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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE
(PPA) PRODUCTS LIABILITY
LITIGATION.

MDL Docket No. 1407

PLAINTIFFS' MOTION TO
REQUIRE CHATTEM, INC. TO
FUND AN INITIAL SETTLEMENT
TRUST

This document relates to:

Park v. Chattem, Inc.
Case No. C02-0755

Pursuant to Federal Rule of Civil Procedure 23(d) (5) and on behalf of the MDL plaintiffs, the Plaintiffs' Steering Committee ("PSC") submits this Motion to Require Chattem, Inc. to Fund an Initial Settlement Trust.

I. Factual Background

The PSC, Chattem and The Delaco Company, as successor by merger to Thompson Medical Company ("Delaco") have been engaged in settlement negotiations for more than a year. The PSC makes this request to enforce the Settlement Agreement reached with Chattem to create a pool of funds to begin to pay administrative expenses associated with this settlement and to provide potential class members with assurance that funds are available to settle claims. On December 19,

1 2003, this Court entered an Order to Stay the cases pending in MDL 1407 and all other
2 federal PPA products liability cases in which Chattem or Delaco were named as parties
3 so that Chattem, Delaco and the PSC could complete their negotiations. Also on that
4 date, the PSC, Chattem and Delaco entered into a Memorandum of Understanding
5 (“Initial MOU”) regarding the proposed settlement. The Initial MOU contemplated that
6 the PSC and Chattem would enter into a more specific and comprehensive class action
7 settlement agreement (the “Settlement Agreement”). On April 13, 2004, Chattem and
8 the PSC finalized the Settlement Agreement and have filed with this Court a Joint
9 Motion for Conditional Approval of Class Action for Settlement Purposes and
10 Preliminary Approval of Proposed Settlement.

11 The Settlement Agreement provides for the creation and funding of a Chattem
12 Settlement Trust (“the Chattem Settlement Trust”). As contemplated by the parties, the
13 Chattem Settlement Trust initially will be funded with the proceeds of policies issued by
14 three of Chattem’s liability insurance carriers: Admiral Insurance Company (“Admiral”),
15 General Star Indemnity Company (“General Star”) and Kemper Indemnity Insurance
16 Company (“Kemper”).

17 At the time Chattem entered negotiations with the PSC for a global settlement of
18 its PPA products liability cases, it continued to announce in public filings that it had \$102
19 million of product liability insurance coverage for claims related to Dexatrim® containing
20 PPA occurring after December 21, 1998 and prior to May 31, 2001, if the claims were
21 reported by May 31, 2004. This \$102 million in coverage consisted of \$2 million
22 provided by Admiral, \$25 million by General Star, \$50 million by Kemper and \$25 million
23 by Interstate Fire & Casualty Company (“Interstate Fire”). In May 2004, Chattem settled
24 one PPA lawsuit for \$3.5 million, which exhausted \$3.5 million of Chattem’s coverage.

25 In July 2003, Kemper filed suit against Chattem and Chattem’s three other layers
26 of insurance carriers, seeking, among other things, rescission of Kemper’s policy. The
27 case was styled *Kemper Indemnity Ins. Co. v. Chattem, Inc., et al*, U.S. District Court,
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1 E.D. of Tennessee at Chattanooga, No. 1:03-CV-264. Interstate Fire intervened into
2 this case and asserted claims against Chattem. General Star and Interstate Fire also
3 asserted rescission claims against Chattem in the same litigation. Before entering into
4 the MOU with the PSC on December 19, 2003, Chattem entered into agreements with
5 Admiral, General Star and Kemper to resolve all outstanding coverage issues.
6 Chattem's litigation with Interstate Fire continues. The agreements between Chattem
7 and Admiral, General Star and Kemper are attached as Exhibits A, B & C to the
8 Declaration of Crews Townsend ("Townsend Declaration") at pp. 12-26.

