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15 **UNITED STATES DISTRICT COURT**
16 **SOUTHERN DISTRICT OF CALIFORNIA**

17 **IN RE: INCRETIN-BASED**
18 **THERAPIES PRODUCTS**
19 **LIABILITY LITIGATION**

20 **Relates to: ALL CASES**

21 **Master File No.: 3:13-md-02452-AJB-MDD**
22 **MDL – 2452**

23 **PLAINTIFFS’ MEMORANDUM OF**
24 **POINTS AND AUTHORITIES IN**
25 **FURTHER SUPPORT OF PLAINTIFFS’**
26 **MOTION FOR ENTRY OF A COMMON**
27 **BENEFIT ORDER**

28 Date: December 11, 2014
Time: 3:00 P.M.
Courtroom: 3B
Judge: Hon. Anthony J. Battaglia
Magistrate: Hon. Mitchell D. Dembin

PLAINTIFFS’ MEMORANDUM OF POINTS AND AUTHORITIES IN
FURTHER SUPPORT OF PLAINTIFFS’ MOTION FOR ENTRY OF A
COMMON BENEFIT ORDER

1 **PROCEDURAL HISTORY**

2 On August 1, 2014, the Plaintiffs’ Steering Committee (“PSC”) filed a motion
3 (Dkt. 531) seeking an Order creating a “common benefit fund.” On August 1, 2014 the
4 Court issued an Order requiring that responses to the PSC’s motion be filed by August 8.
5 (Dkt. 533) On August 8, 2014 Defendants filed a response stating that “Defendants take
6 no position on the appropriateness of Plaintiffs’ submission, other than to reserve the
7 right to object should Plaintiffs subsequently seek to impose any expectations upon
8 Defendants with respect to issues associated with any Common Benefit Fund.” (Dkt. 541)
9 On August 11, 2014 the Court invited interested parties to file objections to the PSC’s
10 motion by August 21. (Dkt. 547) No objections were filed and the Court granted the
11 PSC’s motion and “adopt[ed] the proposed Common Benefits Participation Agreement
12 (Doc. No. 531, Exhibit A) for use in this regard.”
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16 After reading the text of the Order, the PSC realized that a filing error had
17 occurred. The PSC inadvertently attached the “Common Benefit Participation
18 Agreement” as Exhibit A to its motion. The PSC had intended to attach a proposed case
19 management order (“CMO”) as the exhibit. Liaison counsel for the PSC then contacted
20 the Court to make it aware of the error and was instructed to electronically mail the Court
21 a copy of the proposed order. The PSC did so. On August 26, 2014 under the belief that
22 the proposed order the PSC submitted was agreed to by all parties, the Court entered a
23 CMO (Dkt. 576) establishing a Common Benefit Fee and Expense Fund in accordance
24 with the PSC’s proposed order.
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1 On September 12, 2014 counsel for Defendants notified the PSC that they were
2 objecting to the CMO governing the common benefit fund. During a status conference on
3 October 23, 2014, the PSC informed the Court of the administrative error and was given
4 leave to file this motion.
5

6 ARGUMENT

7 Two issues require the Court's intervention: First, whether Defendants will be
8 responsible for withholding the common benefit assessment following a settlement or
9 judgment. Second, at what point after the filing of a state court case (filed anywhere other
10 than the California state coordinated proceedings) will Defendants be required to notify
11 the PSC of the lawsuit. Because Defendants' proposals are regressive, unwieldy, and will
12 only generate unnecessary complications, the PSC requests that the CMO establishing a
13 common benefit fee and expense remain unchanged and respectfully submits that such
14 relief is appropriate.
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17 **A. Defendants' are in the Best Position to Assure that Common** 18 **Benefit Assessments Owed are Paid**

19 The PSC's order reads that "[f]or cases subject to an assessment, Defendants are
20 directed to withhold an assessment from any and all amounts paid to plaintiffs and their
21 counsel and to pay the assessment directly into the Funds as a credit against the
22 settlement or judgment." (Dkt. 576, p. 11) This is standard practice. MDL courts routinely
23 direct Defendants to withhold assessment funds at the time of settlement. *See MDL*
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1 Common Benefit Orders attached hereto as Exhibits A-L.¹ Defendants' position is
2 inefficient, cumbersome, and impractical, as it is based on the premise that the PSC
3 would be in a better position to assure assessment fees are paid by retroactively collecting
4 these funds. MDLs are complex and "recoveries by individual plaintiffs or groups of
5 plaintiffs in such matters may occur at different times, and individual plaintiffs or groups
6 of plaintiffs, unlike most individual class members, usually are represented by individual
7 counsel." *In re Zyprexa Products Liab. Litig.*, 594 F.3d 113, 129-30 (2d Cir. 2010)
8 Defendants' position is a recipe for non-compliance with the common benefit order.
9 Under the Defendants rationale, the PSC would have to notify, contact, collect, and
10 follow-up on each individual settlement with each individual attorney rather than
11 Defendants simply withholding assessment funds at the time of a settlement or judgment.
12 Defendants' suggestion is burdensome and will only lead to further complications and
13 delayed resolution. The PSC requests only what has repeatedly been accomplished in the
14 majority of MDLs establishing a common benefit fund. Defendants requested creation of
15 this MDL. Defendants are beneficiaries of the enormous efficiencies of the MDL process.
16 They plainly benefit from interacting primarily with a PSC rather than hundreds of
17 individual plaintiff's attorney. The minimal burden of withholding common benefit
18 assessments is a small price to pay in light of these benefits.
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26 ¹ Specifically, the PSC directs the Court to Exhibit A, Order from *In re: Propulsid*, p. 2; Exhibit B, Order from *In re: Guidant*
27 *Defibrillators*, p. 3; Exhibit C, Order from *In re: Levaquin*, p. 3; Exhibit D, Order from *In re: Bextra*, p. 3; Exhibit E, Order
28 from *In re: Toyota Motor Corp.*, p. 8; Exhibit F, Order from *In re: Chantix*, p. 9; Exhibit G, Order from *In re: Stryker*, p. 8;
Exhibit H, Order from *In re: DePuy*, p. 6; Exhibit I, Order from *In re: Pradaxa*, p. 12; Exhibit J, Order from *In re: Oil Spill*,
p. 10; Exhibit K, Order from *In re: Heparin*, p. 3; Exhibit L, Order from *In re: Vioxx*, p.2.

