

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

*	*	*	*	*	*	*	*	*
								*
								*
IN RE:								*
								*
FOSAMAX PRODUCTS LIABILITY LIGATION								*
								*
<i>This Document Relates to All Actions</i>								*
								*
*	*	*	*	*	*	*	*	*

**PLAINTIFFS STEERING COMMITTEE'S**  
**MEMORANDUM OF AUTHORITIES IN SUPPORT OF**  
**MOTION FOR CREATION OF COMMON BENEFIT FUND**

COMES NOW THE PLAINTIFFS STEERING COMMITTEE, by and through Lead Counsel of Record, and files this Memorandum of Authorities in Support of its Motion requesting the Court to create a common benefit fund for the work performed and the expenses incurred by the Plaintiffs Steering Committee ("PSC"), as well as the common benefit attorneys directed by the PSC to perform work for the common benefit of Fosamax plaintiffs. For the reasons stated below, the PSC respectfully requests this Court to enter Case Management Order No. 17, a proposed version of which is attached hereto as Exhibit "A". The PSC is not asking the Court at the present time to enter any Order of payment of common benefit fees. Rather, through this motion, the PSC solely requests the Court to establish the procedure by which the common benefit fund will be created.

**I. PROCEDURAL HISTORY AND STATEMENT OF THE FACTS: THE PSC HAS CREATED SUBSTANTIAL WORK PRODUCT FOR THE COMMON BENEFIT OF ALL FEDERAL LITIGANTS.**

On September 25, 2006, this Court entered Case Management Order No. 2 and through

that CMO appointed the MDL No. 1789 Plaintiffs Executive Committee and Plaintiffs Steering Committee ("PSC"). The Court charged the PSC with the following obligations:

- (1) Initiate, coordinate, and conduct all common benefit pretrial discovery on behalf of all plaintiffs in all actions which are consolidated with the instant MDL.
- (2) Develop and propose to the Court schedules for the commencement, executions, and completion of all discovery on behalf of all plaintiffs.
- (3) Cause to be issued in the name of all plaintiffs the necessary discovery requests, motions, and subpoenas pertaining to any witnesses and documents needed to properly prepare for the pretrial of relevant issues found in the pleadings of this litigation.
- (4) Conduct all discovery in a coordinated and consolidated manner on behalf of and for the benefit of all MDL plaintiffs.
- (5) Examine witnesses and introduce evidence at hearings on behalf of plaintiffs.
- (6) Act as spokesperson for all plaintiffs at pretrial proceedings and in response to any inquiries by the Court.
- (7) Submit and argue any motions to the Court, and file any briefs in opposition to motions, on behalf of all plaintiffs, which involve matters within the sphere of the responsibilities of the Plaintiffs' Steering Committee.
- (8) Explore, develop, and pursue all settlement options pertaining to the common benefit of all plaintiffs.
- (9) Maintain adequate files of all pretrial matters, including establishing and maintaining a document depository, and having those documents available, under

reasonable terms and conditions, for examination by all MDL Plaintiffs or their attorneys.

- (10) Perform any task necessary and proper for the Plaintiffs' Steering Committee to accomplish its responsibilities as defined by the Court's orders, including organizing sub-committees comprised of plaintiffs' attorneys both on the PSC and not on the PSC and assigning them tasks consistent with the duties of the Plaintiffs' Steering Committee.
- (11) Perform such other functions as may be expressly authorized or directed by further orders of this Court.

Since that time, the PSC has performed the tasks directed by the Court<sup>1</sup>, and continues to refine and generate the work product which will be available to the Fosamax plaintiffs. Tens of thousands of hours have spent by the attorneys of the Plaintiffs Steering Committee, and millions of dollars have been spent through the Plaintiffs Steering Committee litigation fund and the CMO 12 held common benefit expenses of the Plaintiffs Steering Committee counsel and common benefit counsel directed by the PSC to perform certain tasks. (O'Brien decl., ¶ 2, Exhibit "B" hereto.)

The Plaintiffs Steering Committee has reviewed and coded several million pages of documents from Merck and various third party organizations produced in this MDL. These documents have been reviewed, organized, coded, and indexed and a comprehensive ready-to-

---

<sup>1</sup> Upon information and belief, additional discovery is currently ongoing in several state court jurisdictions, the activity for which began well after the commencement of this MDL. Those state court litigants may choose to utilize and rely upon the MDL work product in the prosecution of their discovery, thus necessitating the filing of the instant motion.

use master exhibit list created. (O'Brien decl., ¶ 3.) The PSC has also created an electronic library of thousands of medical articles which have been reviewed, organized, coded, and indexed. (O'Brien decl., ¶ 3.) All of these documents and the confidential work product relating thereto are available for and as the common benefit work product for the Fosamax plaintiffs. (O'Brien decl., ¶ 3.)

The Plaintiffs Steering Committee has taken the videotaped depositions of the following Merck employees (or former employees):

- (1) Mr. James Adams  
*Associate Director, Worldwide Regulatory Affairs*
- (2) Christiane Arsever, M.D.  
*Associate Director, Medical Services*
- (3) Daniel Baran, M.D.  
*Senior Medical Director*
- (4) Thomas Bold, M.D.  
*Senior Director, Clinical Risk Management and Safety Surveillance*
- (5) Mr. Patrick Counihan  
*V.P. of Health Care Systems*
- (6) Anastasia Daifotis, M.D.  
*V.P. of Clinical Research*
- (7) Anne DePapp, M.D.  
*Executive Scientific Director, Merck Human Health Division*
- (8) Michelle Flicker, M.D., Ph.D.  
*Director, Regulatory Affairs*
- (9) Ms. Mary Ellen Fiore  
*Clinical Risk Management & Safety Surveillance Associate*
- (10) Michael Goldberg, M.D.  
*Former Senior Director of Worldwide Product Safety & Epidemiology*

