

claims or objections. The report and recommendation of the Special Master to Chief Judge Perry is due November 2, 2012.

In their motion for allocation (D.I. 4674) at 4, footnote 3, Lead Counsel stated that the Fund as of September 4, 2012 contained \$48,574,512.33 in Common Benefit fees and \$18,648,309.19 in Common Benefit expenses. It was anticipated the Funds would increase in late October to about \$53 million and \$20 million respectively.

Response to the Special Master's Notice of September 19, 2012

1. The Phipps Legal Team (Phipps)¹, timely responded by filing:
 - a. Objection to Lead Counsels' Motion for Allocation of Common Benefit Fees and Expenses; and supporting memorandum and exhibits.
 - b. Motion to participate in the allocation of Common Benefit Fees and Expenses and memorandum with exhibits in support thereof. In the motion request, the Phipps Legal team asks the court to "(1) vacate its order creating a Common Benefit Fund; (2) exempt the plaintiffs represented by the Phipps Legal team from the requirement of contribution to the Common Benefit Fund; (3) reduce the amount of the Fund; (4) distribute only the amount that is fair and reasonable to PLC (which is significantly less than that requested); and/or (5) distribute the amount

¹ The Phipps legal team headquartered in San Antonio, Texas, is composed of its leader Martin J. Phipps and Larry Goldman, Craig Saucier, Clayton Smaistrila, Amanda Hazleton, Douglas Pennebaker, John McGlothlin, Deborah Early, Perry Dominguez, Kim Knox, and Teresa Choate Beal, all of the firm of Goldman Phipps and Mikal Watts and Austin Anderson in the firm of Watts P.C. and Kimberly S. Keller and Shane J. Stolarczyk of the firm of Heller Stolarczyk PLLC.

discussed above, which is fair and reasonable to the Phipps Legal Team for Common Benefit work.”; and

- c. Motion to compel discovery in response to Lead Counsels’ motion for allocation.

2. The Deacon Law Firm, headquartered in Jonesboro, Arkansas,² timely filed Motion for Allocation and Distribution of Common Benefit Fees and Expenses

3. The firm of Stevens Baldo Freeman and Lighty of Beaumont, Texas timely filed Motion for Allocation and Distribution of Common Benefit Fees and Expenses. R. Lyn Stevens is the primary attorney alleging the furnishing of Common Benefit services and expenses. (D.I. 4829-1)

4. The Coffman Law Firm also of Beaumont, Texas timely filed Motion for Allocation and Distribution of Common Benefit Fees and Expenses. Richard L. Coffman is the primary attorney alleging the furnishing of Common Benefit services and expenses. (D.I. 4825)

5. The Bohrer Law Firm, L.L.C. of Baton Rouge, Louisiana timely filed on behalf of Farmers Rice Milling Company, Inc. (Farmers) a motion to participate in the Allocation of Common Benefit Fees and Expenses. The court’s order (D.I. 2574) of February 24, 2010 establishing the Fund, required so called non-producer plaintiffs like rice mills to pay 7% into the

² The firm was originally known as Barrett & Deacon. On June 22, 2012 that firm formed a wholly-owned subsidiary effective September 1, 2012 known as the Deacon Law Firm. Barrett and Deacon changed its name to Waddell, Cole and Jones P.A. Some lawyers remained with the Waddell firm and others went with the Deacon Law Firm. As a part of the reorganization all right, title and interest the original firm had to any Common Benefits in the rice case were transferred to the Deacon Law Firm. The attorneys, who allegedly participated in furnishing legal services for the Common Benefit of all parties in the rice litigation now with the Deacon Law Firm are Barry Deacon, Andrew H. Dallas and Jason M. Milne (Barry Deacon declaration attached to his Reply to Co-Lead Counsels’ Response to Deacon Law firms Motion for Allocation of Common Benefit Fees). (D.I. 4894)

Fund of any gross recovery obtained by way of judgment, settlement, or otherwise for attorney fees and 3% for expenses. In its motion Farmers requests allocation of Common Benefit fees and expenses and/or equitable modification of the Courts February 24, 2010 Common Benefit memorandum and Order. The equitable request is for the court to reduce the 7% contribution to the Fund for attorney's fees to 3.5%. Philip Bohrer is alleged as the Lead Counsel for Farmers.

6. The law firm of Moore Landrey, LLP of Austin, Texas timely filed on behalf of Beaumont Rice Mills, Inc a Motion to participate in the Allocation of Common Benefit Fees and Expenses or in the alternative, like Farmers' request, for a modification of the court's order of February 24, 2010 to reduce the attorney fee contribution to the Fund from 7% to 3.5%. (D.I. 4833) In Exhibit 1 attached to Beaumont's motion, Ethan Shaw, John Cowart and Scott Kinsel were listed as the Moore Landrey attorneys involved.