1 **B. Defendants’ Suggestion to Provide Notice of a State**
2 **Filing only after there is an Indication of Interest in use**
3 **of MDL Materials is Ambiguous and Will Only**
4 **Generate Unnecessary Complications**

5 Defendants request that their obligation to notify the PSC of the commencement of
6 state court actions should not arise until after there is some indication of interest in the use
7 of MDL discovery or PSC materials. The PSC requests that Defendants notify Plaintiffs’
8 Liaison Counsel of any such filing within 30 days of service of the complaint upon
9 Defendant(s). Once again, this is an issue of practicality and the approach proposed by the
10 PSC is commonly followed in MDLs. *See* Exhibit F, Order from *In re: Chantix*, p. 9;
11 Exhibit I, Order from *In re: Pradaxa*, p. 8. The PSC’s position is the reasonable one. The
12 PSC’s proposed trigger for notification is unambiguous. It serves to aid the Court in
13 coordinating this litigation with any state court litigation. There is no perceptible benefit
14 to the Defendants’ position. Their position is subject to ambiguity and will only lead to
15 further complications and unnecessary disputes over questions such as what constitutes an
16 “indication of interest” and to whom the indication must to be made. Further, Defendants’
17 position requires a subjective determination of whether an individual attorney has actually
18 indicated an interest in PSC materials or MDL discovery.
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22 Additionally, the PSC’s position allows for the PSC to reach out to state court
23 litigants and provide them with an opportunity to utilize MDL discovery or PSC
24 materials. This benefits both parties. As an example, state court attorneys may not feel it
25 necessary to re-depose manufacturer defendant employees who have already been
26 deposed in the MDL. Defendants’ requirement that a litigant demonstrate an indication of
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1 interest in the materials ignores the possibility that a state litigant may not know of the
2 opportunity to utilize the materials and thus would never be able to demonstrate some sort
3 of indication of interest. Accordingly, the PSC requests that the Court follow the PSC's
4 objective approach and require that Defendants notify the PSC of a state filing within 30
5 days after service.
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7 CONCLUSION

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9 “The purpose of an MDL case is to enhance the efficiency and consistency of the
10 pretrial phase of all of the pending cases which are consolidated into the MDL.” *Judy v.*
11 *Pfizer, Inc.*, No. 4:05CV1208RWS, 2005 WL 2240088, at *1 (E.D. Mo. Sept. 14, 2005).
12 Defendants’ positions will undermine that purpose. Defendants are in the best position to
13 withhold common benefit assessments. Requiring the PSC to collect each assessment
14 after money has been distributed to hundreds of counsel and their clients will inevitably
15 lead to avoidable complications. Foreseeable complications include additional litigation
16 over the propriety of any assessment, requests for equitable relief from any assessment,
17 demands for claw backs of distributed funds, and the like. Defendants, who asked for the
18 creation of this MDL because of the efficiencies it creates for all parties and the judiciary,
19 must take on some responsibility to effect efficient and prompt resolution following
20 settlement or judgment. The modest burden this will place on Defendants is significantly
21 outweighed by the efficiencies produced simply by having the Defendants withhold
22 common benefit assessments.
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1 Likewise, requiring Defendants to notify the PSC after a case has been served on
2 Defendants eliminates ambiguity and subjectivity, provides for an efficient process, and
3 permits prompt and seamless coordination with state litigants. For the foregoing reasons,
4 the PSC respectfully requests that the CMO establishing a common benefit fee and
5 expense remain unchanged and respectfully submits that such relief is appropriate.
6

7 DATED: November 30, 2014

PLAINTIFFS' COUNSEL

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served electronically by means of the Court's CM/ECF filing system on November 30, 2014 to all counsel of record in this action.

/s/ Jacob Plattenberger
Jacob Plattenberger