

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

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**IN RE: PROPULSID PRODUCTS** : **MDL NO. 1355**  
**LIABILITY LITIGATION** :  
: **SECTION: L**  
: **JUDGE FALLON**

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: **This Document Relates to:**  
: **All cases**  
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**THE PLAINTIFFS’ STEERING COMMITTEE’S**  
**MEMORANDUM IN SUPPORT OF MOTION FOR DISTRIBUTION**  
**OF ADDITIONAL ATTORNEY’S FEES AND REIMBURSEMENT OF**  
**COSTS (RE: MDL SETTLEMENT PROGRAM I)**

The Plaintiffs’ Steering Committee (“PSC”) hereby submits this motion for an additional award of attorney’s fees and reimbursement of costs derived from the Propulsid MDL Settlement Program I. No request is made for any amounts, at this time, from the PTO No. 16 Litigation Fund. The Settlement Program was developed and created by the PSC along with the defendants, Johnson & Johnson and Janssen Pharmaceutica, Inc., under the guidance and supervision of the Court.<sup>1</sup> On February 4, 2004, the Settlement Agreement was reached with defendants and since that time, claims have been processed. The Settlement Program is nearing conclusion and all claims will have been reviewed and processed. Thus, it is time to now conclude the matter by making a final distribution of attorney’s fees and costs.<sup>2</sup>

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<sup>1</sup> No fee or cost request is made in this motion regarding the Propulsid Settlement Program II.

<sup>2</sup> Funds are presently and have been held at Deutsch Bank in an account named “Propulsid Attorneys Fee Fund” and such funds were provided pursuant to the Settlement Agreement. The most current financial statement for the account is attached as Exhibit “B”.

On May 3, 2005, the PSC filed a Motion for Award of Attorney's Fees and Reimbursement of Costs [Rec. Doc. 1752]. By Order dated May 27, 2005, the Court found that the award of \$22,500,000.00 negotiated by the parties for attorney's fees and reimbursement of costs in the matter fairly compensates the attorneys for their labors and efforts in the case [Rec. Doc. 1776]. The Court further ordered that costs shall be reimbursed from this fund first, and the attorney's fees be disbursed later upon approval of the Court, following the protocol described by counsel during the hearing in Court on May 25, 2005. Regarding the separate fees described in the Court's Pre-Trial Order No. 16, the Court denied this issue, without prejudice to the rights of the parties to re-urge the issue at the appropriate time, if it becomes relevant.<sup>3</sup>

Thereafter, on October 3, 2005, the PSC's Emergency Motion and Incorporated Memorandum for Distribution of Attorney's Fees With Full Reservation of Rights of All Attorneys Who May Claim Any Rights to Common Fees and Expense Reimbursements was filed with the Court [Rec. Doc. 1842]. That motion was filed as a result of the emergency circumstances that existed as a result of Hurricane Katrina. Following extensive consultation and review by Special Master, Patrick A. Juneau, and having input from the independent CPA of the Plaintiffs' Steering Committee, Philip Garrett of the Wegmann-Dazet accounting firm, a request was then made for an interim distribution for legal fees and costs from the fund held at Deutsch Bank for MDL 1355. The distribution requested was for partial distributions subject to later adjustment of claims by all attorneys with full reservation of rights of all attorneys who may claim any right to common fees and expense reimbursements and they may file any such claim by affidavit with the Special Master

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<sup>3</sup> The PSC suggests to the Court that a determination of the allocation of funds remaining on deposit pursuant to PTO 16 be addressed at a later date.

for future consideration. The Order and Reasons dated November 23, 2005, was entered by the Court [Rec. Doc. 1870]. (The Capital Contribution Balance Report was subsequently replaced and substituted by Order dated December 2, 2005 [Rec. Doc.1874].) The Order and Reasons of November 23, 2005 provided a first distribution. The Court ordered that held costs of \$1,515,215.98 and capital contributions of \$1,005,394.63 were to be reimbursed from the Deutsch Bank Attorneys Fee Fund, and further that a distribution of attorney's fees in the amount of \$12,380,000.00 was to be made. Thus, total distributions made in the initial distribution from the Fund were \$14,900,610.61.