At the completion of filing of all claims to the Fund, the Special Master prepared a resume of these claims attached to this Report as Exhibit A. The Exhibit reflects the claims as:

1. Lead Counsels 31 firms
2. Phipps Legal Team
3. Deacon Law Firm
4. Baldo, Freeman & Lightly LLP
5. Coffman Law Firm
6. Farmers Rice Milling Company, Inc. by Bohrer Law Firm; and
7. Beaumont Rice Mills, Inc. by Moore Landrey, LLP

The Exhibit also shows the amount of Fees and Expenses requested as well as alternative relief.

In order to identify the claims of Lead Counsels legal group, their Exhibit 5 attached to their Motion and Memorandum in Support for Allocation of Common Benefit Fees and

Expenses (D.I. 4674) is labeled Exhibit B for the purpose of this report of the Special Master. That exhibit is as identified by Lead Counsel as “Summary of Common Benefit Confirmed Lodestar Fees and Expenses.” The exhibit lists the name of each firm and “Lodestar Fees Confirmed and Expenses Confirmed.”

No requests to participate in the Allocation of the Fund have been filed other than those identified in this report.

After the requests were filed Lead Counsel timely filed “Responses and Oppositions to Other Counsel Motions on Allocation and Distribution of Common Benefit Fees and Expenses.” (D.I.4877). Although not specifically identified in the Response, Lead Counsel has informed the Special Master that they agree with the claims of Baldo, Freeman and Lighty LLP and the Coffman Law Firm.

Lead Counsel have therefore acknowledged that these claims should be added to the list of the original 31 claims. Baldo, Freeman and Lighty is listed as Stevens, Baldo, Freeman and Lighty LLP. Accordingly, those claims are deleted from the Special Master’s resume, Exhibit A.

Late in the afternoon of November 1, 2012, and after a rough draft of this report had been completed, the undersigned conferred with Lead Counsel Downing and Barry Deacon and after negotiation, it appeared that a compromise had been reached which appeared reasonable to the Special Master. Accordingly, Exhibit A and B have been amended. Exhibit A-1 has the claims of Deacon, Baldo and Freeman deleted. Exhibit B-1 includes the claims of Deacon, Baldo and Freeman as a result of the compromise. The Deacon claim will be discussed infra in paragraph G.

In their response Lead Counsel has opposed the requests of Phipps Legal Team, Deacon Law Firm, Farmers Rice Milling, Inc. and Beaumont Rice Mills, Inc. to be included in the Fund

distribution. The Deacon Law Firm has replied to Lead Counsel's response (D.I.4894) but these pleadings are mute because of the settlement.

In an effort to mediate the disputed claims, the Special Master met at length informally on October 24, 2012 with Lead Counsel Don M. Downing and Adam J. Levitt and Martin J. Phipps and two other members of the Phipps Legal team. A similar meeting was held on October 26, 2012 with both Lead Counsel and Barry Deacon of the Deacon Law Firm. Although the discussions were helpful a "meeting of the minds" was not forthcoming at that time.

A. Claims of Stevens, Baldo Freeman and Lighty, LLP and Coffman Law Firm

After these claims were filed, representatives of these two firms met with Co-Lead Counsel and were able to reach an agreement. Lead Counsel reviewed the two motions and corresponding billing records and concluded each firm performed Common Benefit work for a bellweather plaintiff. This conclusion was reached by applying the fair and uniform standards and guidelines developed by Co-Lead Counsel and applied to all Common Benefit Attorneys. Downing declaration (D.I.4676-2) and Levitt declaration (D.I.4676-18) Accordingly, the list of attorneys and firms Lead Counsel moved to share in the Fund was amended by including the claims of the Stevens Baldo Freeman and Lighty firm and the Coffman Law firm. In view of that inclusion, the Stevens and Coffman separate claims have been withdrawn. See (D.I.4874) and (D.I.4873).

In addition to participating in negotiation sessions with members of the Phipps Legal Team and the Deacon Law Firm, the Special Master has conducted an in-depth review of all motions filed and responses to the motions and objections and replies. These pleadings together with memorandum of support and an array of exhibits were voluminous. In addition, the undersigned engaged in substantial legal research as to contested points.

The Special Master in making this Report and Recommendation is mindful of the Court's admonition and will address:

- (1) The reasonableness of the protocols and processes used by Co-Lead Counsel or any other counsel in reaching their proposed allocations;
- (2) The reasonableness of the allocations proposed by Co-Lead counsel, or those proposed by any other counsel;
- (3) Any adjustments agreed to by the parties;
- (4) Any adjustments proposed by the Special Master; and
- (5) The reasonableness of the fees and expenses proposed by Co-Lead Counsel or any other counsel as adjusted by agreement and/or by the Special Master.