9 Under the terms of its Settlement Agreement with Chattem, Admiral agreed to
10 exhaust its policy, which amount has already been paid and is available for funding the
11 Chattem Settlement Trust. (See Ex. A to Townsend Declaration, pp. 12-17). General
12 Star agreed to pay \$22,500,000 to exhaust its coverage. (See Ex. B to Townsend
13 Declaration, pp. 18-20). Under the terms of the Memorandum of Understanding
14 between Chattem and General Star, General Star is required to make this payment "by
15 wire transfer on five business day's notice, as required to fund the global settlement of
16 the Dexatrim claims against Chattem..." (*Id.*) In resolution of its coverage dispute,
17 Kemper agreed to pay "up to" \$37,500,000 to exhaust its policy limits. (See Ex. C to
18 Townsend Declaration, pp. 21-26). Kemper's obligation to pay arises on a case-by-
19 case basis once the underlying coverage is exhausted unless the underlying layers of
20 insurance have been exhausted and "establishment of a settlement account is ordered
21 by [this] Court..." (*Id.*) In such an event, Kemper is required to pay the full amount of its
22 coverage into the Court-ordered account. (*Id.*)

23 The PSC brings the present motion to enforce the settlement it reached with
24 Chattem and to protect the funds that have been designated to perform the settlement
25 reached. Chattem has agreed to create a Settlement Trust funded with approximately
26 \$61 million prior to giving notice of this settlement to potential claims members.

1 Kemper, which is responsible for paying most of the initial funding of the
2 Settlement Trust, has suffered serious financial difficulties in the recent past. In 2003,
3 due to capital constraints and downgrades from credit rating agencies, Kemper ceased
4 underwriting operations and voluntarily commenced run-off operations. In the summer
5 of 2003, the Illinois Department of Insurance threatened to put Kemper into
6 receivership. In November, 2003 Kemper engaged an outside firm to manage its
7 business runoff. (See Selected pages from Kemper's website and the June 6, 2003
8 article from Chicagobusiness.com attached as collective Exhibit D to the Townsend
9 Declaration, pp. 27-30).

10 Because the plaintiffs have reached a final settlement with Chattem and the
11 funding of this settlement depends primarily on the insurance proceeds outlined above,
12 the plaintiffs seek the Court's assistance in creating and protecting the Settlement Trust
13 that will fund the settlement. A proposed Initial Settlement Trust Agreement has been
14 prepared and is filed as Exhibit E to the Townsend Declaration. The purpose of the
15 Initial Settlement Trust Agreement is to create a trust for the Chattem insurance
16 proceeds to be held under the control of the Court until the Court's preliminary and final
17 ruling on the fairness of the proposed settlement. At that time, the Initial Settlement
18 Trust will be supplanted by the Chattem Settlement Trust. The Initial Settlement Trust
19 will be managed under this Court's direction and control, consistent with the Settlement
20 Agreement.

21 The present motion does not seek to impose any new obligations or
22 requirements on Chattem or its insurers. Pursuant to the individual agreements
23 between Chattem and its insurers and pursuant to the Settlement Agreement between
24 plaintiffs and Chattem, Chattem and its insurers have agreed to fund a settlement trust
25 for the purpose of implementing the settlement. The present motion simply seeks the
26 Court's assistance in effectuating the creation of a settlement trust. Such an action will
27 allow for the immediate payment of administrative expenses and will provide a fund for
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1 payment of claims soon after final trial court approval. This action also will demonstrate
2 to potential class members that funding is available to pay claims before the time notice
3 of the settlement is published.

4 **II. Legal Authority**

5 Federal Rule of Civil Procedure 23(d) grants the Court broad authority to issue
6 appropriate orders in the context of a class action. Specifically, Rule 23 (d) provides:

7 (d) **Orders in Conduct of Actions.** In the conduct of actions to
8 which this rule applies, the court may make appropriate orders: (1)
9 determining the course of proceedings or prescribing measures to prevent
10 undue repetition or complication in the presentation of evidence or
11 argument; (2) requiring, for the protection of the members of the class or
12 otherwise for the fair conduct of the action, that notice be given in such
13 manner as the court may direct to some or all of the members of any step
14 in the action, or of the proposed extent of the judgment, or of the
15 opportunity of members to signify whether they consider the
16 representation fair and adequate, to intervene and present claims or
17 defenses, or otherwise to come into the action; (3) imposing conditions on
18 the representative parties or on intervenors; (4) requiring that the
19 pleadings be amended to eliminate therefrom allegations as to
20 representation of absent persons, and that the action proceed accordingly;
21 (5) dealing with similar procedural matters. The orders may be combined
22 with an order under Rule 16, and may be altered or amended as may be
23 desirable from time to time.

