

WISCONSIN MEDICAL SOCIETY, INC.  
330 East Lakeside Street  
Madison, Wisconsin 53715, and

DAVID M. HOFFMANN, MD  
1040 Division Street  
Mauston, WI 53948,

COPY

Plaintiffs,

Case No.: 07CV4035

Case Code: 30701

vs.

MICHAEL L. MORGAN  
in his official capacity as Secretary of the  
Wisconsin Department of Administration  
101 East Wilson Street  
Madison, Wisconsin, 53702,

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DANE COUNTY  
CIRCUIT COURT

Defendant.

**AMENDED COMPLAINT**

The Plaintiffs, Wisconsin Medical Society, Inc. and David M. Hoffmann, MD, by their attorneys, Thomas M. Pyper, Cynthia L. Buchko and Kelly Dvorak of Whyte Hirschboeck Dudek S.C., for their Complaint against Defendant allege as follows:

**PARTIES**

1. Plaintiff Wisconsin Medical Society, Inc., ("WMS") is a Wisconsin corporation with its principal office at 330 East Lakeside Street, Madison, Wisconsin 53715. WMS has existed since 1841 and is the largest association of medical doctors in the state, with a membership exceeding 11,000. Most of WMS's member physicians are "health care providers,"

as that term is defined in Wis. Stat. § 655.001(8). WMS has standing in this case as an association whose members have standing to sue in their own right and because the interests it seeks to protect are germane to WMS's purpose.

2. Plaintiff David M. Hoffmann, MD ("Dr. Hoffmann") is an adult resident of the State of Wisconsin who maintains a place of business at Mile Bluff Clinic, 1040 Division Street, Mauston, Wisconsin 53948. Dr. Hoffmann is a member of the WMS and is a practicing physician in rural Wisconsin. Dr. Hoffmann is a "health care provider," as that term is defined in Wis. Stat. § 655.001(8), and is obligated to pay into the Injured Patients and Families Compensation Fund ("Fund").

3. Defendant Michael L. Morgan ("Mr. Morgan" or "Secretary Morgan") is the Secretary of the State of Wisconsin Department of Administration ("DOA"), with his principal office at 101 East Wilson Street, Madison, Wisconsin, 53702. As the Secretary of the DOA, Mr. Morgan has the responsibility to "plan, direct, coordinate and execute the functions vested" in the DOA, pursuant to Wis. Stat. § 15.04(1),

### **FACTUAL ALLEGATIONS**

4. The Fund was created in 1975 in response to the deleterious effects on the cost and quality of health care in Wisconsin due to increased insurance costs caused by lawsuits over patient care. *See* L. 1975, c. 37, §1. From 1975-2003, the Fund was known as the Wisconsin Patients Compensation Fund.

5. The Fund was created "for the purpose of paying that portion of a medical malpractice claim which is in excess of the limits expressed in s. 655.23(4) or the maximum liability limit for which the health care provider is insured, whichever limit is greater, paying future medical expense payments under s. 655.015, and paying claims under sub. (1m)." *See*

Wis. Stat. § 655.27(1). The Fund was established to “curb the rising costs of health care by financing part of the liability incurred by health care providers as a result of medical malpractice claims and to ensure that proper claims are satisfied.” Wis. Stat. § 655.27(6).

6. Participation in the Fund is mandatory for each physician and nurse anesthetist for whom this state is a principal place of practice and who practices his or her profession more than 240 hours in a fiscal year *except* that physicians and nurse anesthetists employed by the state, a county, a municipality or the federal government (*e.g.*, University of Wisconsin Hospital physicians and nurse anesthetists) are exempt from participating in the Fund. *See* Wis. Stat. §§ 655.002 and 655.003.

7. As of December 31, 2006, the Fund had 14,308 participants, approximately 84% of which were physicians.

8. As of December 31, 2006, 10,620 health care providers were exempt from participation in the Fund because: they practiced part-time or had temporarily ceased practice; they had retired; the location of their principal place of practice was outside this state; they were employed by the state, a county, a municipality or the federal government; or they were not yet practicing or had never practiced.

9. The Fund is obligated to provide occurrence coverage for claims against health care providers that have complied with Wis. Stat. ch. 655. Wis. Stat. § 655.27(1). For this occurrence coverage, health care providers must pay fees that are set and assessed by the Commissioner of Insurance (“Commissioner”), after approval by the Fund Board of Governors (“Board”). *See* Wis. Stat. § 655.27(3).