B. Lead Counsel's Motion to Allocate and Distribute Certain Common Benefit Fees and Expenses Paid or Soon to be Paid Into the Common Benefit Fund.

In its order of February 24, 2010 (D.I. 2574), at 20, the court directed that "1. Lead Counsel shall establish a common benefit trust fund at a national bank in the name of and to be maintained by Lead Counsel, the purpose of which will be to hold funds as provided in this Order to compensate attorneys for services rendered for the plaintiffs' common benefit and to reimburse them for expenses incurred in conjunction with those common benefit services." Thus, the Fund is created to have monies available to reimburse attorneys for fees and expenses for work benefitting clients they do not directly represent. *Id.* at 5.

Lead counsel in the Memorandum attached to its Motion (D.I. 4676) at 2 state the Global Producer Settlement will ultimately provide \$750 million in compensation to rice farmers and their landlords and \$168 million to various importers, mills and those not included in the Global

Producer Settlement. As set out earlier, there will be appropriated \$53 million in the fund set aside for fees and \$20 million for expenses.

Accordingly, Lead Counsel refined Exhibit A-1 as the “Summary of Common Benefit Confirmed Lodestor Fees and Expenses,” and listed the participating firms or lawyers in alphabetical order. The second column is entitled “Lodestor Fees Confirmed” and the third entitled “Expenses Confirmed.” The Summary shows some firms participate in both fees and expenses while others share in fees only or expenses only.

Lead counsel developed their own protocol and process in reaching the conclusions set out in Exhibit A-1. They aver that they reached out to nearly three dozen firms believed to have performed common benefit work. These firms submitted voluminous records supporting their time and expenses attempting to confirm that those time sheets and records related to common benefit work as opposed to work for individual clients or other matters. (D.I. 4676) at 4.

It was further averred that each submitting attorney also furnished a declaration attesting to the reasonableness of the claim, the fairness of the process, and that their fees and expenses were incurred for common benefit work. Attached to most of the claims was a declaration from a third-party attorney supporting the reasonableness of the firms’ billing rate in the locale where that attorney practiced. See (D.I. 4676) at 4 and 5 and attached Exhibits 2A-2EE and 3A-3R. The Special Master has reviewed each request together with the declarations and exhibits supporting the request.

Common benefit attorneys include attorneys, paralegals, and staff acting at the attorneys’ direction in performing common benefit work. Lead Counsel aver that common benefit attorneys performed a variety of services including:

- (1) Carrying out the duties of the Executive Committee appointed by the Court in its Leadership Order. (D.I. 182) (D.I. 4676) at 7.
- (2) Designing and launching an informational Internet website to provide updated information to all parties.
- (3) Conducting numerous interviews and collected voluminous documents which were utilized to draft the 97 page Master Consolidated Class Action Complaints (D.I. 264) which served as a model for all complainants to use.
- (4) Drafting extensive and detailed protocols governing the conduct of the litigation.
- (5) Engaging in extensive discovery involving:
 - (a) Prepared for and took or defended 167 depositions in the United States and Europe;
 - (b) Coordinated the taking of the depositions with all counsel and made the transcripts available.
 - (c) Engaged in hundreds of “meet and confer” conferences with Bayer counsel and all plaintiffs’ counsel, and 21 third parties that were subpoenaed.
 - (d) Created an on-line document repository for over 2.8 million pages of documents and analyzed and coded the documents in preparation for all modes of discovery.
 - (e) Transmitted all documents that were produced in languages other than English.

- (f) Produced and incurred the expense of producing electronic discovery documents, including use of computer retrieved specialists.
- (6) Coordinated discovery with state court plaintiffs' counsel and allowed that counsel to use and have the benefit of common benefit attorneys' work.
- (7) Engaging in substantial research and briefing in response to Bayer's substantive and procedural motions such as jurisdictional issues involving foreign Bayer defendants, motions for partial summary judgment including Express Federal Preemption issues and the application of the Plant Protection Act and made their work available to all plaintiffs' attorneys.
- (8) Researched the need for and retained four liability and five damage experts. Made these experts and their research and opinions available to all parties. The economic theories of the experts and conclusions as to damages was instrumental to the success of all bellweather trials as well as State trials. Defended all Daubert motions levied by Bayer contesting the experts' credentials and theories. Filed and prosecuted Daubert motions directed to Bayer experts.
- (9) Obtained favorable court rulings on Bayer's substantive motions enabling plaintiffs in the bellweather trials, to make submissable jury issues. These ruling became models on which all plaintiffs could rely not only in the MDL litigation but in the state cases as well. This was especially

noteworthy as to the submission of the economic loss theory and punitive damages.