- (11) Peter Gruer, M.D.  
*Former Director, Worldwide Product Safety & Epidemiology*
- (12) Georgianna Harris, Ph.D.  
*Director, Regulatory Affairs*
- (13) Ms. Linda Hostelley  
*V.P. Worldwide Product Safety & Quality Assurance*
- (14) Donald B. Kimmel, D.D.S., Ph.D.  
*Former Director, Molecular Endocrinology*
- (15) Mr. Patrick Magri  
*V.P. of Marketing*
- (16) Ms. Christine Peverley  
*Clinical Research*
- (17) Alfred Reszka, Ph.D.  
*Researcher, Dept of Molecular Endocrinology and Bone Biology*
- (18) Mr. Ron Rogers  
*Merck Spokesperson*
- (19) Philip Ross, M.D.  
*Senior Director and Acting Head, Medical Communications Department*
- (20) Nancy Santanello, M.D., M.S.  
*Executive Director, Dept. of Epidemiology*
- (21) Arthur Santora, M.D., Ph.D.  
*Executive Director, Clinical Research*
- (22) Frank Seebach, M.D.  
*Director, Regulatory Affairs*
- (23) Ms. Ellen Westrick  
*Executive Director, Office of Medical/Legal*

The PSC has also deposed Merck consultant Dr. Jack Gotcher of the University of Tennessee Medical Center. All of these depositions have been recorded videographically and

stenographically, and summarized. They are available for and as the common benefit work product for the Fosamax plaintiffs. (O'Brien decl., ¶ 4.)

The Plaintiffs Steering Committee has also obtained and produced common benefit expert reports from the following expert witnesses:

- (1) Mahyar Etminan, Pharm.D., M.Sc.  
University of British Columbia  
Center for Epidemiology and Clinical Evaluation  
Vancouver, British Columbia
- (2) Curt Furberg, M.D.  
Division of Public Health Sciences  
Wake Forest University School of Medicine  
Winston-Salem, NC
- (3) Alastair Goss, DDSc.  
University of Adelaide  
College of Oral Surgery  
Adelaide, SA  
Australia
- (4) Gordon Guyatt, M.D.  
Dept. Of Clinical Epidemiology & Biostatistics  
McMaster University  
Hamilton, Ontario
- (5) John Hellstein, DDS, M.Sc.  
University of Iowa  
College of Dentistry  
Iowa City, IA
- (6) Robert Marx, DDS  
University of Miami School of Medicine  
Division of Oral & Maxillofacial Surgery  
Miami, FL
- (7) Suzanne Parisian, M.D.  
MD Assist, Inc.  
Phoenix, AZ

(O'Brien decl., ¶ 5.)

The PSC has prepared those witnesses for discovery deposition by Merck's counsel, and will be conducting *de bene esse* depositions of several of those witnesses for the common benefit use of the Fosamax Plaintiffs, in addition to the *de bene esse* deposition of Dr. Alastair Goss which already has been preserved by the PSC. (O'Brien decl., ¶ 6.) Further, all of these discovery depositions have been recorded stenographically, and summarized. They are available for and as the common benefit work product for the Fosamax plaintiffs. (O'Brien decl., ¶ 6.)

The PSC has conducted extensive research relating to the following expert witnesses retained by Merck, and has conducted their discovery depositions:

- (1) Paul Bartlett, Ph.D.  
Department of Chemistry  
University of California  
Berkeley, CA
- (2) John Bilezikian, M.D.  
Department of Medicine  
Columbia University  
New York, NY
- (3) Jane Cauley, Dr.PH  
Department of Epidemiology  
University of Pittsburgh  
Pittsburgh, PA
- (4) David Dempster, Ph.D.  
Regional Bone Center  
Helen Hayes Hospital  
West Haverstraw, NY
- (5) Ellen Eisenberg, D.M.D.  
Section of Oral & Maxillofacial Pathology  
University of Connecticut School of Medicine  
Farmington, CT

- (6) Robert Glickman, D.M.D.  
Department of Oral & Maxillofacial Surgery  
New York University School of Dentistry  
New York, NY
- (7) Elizabeth Holt, M.D., Ph.D.  
Section of Endocrinology & Metabolism  
Yale University School of Medicine  
New Haven, CT
- (8) Jeri Nieves, Ph.D.  
School of Public Health  
Columbia University  
New York, NY
- (9) Lisa Rarick M.D.  
RAR Consulting, LLC  
Gaithersburg, MD
- (10) Daniel Shames, M.D.  
Daniel A. Shames Consulting, Inc.  
Potomac, MD
- (11) Scott Tomar, D.M.D., M.P.H.  
University of Florida College of Dentistry  
Gainesville, FL

All of these depositions have been recorded stenographically, and summarized. They are available for and as the common benefit work product for the Fosamax plaintiffs. (O'Brien decl., ¶ 7.)

Additionally, the PSC has generated the briefing and conducted all the hearings relating to Merck's *Daubert* challenges, the PSC's *Daubert* challenges, and Merck's Motion for Partial Summary Judgment (on the 3-year duration issue). (O'Brien decl., ¶ 8.) All of the rulings pertaining thereto inure to the common benefit of the Fosamax plaintiffs and will carry forward (should this matter not globally resolve in the MDL) as the cases are remanded back to the



appropriate District Courts.

**II. THIS COURT SHOULD ESTABLISH A PROCEDURE FOR THE ESTABLISHMENT OF THE FOSAMAX MDL COMMON FUND.**

In the context of multi-district litigation, federal courts recognize the “common fund doctrine”. *See, e.g.*, MANUAL FOR COMPLEX LITIG. (4<sup>th</sup> ed.), § 14.12. The common fund doctrine is a principle of equity designed to ensure that common benefits efforts are compensated and expenses incurred reimbursed, by providing that a “litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

As the Third Circuit has observed:

These equitable powers may, under the equitable fund doctrine, be used to compensate individuals whose actions in commencing, pursuing or settling litigation, even if taken solely in their own name and for their own interest, benefit a class of persons not participating in the litigation.

...

The award of fees under the equitable doctrine fund is analogous to an action in quantum meruit: the individual seeking compensation has, by his actions, benefitted another and seeks payment for the value of the service performed.

*Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Std. Sanitary Corp.*, 487 F.2d 161, 165 (3<sup>rd</sup> Cir. 1973); *see also Strong v. Bell South Telecommunications, Inc.*, 137 F.3d 844, 850 (5<sup>th</sup> Cir. 1988). Put another way, “the doctrine is designed to spread litigation costs proportionately among all beneficiaries so that the active beneficiary does not bear the entire burden along and the ‘stranger’ beneficiaries do not receive their benefits at no cost to themselves.” *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9<sup>th</sup> Cir. 1977).

