assignments, non-specific email listings, and entries insufficiently described. *See* Appx.1147-1148 (¶¶5-6); Addm.60.[31] The result was a detailed break-down of time and rates per firm per timekeeper. Addm.77-86. Each CBA also provided a declaration attesting to the time recorded and its character as common benefit work. Appx.958-1285.

There is nothing improper about relying on lead counsel to recommend fee allocations. *See* MCL 4th §14.221 ("Lead counsel can be made responsible for overseeing [multiple fee submissions]"). Moreover, lead counsel are well-positioned to evaluate the contributions of all the attorneys whose activity they

[31] The approximate $62,000,000 in time initially submitted was reduced by lead counsel's audit to $51,053,603.13. Appx.896-897. Addition of the two firms (also audited) brought the total to $51,584.012.54. *See* Addm.49-50, 74-75.

coordinated throughout the litigation. *See, e.g., Victor v. Argent Classic Convertible Arbitrage Fund L.P.*, 623 F.3d 82 (2d Cir. 2010) ("Since lead counsel is typically well-positioned to weigh the relative merit of other counsel's contributions, it is neither unusual nor inappropriate for courts to consider lead counsel's proposed allocation"); *In re Crazy Eddie Sec. Litig.*, 824 F.Supp. 320, 328 (E.D.N.Y.1993) (court required that all work be performed under direction of committee and so "will place great weight on [their] recommendation"); *Phenylpropanolamine*, 2009 U.S. Dist. LEXIS 126729 at *3-4 (appointing committee to audit records). Having coordinated all activity in the MDL, Co-Lead Counsel had particular and discerning knowledge of who performed what work and whether it was for the common benefit. Appx.959 (¶3); Appx.1146 (¶3).[32]

Thematically, Appellants suggest that the court should itself have scrutinized the underlying billing records. App.Br.8-9, 11, 31-33. These records were offered (*see* Appx.3404), but found unnecessary based on the preceding work of lead counsel and the numerous declarations provided. Addm.60, 94-95; Appx.958-

[32] Concerns over allowing the "fox" to recommend "how to divvy up the chickens" (App.Br.11, 37) are misplaced. Nineteen of the 27 CBAs requesting fees were *not* executive committee members. App.Br.51-52; *compare* Addm.4-5; Addm.75. And executive committee members were subject to lead counsel's audit like everyone else. There were two "foxes" and many "chickens" who could have objected to the allocation and time reductions yet did not. Appx.988, 995, 1004, 1013, 1033, 1039, 1057, 1064, 1074, 1094, 1101, 1108, 1115, 1121, 1128, 1166, 1174, 1199, 1262, 1269, 1275, 1288, 1292. Appellees did not seek, and the court did not award, any distribution to Appellants. *Infra*, Section IV. They are not among the chickens and have no stake in the allocation.

1285, 1310-1457. Notably, while Appellants objected that the Special Master did not review the underlying records (Appx.3861-3866), they *did not* assert that the court was under legal compulsion to do so. *See* Appx.1655-1679, 3848-3972. They provide no authority for such a proposition here.[33] The hours submitted were verified after painstaking audit and presented by sworn declarations. Appx.960-961, 982-1285. Appellants agree that testimony in that form is appropriate. App.Br.36. The court did not err in relying on it.

Moreover, it would have been wholly impracticable for the court to have scrutinized individual billing records at the juncture at which the fee request was

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[33] Appellants newly cite *In re Diet Drugs*, 401 F.3d 143, 149-50 (3d Cir. 2005), which simply recounts that the lower court had appointed an outside auditor. App.Br.33, 35. Appellants *did not ask* the court to do that. And the Third Circuit expressly holds that a district court may rely on summaries rather than requiring original time/expense records. *Diet Drugs*, 582 F.3d at 539 (in large cases, "reliance on summaries is certainly within the discretion of the district court"). Appellants also newly cite sections of the MCL recommending "exacting review," establishment of fee formulas, periodic submission of billing records, and budgets. App.Br.35-36. Appellants did not make such arguments below and themselves discount the MCL as legal authority. App.Br.15-16. Here, interim fee procedures were not ordered and Appellants never objected that they should have been. While fee structures may be established early, they often are not. *E.g.*, *Walitalo*, 968 F. 2d at 744-45 (motions proposing fee calculation filed but unaddressed by court until after settlements). Moreover, the procedures recommended by the MCL are all "primarily relevant to. . .the lodestar approach." MCL 4th §14.231. Here, the award is fully supported under the percentage method alone. In this regard, Appellants' citation to *Air Crash Disaster* (App.Br.34-35) is misplaced as the Fifth Circuit recently joined the majority of Circuits, including this one, allowing flexibility in the choice between the percentage and lodestar approaches (both informed by the *Johnson* factors applied here). *Union Asset Mgt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012).