- (10) Extensive preparation for and engaged in three bellweather trials resulting in favorable plaintiffs' verdicts. Settled favorably a fourth bellweather case after the fourth day of trial. Preparation for each trial was immense and involved submission of and defense of multiple motions in limine, compliance with courts pretrial orders, engaging experts and assisting them to prepare for trial and developed trial strategy. As the court is aware the first bellweather trial lasted four weeks and 30 witnesses testified live or by video. Successfully defended Bayer's voluminous post-trial motions; tried the second bellweather trial lasting three and one-half weeks and engaged in similar extensive trial preparation and the defense of post-trial motions after again obtaining a successful jury verdict.
- (11) Made available to counsel all the evidence used in the first two bellweather trials so that evidence could be used in state tried cases. Those trials, particularly the Kyle and Schafer cases, resulted in very favorable plaintiffs's verdicts (A list of the MDL and State Court cases that were tried is Exhibit C attached hereto.)
- (12) Conducted appellate legal work as the first three bellweather trials were appealed by Bayer to the United States Court of Appeals for the Eighth Circuit. The Common Benefit attorneys briefed the main two points urged by Bayer for reversal, i.e. that plaintiffs' claims were pre-empted by the

Plant Protection Act and were barred by the economic loss doctrine. A settlement was had before oral argument.

- (13) Engaged in many settlement discussions, some of which were conducted by the undersigned as a Court-appointed Special Master for settlement.
- (14) Performed thousands of hours of drafting, research, obtaining expert witnesses, discovery, preparation for trial and trial all of which effort was made available for use by over 7,000 farmer plaintiffs and numerous non-producer plaintiffs. Lead Counsel believe these hours total 107,023. See *infra* Exhibit D and Exhibit 2A, Addendum at 10 attached to (D.I. 4676).

The Court has established the Common Benefit Fund. (D.I.2574) at 8. Such a fund has been approved by the Court of Appeals for the Eighth Circuit. *Walitalo v. Iacocca*, 968 F2d 741, 747 (8th Cir. 1992).

Although there are two acceptable methods used to allocate the Fund the Special Master recommends to the Court the use of the “Lodestar” method as opposed to the “percentage of the Fund” method. The lodestar method has been approved by our circuit. *Johnston v. Comerica Mortgage Co.*, 83 F3d 241, 246 (8th Cir. 1996). Using that method “the hours expended by an attorney are multiplied by a reasonable hourly rate of compensation so as to produce a fee amount which can be adjusted, up or down, to reflect the individualized characteristics of a given action. *Johnson* 83 F3d at 244.

Although the Phipps Legal team has objected to Lead Counsel’s Motion for Allocation, there appears to be no disagreement in using the “Lodestar” method for allocating the Fund and again the Special Master recommends to the Court the usage of that method.

The Phipps Legal team is the only group of attorneys to object to the Lead Counsel's Motion for Allocation. Those objections are:

1. There is no basis in law or equity to establish a common benefit fund and the court should vacate the order and return the proceeds to contributing plaintiffs.
2. The Phipps Legal team should be exempted from contributing to the Fund or its contribution should be significantly less than contributions by other plaintiffs.
3. The percentage distribution sought is exorbitant; and
4. The hourly rates are inflated and discovery is needed to determine if the rates are unreasonable.

As to objection #1 the Special Master makes no recommendation as it is not within the purview of my assignment. Nonetheless, it appears the basis of the objection was similar to that made when the fund was created and thus the court has already ruled in its exhaustive opinion (D.I. 2574)

Objection No. 2 also calls for relief which is not within the duties assigned to the Special Master. At this stage there is no separate claim against the Phipps Legal team for contribution to the Fund although in negotiation sessions the potential has been raised.

C. Discussion as to Reasonableness of the percentage Distribution and the Attorneys Hourly Rates

As to the percentage distribution, Lead counsel indicates \$750 million will be paid to producer plaintiffs. Their requested fee allocation is \$51,584,012.54. Thus, the percentage of

fee requested from the total recovery is 0.069%. When expenses of \$5,468,450.26 are included the percentage is 0.076%.

The court in its order establishing the Fund (D.I. 2574) at 14 addressed this issue in detail. After analyzing the cases the court reasoned the set aside of 8% for producers, 7% for non-producers and 3% for expenses was reasonable. Thus, it is unnecessary for the Special master to consider the objection further as the fee and expense request of Lead counsel's group is well within the 8% established by the court. Even the additional amount requested by Lead Counsel for enhancements, which will be discussed later, does not cause the percentage distribution to be unreasonable. Thus, the Special master recommends to the Court that it find the percentage distribution of the allocation proposed by Lead Counsel to be reasonable.

The Final objection is to the reasonableness of the fees charged by individual attorneys listed in lead counsel's motion. These rates, hours and fees were attached to lead counsels' motion and are attached as Exhibit D.