10. Assessments set by the Commissioner and approved by the Board must be based on, among other factors, the past and prospective loss and expense experience of the fund. *See* Wis. Stat. § 655.27(3)(a)2.

11. The Commissioner is responsible for the collection of fees and deposit of those fees into the Fund. *See* Wis. Stat. § 655.27(3)(c).

12. “Moneys shall be withdrawn from the fund by the commissioner *only upon* vouchers approved and authorized by the board of governors.” *See* Wis. Stat. § 655.27(4)(a) (emphasis added).

13. Since 1980, the Fund has been operated on an accrual basis, meaning that in a fiscal year, health care providers are assessed fees sufficient to cover the estimated loss liabilities (*e.g.*, estimated medical malpractice occurrences); however, the loss liabilities are discounted to take into account future investment returns.

14. Accrual accounting attempts to ensure that the Fund has sufficient assets to pay all outstanding liabilities (reported and unreported) if the Fund were to be discontinued.

15. It is a policy of the Board to approve fee assessments at levels that will result in a zero accounting surplus/deficit. Because of this policy, the Fund is currently collecting fees in an amount less than the amount being paid out for claims and expenses. As a result, investment income is being used to pay claims and expenses. Thus, the Fund has been attempting to reach a “break even” status with no surplus monies over the amount necessary for the payment of losses.

16. The Fund has paid more than \$633.6 million in claims from its inception in 1975 through December 31, 2006.

17. A small number of large-value claims can significantly affect the Fund's operations and cash flow, but the uncertainty and long-term nature of medical malpractice claims makes it difficult to predict when large claims will be settled and paid from the Fund.

18. The Fund has played an important role in contributing to Wisconsin's reputation as a desirable place for health care providers to practice. According to the Legislative Audit Bureau, "[t]he Injured Patients and Families Compensation Fund is often cited as an important factor in Wisconsin's relatively stable environment for health care providers in comparison to other states. Its solid financial position provides flexibility to readily respond to changes that may occur in the medical malpractice environment in the future."

19. Health care providers, patients and consumers all benefit by having confidence in the reliability and soundness of the Fund's financial operations.

20. Prior to 2003, the inviolability of the Fund was ensured by a provision within the governing statute, which provided that: "[t]he fund shall be held in trust for purposes of this chapter and may not be used for purposes other than those of this chapter." *See Wis. Stat. § 655.27(6) (2001-2002).*

21. In 2003, Wis. Stat. § 655.27(6) was amended and the purpose and inviolability of the Fund was reinforced. The new language of Wis. Stat. § 655.27(6) provides that:

The fund is established to curb the rising costs of health care by financing part of the liability incurred by health care providers as a result of medical malpractice claims and to insure that proper claims are satisfied. The fund, including any net worth of the fund, is held in irrevocable trust for the sole benefit of health care providers participating in the fund and proper claimants. Monies in the fund may not be used for any other purpose of the State.

Wis. Stat. § 655.27(6).

22. Two of the legislature's objectives for the Fund are to keep annual health care provider assessments at a low rate and to protect the Fund's financial status.

23. 2007 Wisconsin Act 20 (the "Act") is the codification of the 2007-2009 biennial budget proposal.

24. The Act finances, in part, the Medical Assistance Trust Fund ("MATF") with the transfer of \$200 million from the Fund. Section 9225 of the Act provides:

(2) MEDICAL ASSISTANCE TRUST FUND.  
Notwithstanding section 655.27(6) of the statutes, there is transferred from the injured patients and families compensation fund to the Medical Assistance trust fund \$71,500,000 in fiscal year 2007-08 and \$128,500,000 in fiscal year 2008-09.

25. The MATF, *see* Wis. Stat. § 20.435(4)(w), is used to pay for services under Wis. Stat. §§ 46.27 (Long Term Care community options program), 46.275(5) (community integration program for residents of state centers), 46.278 (6) (community integration program and brain injury waiver program for persons with developmental disabilities), 46.283(5) (family care resource centers), 46.284(5) (family care management organizations), 49.45 (Medicaid), and 49.472 (6) (Medical Assistance Purchase Plan).