made. Such an undertaking would have entailed bulk examination of thousands of time entries from the 252 attorneys and professionals who rendered services for half a decade. *See* Addm.77-87. It also would have been an extreme misuse of judicial resources given the preceding work of Co-Lead Counsel and the numerous declarations provided.

The Supreme Court recently reiterated that fee determinations "should not result in a second major litigation." *Fox v. Vice*, __ U.S. __, 131 S.Ct. 2205, 2216, 180 L.Ed.2d 45 (2011). While the court must apply the correct standards and the applicant must submit appropriate documentation, "trial courts need not, and indeed should not, become green-eyeshade accountants." *Id.* The goal is "not to achieve auditing perfection." *Id.* Trial courts "may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time. And appellate courts must give substantial deference to these determinations, in light of "the district court's superior understanding of the litigation." *Id.* Indeed, the Court said: "We can hardly think of a sphere of judicial decision making in which appellate micromanagement has less to recommend it." *Id.*[34]

[34] *See, e.g.*, *Diet Drugs*, 582 F.3d at 539 (reviewing individual billing records may be unnecessary time-consuming process and reliance on summaries within district court's discretion). This is particularly true when the fee award is reasonable under the percentage method. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000); *Turner*, 472 F. Supp. at 867.

Appellants do not contest that correct standards were employed, and the court below had extensive documentation on which to base its findings. Appellants' arguments to the contrary are unsupported by the record.

Appellants also suggest that *they* should have been allowed to review the underlying billing records. As the Special Master rightly observed, however, opening such discovery would have "produced a wealth of problems" (including invasion of attorney-client privilege), would have embarked all involved into the "second litigation" against which the Supreme Court cautions, and was in no way demonstrated to be necessary. *See* Addm.62; Appx.3400-3586. The court concurred. Addm. 94-95.

While discovery "may" sometimes be appropriate (App.Br.36), it is neither required nor typical. Appellants misrepresent the holding in *Diet Drugs* (App.Br.34), in which the Court said that the district court allowed limited discovery but "need not have granted any discovery at all." 582 F.3d at 538 (citing *In re Prudential Ins. Co. v. America Sales Practice Litig.*, 148 F.3d 283, 338 (3d Cir. 1998)("discovery in connection with fee motions should rarely be permitted"); MCL 4th §14.224 (same). "[T]he court should consider the completeness of the material submitted. . .[and if] the motion provides thorough information, the burden should be on the objector to justify discovery to obtain further information." MCL 4th §21.724; *see also id.* §14.1 (referencing §21.7).

Appellants' motion to compel not only violated FRCP 37(a)(1) but was based on the same misleading assertions presented here. App.Br.38-48; Appx.1670-1676.

First, in their 2009 and 2010 filings, Leadership Counsel did not state that they had incurred exactly, but *in excess of*, $20,000,000 and $22,000,000 in fees. App.Br.6, 39-46; *compare* Appx.22-23, 3421, 3410-3411. And of course, Leadership Counsel (8 firms) are *a subset* of the 27 for whom fees ultimately were sought—and for services rendered from the inception of the litigation. *See* Appx.3409-3412.

Second, Appellees did *not* claim in 2012 that $72M in fees had been incurred. App.Br.38-39, 44. Rather, they requested approval of *up to* $72M, comprised of the aggregate lodestar and enhancements to six firms based on a maximum potential multiplier of 1.38. Appx.945-947; 2323-2324, 3409-3410. The aggregate lodestar ($51,584.012.54) was fundable by, and paid from, the existing fee portion of the fund. Appellees sought *approval* for the full amount if and when additional funding becomes available. Appx.945-947, 2323-2324, 3406, 3409-3410, 3881-3882.

Third, Appellants' criticism of the hours of Downing and Garrison is based on faulty hypothetical math. App.Br.46-48. Downing's 8,815 hours span six years, or 2,190 days. Appx.3412-3413. This equates to 4.025 hour per day, or 28.18 hours per week, not 42.8 per week as Appellants suggest. App.Br.46.