Many courts, including the Eighth Circuit, *Hardman v. Board of Education of Dollarway, Arkansas School Dist.*, 714 F2d 823, 825 (8th Cir 1983), have considered the so-called Johnson Factors in determining the reasonableness of attorney fees. These twelve factors were identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F2d 714 (5th Cir. 1974). The factors are:

- (1) The time and labor required;
- (2) The novelty and difficulty of the questions;
- (3) The skill requisite to perform the legal service properly;
- (4) Preclusions of other employment due to acceptance of the case;
- (5) The customary fee;
- (6) Whether the fee is fixed or contingent;

- (7) Time limitations imposed by the client or the circumstances;
- (8) The amount involved and the results obtained;
- (9) The experience, reputation, and ability of the attorneys;
- (10) “Undesirability” of the case;
- (11) The nature and length of the professional relationship with the client; and
- (12) Awards in similar cases.

The Special Master will not outline an exhaustive discussion of each of the Johnson factors as not all need to be applied. Rather, some brief observations are appropriate to support my recommendation. Some observations are gleaned from several negotiating sessions I conducted as Special Master for Settlement and are well-known to this court as a result of trying the bellweather cases and events leading to those trials.

This MDL litigation was exhaustive. It spanned a period in excess of five years. Resistance to plaintiffs’ claims was monumental and the time spent included many 18-hour days and seven-day weeks. Discovery was international. Over 7,000 farmer plaintiffs were involved with hundreds of lawyers. Personal feelings sometimes were bitter and divisive. Legal, personal and financial resources were on occasion stretched to the limit. As Exhibit D reveals the common benefit attorneys have spent 107,023 hours for the common benefit. Three MDL cases were tried to conclusion and a fourth was settled during trial, comprising a total in excess of eleven weeks. Several state cases including the Riceland trial were tried to conclusion. Appellate briefs were prepared and filed before settlement. The novelty of the issues was unique requiring not only skill but diligence. Most attorneys’ fee arrangements were contingent and ranged from 25% to 40%. The results obtained generally were highly satisfactory to all the clients.

As stated, the Special master has carefully reviewed the exhibits attached to Lead Counsel's motion. Exhibit 2A-2EE and 3A-3R and subsections are informative as they set out attorney declarations as to the hours spent. The fee per hour, the rates charged by attorneys in the area where each practice and the experience and reputation of the lawyer are described in detail. Most important the fee charged is rated by independent counsel. Initially, the Special Master felt it might help to review the time sheets and records underlying each counsel's fee request. After examining all declarations of counsel and particularly those of Lead counsel it appeared unnecessary.

Lead Counsel Downing and Levitt explained in their declaration how they arrived at the acceptable hours spent and rates charged. For illustration they examined all records and time sheets of each attorney. They identified and removed duplicative or excessive billing; they removed billing from overstaffing and removed billing entered for intra-law firm status; they removed billing for reviewing EFC notices and other materials not associated with proper work assignments; they removed entries for individual client work; they removed non-specific email listings and set a standard small time rate for emails; they removed interest charges and other "carrying charges": they adjusted excessive travel related expenses and removed all time entries that did not sufficiently identify the work performed. See (D.I. 4676) at 51, 52. As these declarations were under oath, it appeared unnecessary to duplicate Lead Counsel's work.

To be sure the rates of some attorneys in Lead counsel's group are high. See Exhibit D. But see also Lead Counsel's memo supporting their motion (D.I.4676) at 44, Footnote 26 where independent counsel sets out the rates charged by experienced counsel in the areas where each lawyer practices. "The hourly rate to be applied in calculating the lodestar is that which is normally charged in the community where the attorney practices." *Stoneridge Investment*

Partners v. Charter Communications, Inc., 2005 U.S. Dist. LEXIS 14772 at 54 (ED Mo. 2005).

“While hourly rates up to \$695.00 are high for the eastern District of Missouri, they are nevertheless within the range of reasonableness in the realm of nationwide securities class actions.” *In re Bank America Corp. Sec. Litigation*, 228 F.Supp.2d 1061, 1065 (ED Mo. 2002)

The Phipps Legal Team complains that many of the per hour rates charged by Common Benefit attorneys are too high and obviously inflated. The Team has prepared a spreadsheet. Exhibit E attached to their objections (D.I. 4836). The spreadsheet attempts to show that the overall total of common attorney benefit fees is 100% greater than the overall total when applying the state median/average hourly rate or regional rate driver. This argument is not persuasive particularly in light of the independent declaration of attorneys who aver the rates charged by common counsel in the area where each practices are reasonable.

It is especially unpersuasive when examining the rates charged by the members of the Phipps Team as shown in Exhibit E infra. Of that group of 16 lawyers two charged \$650.00 per hour, three charged \$600.00 per hour and one charged \$550.00 per hour.

In any event, the Special Master finds the rates of lawyers under the facts in this case as claimed in Lead Counsel’s motion are reasonable. This finding is supported in that of the hundreds of lawyers representing plaintiffs in this case, only the Phipps legal team has objected to the reasonableness of lawyers fee charges.