The practice of fee assessment proposed by the PSC is consistent with well established

MDL practices. *See e.g., In re Diet Drugs Prods. Liab. Litig.*, 1999 WL 124414 (E.D. Pa. 1999) (defendant ordered to pay 9% of all settlement payments into fee and cost account); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1414, 1996 WL 900349 (E.D. Pa. 1996) (parties ordered to sequester 12% of recoveries for fees *and* 5% of recoveries for costs in order to create fund from which court-appointed Plaintiffs' Legal Committee could seek reimbursement for the work performed on behalf of all plaintiffs); *In re MGM Grand Hotel Fire Litigation*, 660 F. Supp. 522 (D. Nev. 1987) (court awarded legal committee seven percent of gross recovery of "global settlement" funds to reasonably compensate committee for professional labors and for bearing considerable long-standing risks.) Moreover, the defendants typically have had the responsibility of withholding the assessed funds and paying them into the common benefit fee and cost account. *See e.g., In re Diet Drugs*, 1999 WL 124414 at \*2. In the other bisphosphonate-related ONJ MDL, the presiding court in *In re Aredia Zometa Products Liability Litigation*, MDL No. 1760, has already entered an assessment order at 8%. (*See* Exhibit "C" hereto.) In the instant case, the proposed assessment model is modest and includes scale-down provisions which help to minimize the assessments to be paid by counsel subject to the assessment:

- (1) 6% of the gross monetary recovery (of which 3% is to be paid from fees and 3% paid from costs) for those firms which, within 90 days of the proposed Order, have expressly subjected all their Fosamax jaw injury cases, whether in Federal or State court, or as of yet unfiled, pursuant to the assessment agreement <sup>2</sup>, OR;

---

<sup>2</sup> As of the filing of this motion, more than 75 firms have already signed on to the assessment/participation agreement and submitted those executed agreements to the PSC's representative. (O'Brien decl., ¶ 9.)

- (2) 8% of the gross monetary recovery (of which 5% is to be paid from fees and 3% paid from costs) for those firms which, later than 90 days of the proposed Order or the filing of their initial Fosamax jaw injury case, have expressly subjected all their Fosamax jaw injury cases, whether in Federal or State court, or as of yet unfiled, pursuant to the assessment agreement, OR;
- (3) 10% of the gross monetary recovery (of which 7% is to be paid from fees and 3% from costs) for those cases within the MDL which have not signed on to the assessment/participation agreement, or for any firm which has not signed on to the assessment/participation agreement but utilizes the MDL work product, or for any case whose counsel has not signed on the assessment/participation agreement but participates in a PSC-coordinated master settlement.

Apart from application of the traditional common fund doctrine as an equitable principle governing the payment of counsel fees and litigation expenses, it has consistently been recognized that federal courts possess the inherent power to appoint counsel to coordinate and manage complex multiparty litigation and to require that such counsel be paid for discharging their duties out of the proceeds of the litigation generally. The appointment of lead liaison counsel and appropriate committees is a necessary tool in managing multi-district litigation:

A necessary corollary to court appointment of lead and liaison counsel and appropriate management committees is the power to assure that these attorneys receive reasonable compensation for their work. *See In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5<sup>th</sup> Cir.1977); *see also Smiley v. Sincoff*, 958 F.2d 498, 501 (2d Cir.1992) ("District courts have exercised this power to establish fee structures designed to compensate committee members for their work on behalf of all plaintiffs involved in consolidated litigation.") (citing *In re Air Crash*, 549 F.2d at 1016 (5<sup>th</sup> Cir.1977)); *Walitalo v. Iacocca*, 968 F.2d 741, 747 (8<sup>th</sup> Cir.1992) ("It is well established that courts can impose liability for court-

appointed counsel's fees on all plaintiffs benefitting from their services.”  
(citations and footnote omitted)).

...

The Fifth Circuit held *In re Air Crash* “... that the district court had the power to direct that the Committee and its counsel be compensated and that requiring the payment come from other attorneys was permissible.” *Id.* at 1016. That court based its affirmation of the district court's power to establish such a compensation scheme on the ground that “... if lead counsel are to be an effective tool the court must have means at its disposal to order appropriate compensation for them. The court's power is illusory if it is dependent upon lead counsel's performing the duties desired of them for no additional compensation.” *Id.*

*In re Linerboard Antitrust Litigation*, 292 F.Supp. 644, 653-54 (E.D. Pa. 2003).

In *In Re Nineteen Appeals* arising out of the *San Juan Dupont Plaza Hotel Fire Litigation*, 902 F.2d 604 (1<sup>st</sup> Cir. 1992), the court articulated the following principle of assessing fees:

Under standard American rule practice, each litigant pays his or her own attorneys' fees. Yet, there are times when the rule must give way. ...

A court supervising mass disaster litigation may intervene to prevent or minimize an incipient free-rider problem and to that end, may employ measures reasonably calculated to avoid unjust enrichment of persons who benefit from a lawsuit without shouldering its costs. Such courts will most often address the problem by specially compensating those who work for the collective good, chiefly through invocation of the so-called common fund doctrine.” ...

Here, [the District Court's] decision to use a steering committee created an occasion for departure from the American rule. In apparent recognition of the free-rider problem, the judge served notice from the beginning that he would eventually make what he ... later termed a “common fund fee award” to remunerate PSC members for their efforts on behalf of communal interests. This was a proper exercise of judicial power.

*In re Nineteen Appeals*, 982 F.2d at 606-07 (internal citations omitted).

The absence of an assessment order would lead to litigants and counsel being unjustly

enriched by the efforts and hard work performed by the Plaintiffs Steering Committee. As such, both equity and precedent support entering the PSC's Proposed Fee and Expense Assessment Order, a copy of which is attached hereto as Exhibit "A". Furthermore, the CMO, as drafted, provides an avenue for and encourages those Fosamax attorneys who are not engaged in the active litigation to minimize the fee assessments which they will be required to pay by signing on to the appropriate assessment agreement, as referenced in the proposed CMO.