26. None of the programs funded by the MATF relate to the Fund purpose of paying excess medical malpractice claims.

27. On October 25, 2007, Mr. James Johnston, then Executive Policy & Budget Manager, Health & Family Services and Insurance Team, Division of Executive Budget and Finance of the DOA, directed Mr. Stephen Censky, the State Controller, Division of Executive Budget and Finance of the DOA, to transfer \$71,500,000 from the Fund to the MATF on Monday, October 29, 2007.

28. On October 29, 2007, Ms. Karolyn Cassidy, Chief (Financial Management Supervisor) of WISMART Operations Section of the State Controller's Office, Division of Executive Budget and Finance of the DOA, transferred \$71,500,000 from the Fund to the MATF.

29. Messrs. Johnston and Censky and Ms. Cassidy, as employees of the Division of Executive Budget and Finance of the DOA, are under the supervision and direction of, and ultimately report to, Secretary Morgan.

30. On November 30, 2007, Secretary Morgan reported to the Senate and Assembly Chief Clerks of Wisconsin Legislature that the Fund did not have \$71,500,000 in liquid assets on October 29, 2007. Because the Fund did not have sufficient liquid assets to cover the \$71,500,000 transfer described in the preceding paragraph, Secretary Morgan temporarily reallocated money from another state fund or account to cover a \$51,300,000 shortfall. On information and belief, Secretary Morgan is charging, or will charge, the Fund interest for this temporary reallocation.

31. In addition to the loss of \$200 million that will result from the Act, the Fund will not realize investment earnings on this amount.

32. According to the Fund's actuary, Pinnacle Actuarial Resources, Inc. ("Pinnacle"), the transfer of \$200 million from the Fund, approximately 25% of the Fund's net worth, will put the Fund in a deficit accounting position of over \$600,000,000 by 2013 even if the Commissioner and the Board approve annual 25% fee increases from year 2007-08 to year 2012-2013.

33. Transfer of \$200 million from the Fund will result in the Commissioner and the Board having to increase fee assessments by significantly more than 25% per year to bring the Fund back to a zero accounting surplus/deficit.

34. Once the full \$200 million is transferred from the Fund, the Fund will not have funds sufficient to cover the claims of injured patients and families that have occurred but have not yet been paid.

35. The WMS and Dr. Hoffmann have provided the Defendant with the written notice required by Wis. Stat. §§ 893.80 and/or 893.82, in the event compliance is found to be necessary, which WMS and Dr. Hoffmann dispute.

### CAUSES OF ACTION

#### **First Cause Of Action--Unconstitutional Taking Without Just Compensation**

36. Plaintiffs reallege and incorporate herein fully by reference the allegations set forth in paragraph nos. 1 through 35 above.

37. Article I, Section 13 of the Wisconsin Constitution provides that “the property of no person shall be taken for public use without just compensation.”

38. The U.S. Constitution, Amendment V provides in part: “nor shall private property be taken for public use without just compensation.”

39. Health care providers and injured patients and families have a property right in the full net worth of Fund monies being used solely for the express purpose of the Fund.

40. Health care providers and injured patients and families have a property right in the protection of the integrity and security of the Fund.

41. Health care providers and injured patients and families have a property right to have all monies in the Fund withdrawn only by the Board in accordance with the statutes governing Fund withdrawals.

42. Health care providers and injured patients and families have a property right in having the level of contributions by health care providers being determined by the Board based

on loss projections and investment performance rather than as a need to replace monies unlawfully withdrawn from the Fund by the State.

43. The taking of Fund money is for the MATF, which is a valid public purpose.

44. The transfer of money from the Fund to the MATF under the Act by DOA employees under the supervision and direction of Secretary Morgan constitutes a taking of the health care providers' and injured patients' and families' property interests in the Fund without just compensation.

45. Because the Act constitutes a taking of health care providers' and injured patients' and families' property interests without just compensation, § 9225 of the Act is unconstitutional.

#### **Second Cause Of Action--Unconstitutional Impairment Of Contract**

46. Plaintiffs reallege and incorporate herein fully by reference the allegations set forth in paragraph nos. 1 through 35 above.

47. Article I, Section 12 of the Wisconsin Constitution provides: "No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed. . . ."

48. Article I, Section 10 of the United States Constitution provides: "No state shall ... pass any ... law impairing the obligations of contracts...."

49. Pursuant to Wis. Stat. § 655.27(1) and (3), the State provides excess medical malpractice liability coverage on an occurrence basis in exchange for payment of fees by health care providers.