On February 16, 2006, a Motion of the Plaintiffs' Steering Committee for Release and Disbursement of Funds from Deposit Made to the Registry of the Court Pursuant to Pre-Trial Order No. 16 was filed [Rec. Doc. 1955]. The motion sought the release of \$150,000.00 of principal funds from the deposit in the registry of the Court pursuant to Pre-Trial Order No. 16 to pay for costs and expenses incurred in connection with the multi-district litigation matter, as well as \$100,000.00 to pay depository rental. By Order dated May 2, 2006, \$150,000.00 was distributed from the Clerk of Court to pay costs and \$100,000.00 was authorized to be distributed from Deutsch Bank to pay depository rental [Rec. Doc. 1956].

On October 11, 2007, a Motion and Incorporated Memorandum of Distribution of Funds for Expenses and Reimbursements was filed with the Court [Rec. Doc. 3284]. That motion sought the release of funds solely for purposes of payment of expenses and costs in this matter. By Order dated October 26, 2007, the Court authorized an additional interim distribution of \$200,000.00 from the fund presently on deposit with Deutsch Bank Attorneys Fee Fund for payment of costs and expenses in this matter [Rec. Doc. 3385].

On April 3, 2009, the Plaintiffs' Steering Committee's Motion for Distribution of Specific Attorney's Fees Award and for Expenses and Reimbursements (Re: MDL Settlement Program I) was filed with the Court [Rec. Doc. 3804]. That motion requested certain specific awards of attorney's fees derived from the Propulsid MDL Settlement Program I and further, an additional interim distribution of \$60,000.00 for payment of expenses and costs. By Order dated April 27, 2009, the motion was granted [Rec. Doc. 3844].

On April 27, 2009, the Court issued an Order [Rec. Doc. 3844] granting the Plaintiffs' Steering Committee's Motion for Distribution of Specific Attorney's Fees Awards. At that time four (4) specific distributions of attorney's fees were made, one for \$650,000.00, one for \$300,000.00, one for \$33,476.33, and the fourth for \$50,000.00.

On November 2, 2010, the Plaintiffs' Steering Committee filed a Motion for Distribution of Funds for Expenses and Reimbursements [Rec. Doc. 4145]. That motion sought an additional distribution of \$300,000.00 for the payment of expenses and costs. On December 1, 2010, the Court authorized an additional interim distribution of \$300,000.00 from the funds presently on deposit with Deutsch Bank in the Attorneys Fee Fund for payment of expenses and costs in this matter [Rec. Doc. 4153].

To date the total distributions made from the Propulsid Attorneys Fee Fund presently being held at Deutsche Bank, are as follows:

Disbursement for Attorney's Fees:

\$12,380,000.00	11/23/05	Order [Rec. Doc. 1870]	
\$ 650,000.00	4/27/09	Order [Rec. Doc. 3844]	
\$ 300,000.00	4/27/09	Order [Rec. Doc. 3844]	
\$ 33,476.53	4/27/09	Order [Rec. Doc. 3844]	
<u>\$ 50,000.00</u>	4/27/09	Order [Rec. Doc. 3844]	
			\$13,413,476.53

Disbursement for Costs:

\$1,515,215.98	11/23/05	Order [Rec. Doc. 1870]	
\$1,005,394.63	11/23/05	Order [Rec. Doc. 1870]	
\$ 100,000.00	5/2/06	Order [Rec. Doc. 1956] <sup>4</sup>	
\$ 200,000.00	10/26/07	Order [Rec. Doc. 3385]	
\$ 60,000.00	4/27/09	Order [Rec. Doc. 3844]	
<u>\$ 300,000.00</u>	12/1/2010	Order [Rec. Doc. 4153]	
			<u>\$ 3,180,610.61</u>

TOTAL:			<u>\$16,594,087.14</u>
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In late March, 2008, the Plaintiffs' Steering Committee unanimously agreed that the Plaintiffs' Steering Committee would guarantee the necessary funds from the Attorney's Fee Fund so that claimants found eligible as of that time for an award by the Medical Panel could receive the balance, the fifty (50%) percent hold back, at that time from the Settlement Fund. This allowed twelve (12) eligible recipients to receive one hundred (100%) percent of the awards issued at that time. This meant that one hundred (100%) percent of the amount awarded was funded to the twelve (12) claimants who received awards at that time from the Settlement Fund. (See Order issued April 29, 2008.)<sup>5</sup>

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<sup>4</sup> This Order also authorized a disbursement of \$150,000.00 from funds held in the registry of the Court.