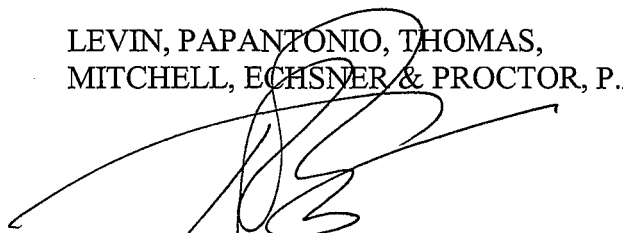
### CONCLUSION

For the foregoing reasons, the Plaintiffs Steering Committee respectfully moves this Court to enter the proposed CMO 17 Common Benefit Fund Assessment Order.

\* \* \*

RESPECTFULLY SUBMITTED, this 21<sup>st</sup> day of October, 2009.

LEVIN, PAPANTONIO, THOMAS,  
MITCHELL, ECHSNER & PROCTOR, P.A.



TIMOTHY M. O'BRIEN  
316 South Baylen Street, Suite 600  
Pensacola, Florida 32502  
(850) 435-7084 (direct dial)  
(850) 436-6084 (direct fax)  
[tobrien@levinlaw.com](mailto:tobrien@levinlaw.com)

Plaintiffs Steering Committee Lead Counsel

**CERTIFICATE OF SERVICE**

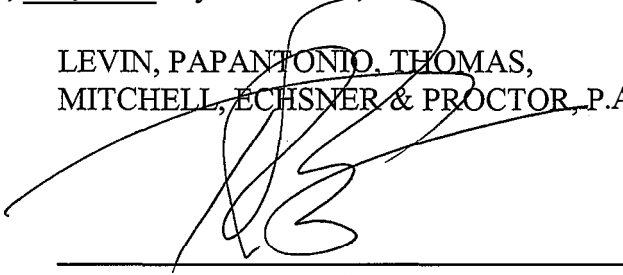
I certify that I filed and caused to be served by ECF and sent a copy of the foregoing by first class U.S. Mail to the following:

VENABLE LLP  
Paul F. Strain, Esq.  
M. King Hill, III, Esq.  
David J. Heubeck, Esq.  
750 E. Pratt Street, Suite 900  
Baltimore, MD 21202

HUGHES HUBBARD & REED LLP  
Norman C. Kleinberg, Esq.  
Theodore V.H. Mayer, Esq.  
William J. Beausoleil, Esq.  
One Battery Park Plaza  
New York, NY 10004

RESPECTFULLY SUBMITTED, this <sup>\*\*\*</sup>21<sup>st</sup> day of October, 2009.

LEVIN, PAPANTONIO, THOMAS,  
MITCHELL, ECHSNER & PROCTOR, P.A.



---

TIMOTHY M. O'BRIEN  
316 South Baylen Street, Suite 600  
Pensacola, Florida 32502  
(850) 435-7084 (direct dial)  
(850) 436-6084 (direct fax)  
[tobrien@levinlaw.com](mailto:tobrien@levinlaw.com)

Plaintiffs Steering Committee Lead Counsel

# Exhibit “A”

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
IN RE: FOSAMAX PRODUCTS LIABILITY :  
LITIGATION : MDL NO. 1789  
: 1:06-md-1789 (JFK)  
-----X  
This Document Relates to: :  
ALL ACTIONS :  
-----X

**CASE MANAGEMENT ORDER NO. 17**  
**(ESTABLISHING PLAINTIFFS' COMMON BENEFIT FUND)**

This order is entered to provide for the fair and equitable sharing among plaintiffs of the cost of litigation services performed and expenses incurred by attorneys acting for MDL 1789 administration and common benefit of all plaintiffs in this complex litigation. The order is presented by the Plaintiffs Steering Committee without opposition from Defendant.

Accordingly, the Court **ORDERS** as follow

**1. The Plaintiffs Steering Committee Has Created Work Product for the Common Benefit of All Federal Litigants.**

On September 25, 2006, this Court entered Case Management Order 2 and through that CMO appointed the MDL No. 1789 Plaintiffs Executive Committee and Plaintiffs Steering Committee ("PSC"). The Court charged the PSC with the following obligations:

- (1) Initiate, coordinate, and conduct all common benefit pretrial discovery on behalf of all plaintiffs in all actions which are consolidated with the instant MDL.
- (2) Develop and propose to the Court schedules for the commencement, executions, and completion of all discovery on behalf of all plaintiffs.
- (3) Cause to be issued in the name of all plaintiffs the necessary discovery requests,



motions, and subpoenas pertaining to any witnesses and documents needed to properly prepare for the pretrial of relevant issues found in the pleadings of this litigation.

- (4) Conduct all discovery in a coordinated and consolidated manner on behalf of and for the benefit of all MDL plaintiffs.
- (5) Examine witnesses and introduce evidence at hearings on behalf of plaintiffs.
- (6) Act as spokesperson for all plaintiffs at pretrial proceedings and in response to any inquiries by the Court.
- (7) Submit and argue any motions to the Court, and file any briefs in opposition to motions, on behalf of all plaintiffs, which involve matters within the sphere of the responsibilities of the Plaintiffs' Steering Committee.
- (8) Explore, develop, and pursue all settlement options pertaining to the common benefit of all plaintiffs.
- (9) Maintain adequate files of all pretrial matters, including establishing and maintaining a document depository, and having those documents available, under reasonable terms and conditions, for examination by all MDL Plaintiffs or their attorneys.
- (10) Perform any task necessary and proper for the Plaintiffs' Steering Committee to accomplish its responsibilities as defined by the Court's orders, including organizing sub-committees comprised of plaintiffs' attorneys both on the PSC and not on the PSC and assigning them tasks consistent with the duties of the Plaintiffs' Steering Committee.

- (11) Perform such other functions as may be expressly authorized or directed by further orders of this Court.

This Court is satisfied that the PSC has faithfully executed the duties with which it was charged and that it is appropriate to order the establishment of a common benefit fund in order to remunerate the PSC for the expenses incurred and efforts conducted on behalf of all Fosamax plaintiffs in this MDL.