50. Pursuant to Wis. Stat. § 655.27(6), the full net worth of monies in the Fund must be held in an "irrevocable trust" for the benefit of health care providers participating in the Fund and injured patients and families.

51. Pursuant to Wis. Stat. § 655.27(6), Fund monies may only be used for the express purpose of the Fund.

52. Pursuant to Wis. Stat. § 655.27(4)(e), all income derived from the investment of Fund monies must be credited to the Fund.

53. By enacting Wis. Stat. § 655.27, the State created contractual rights in favor of the health care providers and injured patients and families in the full net worth of the Fund.

54. By enacting Wis. Stat. § 655.27, the State created contractual rights in favor of health care providers and injured patients and families to have all monies in the Fund distributed only by the Board in accordance with the statutes governing Fund withdrawals.

55. By enacting Wis. Stat. § 655.27, the State created contractual rights in favor of health care providers and injured patients and families to have the level of contributions by health care providers determined by the Board based on loss projections and investment performance rather than as a need to replace monies unlawfully withdrawn from the Fund by the State.

56. By enacting Wis. Stat. § 655.27, the State created contractual rights in favor of health care providers and injured patients and families to have the entire net worth of the Fund held in an irrevocable trust, to have all Fund monies used solely for the express Fund purpose and not to have any Fund monies used for any other State purpose.

57. The State transfer of \$200 million out of the Fund by DOA employees under the supervision and direction of Secretary Morgan substantially impairs the contractual rights of the health care providers and injured patients and families in the Fund.

58. For the reasons set forth in paragraph nos. 45-56, *supra*, § 9225 of the Act constitutes an unconstitutional impairment of contract in violation of Article I, Section 12 of the Wisconsin Constitution and Article I, Section 10 of the United States Constitution.

### **Third Cause Of Action--Invalid Tax**

59. Plaintiffs reallege and incorporate herein fully by reference the allegations set forth in paragraph nos. 1 through 35 above.

60. Pursuant to Article VIII, Section 1 of the Wisconsin Constitution, the State may impose taxes on persons and property.

61. A tax is an enforcement of proportional contributions from persons and property, imposed by the State in its governmental capacity for the support of its government and its public needs.

62. A tax may not be imposed absent clear and express statutory language for that purpose, with all ambiguity and doubt resolved against the one who seeks to impose a tax.

63. The language of Wis. Stat. § 655.27 does not clearly and expressly impose a tax on health care providers.

64. The \$200 million transferred from the Fund by DOA employees under the supervision and direction of Secretary Morgan will be used for purposes that are for the general support of the State and public needs and is, thus, a disguised tax on health care providers and injured patients and families.

65. At the same time the DOA is transferring \$200 million from the Fund to the MATF, it is diverting general purpose revenue funds that would otherwise be required to fund the MATF for other State purposes. Accordingly, the State is taxing health care providers and injured patients and families for a wide variety of State general purposes.

66. Absent clear and express language imposing a tax on health care providers and injured patients and families, the State may not transfer Fund monies to the MATF as a substitute for the monies collected as a tax for the general support of its government and its public needs.

67. For the reasons set forth in paragraph nos. 59-66, *supra*, § 9225 of the Act is an invalid tax on health care providers and injured patients and families.

**Fourth Cause Of Action--Unconstitutional Tax Classification**

68. Plaintiffs reallege and incorporate herein fully by reference the allegations set forth in paragraph nos. 1 through 35 above.

69. The Wisconsin Constitution permits taxation on income, privileges and occupations. *See* Wis. Const. Art. VIII, § 1.

70. When taxes are imposed on privileges or occupations, classifications may be made and different rates may be applied to different classes; however, the classifications must bear a rational relationship to a legitimate government interest. *See* Wis. Const. Art. I, § 1 and U.S. Const. Amend. 14.

71. The natural and reasonable effect of the Act is to tax only certain classifications of health care providers and injured patients and families.

72. The Act § 9225 creates two classifications of health care providers, health care providers that must participate in the Fund and health care providers that do not have to participate in the Fund.

73. When applied to the purpose of the Fund, *i.e.*, to pay excess medical malpractice liability claims, the tax classifications set forth in the paragraph no. 72, *supra*, bear a rational relationship to a legitimate public purpose.

74. When applied to the purpose of the Act § 9225, *i.e.*, to fund the various Medicaid programs under the umbrella of the MATF, the tax classifications set forth in paragraph no. 72, *supra*, do not bear a rational relationship to a legitimate government interest.