<sup>5</sup> The amount guaranteed for the twelve (12) claimants' 50% hold back equals \$3,040,134.50.

Thereafter, additional claimants were found eligible for compensation awards from the Settlement Program. To assure that those additional claimants who were found eligible for compensation could also receive 100% of their awarded settlement amount, an agreement dated December 29, 2008 was reached whereby the PSC's guarantee of March 2008 was modified and the law firms of Herman Gerel, LLP and Levin, Fishbein, Sedran & Berman were substituted as guarantors so that 100% payments to all eligible claimants (including the prior 12) could be made. This modified guarantee agreement allowed all of the eligible claimants and future eligible claimants in the Settlement Program to receive 100% of the awards issued by the Special Master, with no hold back.<sup>6</sup> A total of 35 claimants have been found eligible for compensation awards in the Propulsid I Settlement Program totaling \$20,310,757.25 allocations by the Special Master. All but one (1) of the awards, as of this date, have been paid in full and this one (1) are in the process of being paid.

Now that the Program is now or at its conclusion, the Plaintiffs' Steering Committee hereby submits that the remaining funds available for distribution of attorney's fees and costs should now be ordered by the Court and, therefore, submits this motion for an additional award of attorney's fees and reimbursement of costs derived from the Settlement Program. No request is made at this time regarding funds pursuant to PTO No. 16 Litigation Fund and all rights are reserved with respect to PTO No. 16 Litigation Fund amounts. Further, no request is made at this time regarding fees or costs regarding the Propulsid II Fund.

In cases involving the creation of a fund of money for the collective benefit of similarly situated litigants, fees are to be awarded to plaintiffs' counsel pursuant to the "common fund

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<sup>6</sup> The amount guaranteed for the 12 initial claimants and the additional eligible claimants, 50% hold back amount that has been paid out to claimants, equals \$10,155,378.63.

doctrine.” See *Trustees v. Greenough*, 105 U.S. 527 (1881); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 123-27 (1885); *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 164-66 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393 (1970) ; *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980) and *Blum v. Stenson*, 465 U.S. 886 (1984). This doctrine provides that a private plaintiff, or plaintiff’s attorney, whose efforts create, discover, increase, or preserve a fund to which others also have a claim, is entitled to recover from the fund the costs of his litigation, including attorneys’ fees. It “reflects the traditional practice in courts of equity ... [and] rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant’s expense.” *Boeing*, 444 U.S. at 478.

In *Boeing*, the Supreme Court recognized that common benefit fees should be awarded based on the entire amount of the fund, including any unclaimed portion thereof. *Boeing*, 444 U.S. at 480. *Accord*, e.g., *Waters v. Int’l Precious Metals, Corp.*, 190 F.3d 1291, 1294-98 (11<sup>th</sup> Cir. 1999), *cert. denied*, 530 U.S. 1223 (2000) (class counsel were entitled to a fee determined as a percentage of a \$40 million settlement fund even though the “estimated actual payment to class members [was only] \$6,485,362.15.”); *Williams v. MGM-Pathé Communications Co.*, 129 F.3d 1026, 1027 (9<sup>th</sup> Cir. 1997) (the “district court abused its discretion by basing the fee on the class members’ claims against the [settlement] fund rather than on a percentage of the entire fund,” even where the actual payout from a \$4.5 million settlement fund was only \$10,000); *In re Copley Pharm., Inc.*, 1 F. Supp. 2d 1407, 1412, 1416 (D. Wyo. 1998) (in a pharmaceutical products liability class action, court overruled defendant’s objection that the fee should be awarded as a percentage of the amounts claimed under a class settlement).

