



Work Holdback, either as a general principle or specifically as it relates to CMO-15. Rather, the objection is to the *propriety of the amount* requested by Co-Lead Counsel to be allocated to pay common benefit work.<sup>3</sup> Taking into account the particular circumstances of MDL 2973, particularly when compared to the type of common benefit conferred on Plaintiffs in similar MDLs, the requested holdback percentage is too high and unreasonable on its face. Accordingly, Plaintiffs' Motion should be denied in its current form.

### **ARGUMENT**

Co-Lead Counsel maintains that this litigation, which has been “pending for a little over two years” justifies a 9% holdback allocated to pay common benefit work, based on work done and “projected to be performed in the future.” Motion at 3. In an effort to justify the request, the common benefit work already done by the Plaintiffs' Steering Committee (“PSC”) is described as “exceedingly complex” due to the “unique history of the drug.” *Id.* Co-Lead Counsel further explains that the PSC reviewed over 3 million pages of documents, deposed 30 or more witnesses,<sup>4</sup> attended to the demands of Court business and order, developed the case, met with and prepared experts, selected a bellwether case after review of other appropriate cases, reviewed Defendants' bellwether selections, and prepared the bellwether case(s) for trial, including preparing Plaintiffs' experts, spanning “22 months” and “thousands upon thousands of hours.”<sup>5</sup> Motion at 5-11.

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<sup>3</sup> The undersigned does not object to the requested 2% holdback of the gross recovery to be used to reimburse common benefit expenses with the understanding that only actual costs will be reimbursed from this holdback and any remaining funds will be refunded to individual claimants/plaintiffs.

<sup>4</sup> While “3 million pages of documents” and 30 depositions sound like large numbers in the abstract, they are not in the context of a litigation involving a drug that has been on the market for over two (2) decades and certainly not in comparison to other MDLs involving similar pharmaceutical products.

<sup>5</sup> Parker Waichman is not disputing that significant work was done by the PSC in this MDL. Indeed, a substantial amount of that work was performed by Parker Waichman attorneys, which included,

To date, however, there has not been a bellwether trial conducted in this MDL. And, while there has been preliminary briefing in a single bellwether case, *Daubert* and dispositive motion issues have not been fully briefed, nor resolved. In fact, significant discovery (both general and case specific), as well as trial preparation work, still needs to be completed by primary counsel before any individual case could proceed to trial in this (or any other) Court.<sup>6</sup> This work would traditionally have been completed by the PSC prior to remand. Moreover, as of today, there is no *global* resolution of this litigation. Thus, none of these “common benefits” were conferred on the litigants of this MDL.

To be clear, Parker Waichman is not objecting to the *concept* of a holdback for common benefit work. The only purpose here is to object to the *amount* of the proposed holdback given the stage reached in this litigation, especially as compared to other, recent MDLs. A 9% holdback for common benefit work is equal to or greater than a number of recent MDLs where the benefit conferred to Plaintiffs’ – in terms of global rulings, ability to continue litigating individual cases, or even global settlement – went well beyond what has occurred to this point. Indeed, there is nothing in the Motion that suggests this case is so unique that it justifies a 9% common benefit fee holdback. Accordingly, the holdback amount should not be set without guidance from other MDLs and we will attempt to provide that information for the benefit of the Court. *See* 5 Newberg and Rubenstein on Class Actions § 15:116, 117 (6<sup>th</sup> ed.) (December 2022 Update) (explaining that

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but was not limited to, work on foundational orders, the drafting and implementation of both Plaintiff and Defendant Fact Sheets, bellwether case review and workup, high level document review, expert workup and fact witness depositions.

<sup>6</sup> Given the public nature of this filing, Parker Waichman chooses to refrain from elaborating on the additional work that still needs to be completed in any further detail since it involves litigation and/or discovery strategy that is protected by the work-product privilege. It is respectfully submitted that the appropriate forum to further discuss the underlying facts which warrant the instant application would be an *in camera/ex-parte* conference, if necessary.

most MDL courts defer to numbers used in past cases).