Garrison's 6,116.90 hours equate to 3.5 hours per day or 24.68 hours per week. Appx.3413. As with any large complex litigation, the time commitment fluctuated. Little was needed during some periods and much during others. *Id.*[35] In sum, Appellants misrepresent the facts just as they did below. *See* Addm.93-94.

In no way can the process here be likened to the one originally found insufficient in *In re High Sulfur Content Gasoline Prod. Liab. Litig*. App.Br.11, 35. There, the court received the proposed allocation at an *ex parte* hearing. 517 F.3d 220, 229 (5th Cir. 2008). It had no "breakdown of the hours and rates claimed by each attorney," no sworn testimony (by declaration or otherwise) and no documents other than the allocation itself. *Id.* No objections were permitted, and the court sealed the fee requests preventing any communication on the subject. *Id.* After remand, the court appointed a special master, ordered attorneys to submit affidavits and an analysis of *Johnson* factors, and allowed each to file objections to the special master's report. The Fifth Circuit found these procedures sufficient, and also that the district court was not obligated to hold an evidentiary hearing. *In re High Sulfur Content Gasoline Prod. Liab. Litig*., No.09-30313, 2010 WL 2710773, at *1-2 (5th Cir. June 21, 2010).

Here, all submissions were open, all counsel could object and be heard, the supporting materials were voluminous, and sworn declarations were provided.

[35] Downing and Garrison were two mainstays of the litigation. *See* Appx.900-901, 964-967, 3412-3415. Judge Perry observed the work of both first-hand.

And no one other than Appellants objected to the approved allocations. While a court must provide the opportunity "for adversary submissions" (which occurred), it also may resolve fee-related issues "without extensive evidentiary hearings." FRCP 54(d)(2). Appellants cite no authority that an evidentiary hearing or full-blown trial was mandatory[36] or even appropriate. Their arguments are meritless.[37]

IV. THE COURT ACTED WITHIN ITS DISCRETION IN REJECTING A COMMON BENEFIT FEE TO APPELLANTS

[36] Appellants engage in no 7th Amendment or due process analysis. They cite no case holding that federal common fund determinations are made by jury versus court. Due process is satisfied by notice and opportunity to be heard. *U.S. Bancorp*, 291 F.3d at 1038. Appellants were given, and availed themselves of, that opportunity in writing and in person before the Special Master. *See* Addm.50, 96; Appx.1655-1666, 1689-1748, 3848-3972.

[37] Appellants' other arguments about "double" and "triple" recovery, and the supposed advantages of being lead counsel have no place in the analysis and are simply wrong. App.Br.48-51. Appellees certainly did dispute that "double recovery" occurred (*see* App.Br.49; *contra* Appx.2324-2325) and it did not as addressed above. There was no "triple" recovery from non-producers, who were assessed like everyone else because they benefitted from common services—and at a lower rate to account for their circumstances. Addm.35-36. Appellees' website publishes important filings and rulings; it was not used to sign up clients or capable of doing so. Appx.3407.

Despite their objections to the CBTF, Appellants sought a common fund fee (but not expense) award from it. Appx.1680-1688. The court did not abuse its discretion in denying that request.

As Appellants observe, the CMO did not make membership in the leadership group a criteria of distribution. App.Br.64. Many CBAs were not. But they performed services at the request of and in collaboration with MDL leadership for the benefit of all plaintiffs. Appealing Attorneys did not. They identify no work product provided to MDL leadership. They detail no time spent in the MDL for common benefit. Rather, Attorneys claim that *concededly* separate work in their state cases entitles them to a CBTF award. App.Br.64-68. That claim is contrary to the Leadership Order, the CMO, and the purposes of Section 1407. It also is bereft of factual support.

As Appellants say, there was no formal federal-state coordination as sometimes occurs. Add.Br.11. The court, however, recommended coordination if possible (Addm.2), and it was voluntarily accomplished with some state-court counsel. The exception were Attorneys, who admittedly went their own way. Appx.1731-1733, 1742, 1744.[38] At no time did they collaborate with MDL leadership but opposed them in myriad ways. They did so throughout the litigation

[38] *E.g.*, Appx.1732 ("PLC and the Phipps Legal Team, have operated wholly independently"); Appx.1733 (Appellants "prepared their cases for trial separate and apart from the PLC.").

as well as in settlement negotiations, made more difficult by their positions. Addm.95-96; Resp.Appx.1276-1343.