75. The Act § 9225 creates tax classifications of health care providers that do not bear a rational relationship to a legitimate government interest; therefore, the Act § 9225 is unconstitutional. *See* Wis. Const. Art. I, § 1 and U.S. Const. Amend. 14.

76. The Act § 9225 creates two classifications of injured persons and families; persons and families injured by negligent medical care and persons and families injured by other types of negligent conduct.

77. The Act § 9225 affects only one member of a class described in paragraph no. 76, persons and families injured by negligent medical care.

78. When applied to the purpose of the Fund, *i.e.*, to pay excess medical malpractice liability claims, the classifications set forth in paragraph no. 76, *supra*, bear a rational relationship to a legitimate public purpose.

79. When applied to the purpose of the Act § 9225, *i.e.*, to fund the various Medicaid programs under the umbrella of the MATF, the tax classifications set forth in paragraph no. 76, *supra*, do not bear a rational relationship to a legitimate government interest.

80. The Act § 9225 creates tax classifications of injured persons and families that do not bear a rational relationship to a legitimate government interest; therefore, the Act § 9225 is unconstitutional. *See* Wis. Const. Art. I, § 1 and U.S. Const. Amend. 14.

#### **Fifth Cause of Action--Violation of Equal Protection**

81. Plaintiffs reallege and incorporate herein fully by reference the allegations set forth in paragraph nos. 1 through 35 above.

82. Classifications that do not bear a rational relationship to a legitimate government interest violate the Equal Protection Clauses of the Wisconsin and United States Constitutions. *See* Wis. Const. Art. I, § 1 and U.S. Const. Amend. 14.

83. The Act § 9225 creates two classifications of health care providers: health care providers that must participate in the Fund and health care providers that do not have to participate in the Fund.

84. When applied to the purpose of the Fund, *i.e.*, to pay excess medical malpractice liability, the classifications set forth in the preceding paragraph bear a rational relationship to a legitimate public purpose.

85. When applied to the purpose of the Act, to fund Medicaid programs under the umbrella of the MATF, the classifications set forth in paragraph no. 83, *supra*, do not bear a rational relationship to a legitimate government interest.

86. The Act § 9225 creates classifications of health care providers that do not bear a rational relationship to a legitimate government interest; therefore, the Act is unconstitutional. *See* Wis. Const. Art. I, § 1 and U.S. Const. Amend. 14.

87. The Act § 9225 creates two classifications of injured persons and families: persons and families injured by negligent medical care and persons and families injured by other types of negligent conduct.

88. The Act § 9225 affects only one member of a class described in paragraph no. 87, *supra*, persons and families injured by negligent medical care.

89. When applied to the purpose of the Act § 9225, *i.e.*, to fund the various Medicaid programs under the umbrella of the MATF, the classifications set forth in paragraph no. 87, *supra*, do not bear a rational relationship to a legitimate government interest.

90. The Act creates classifications of injured persons and families that do not bear a rational relationship to a legitimate government interest; therefore, the Act § 9225 is unconstitutional. *See* Wis. Const. Art. I, § 1 and U.S. Const. Amend. 14.

**Sixth Cause of Action--Violation of Wis. Stat. § 655.27**

91. Plaintiffs reallege and incorporate herein fully by reference the allegations set forth in paragraph nos. 1 through 35 above.

92. Pursuant to Wis. Stat. §§ 16.401(1) and 20.907(5)(a) and (b), monies that come into the possession of any state officer or agency must be deposited with the DOA and are under the custody and management of the DOA, *unless* the disposition of monies is otherwise provided by law. Pursuant to Wis. Stat. § 16.51(4), the DOA may direct and superintend the collection of all monies due the state, “except as otherwise provided by law.”

93. Pursuant to Wis. Stat. § 655.27(3)(c), the Commissioner is responsible for the collection of fees and for the deposit of those fees directly into the Fund. Wis. Stat. § 655.27(3)(c) was not amended by the Act § 9225.

94. Pursuant to Wis. Stat. § 655.27(4)(a), “[m]oneys shall be withdrawn from the fund by the commissioner only upon vouchers approved and authorized by the board of governors.” Wis. Stat. § 655.27(4)(a) was not amended by the Act § 9225.

95. Because Wis. Stat. §§ 655.27(3)(c) and (4)(a) govern the collection and deposit of moneys into, and withdrawal from, the Fund, Secretary Morgan lacks authority to direct or superintend the deposit, transfer or withdrawal of moneys from the Fund.