**2. Plaintiffs' Litigation Expense Fund to be Established**

Plaintiffs' Lead Counsel and Defendants' Lead Counsel are directed to establish an interest-bearing account to receive and disburse funds as provided in this order. Counsel shall agree on and designate an escrow agent for this purpose. These funds will be held as funds subject to the direction of the Court. No party or attorney has any individual right to any of these funds except to the extent of amounts direct to be disbursed to such person by order of the Court. These funds will not constitute the separate property of any party or attorney or be subject to garnishment or attachment for the debts of any party or attorney except when and as directed to be disbursed as provided by court order to a specific person.

**3. Assessment**

- a. All plaintiffs and their attorneys who, either agree or have agreed - for a monetary consideration - to settle, compromise, dismiss, or reduce the amount of a claim, or, with or without trial, recover a judgment for monetary damages or other monetary relief, including such compensatory and punitive damages, with respect to a FOSAMAX claim are subject to an assessment of the "gross monetary recovery," as provided herein.

- b. Defendants are directed to withhold this assessment from amounts paid to plaintiffs and their counsel, and to pay the assessment directly into the fund as a credit against the settlement or judgment. If for any reason the assessment is not or has not been so withheld, the plaintiff and his counsel are jointly responsible for paying the assessment into the fund promptly.
- c. No orders of dismissal of any plaintiff's claim, subject to this order, shall be filed unless accompanied by a certificate of plaintiff's and defendant's counsel that the assessment has been withheld and deposited into the fund. Lead Counsel for the PSC and Defendant shall meet and confer on the appropriate form of such a certificate and submit the agreed-upon form to the Court for ratification.
- d. The Plaintiffs' Steering Committee shall provide Defense Counsel, plaintiff's counsel, the escrow agent, and the Court (or its designee) with a list of cases and/or counsel who have entered into written agreements with the Plaintiff's Steering Committee. In the event there is a dispute as to whether a case should be on the list, the Plaintiff's Steering Committee shall resolve the matter with the particular plaintiff's counsel either informally or upon written motion. In the absence of a written agreement, Defendant shall consider the case as subject to the mandatory assessment set forth in ¶ 3(f)(3), *infra*.
- e. The "gross monetary recovery" is any and all sums paid by Defendant to settle the plaintiffs' respective claims and, in the event of any structured settlement, include the present value of any fixed and certain payments to be made in the future.
- f. This obligation attaches in the following instances:

- (1) Assessment Option #1. For all cases whose counsel who have already agreed or who have agreed within 90 days of this Order to cooperate with the MDL PSC by signing an appropriate agreement, the assessment in such cases shall be six percent (6%) of the “gross monetary recovery” (3% fees/3% costs). The assessment shall apply to all of that cases of such Counsel with FOSAMAX cases now pending or later filed in, transferred to, or removed to this Court as well as unfiled and/or tolled cases and treated as part of the coordinated MDL 1789 proceeding known as *In re: Fosamax Products Liability Litigation* including cases later remanded to a state court or any cases on tolling agreements, filed in any state court, or clients whose cases are as yet unfiled. Three percent (3%) of the “gross monetary recovery” shall be deemed fees to be subtracted from the attorney’s fee portion of the individual fee contract, and three percent (3%) of the “gross monetary recovery” shall be deemed costs to be subtracted from the client portion of individual fee contracts. Regardless of whether any such agreement has been executed, by operation of this Order this option is deemed accepted by all members of the PSC (and their respective firms and consortiums), and MDL common benefit committee members (and their respective firms and consortiums).
- (2) Assessment Option #2. Following the 90 day period to permit counsel to consider the Assessment Option #1, Counsel can sign an appropriate agreement to an assessment on all FOSAMAX cases now pending, or later

filed in, transferred to, or removed to this Court and treated as part of the coordinated proceeding known as *In re: Fosamax Products Liability Litigation* including cases later remanded to a state court or any cases on tolling agreements, or cases which are as yet unfiled. The assessment in such cases shall be eight percent (8%) of the “gross monetary recovery” (5% fees/3% costs). Five percent (5%) of the “gross monetary recovery” shall be deemed fees to be subtracted from the attorney’s fee portion of the individual fee contract, and three percent (3%) of the “gross monetary recovery” shall be deemed costs to be subtracted from the client portion of individual fee contracts.

- (3) Mandatory Assessment (Option #3). The following mandatory assessment shall apply to all MDL plaintiffs’ counsel who do not sign either an Assessment Option #1 agreement or Assessment Option #2 agreement. Because the extensive litigation efforts of the PSC by necessity inure to the benefit of all Federal litigants, in the absence of a signed Assessment Option agreement, the Court mandates that the following assessment provision shall apply to all Federal Fosamax cases. Additionally, any plaintiff’s counsel with cases not in the MDL who utilizes any aspect of the MDL common benefit work product, or who participates in a PSC-coordinated resolution, and who has not signed an Assessment Option agreement, shall be subject to the following assessment provision. The assessment in such cases shall be ten percent (10%) of the “gross monetary recovery” (7% fees/3% costs). Seven

percent (7%) of the “gross monetary recovery” shall be deemed fees to be subtracted from the attorney’s fee portion of the individual fee contract, and three percent (3%) of the “gross monetary recovery” shall be deemed costs to be subtracted from the client portion of individual fee contracts.

- g. For those counsel desiring to execute any Assessment Option agreement, the PSC has designated Anthony Irpino, Esq., as the contact person:

Irpino Law Firm  
One Canal Place  
365 Canal Street, 22<sup>nd</sup> Floor  
New Orleans, LA 70130  
(504) 525-1500  
[irpinoanthony@hotmail.com](mailto:irpinoanthony@hotmail.com)

**4. Disbursements**

- a. Upon order of the Court, payments may be made from the fund to attorneys who provide services or incur expenses for the joint and common benefit of plaintiffs in addition to their own client or clients. Attorneys eligible are limited to Plaintiffs’ Lead Counsel, Plaintiffs’ Liaison Counsel, members of the Plaintiffs’ Steering Committee and other attorneys called upon by them to assist in performing their responsibilities. All time and expenses are subject to proper and timely submission (each month) of contemporaneous records certified to have been received by Plaintiffs’ Administrative Committee in accord with this Court’s prior orders.
- b. Payments will be allowed only to entities for special services performed, and to reimburse for special expenses incurred, for the joint and common benefit of all plaintiffs.