It is also widely recognized by courts presiding over complex litigation that the efforts of lead counsel, especially steering committees appointed by MDL courts, provide a public benefit that is itself worthy of compensation. In this case, the services of the PSC are deserving of compensation independent of that provided from the PTO 16 funds as the money is not coming from the settlement fund but is being separately provided by the defendants. As recently as the *Diet Drugs* litigation, this precept has been recognized:

It is now commonly accepted in complex multiparty litigation that a court can and in fact should appoint a committee such as the PMC to coordinate the litigation and ease the administrative burden on the court. *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 773-74 (9th Cir. 1977); *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1014-15 (5th Cir. 1977); MANUAL FOR COMPLEX LITIGATION, THIRD (1995) §20.221 at 27. As a corollary to this appointment, the court must be permitted to compensate fairly the attorneys who serve on such a committee. As the court explained in *Florida Everglades*: “if lead counsel are to be an effective tool the court must have means at its disposal to order appropriate compensation for them. The court’s power is illusory if it is dependent upon lead counsel’s performing the duties desired of them for no additional compensation.” *Id.* at 1016.

*See In re Diet Drugs Products Liability Litig.*, 2002 WL 32154197, \*17 (E.D.Pa. Oct. 3, 2002), *aff’d* 582 F.3d 524 (3<sup>rd</sup> Cir. 2009).

The continuing hands-on management by the PSC in the implementation of the Settlement Program is precisely the type of “invaluable services” courts find worthy of compensation in their own right. *See, In re: Diet Drugs Products Liability Litigation*, 553 F.Supp.2d 442, 496 (E.D. Pa. 2008) (“The Joint Fee Applicants created extraordinarily valuable work product for all those who chose to pursue their claims in the tort system. For the federal cases, they also provided invaluable management services.”) *See generally*, *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 773-74 (9<sup>th</sup> Cir. 1977); *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1014-16 & 1019 (5<sup>th</sup> Cir. 1977); MANUAL FOR COMPLEX LITIGATION (THIRD) §20.221 at 27 & §20.223 at 29 (1995); *In re Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire*



*Litigation*, 982 F.2d 603, 606-07 (1<sup>st</sup> Cir. 1992); *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1296 (E.D.N.Y. 1985), *mod'd on other grounds*, 818 F.2d 226 (2<sup>nd</sup> Cir. 1987).

Since the first fee distribution of November, 2005, considerable time and efforts have been dedicated to activities in connection with MDL No. 1355 by only a handful of law firms, primarily from the offices of Liaison Counsel, Russ M. Herman, and the offices of Levin, Fishbein, Sedran & Berman, with PSC member Arnold Levin. Substantial work in connection with the ongoing Settlement Program in MDL Settlement Program I has taken place. According to the Special Master, 28,618 claimants have been enrolled into the Program and 13,396 have submitted claim forms. As of February 23, 2012, 688 Tier I claims and 3,553 Tier II and III claims have been submitted to the Medical Panel for review. 8,543 medical record reimbursement forms have also been submitted to the Special Master.

As of February 23, 2012, thirty-five (35) of the Tiered claims submitted to the Panel have been judged to be eligible by the Panel and the Special Master has paid thirty-four (34) of the thirty-five (35) awards. As of February 23, 2012, no Tiered claims are still in review by the Panel. 15,222 claimants enrolled in the Program, but did not submit Claim Forms. In addition, as of February 23, 2012, \$2,198,750.00 was paid for 9,389 claimants through the Administrative Fund. From the Settlement Fund, \$20,310,757.25 has been allocated to thirty-five (35) eligible claimants. Further, the Special Master, Patrick Juneau, advises that a few remaining additional claims are in the process of review by the Medical Panel and the Special Master's Office in order to complete the process outlined in the Settlement Program and that the process will be fully completed within the next forty-five (45) days. No more claims are being submitted into the Settlement Program.