In summation, the Special Master finds that Lead Counsel’s protocols and processes used in reaching their proposed allocations are reasonable as are the proposed allocations themselves. It is, therefore, recommended to the Court that Lead Counsel be authorized to pay the fees and expenses allocated on Exhibit B-2 to the respective firms and lawyers set out therein.

D. The Phipps Legal team's Motion to Participate in the Allocation of Common Benefit Fees and Expenses and for Discovery.

Phipps claims that discovery is needed in order to review time records and spreadsheets of all attorneys listed in Exhibit B-2. This discovery would enable Phipps to respond more completely to the allocation request of Lead Counsel.

This issue has been addressed earlier by the Special master in deciding whether this production would benefit him in making this report and recommendation. The Special Master concluded that it would not, as the declarations furnished sufficient background. The same conclusion is reached as to the Phipps' request for discovery.

First, Phipps has not complied with the requirements of Fed.R.Civ.P. 37(a)(1) and E.D.Mo.LR 37-3.04 (A). Those rules require a movant to confer or attempt to confer in good faith to resolve the discovery dispute. There is no allegation in Phipps' motion for discovery to show compliance with the rules.

The Phipps Discovery motion should also be rejected on the merits. While underlying documents used to form an opinion or conclusion are frequently discoverable, it is unnecessary to furnish them for the purpose of these proceedings. All parties may access electronic filings in this matter. The filings particularly in Exhibit D show the name of the attorney, the hourly rate, the hours worked and the fees and expenses. In their declaration lead counsel Downing and Levitt describe in detail how the Exhibit was prepared. To open discovery in this area would produce a wealth of problems. Conceivably, depositions of all attorneys could be undertaken as well as responding to interrogatories. Attorney-client and work product privilege might surface. As the Special Master has concluded, there is now sufficient evidence available to support or contest the allocation requested.

In addition, as Lead Counsel have suggested, the court may rely on summaries of attorneys and need not review actual billing records. *In re Rite Aid corp. Sec. Litig.*, 396 F.3d 294, 306, 307 (3rd Cir. 2005) and *In re Diet Drugs Prod. Liab. Litig.*, 582 F.3d 524, 539 (3d Cir. 2009).

Although this motion for discovery is properly before the court and not necessarily within the assignment to the Special Master, the undersigned takes the liberty of recommending to the court that it be denied.

As set out earlier Phipps requests the court to vacate its order creating a common benefit fund, to exempt Phipps firm from contributing to the Fund, to reduce the amount of the Fund, to distribute only that amount which is fair and reasonable to Lead Counsel's group and/or distribute a fair and reasonable amount from the fund to Phipps for common benefit work. (D.I.4838) at 8.

The Special Master has addressed all requests except the right of Phipps to be included in the allocation of the Fund proceeds and will now consider that issue.

Phipps claims it represented nearly 5,000 clients, brought suit on behalf of 4,000 plaintiffs and submitted claims for 20% of the total rice acreage involved in the litigation. This forced Bayer to work on state and MDL cases and helped forge the settlement. In addition, the work involved review and analysis of over 4.2 million documents, taking of 140 depositions, preparations of six cases for trial with two going to verdict, attended various mediation sessions and orchestrated the terms of the Global Producer Settlements. (D.I.4839) at 4 and 5.

Phipps also represents that it worked independently from the Lead Counsel attorney group. It developed its own strategy and independent expert analysis. It did not share any experts or their reports. "They prepared their cases for trial separate and apart from the PLC."

(D.I.4839) at 44, 45. The Arkansas State case, *Kyle v. Bayer* was tried by Phipps and a very favorable verdict was obtained. In addition, it was the first case in which punitive damages were awarded. Another Arkansas State case *Sims v. Bayer* resulted in a favorable verdict. See Exhibit C.

Various settlement meetings were held with Bayer and other plaintiffs' attorneys and sometimes only with Bayer. These discussions were helpful in forging the ultimate settlement. (D.I.4839) at 54-56.

Accordingly, Phipps claims much of this work was for the common benefit of all plaintiffs and Phipps should receive \$13,271,247.50 in fees. See (D.I.4839) Exhibit H. This is now identified as Exhibit E and attached to this report.

Lead counsel oppose the Phipps motion to be included in distribution of the Fund. The basis for the opposition is that Phipps performed all its services for its clients and not for the common benefit of all plaintiffs. Phipps acted independently, developed its own strategy and experts and separated themselves from common benefit counsel. Phipps work claimed to have pressured Bayer in arriving at a settlement has no basis in fact or law.