96. The transfer of moneys from the Fund on October 29, 2007, as set forth in paragraphs 27-30, *supra*, violated Wis. Stat. §§ 655.27(3)(c) and (4)(a).

### **Seventh Cause Of Action--Violation of 42 U.S.C. § 1983**

97. Plaintiffs reallege and incorporate herein fully by reference the allegations set forth in paragraph nos. 1 through 58 and 68-90 above.

98. Implementation of the Act § 9225 by Secretary Morgan constituted a deprivation of WMS's and Dr. Hoffmann's rights and privileges secured by the U.S. Const. Art. I, Section 10 and Amends. V and XIV, as described in paragraph nos. 1-58 and 68-90, *supra*, in violation of 42 U.S.C. § 1983.

99. WMS and Dr. Hoffmann are entitled to a judgment declaring the Act § 9225, and the Defendant's transfer of money from the Fund under the Act § 9225, to be in violation of 42 U.S.C. § 1983. As a consequence, WMS and Dr. Hoffmann are entitled to a permanent injunction against enforcement of the Act § 9225.

100. WMS and Dr. Hoffmann are entitled to a judgment awarding them their actual costs and attorneys' fees for violation of 42 U.S.C. § 1983, pursuant to 42 U.S.C. § 1988.

### **Ninth Cause of Action--Permanent Injunction**

101. Plaintiffs reallege and incorporate herein fully by reference the allegations set forth in paragraph nos. 1 through 99 above.

102. Because the Act § 9225 is unconstitutional or otherwise invalid or unenforceable, Secretary Morgan must be permanently enjoined from transferring monies out of the Fund pursuant to the Act § 9225 and ordered to return all monies wrongfully withdrawn together with lost earnings.

WHEREFORE, the Wisconsin Medical Society, Inc. and David M. Hoffmann, MD respectfully request the following relief:

- a. A declaration that the Act § 9225 constitutes an unconstitutional taking without just compensation in violation of Article I, Section 13 of Wisconsin Constitution and the United States Constitution, Amendment V;
- b. A declaration that the Act § 9225 constitutes an unconstitutional impairment of contract in violation of Article I, Section 13 of Wisconsin Constitution and Article I, Section 10 of the United States Constitution;
- c. A declaration that the transfer of Fund monies to the MATF constitutes an unlawful tax and is, accordingly, invalid and void *ab initio*;
- d. A declaration that the Act § 9225 creates tax classifications that bear no rational relationship to a legitimate government purpose in violation of Article VIII, Section 1 and Article I, Section 1 of the Wisconsin Constitution and the Fourteenth Amendment of the United States Constitution;
- e. A declaration that the Act § 9225 creates classifications that bear no rational relationship to a legitimate government purpose in violation of Article I, Section 1 of the Wisconsin Constitution and the Fourteenth Amendment of the United States Constitution;
- f. A declaration that Secretary Morgan violated Wis. Stat. §§ 655.27(3) and (4) by transferring monies from the Fund;
- g. A declaration that Secretary Morgan's implementation of the Act § 9225 violated 42 U.S.C. § 1983;
- h. A judgment against Secretary Morgan directing him to replace all funds removed from the Fund pursuant to the Act § 9225, with lost earnings at the actual earnings rate established by the Wisconsin Investment Board;

- i. A permanent injunction precluding Secretary Morgan from transferring monies out of the Fund under the provisions of the Act and ordering immediate return of all monies taken with lost earnings;
- j. Recovery of attorneys' fees and costs pursuant to 42 U.S.C. § 1988;
- k. Recovery of attorneys' fees and costs from the Fund on the common fund grounds that:
  - the Plaintiffs are pursuing this litigation for the benefit of all health care providers that participate in the Fund and proper Fund claimants;
  - those benefiting from this litigation are small in number and easily identifiable (*i.e.*, health care providers that participate in the Fund and proper Fund claimants);
  - the benefits of this litigation to health care providers that participate in the Fund and proper Fund claimants are traceable; and
  - the attorney fees and costs are capable of being shifted with some exactitude to those benefiting by being paid out of the money returned to the Fund; and
- l. Such other relief as this court deems just and equitable.

Dated this 29th day of February, 2008.

WHYTE HIRSCHBOECK DUDEK S.C.

By: 

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