Some of the other activities engaged in by select counsel since November 2005 include an agreement to amend both the Propulsid I and II Settlement Programs which is set forth in a

Supplemental Agreement re Propulsid MDL I and II, entered into in August, 2007. (This amendment enabled claimants, under certain limited conditions, to seek re-review of a claim processed by the Medical Review Panel. As of February 23, 2012, fifty-nine (59) claimants had received a second review.) Propulsid II was developed and modeled after the Propulsid I Program so that state court claimants could participate in a second Propulsid Settlement Program. In connection with the Propulsid Settlement Programs, numerous orientation sessions occurred for the doctors who were participants and nominated by the parties to the Medical Review Panel. The PSC has continued to operate and maintain the plaintiffs depository. The parties have also had and continue to have regularly scheduled meet and confer conferences with Special Master Juneau and continue to administer the Propulsid litigation with the goal of finalizing the matter and addressing dismissal motions. Further, the parties have continued to address financial issues and cy pres matters. Considerable time and expenses have been incurred since the initial distribution of funds in November, 2005. Expenses have continued to be incurred by the PSC and members of the PSC are entitled to seek reimbursement for both shared and held expenses.

Pursuant to Pretrial Order No. 3, time and expense submissions have continuously been routinely submitted by lawyers and in particular members of the PSC. These submissions have been received and reviewed by the independent CPA, Philip Garrett, of the Wegmann-Dazet accounting firm. Monthly reports of time and expenses continue to be received from Wegmann-Dazet.

According to a report provided by Wegmann Dazet (see attached Exhibit "A"), total held costs in this matter through December 31, 2011 equals \$1,609,639.53. Some of these held costs were previously reimbursed to firms, but as of December 31, 2011, according to a report by Wegmann Dazet, unreimbursed held costs total \$94,423.55 (the breakdown by firm is referenced on the attached Exhibit "A"). Reimbursement of these expenditures is appropriate at the present

time. All capital contributions have been previously reimbursed to firms.

According to the most recent statement received from Deutsche Bank for period ending January 31, 2012 (*see* Exhibit “B”), the financial institution where attorneys fees funds are deposited, there is \$7,284,054.36 on deposit (this includes interest/dividends reinvested) available for distribution.<sup>7</sup> Following the analysis by Wegmann-Dazet, Plaintiffs’ Liaison Counsel, Russ M. Herman, has submitted to the Special Master, Patrick A. Juneau, for his review, all the time and expense reports certified by the independent CPA of the Plaintiffs’ Steering Committee, Philip A. Garrett, of the Wegmann-Dazet accounting firm. *See In re High Sulphur Content Gasoline Products Liability Litigation*, 517 F.2d 220, 232 n. 18 (5<sup>th</sup> Cir. 2008)(approving use of special masters to oversee fee allocations as a means of providing procedural protection); *Turner v. Murphy Oil USA, Inc.*, 2008 WL4661806, \*8 (E.D.La. Oct. 6, 2008). Movant seeks an Order authorizing Russ M. Herman, on behalf of the Plaintiffs’ Steering Committee, to make an additional distribution from the Fee Fund of MDL 1355 in accordance with the scheduled detail of payout attached hereto as Exhibit “C”. Further, movant requests that the remaining funds in reserve be distributed to Plaintiff’s Liaison Counsel, Russ M. Herman, for the purposes of winding down this litigation and to pay outstanding expenses incurred or to be incurred. If funds remain following payment of additional costs and expenses, Russ M. Herman, as Plaintiff’s Liaison Counsel, will petition the Court to distribute any remaining funds pro rata to all counsel who have been allocated attorney’s fees from the Deutsch Bank Attorneys Fee Fund in this litigation.

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<sup>7</sup> This amount on deposit with Deutsche Bank continues to accrue interest.

Wherefore, movant respectfully requests that the instant Motion for Distribution of Additional Attorney Fees and Reimbursement of Costs be granted.

Respectfully submitted,

/s/ Leonard A. Davis

**RUSS M. HERMAN, T.A. (La. Bar #6819)**

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**LIAISON COUNSEL FOR PLAINTIFFS**

**CERTIFICATE OF SERVICE**

I hereby certify that the above and foregoing has been served on Liaison Counsel, James Irwin, by U. S. Mail and e-mail or by hand delivery and e-mail and upon all parties electronically by uploading the same to Lexis-Nexis File and Serve in accordance with Pre-Trial Order No. 4, and that the foregoing was electronically filed with the Clerk of Court of the United States District Court for the Eastern District of Louisiana by using the CM/ECF system which will send a Notice of Electronic Filing in accord with the procedures established in MDL 1355 on this 15<sup>th</sup> day of March, 2012.

/s/ Leonard A. Davis

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