The Special Master concludes that there is a factual basis that the Phipps Legal team did act independently working principally for their own clients. : This in no way faults Phipps. Throughout they were free to represent their clients in any way they chose. And they did. As summarized earlier relying on the Phipps memorandum (DI4839), their lawyers worked independently, developed their own strategy and prepared their cases for trial separate and apart from common benefit attorneys. They did not share the benefit of their experts or their opinions.

In fact, the court has addressed this issue to some extent. In the order setting up the fund (D.I. 2574) the court stated at 5:

One of the objecting lawyers, Martin Phipps, is currently conducting a trial of one plaintiff's case in an Arkansas state court. Although Phipps has used his own expert witnesses, he has 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.

The court also concluded at 1 and 2:

First, I will not require defendants to hold back and contribute amounts from settlements and judgments related to cases pending in state courts. I reach this conclusion reluctantly, because it is 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. In fact, most of the lawyers representing plaintiffs in state cases have agreed to join in the trust. The lawyers and plaintiffs who have not agreed to join in the trust will have been unjustly enriched if they are not required to contribute to the fees of the leadership lawyers. But I do not have jurisdiction to order hold-backs for those state cases. This is so even though the plaintiffs' lawyers who have state cases also have cases before me.

Without outlining its conclusion in great detail, the Special master is convinced that the Phipps strategy was helpful to its clients but not to the common good of all plaintiffs. Some of the actions of members of the group even resulted in sanctions by this court.³

The Special master relies on the Phipps declaration for accuracy as it has relied on the declarations of all other counsel. Large amounts of time and effort have been spent by the members of that group in prosecuting the interests of their clients. But that work has been performed in the client's interest and not for the common good. There was never any attempt to co-ordinate Phipps activities with those of Lead Counsel. It is inappropriate therefor for Phipps

³ In (D.I.4257), the Court found that Martin Phipps violated Rules of Professional Conduct 4.1, 4.2 and 4.3 by providing false and misleading information to landlords who were either unrepresented or represented by other counsel and remedial actions were ordered.

to receive the reward of contingency fees obtained for their clients and yet claim an interest in the fund set up to make monies available for those lawyers who performed legal services for all plaintiffs.

Again, the undersigned finds no basis to include Phipps in the allocation group entitled to the court's set aside account. The so called pressure applied on Bayer to reach a Global Settlement because of the state court success of the Phipps Legal team has no basis in law or fact. Some attorneys who were successful in prosecuting their State court cases also were a part of the common benefit group. The reason is that they operated with each other and not independently and in coordination with all performed services for all.

The Special master recommends to the court that the motion of the Phipps Legal Team to participate in the allocation of common Benefit fees be denied.

- E. Motion of Farmers Rice Milling Company, Inc. and Beaumont Rice Mills to Reduce the Fee Contribution from 7% to 3.5% or in the Alternative to Participate in the Allocation of Fees and Expenses.

Farmers and Beaumont are basically engaged in the milling of rice and its products and are not farmers or rice growers. As such they are commonly referred to as non-producers.

In the Court's February 24, 2010 order (DI2574) non-producer plaintiffs were to have 7% of any gross recovery obtained held back for attorney fees and placed in the Common Benefit Fund. Farmers and Beaumont are requesting the court to modify that order and reduce the hold back to 3.5%.

This is a matter for the court to decide and not within the assignment of the Special Master. Suffice it to say, numerous other non-producer cases have settled and if there is a percentage change it probably would need to be applicable to all non-producers. Also the court

addressed the hold back percentages in its order and determined for various reasons that non-producers hold back should be 7% or 1% lower than the 8% Producer hold back.

If the court denies the request to lower the percentage to 3.5%, Farmers and Beaumont request to participate in the Fund claiming they have performed Common Benefit Services. Lead Counsel oppose this request.

As suggested, the court in its order setting up the Common Benefit Fund found that non-producers have benefited slightly less than the producers so their percentage is 1% less. Thus, non-producers were not expected to be a part of the attorneys providing services for all.

Beaumont and Farmers aver that they helped develop experts that were for the common benefit of all non-producers. Even if so, this did not benefit the producers who constitute the bulk of all plaintiffs involved.

The Special Master recommends to the court that the Farmers and Beaumont claims to be a part of the Fund allocated be denied.

F. Lead Counsel's Request for a Multiplier for Extraordinary Contributions.

Lead Counsel on behalf of six firms is also requesting additional compensation to be paid from the common Benefit Fund for extraordinary contribution and effort. The request is identified by a chart labeled Exhibit 7 attached to Lead counsel's Memorandum in Support of the Motion for Allocation. (DI4676) at 54. The chart has been relabeled as Exhibit F attached to this report.

Exhibit F shows the lodestar fee for each of the six firms, the multiplier as to \$53 million which is the anticipated amount in the fund in late October and the Multiplier as to \$72 million which is the amount that would be in the fund if payments are made as the result of all

settlements. The exhibit also shows the percentage of funds in excess of the aggregate lodestar amount.