Attorneys' compensation theory is that they applied "pressure" on Bayer and created "leverage" for settlement as an incident of their state-court cases. App.Br.65-68. They cite no authority for that theory, and no opinion or order awarding common benefit fees to attorneys acting outside a coordinated framework in pure representation of their own clients.[39] To do so would seriously undermine both the structure and efficiencies of coordinated action. *Smiley*, 958 F.2d at 502. Attorneys had access to all documents and depositions obtained in the MDL, Appellees' legal arguments, MDL rulings, and other work they used in state cases. Appx.2321, 2326-2330, 2427-3399; Resp.Appx.1286-1289. MDL attorneys should not be forced to pay for duplicated work, or *any work* not requested by MDL leadership or performed for the benefit of all. Appellants' theory invites anyone to ignore a leadership order, act solely in the interests of their own clients, and assert entitlement to fees by *post-hoc* claims of "pressure" on a defendant to

[39] Courts have rejected similar arguments. For example, in *In re BankAmerica Corp. Sec. Litig*; 228 F. Supp.2d 1061, 1064 n.5 (E.D. Mo. 2002), the attorney for a class opt-out sought fees from the settlement fund, arguing that he "contribut[ed] to the adversarial nature of this case," enhancing settlement. *Id.* at 1069. The opt-out, however, "separated its interests" from the class and the lawyer's efforts were for it alone. Neither did those efforts "help to create or enhance the class recovery." *Id*. at 1069-70. The same is true here, as found below. Addm.95-96.

settle. That defeats the purposes of Section 1407 and here, the Leadership Order and CMO.

Appellants' "value-to-settlement" theory also is devoid of factual support. What factual representations they do advance are sans actual evidence,[40] misleading, or outright false. Contrary to Appellants' suggestions, Appellees certainly countered both their legal analysis and factual inaccuracies below. App.Br.70; *contra* Resp.Appx.1276-1301.

Attorneys cite the "nearly 5,000 clients" they represented, claiming "leverage" by keeping state clients out of the MDL. App.Br.65; Appx.1728. It was not the number of clients, but the amount of *rice acres*, however, that was material to settlement. *See* Resp.Appx.1028, 1297. Attorneys represented only "20% of the total rice acreage involved in this litigation." App.Br.65; *see also* 1298(n.28). They were the tail, not the dog.

Attorneys also say that Appellees acknowledged that state litigation served a common benefit. Add.Br.64, 69. The referenced litigation, however, was *Schafer v. Bayer* in Arkansas. Appx.913. State counsel representing *Schafer* plaintiffs were part of the MDL coalition performing common services including MDL

[40] For example, Attorneys posit that *Vioxx* state cases pressured Merck "to pay more in settlement." App.Br.68. This is rank speculation and says nothing about this case at all. Attorneys also say they were the "driving force" behind global settlement, citing emails evidencing nothing of the kind. App.Br.69; Appx.2176-2243.

depositions and trial. MDL leadership members were part of *Schafer's* trial team. *Schafer* counsel shared all their work with MDL counsel, and sat with the MDL settlement team. They were a collaborative part of the MDL team and vice-versa. Resp.Appx.1296-1297. Appealing Attorneys were not.

Appellants hold forth their *Kyle* case as the largest per-acre verdict of $733/acre. App.Br.66, 69; Appx.1735. The highest number of acres at issue in *Schafer*, however, was 6,648.99 not 8,315 as Appellants represent. App.Br.66 n.36; *contra* Resp.Appx.1296. Thus, *Schafer* produced a ***$898.72/acre*** compensatory verdict (more than *Kyle*), and a ***$7,215.47/acre*** total verdict. *Id.*

Appellants also claimed credit for "orchestrating" the settlement structure. Add.Br.5; Appx.1744-1745. The concept of multiple "pots" for market loss and other losses, however, originated with Co-Lead Counsel in 2008 and was presented to Bayer in 2009. *See* Resp.Appx.1282 (n.4), 1298-1299, 1331-1335.[41] While refined over time, that basic structure ultimately was adopted. Resp.Appx.1030-1039. These facts were not contested by Appellants in subsequent briefing. Resp.Appx.1298-1299; *compare* Appx.3848-3872.