- c. Payment may, for example, be made for services and expenses related to the obtaining, reviewing, indexing, and payment for hard copies of computerized images of documents for the defendants; to conducting “national” or “state” depositions; and to activities connected with the coordination of federal and state litigation. The fund will not, however, be used to pay for services and expenses primarily related to a particular case, such as the deposition of a treating physician, even if such activity results in some incidental and consequential benefit to other plaintiffs.
- d. Payments will not exceed the fair market value for the services performed or the reasonable amount of the expenses incurred, and, depending upon the amount of the fund, may be limited to a part of the value of such services and expenses. Noting this, it is the express intention for the aforementioned assessments to properly and fully compensate Plaintiffs’ Lead Counsel, Plaintiffs’ Liaison Counsel, members of the Plaintiffs’ Steering Committee and other attorneys called upon by them to assist in performing their responsibilities for the common benefit work which they perform in connection with this matter.
- e. No amounts will be disbursed without review and approval by the Court or such other mechanism as the Court may order. Defense Counsel shall provide at least quarterly notice to the Court or its designee the names and docket numbers of the cases for which it has made an assessment. Details of any individual settlement agreement, individual settlement amount and individual amounts deposited into escrow shall be confidential and shall not be disclosed to the Plaintiff’s Steering Committee, the Court, or the Court’s designee. However, monthly statements from

the escrow agent shall be provided to Plaintiff's Lead Counsel, Defendants' Lead Counsel, the Court and/or the Court's designee showing only the aggregate of the monthly deposits, disbursements, interest earned, financial institution charges, if any, and current balance.

- f. If the fund exceeds the amount needed to make payments as provided in this order, the Court may order a refund to those who have contributed to the fund. Any such refund will be made in proportion to the amount of the contributions.

**5. Distribution of this CMO.**

The Court directs the PSC to post this CMO to its website, [www.fosamaxmdl.com](http://www.fosamaxmdl.com), as well as the appropriate Assessment Option agreements referenced in this Order. The Court further understands that Merck, upon a plaintiff filing a new Fosamax case in the MDL, automatically circulates to the plaintiff's counsel documentation concerning the plaintiff's CMO 8 profile form obligations. The Court directs Merck to include this CMO in the package circulated to plaintiff's counsel upon the filing of a new Fosamax MDL case.

**IT IS SO ORDERED.**

Dated: New York, New York

\_\_\_\_\_, \_\_\_\_\_, 2009

---

JOHN F. KEENAN  
UNITED STATES DISTRICT JUDGE  
SOUTHERN DISTRICT OF NEW YORK



# Exhibit “B”

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

*	*	*	*	*	*	*	*	*
								*
IN RE:								*
								*
FOSAMAX PRODUCTS LIABILITY LIGATION								*
								*
<i>This Document Relates to All Actions</i>								*
								*
*	*	*	*	*	*	*	*	*

**DECLARATION OF TIMOTHY M. O'BRIEN, ESQ.**  
**PURSUANT TO 28 U.S.C. § 1746**

COMES NOW, Timothy M. O'Brien, who, pursuant to 28 U.S.C. § 1746 declares the following statements to be true:

1.

My name is Timothy M. O'Brien. I am a Shareholder in the law firm of Levin, Papantonio, Thomas, Mitchell, Echsner, & Proctor, P.A. I have been appointed by this Court to serve as Lead Counsel for the Plaintiffs Steering Committee in the above-referenced Multi-District Litigation. I make the following declaration in support of the Plaintiffs Steering Committee's Motion for Creation of Common Benefit Fund.

2.

On September 25, 2006, this Court entered Case Management Order No. 2 and through that CMO appointed the MDL No. 1789 Plaintiffs Executive Committee and Plaintiffs Steering Committee ("PSC"), charging the PSC with numerous discovery and litigation obligations for the common benefit of those plaintiffs with Fosamax jaw injury cases. Since that time, the PSC has

performed the tasks directed by the Court, and continues to refine and generate the work product which will be available to the Fosamax plaintiffs. Tens of thousands of hours have spent by the attorneys of the Plaintiffs Steering Committee, and millions of dollars have been spent through the Plaintiffs Steering Committee litigation fund and the CMO 12 held common benefit expenses of the Plaintiffs Steering Committee counsel and common benefit counsel directed by the PSC to perform certain tasks.

3.

The Plaintiffs Steering Committee has reviewed and coded several million pages of documents from Merck and various third party organizations produced in this MDL. These documents have been reviewed, organized, coded, and indexed and a comprehensive ready-to-use master exhibit list created. The PSC has also created an electronic library of thousands of medical articles which have been reviewed, organized, coded, and indexed. All of these documents and the confidential work product relating thereto are available for and as the common benefit work product for the Fosamax plaintiffs.

4.

The Plaintiffs Steering Committee has taken the videotaped depositions of the following Merck employees (or former employees):

- (1) Mr. James Adams  
*Associate Director, Worldwide Regulatory Affairs*
- (2) Christiane Arsever, M.D.  
*Associate Director, Medical Services*
- (3) Daniel Baran, M.D.  
*Senior Medical Director*

- (4) Thomas Bold, M.D.  
*Senior Director, Clinical Risk Management and Safety Surveillance*
- (5) Mr. Patrick Counihan  
*V.P. of Health Care Systems*
- (6) Anastasia Daifotis, M.D.  
*V.P. of Clinical Research*
- (7) Anne DePapp, M.D.  
*Executive Scientific Director, Merck Human Health Division*
- (8) Michelle Flicker, M.D., Ph.D.  
*Director, Regulatory Affairs*
- (9) Ms. Mary Ellen Fiore  
*Clinical Risk Management & Safety Surveillance Associate*
- (10) Michael Goldberg, M.D.  
*Former Senior Director of Worldwide Product Safety & Epidemiology*
- (11) Peter Gruer, M.D.  
*Former Director, Worldwide Product Safety & Epidemiology*
- (12) Georgianna Harris, Ph.D.  
*Director, Regulatory Affairs*
- (13) Ms. Linda Hostelley  
*V.P. Worldwide Product Safety & Quality Assurance*
- (14) Donald B. Kimmel, D.D.S., Ph.D.  
*Former Director, Molecular Endocrinology*
- (15) Mr. Patrick Magri  
*V.P. of Marketing*
- (16) Ms. Christine Peverley  
*Clinical Research*
- (17) Alfred Reszka, Ph.D.  
*Researcher, Dept of Molecular Endocrinology and Bone Biology*

- (18) Mr. Ron Rogers  
*Merck Spokesperson*
- (19) Philip Ross, M.D.  
*Senior Director and Acting Head, Medical Communications Department*
- (20) Nancy Santanello, M.D., M.S.  
*Executive Director, Dept. of Epidemiology*
- (21) Arthur Santora, M.D., Ph.D.  
*Executive Director, Clinical Research*
- (22) Frank Seebach, M.D.  
*Director, Regulatory Affairs*
- (23) Ms. Ellen Westrick  
*Executive Director, Office of Medical/Legal*

The PSC has also deposed Merck consultant Dr. Jack Gotcher of the University of Tennessee Medical Center. All of these depositions have been recorded videographically and stenographically, and summarized. They are available for and as the common benefit work product for the Fosamax plaintiffs.