24 The purpose of Federal Rule of Civil Procedure 23(d) is discussed in Wright,
25 Miller & Kane, Federal Practice and Procedure: Civil 2d, § 1791,:

26 Because class actions tend to be extremely complicated and protracted,
27 their management and disposition frequently require the exercise of
28 considerable judicial control and ingenuity in the framing of orders relating
to various aspects of the case. Rule 23(d) provides the trial court with
extensive discretion in achieving this objective and offers some guidance
as to the types of problems the district judge is likely to encounter.

Specifically, subpart (5) of Rule 23(d) allows the trial court to issue procedural
orders as needed based upon the facts specific to a particular case. Rule 23(d)(5) is
discussed in Moore's Federal Practice 3d, § 23.70 as follows:

The courts have rejected a narrow interpretation of this provision, and
have relied upon Rule 23(d)(5) to find authority for just about any type of

1 procedural order that facilitates the fair and efficient conduct of the action
2 and protects the interests of the absent class members.

3 The case of Philadelphia Electric Co. v. Anaconda Am. Brass Co., 47 F.R.D. 557
4 (E.D. Pa. 1969) illustrates the ability of trial courts to issue orders to preserve settlement
5 funds in a class action. In this case, three defendants in a multi-defendant case settled
6 with the plaintiff before class certification. Pending resolution of the class certification
7 issues, the trial court placed the settlement proceeds in an escrow account for the
8 benefit of the proposed class. See also Newberg on Class Actions 4th Ed., § 12:24.

9 Like the court in Philadelphia Electric, the PSC requests that this Court exercise
10 its discretion by ordering Chattem to fund the Initial Settlement Trust with the insurance
11 proceeds contemplated in the Settlement Agreement and Chattem's agreements with its
12 insurers to insure the funds are available to pay the class action plaintiffs pursuant to
13 the Settlement Agreement. Chattem has agreed to create a Settlement Trust to fund
14 the settlement embodied within the Settlement Agreement filed today with this Court.

15 Pursuant to RCWA 6.25.030, the PSC also requests the Court issue a Writ of
16 Attachment to secure the Initial Settlement Trust and its corpus until the fairness
17 hearing. Among other provisions, RCWA 6.25.030 authorizes the issuance of writs of
18 attachment while an action is pending when the defendant is a foreign corporation.
19 Chattem is a Tennessee corporation and its insurers are also located outside the State
20 of Washington. Bringing the settlement funds under the control of this Court protects
21 the settlement class members consistent with the Settlement Agreement before this
22 Court.

23 Assuming the insurance carriers pay consistent with their agreements with
24 Chattem, issuing the requested order will not subject Chattem to any undue prejudice or
25 hardship. It will simply enforce the agreement reached by the parties.
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1 **III. Requested Relief**

2 The PSC respectfully requests the Court order the following:

3 1. That Chattem create an Initial Settlement Trust in accordance with the
4 Initial Settlement Trust Agreement and that within twenty (20) days of the entry of the
5 Court's Order, Chattem will collect and deposit \$60,885,000 into the Initial Settlement
6 Trust;

7 2. That AmSouth be approved to act as Trustee of the Initial Settlement
8 Trust, according to the terms of the Trust.

9 3. That after the trust is funded the Court will issue a Writ of Attachment
10 taking possession of the trust for the benefit of potential class members. Further, that
11 the PSC is ordered to prepare and present to the court a Writ of Attachment that
12 accomplishes this purpose.

13 4. That if the Settlement Agreement is terminated in accordance with its
14 terms, the parties are to notify the Court, and the Court will issue an appropriate order
15 after notice an appropriate hearing.

1 DATED this ____ day of April, 2004.

2 *Levinson Friedman, P.S.*

3
4 _____
5 Lance E. Palmer
6 WSBA #18141
7 **Plaintiffs' Liaison Counsel**

8 Signed and submitted on behalf of,
9 and approval of, the individuals
10 listed below

11 Arthur Sherman
12 *Sherman, Salkow, Petoyan & Weber*
13 11601 Wilshire Blvd, Suite 675
14 Los Angeles, CA 90025-1742
15 **Plaintiffs' Co-Lead Counsel**

16 Richard Lewis
17 *Cohen, Milstein, Hausfield & Toll*
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19 Suite 500
20 Washington, D.C. 20005
21 **Plaintiffs' Co-Lead Counsel**

1 DATED this 15th day of April, 2004.

2 Levinson Friedman, P.S.

3 

4 Lance E. Palmer

5 WSBA #18141

6 **Plaintiffs' Liaison Counsel**

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