The CBTF was established to pay "attorneys who perform work benefitting all of the plaintiffs." Addm.22; *see also id.* 41. The court found that the work

[41] Mr. Watts began negotiating with Bayer in December, 2010. App.Br.69-70; Appx.2176. By that time, the settlement structure was long since designed and discussed with Bayer by Co-Lead Counsel.

done by Appellants for their own clients "did not benefit the rest of the plaintiffs while the work performed by [CBAs] definitely benefitted [Appellants]." Addm.95. Appellants show no error in the first finding and do not challenge the second. There was no abuse of discretion.

CROSS-APPEAL

I. THE DISTRICT COURT HAS JURISDICTION TO REQUIRE COMMON BENEFIT FUND CONTRIBUTION FROM STATE RECOVERIES

When it established the CBTF, the district court found it "abundantly clear that the plaintiffs in the related state-court cases have derived substantial benefit from the work of the leadership counsel in these federal cases." Addm.23. The court reiterated that finding when it awarded fees and expenses to common benefit attorneys. Addm.93, 95. The court concluded that it lacked jurisdiction to require contribution from state recoveries "reluctantly." Addm.32; *see also* Addm.93 ("the only reason I did not order common-benefit contributions from the state-court proceedings was because I lacked jurisdiction to do so."). Respectfully, the jurisdictional deficit perceived by the district court is not present, and the power to do equity and further the goals of Section 1407 is properly exercised in respect to state recoveries benefitted by work undertaken in the MDL.

A. There Is No Jurisdictional Obstacle To Ordering Contribution From Non-MDL Recoveries

The court's jurisdictional ruling rested on the misconception that the assessment would be taken from parties not before it, *i.e.*, plaintiffs in state cases. The court relied on several cases cited by Attorneys in which jurisdiction was found lacking because the assessment order would require contribution from persons absent from the proceedings. *See* Addm.30-31, citing *In re Showa Denko K.K. L Tryptophan Products Liability Litigation-II*, 953 F.2d 162, 166 (4th Cir. 1992) (order compelled contributions "from plaintiffs in state or federal litigation who are not before the court."); *Hartland v. Alaska Airlines*, 544 F.2d 992, 1001 (9th Cir. 1976) (order compelled counsel not party to the action to pay into the fund); *In re Baycol Prods. Litig.*, MDL 1431, 2004 WL 190272, at *1 (D. Minn. Jan. 29, 2004) ("transferee court does not have jurisdiction to assess fees and costs against parties whose cases had not been transferred pursuant to §1407").[42] As explained by the PSC in *BP Oil*, however, the withhold for compensation to, and reimbursement of expenses incurred by, common benefit counsel "frequently does not diminish the plaintiffs' recovery. . .[but may]. . .be assessed. . .against the defendants, or against the plaintiff attorney fee portion of any recovery." Appx.2415. And the MDL court certainly may "exercise (its) jurisdiction over the

[42] The other authorities cited (Addm.31; App.Br.7 n.5) do not make this finding. In *Zyprexa*, the court expressly did not reach the issue of whether a federal MDL court could order attorneys representing both federal and state plaintiffs to set aside a portion of their fee recoveries in state cases for use in a common benefit fund." 467 F. Supp. 2d at 268. In *Linerboard*, the court expressly reserved the possibility of assessing state recoveries in the future. 292 F. Supp. 2d at 665.

named parties . . .and their counsel." Appx.2414. *See also, e.g., In re Diet Drugs*, 282 F.3d 220, 231 (3d Cir.2002) (court has jurisdiction not only over class members but attorneys representing them).

Assessments need not be levied on plaintiffs, but rather, may be withheld by defendants and/or paid by plaintiffs' counsel, both of whom are before the court in the MDL. A holdback from the defendant is not a payment from the plaintiff. *See, e.g., Zyprexa*, 467 F.Supp. 2d at 266 ("The common benefit fund set-aside is a holdback, not a levy."). There is no concern regarding lack of jurisdiction when the withhold comes from the defendant since it is a party to the action.[43] A contribution order also should not be considered an exercise of jurisdiction against an absent plaintiff because it ultimately comes not from his, but his counsel's, share of the settlement.[44] Attorneys here had clients within and without the MDL

[43] Bayer is still a party before the district court in the MDL. In addition, not all producer settlements have been paid out. *See* App.Br.26 n.16. Bayer still can withhold assessment on any payment still due under the MDL or GMB settlements.