5.

The Plaintiffs Steering Committee has also obtained and produced common benefit expert reports from the following expert witnesses:

- (1) Mahyar Etminan, Pharm.D., M.Sc.  
University of British Columbia  
Center for Epidemiology and Clinical Evaluation  
Vancouver, British Columbia
- (2) Curt Furberg, M.D.  
Division of Public Health Sciences  
Wake Forest University School of Medicine  
Winston-Salem, NC

- (3) Alastair Goss, DDSc.  
University of Adelaide  
College of Oral Surgery  
Adelaide, SA  
Australia
- (4) Gordon Guyatt, M.D.  
Dept. Of Clinical Epidemiology & Biostatistics  
McMaster University  
Hamilton, Ontario
- (5) John Hellstein, DDS, M.Sc.  
University of Iowa  
College of Dentistry  
Iowa City, IA
- (6) Robert Marx, DDS  
University of Miami School of Medicine  
Division of Oral & Maxillofacial Surgery  
Miami, FL
- (7) Suzanne Parisian, M.D.  
MD Assist, Inc.  
Phoenix, AZ

6.

The PSC has prepared those expert witnesses for discovery deposition by Merck's counsel, and will be conducting *de bene esse* depositions of several of those witnesses for the common benefit use of the Fosamax Plaintiffs, in addition to the *de bene esse* deposition of Dr. Alastair Goss which already has been preserved by the PSC. Further, all of these discovery depositions have been recorded stenographically, and summarized. They are available for and as the common benefit work product for the Fosamax plaintiffs.

7.

The PSC has conducted extensive research relating to the following expert witnesses retained

by Merck, and has conducted their discovery depositions:

- (1) Paul Bartlett, Ph.D.  
Department of Chemistry  
University of California  
Berkeley, CA
- (2) John Bilezikian, M.D.  
Department of Medicine  
Columbia University  
New York, NY
- (3) Jane Cauley, Dr.PH  
Department of Epidemiology  
University of Pittsburgh  
Pittsburgh, PA
- (4) David Dempster, Ph.D.  
Regional Bone Center  
Helen Hayes Hospital  
West Haverstraw, NY
- (5) Ellen Eisenberg, D.M.D.  
Section of Oral & Maxillofacial Pathology  
University of Connecticut School of Medicine  
Farmington, CT
- (6) Robert Glickman, D.M.D.  
Department of Oral & Maxillofacial Surgery  
New York University School of Dentistry  
New York, NY
- (7) Elizabeth Holt, M.D., Ph.D.  
Section of Endocrinology & Metabolism  
Yale University School of Medicine  
New Haven, CT
- (8) Jeri Nieves, Ph.D.  
School of Public Health  
Columbia University  
New York, NY

- (9) Lisa Rarick M.D.  
RAR Consulting, LLC  
Gaithersburg, MD
- (10) Daniel Shames, M.D.  
Daniel A. Shames Consulting, Inc.  
Potomac, MD
- (11) Scott Tomar, D.M.D., M.P.H.  
University of Florida College of Dentistry  
Gainesville, FL

All of these depositions have been recorded stenographically, and summarized. They are available for and as the common benefit work product for the Fosamax plaintiffs.

8.

Additionally, the PSC has generated the briefing and conducted all the hearings relating to Merck's *Daubert* challenges, the PSC's *Daubert* challenges, and Merck's Motion for Partial Summary Judgment (on the 3-year duration issue).

9.

The PSC has prepared an assessment early option agreement which has been circulated to dozens of firms representing Fosamax jaw injury plaintiffs. A true and correct copy of this agreement form is attached to the proposed CMO 17 as Exhibit "1". To date, more than 75 firms have signed on to the assessment agreement and submitted the executed agreements to the PSC.

Pursuant to 28 U.S.C. § 1746, under penalty of perjury, I affirm the foregoing statements to be true.

Executed on this 21<sup>st</sup> day of October, 2009, at Pensacola, Florida.



---

TIMOTHY M. O'BRIEN



# Exhibit “C”

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION

IN RE: AREDIA AND ZOMETA            )  
PRODUCTS LIABILITY LITIGATION    )  
(MDL No. 1760                        )  
  )  
This document Relates to            )  
All Cases                                )

No. 3:06-MD-1760  
Judge Campbell/Brown

FEE AND EXPENSE ASSESSMENT ORDER

1. The Court finds that this litigation has advanced to the point that it is appropriate to establish a system for the sequestration of a certain percentage of payments that may be made by a defendant to plaintiffs in settlement of claims or satisfaction of judgments (all such payments hereinafter referred to as "claim payments"). The funds so sequestered are to be available to provide for reimbursement of expenses and payment of attorneys' fees to Common Benefit Attorneys, subject to a proper showing in the future. "Common Benefit Attorneys" means the Plaintiffs' Steering Committee (PSC), liaison counsel, and other MDL attorneys who have been authorized by the PSC to perform work for the common benefit of personal injury plaintiffs in MDL 1760 (hereinafter the Common Benefit Attorneys).

2. A. Before making any claim payment to a plaintiff whose claim has been resolved in an action which is or ever has been properly transferred into this MDL, the defendant paying the claim payment shall deduct from the payment an amount equal to 8% of the gross amount, with 6% deemed fees to be subtracted from the

attorneys' fees portion of the individual fee contracts, and 2% deemed to be expense reimbursement to be subtracted from the client portion of the individual fee contract. Such sum shall be paid as hereinafter provided for deposit into the MDL 1760 Fee and Expense Trust Account (this account and its procedures will be established in a future order of this Court).