Counsel aver that such a multiplier is commonly awarded in complex cases like this. See Memorandum in Support of Motion for allocation. (DI4676) at 47. Cases cited by counsel show fees representing multipliers of 2.5 – 3.5 are the ordinary range. The fee multiplier requested is 1.38 which is below the average awarded in many cases. Motion (D.I.4674) at 53.

The basis for awarding fee multipliers is to provide an incentive to experienced lawyers to engage in speculative litigation on the contingency basis when the risks are great. The Special Master agrees that in this litigation the risk is taking on the complaint against Bayer was enormous. Bayer, with extraordinary resources and a huge desire to defend its position contested daily the efforts of plaintiff lawyers. A special group of highly resolved and experienced lawyers was needed to prosecute the claims in this case. As Special master for settlement, the undersigned was well aware of the efforts of the six firms claiming fee multipliers here.

Again, no plaintiff or counsel has objected to a fee multiplier award, except the Phipps Legal Team. These objections restate the earlier position taken that the percentages are exorbitant, the individual lawyer fees are excessive and that the six firms requesting a fee enhancement are requesting an unnecessary windfall. The Special Master is not persuaded by these arguments for the reasons previously stated. The six firms involved constituted the leadership team of those lawyers providing common benefit services. They spearheaded plaintiffs' prosecution of the MDL cases and provided the leadership required to achieve an excellent result. As such, they are entitled to receive a fee multiplier and the Special Master recommends that they receive the fee multiplier request.

In paying the lodestar amounts and ultimately the enhancements, the undersigned accepts the agreement made between Lead Counsel and the firm of Hare Wynn Newell and Newton LLP (Hare Wynn). Hare Wynn agreed to participate in the MDL Common Benefit Fund in all their numerous state cases. As such there was a 8% payment made while the Hare Wynn agreement required only a 7% payment. Thus, the sum of \$1,355, 594.74 should be returned to Hare Wynn. This payment should be made after all lodestar fees and expenses are paid and before any multiplier is paid. See (D.I.4676) at 27, footnote 13.

G. Claim of the Deacon Law Firm to be Included in the Allocation of Common Benefit Fees.

As earlier reported after much negotiation between counsel and the undersigned and after Deacon furnished time sheets to Lead Counsel and the undersigned, a compromise was reached as to the Deacon Law Firm request. Lead Counsel determined the Deacon Law Firm had performed some common benefit work. This conclusion was reached by applying the fair and uniform standards and guidelines developed by Co-Lead Counsel and applied to all Common Benefit Attorneys. Accordingly, the list of attorneys and firms Lead Counsel moved to share in the Fund will be amended to include the claim of the Deacon Law firm. See Exhibit B-2. That claim will be dismissed contemporaneously with the filing of this Report on November 2, 2012.

Summary of Report and Recommendation of the Special Master

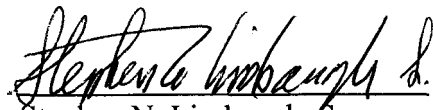
The special Master recommends to the Court, in accordance with the foregoing Report and Findings that it find:

1. That the protocols and processes used by Lead Counsel in reaching their proposals as shown in Exhibit B-2 and Exhibit F were reasonable.

2. That the fees and/or expenses of each firm or attorney listed on Exhibit B1 be approved as fair and reasonable and that these sums be paid first from the Common Benefit Fund;
3. That the sum of \$1,355,594.74 per agreement next be paid from the Common Benefit Fund to Hare, Wynn Newell and Newton, LLP;
4. That when the Common Benefit Fund accumulates a sum not exceeding \$72 million, the balance remaining after the payouts in #2 and #3 be approved as a fair and reasonable multiplier and paid proportionately to the six firms identified on Exhibit F.
5. That the motion requests of the Phipps Legal Team, Farmers Rice Milling Co., Inc. and Beaumont Rice Mills, Inc. made in response to the Special Master's notice be denied.

Dated: November 2, 2012

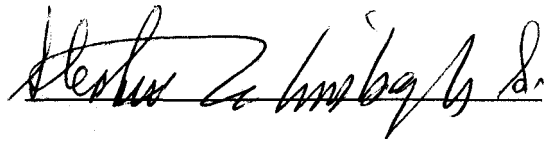
Respectfully submitted,



Stephen N. Limbaugh, Sr.
Special Master
7700 Forsyth Blvd., Suite 1800
St. Louis, Missouri 63105
Telephone: 314-621-5070
Fax: 314-552-4807
slimbaugh@armstrongteasdale.com

CERTIFICATE OF SERVICE

I hereby certify that on 2nd day of November, 2012, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon all counsel of record.

A handwritten signature in black ink, appearing to read "Hester Z. Long Jr.", written over a horizontal line.