[44] Assessments commonly are directly against the lawyers' fee portion of settlement or judgment. *See, e.g., Air Crash Disaster*, 549 F.2d at 1016 (district court has power to require that court-appointed counsel be compensated and "requiring the payment come from other attorneys was permissible."); *Smiley*, 958 F.2d at 501-502 (lawyer representing individual plaintiffs required to pay his fee to court-appointed committee); *Diet Drugs*, 553 F. Supp. 2d at 457 (assessment "taken from the fee of each plaintiff's individual attorney, if the plaintiff is represented."); *Vioxx*, 760 F. Supp.2d at 653 (common benefit fee deducted not from claimant's portion but counsel fees); *In re Yasmin and Yaz Marketing, Sales Practices and Relevant Prods. Liab. Litig.*, MDL 2100, 2010 U.S. Dist. LEXIS 22361 (S.D. Ill. Mar. 8, 2010) (assessment against counsel); *Pradaxa* 2012 U.S.

and availed themselves of the benefit of MDL work in both spheres. Use of Leadership's work in the MDL was required in the MDL by the Leadership Order, but Attorneys purposefully extended that use to their state cases. Addm.25-26, 33-34, 93, 95; Appx.2327-2330. In addition, unlike counsel in *Showa-Denko*, Attorneys have, in the matter of fees, appeared before the court in their own capacities to object to allocation/distribution to CBAs and seek a common fund award for themselves. *See, e.g.*, Appx.1656. Any position that Attorneys are not "parties" to the fee dispute also is belied by their joinder in this appeal. As a normal rule, non-parties cannot appeal. *Mausolf v. Babbitt*, 125 F.3d 661, 666 (8th Cir. 1997). Yet Attorneys have named themselves appellants. *See* Appx.3802, 3821-22; *see also* FRAP 3(c) (notice of appeal to specify "the party or parties taking the appeal"). Attorneys were, and upon remand still would be, before the court and again there is no jurisdictional impediment.

B. Extending A Common Benefit Order To State-Court Cases Does Equity And Serves Public Policy

The power to do equity does not stop on the track between federal and state use of the same work product. Excluding state recoveries from common fund

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Dist. LEXIS 162110 (same); *In re Zyprexa Prods. Liab. Litig.*, MDL 1596, 2007 U.S. Dist. LEXIS 98519 at *20-21 (E.D.N.Y. Aug. 17, 2007) (half of assessment from attorney's fee portion and half from plaintiff's portion of recovery); *see also In re Fosamax Prods. Liab. Litig.*, MDL 1789, ECF No. 29, CMO 17 ¶3(f)(3) (S.D.N.Y. Apr. 28, 2011) (fee assessment from attorney's fee portion of recovery and cost assessment from client's portion), Resp.Appx.601-611.

contribution allows Attorneys to profit at the expense of the leadership group. It is fair and just that they bear their fair share. *Air Crash Disaster*, 549 F.2d at 1020; Section II.A, *supra*. Including state recoveries also serves public policy including those underlying Section 1407.

If assessment does not extend to state cases filed as part of mass litigation like this one, counsel have a strategy path for appropriating the work of others. Counsel can file as little as one case in federal court to get a "foot in the door" of the MDL and warehouse the bulk of their cases in state court. They then get the benefit of all the MDL work and pocket the full fee from state recoveries produced in large part by work they did not have to perform.[45] This situation not only is inequitable, but creates powerful incentive to keep cases out of the MDL and disincentive to collaborate.

The court here found the same percentage assessment imposed on federal cases also appropriate for state cases (Addm.42) partly in response to Bayer's forum shopping concern that unequal assessment "creat[es] an incentive for federal litigants and potential litigants to flee the MDL. . .so as to save on the assessment rate." Appx.273. The potential for strategic filing is very real and in fact happened here. *E.g.*, Appx.945-953, 958-961. Large state-court filings with

[45] Beneficiaries of leadership's work include "the attorneys whose time was not so consumed in [performing the work leadership undertook]." *Air Crash Disaster*, 549 F.2d at 1011.

consequent removal and battle over remand not only burdens the defendant but requires "significant expenditure of judicial time and resources, derailing the progress of the litigation as a whole. Delays of this nature could well frustrate the purpose of MDLs." *In re Zyprexa Prods. Liab. Litig.*, 594 F.3d 113, 127-128 (2d Cir. 2010)(Kaplan, concurring). Another "troubling potential" arises from attorney "incentives to file cases in state courts without respect for the best interests of their clients because [they] can use PSC 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." *Zyprexa*, 467 F.Supp.2d at 269.