B. In measuring the gross amount, the Defendant shall include the present value of any fixed and certain payments to be made in the future; in the event that a Defendant makes payment to an insurance annuity company, the present value shall be the amount of the payment to the insurance annuity company.

C. In measuring the gross amount, the Defendant shall exclude (1) court costs that are to be paid by the Defendant; and (2) any payments to be made by the Defendant on an intervention asserted by third-parties, such as to physicians, hospitals, and other health-care providers in subrogation-related treatment of the plaintiff.

3. Payment by a defendant to the MDL 1760 Fee and Expense Trust Account of the appropriate assessment amount shall fully discharge the Defendant's obligation under this Order.

4. The requirements of paragraph 2 shall apply regardless of whether a plaintiff's case is disposed of during the time it is on the docket of the transferee court, or following remand or transfer from the transferee court to another federal

district court for trial, or transfer to other district courts in accordance with 28 U.S.C. § 1404 or other provisions of law. The requirements shall follow the case to its final disposition in any United States court, including a court having jurisdiction in bankruptcy.

5. As a condition of appointment by this Court of any counsel to the Plaintiffs' Steering Committee, such counsel are deemed to have agreed to the terms of paragraph 2.

6. MDL counsel shall use the Common Benefit Resource materials only in this MDL case, absent further order of the Court.

7. The set-aside payments as provided in paragraph 2 of this Order shall be deposited into the MDL 1760 Fee and Expense Trust Account. All funds in the account will be held as funds subject to the direction of the Court. The Court may by separate order appoint a trustee who may not be a member of the PSC or counsel for any MDL Plaintiff, to administer the Fee and Expense Trust Account in accord with the orders of the Court. The trustee shall post a bond approved by the Court and shall be subject to an independent audit and confidentiality requirements, as will be more fully set forth in the order appointing the trustee. Any audit may be paid for out of the MDL 1760 Fee and Expense Trust Account. In this event, a defendant paying a claim payment shall pay the appropriate assessment to the trustee. If payments are made to any plaintiff or claimant before this Court establishes the MDL 1760

Fee and Expense Trust Account, the defendant paying the claim payment shall deposit the set-aside payment as provided in paragraph 2 of this Order into a separate interest-bearing trust account and transfer amounts to the MDL 1760 Fee and Expense Trust Account after that Account is fully operational. For purposes of this Order, the defendant "tenders payment" to a plaintiff or claimant at the time funds are tendered to an individual plaintiff or claimant, or his or her attorney if represented by counsel, and not at the time that funds may be tendered to or deposited to an intermediate escrow account.

8. A. The trustee shall maintain detailed records which identify all claim payments made to personal injury plaintiffs. The records shall include the personal injury plaintiffs' and plaintiffs' counsel's names, current address and telephone numbers, civil action numbers or other identifying number, amount of deposit, date of deposit, and other information that may be required by the circumstances. All such records shall be maintained as highly confidential material and the only persons with access to such records shall be the Court and its designated trustee and independent auditor. One purpose of maintaining confidentiality is to protect the Defendant's concerns regarding disclosure of the amounts that it deposits into the escrow fund, inasmuch as knowledge of such amounts would allow calculation of

settlements paid by the Defendant, which settlements may be confidential.

B. The trustee shall report to the Court from time to time the aggregate sums that are deposited in and paid from the Trust Account as will be more fully set forth in the order appointing the trustee. Absent further order of the Court, the trustee's reports shall not include the terms of any individual settlement agreement. The trustee shall confer with the Defendant and the Court to determine the appropriate form that should be completed and accompany any payment to be made to the trustee to allow the trustee to verify the accuracy of any payment made. The fees and expenses of the trustee shall be paid from the Trust Account upon the approval of this Court. Any dispute may be brought to the Court by appropriate motion of the parties, the trustee, or the independent auditor.

9. Upon payment of the assessment described herein, the Defendant shall report to the trustee the information described in paragraph 8. This report is intended to assist the Court and its designated trustee in monitoring compliance with this Order.

10. Upon a proper showing the Common Benefit Attorneys will be entitled to receive an aware of counsel fees and reimbursement of out-of-pocket litigation expenses to be paid from the MDL 1760 Fee and Expense Trust Account in such amounts as are determined by the Court based on all relevant factors and

applicable law. In making such an award, the Court will first determine the amount of expenses for which reimbursement is appropriate. The amount remaining in the MDL 1760 Fee and Expense Trust Account after deducting the amount of expenses awarded by the Court will be available for any award of counsel fees. In making an award of counsel fees to the Common Benefit Attorneys and in apportioning any fee award among those attorneys, appropriate consideration will be given to the experience, ability, and contribution made by each Common Benefit Attorney who seeks to recover counsel fees from the MDL 1760 Fee and Expense Trust Account, provided, however, that the Court will only consider compensation for those services which were authorized by the PSC.

11. Any sum ordered to be paid by the Court pursuant to this Order as reimbursement for out-of-pocket costs shall be prorated among the plaintiffs whose claim payments were deposited, in part, in the MDL 1760 Fee and Expense Trust Account. Any sum ordered to be paid by the Court pursuant to this Order as an award of counsel fees shall be deducted from the gross recovery.

12. The Court is not making the determination by this Order that the Common Benefit Attorneys shall receive any specific sum or percentage as payment of counsel fees and reimbursement of litigation expenses. Such a determination is specifically reserved for an appropriate time following petitions related to such an award. Rather, this Order is intended to develop a mechanism for

the creation of a fund from which the amount of fees and costs to which the Common Benefit Attorneys ultimately may be determined to be entitled may be awarded and paid with reliability.

13. At such time as the MDL 1760 Fees and Expense Trust Account contains balances that are not necessary to be retained for the payment of fees and costs, the Court will, upon applicable provisions of law, following a hearing, make refunds on an equitable basis, or if such balances are of small amounts, enter such orders concerning the disposition of such funds as are appropriate under the law.



---

JOE B. BROWN  
UNITED STATES MAGISTRATE JUDGE