In other MDLs – many of which have more significant case work-up, substantive motion practice, multiple bellwether trials, and trial packages developed for cases that cannot be resolved before the MDL court – courts have entered orders setting lower attorney fee holdbacks/assessments than what is currently being requested here:

<b>Case Name</b>	<b>Case No.</b>	<b>Date of Order</b>	<b>Common Benefit Fee Percentage</b>	<b>MDL Details</b>
<i>In Re Zimmer Durom Cup Products Liability Litigation</i>	2:09-cv-04414-SDW	4/29/2015	2%	Common benefit work included a global resolution.
<i>In Re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Relevant Products Liability Litigation</i>	3:09-md-2100-DRH-PMF	3/25/2010	4% for DVT cases and 9% for ATE Cases	Common benefit work included dispositive and <i>Daubert</i> motion practice, bellwether trial work up and global resolution of certain case types.
<i>In Re Actos (Pioglitazone) Products Liability Litigation</i>	6:11-md-2299	2/29/2016	8.6%	Common benefit work included dispositive and <i>Daubert</i> motion practice, a substantial bellwether trial verdict, and a global resolution.
<i>In re: JUUL Labs, Inc., Marketing, Sales Practices, and Products Liability Litigation</i>	19-md-02913	5/27/2020	5% fee for early participation; 8% if late	Common benefit work included a global resolution.
<i>In Re Vioxx Products Liability Litigation</i>	2:05-md-01657	10/19/2010	Initially 8%, later reduced to 6.5%	Common benefit work included dispositive and <i>Daubert</i> motion practice, multiple bellwether trials, and a global resolution.
<i>In Re: DePuy Orthopaedics, Inc., Pinnacle Hip Implant Products Liability Litigation</i>	3:11-cv-02244	7/22/2019	7%	Common benefit work included dispositive and <i>Daubert</i> motion practice, five bellwether trials, two Mandamus Petitions and two Fifth Circuit Hearings.

<i>In Re Wright Medical Technology Inc., Conserve Hip Implant Products Liability Litigation</i>	1:12-md-2329	2/15/2013	3.5%	Common benefit work included dispositive and <i>Daubert</i> motion practice, multiple bellwether trials, and a Global Resolution.
<i>In Re: Uloric Products Liability Coordinated Pretrial Proceedings</i>	1:20-cv-00623	9/12/2021	3% (inclusive of expenses)	Common benefit work included a global resolution.
<i>In Re: Johnson &amp; Johnson Talcum Powder Products Marketing, Sales Practices, and Products Liability Litigation</i>	3:16-cv-2738	9/17/2020	6% for Early Participation; 10% if late	Common benefit work included substantial litigation involving multiple Bankruptcies, multiple trials, dispositive and <i>Daubert</i> motion practice.
<i>In Re: 3M Combat Arms Earplug Products Liability Litigation</i>	3:19-md-02885	02/17/2021	9% for early participation; 15% for late participation	Common benefit work included dispositive and <i>Daubert</i> motion practice, more than fifteen (15) bellwether trials, and bankruptcy related proceedings.

The common benefit conferred to plaintiffs through the above MDLs includes *Daubert* motion practice, case-dispositive motion practice, bellwether trial workup, and even global settlement in some instances. Taking all these factors into consideration, the proposed Common Benefit Work Holdback of 9% – a number that exceeds many of the examples above – is particularly high and should be reduced by this Court.<sup>7</sup>

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<sup>7</sup> Parker Waichman appreciates that any holdback order entered is non-final at this juncture and is subject to review as the Court deems appropriate. Parker Waichman also understands that any award or distribution of the Common Benefit Work Holdback to any firm will ultimately have to be approved by Special Master Falk and the Court, as acknowledged by Co-Lead Counsel. *See* Motion at n. 5. As such, Parker Waichman reserves the right to appeal the imposition of the actual assessment when a final order is entered.

**CONCLUSION**

Accordingly, and for the reasons stated above, Parker Waichman requests the Court deny Plaintiffs' Motion in its current form. To the extent this Court opts to amend CMO 15, the Common Benefit Work Holdback should be reduced to a more proportional percentage.

Dated: April 17, 2023

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing was filed with the Clerk of Court using the CM/ECF system this 17<sup>th</sup> day of April, 2023, thereby giving notice to all counsel of record.

/s/ Melanie H. Muhlstock

Melanie H. Muhlstock