The more state clients an attorney can accumulate the more benefit he obtains upon settlement if excluded from common benefit contribution. Phipps Appellants twice were brought before the court for improper client solicitation, and once were sanctioned for doing so. Addm.96; Resp.Appx. 838-868, 1106-1118, 1253-1275, 1283-1284; TR73-191. Their behavior interfered with the progress of the litigation and made settlement more difficult. Addm.96; Appx.1281-1282. Attempts to resolve the fee issue also can be a heavy sticking point to global federal-state resolution. The stockpiler of state plaintiffs may require (as Appellants did here) a separate agreement or provisions insulating state recoveries from the federal common benefit order. That attorney's insistence on refusing to pay fair share for work he used assuredly complicates settlement and ultimately

forces federal counsel to walk away from resolution of the fee issue by agreement for the sake of their own clients and everyone else.

Many courts have taken steps to ensure that state counsel with access to federal work product are included in common fund contribution. *See, e.g.*, *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico,* MDL 2179, 2011 WL 6817982 at *4-5 (E.D. La. Dec. 28, 2011), as amended 2012 WL 37373 (E.D. La. Jan. 4, 2012) and 2012 WL 161194 (E.D. La. Jan. 18, 2012) (requiring assessment on "state court plaintiffs represented by counsel who have participated in or had access to the discovery conducted in this MDL"); *Phenylpropanolamine* 2009 U.S. Dist. LEXIS 126729, at *3 (noting assessment order for state counsel wishing to avail themselves of common benefit work); *Vioxx,* 760 F. Supp.2d at 644-645 (same); *see also Fosamax,* MDL 1789 (S.D.N.Y. Apr. 28, 2011) (same) Resp.Appx.601-611; *In re Avandia Mktg., Sales Practices and Prods. Liab. Litig.*, MDL 187, Dkt. No. 495-1 at 4 (E.D. Pa. Aug. 26, 2009) (same), Resp.Appx.579-600. The Federal Judicial Center also notes that "MDL transferee judges generally issue orders directing that a fixed percentage of any settlement be contributed to a general fund," except as to "attorneys *with no cases in the MDL and who do not use federal discovery material*." Fed. Judicial Ctr., Managing Multidistrict Litigation in Products Liability Cases, A Pocket Guide for Transferee Judges 14-15

(2011) (emphasis added), Resp.Appx.1118.1-1118.3. It is right that those who do use MDL work in state cases contribute in just proportion.

CONCLUSION

For all the foregoing reasons, the Court should affirm the district court's orders below, with the exception of the court's ruling that it lacks jurisdiction to order assessment upon non-MDL recoveries obtained by claimants whose counsel also had clients in the MDL, which Appellees/Cross-Appellants request be reversed and the assessment matter be remanded for proceedings consistent therewith.

Respectfully Submitted,

/s/ Don M. Downing
Don M. Downing
Gretchen Garrison
GRAY, RITTER & GRAHAM, P.C.
701 Market Street, Suite 800
St. Louis, Missouri 63101-1826
Telephone: (314) 241-5620

Adam J. Levitt
GRANT & EISENHOFER P.A.
30 North LaSalle Street, Suite 1200
Tel: 312-214-0000
Fax: 312-214-0001
alevitt@gelaw.com

Stacey Kelly Breen

WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLC
55 West Monroe Street, Suite 1111
Chicago, Illinois 60603
Tel: (312) 984-0000
Fax: (312) 984-0001
breen@whafh.com

CERITIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) and 28.1(e)(2)(B)(i). As measured by the word processing system used to prepare this brief, there are 16,407 words in the brief exclusive of matters in Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 28.1(e)(2)(B)(ii) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally-spaced typeface (Times New Roman 14 point) using Microsoft Word 2010.

/s/ Don M. Downing

Don M. Downing
GRAY, RITTER & GRAHAM, P.C.
701 Market Street, Suite 800
St. Louis, Missouri 63101-1826
Telephone: (314) 241-5620

CERTIFICATE OF SERVICE

This brief has been submitted for review through the Court's CM/ECF system on May 20, 2013, to be served electronically upon counsel registered to receive notification by that system.

/s/ Don M. Downing
Don M. Downing
GRAY, RITTER & GRAHAM, P.C.
701 Market Street, Suite 800
St. Louis, Missouri 63101-1826
Telephone: (314) 241-5620