



### **The E-Ferol Class Action**

On May 29, 2003, Plaintiffs Victoria Klein and Ashley Swadley filed the above styled lawsuit against Defendants O'Neal, Inc., d/b/a O'Neal, Jones & Feldman Pharmaceuticals ("O'Neal"), Revco D.S., Inc., and Carter-Glogau Laboratories, Inc., now known as Retrac, Inc., on behalf of a putative class. This action arises out of the manufacture and distribution of E-Ferol Aqueous Solution ("E-Ferol"), a pharmaceutical product administered intravenously to premature infants in 1983 and 1984 to assist with various health complications due to prematurity. The Plaintiffs, who were administered E-Ferol aqueous solution as infants, allege Defendants were negligent in manufacturing and marketing of E-Ferol in violation of the requirements of the FDA Act; that the Defendants negligently misrepresented certain qualities of E-Ferol; and that E-Ferol was an unreasonably dangerous product as manufactured and marketed. Defendants deny any wrongdoing.

On May 11, 2004, the U.S. District Court for the Northern District of Texas, Wichita Falls Division, certified this case as a Class Action (the "E-Ferol Class Action") designating Victoria Klein and Ashley Swadley as Class Representatives and Art Brender as Lead Class Counsel and Dwain Dent and Fred L. Streck, III as Class Counsel. The E-Ferol Class is defined as:

All persons in the United States, including any estate representatives or heirs of deceased persons, who, during the period from November 1, 1983 until April 30, 1984, were administered E-Ferol aqueous solution. Included in the class are parents, spouses, children, guardians, and legal representatives of such persons with direct or derivative claims.

Excluded from the class is any person who previously released a claim related to the administration of E-Ferol. There are currently 328 recipients of E-Ferol in the E-Ferol Class Action. More specifically, the class consists of 34 infants who allegedly died from E-Ferol toxicity ("death claimants"), 22 infants who allegedly sustained brain or neurological injuries

from E-Ferol exposure (“cerebral palsy or CP claimants”), and 239 E-Ferol recipients who have no current evidence of injury, but seek recovery for medical monitoring (“medical monitoring claimants”). The class also includes 33 recipients whose claims were dismissed by the District Court on May 22, 2008, on the grounds that 8 death claims were untimely asserted and thus legally barred and 25 who were subject to the Tennessee Statute of Repose.

Plaintiffs and Defendants have reached a proposed settlement in this matter. The terms of the Settlement Agreement are contained in this Class Action Settlement Notice and are also available on the E-Ferol Class action website: [www.eferolclassaction.com](http://www.eferolclassaction.com) or at the U.S. District Courthouse, 1000 Lamar, Room 203, Wichita Falls, Texas, during regular business hours. Class members have the right to object to the proposed settlement. As further explained below, any such objections must be filed with the Court and served on Class Counsel and Lead Counsel for the Defendants no later than December 30, 2009.

DO NOT CONTACT THE U.S. DISTRICT COURT OR COURT CLERK WITH QUESTIONS ABOUT THIS SETTLEMENT.

**Notice of Fairness Hearing  
and Options Available to Class Members**

Please take notice that a hearing will be held beginning on the 16<sup>th</sup> day of February, 2010, at 9:00 o’clock a.m., before the Honorable Sidney A. Fitzwater, Chief Judge, United States District Court for the Northern District of Texas, at the U.S. Courthouse, 1100 Commerce, Room 1525, Dallas, Texas, to determine whether the proposed settlement (the “**Settlement**”) of the above captioned class action should be approved and whether attorneys’ fees and expenses should be awarded to class counsel. The hearing will be held, pursuant to Fed. R. Civ. P. 23(e) and (h)(1), and is for the purpose for determining whether the proposed settlement is fair, reasonable, and adequate and whether the requested attorneys’ fees and expenses and costs are

reasonable. If the proposed settlement is approved, a judgment will be entered releasing the Defendants, their past, present, or future representatives, agents, assigns, employees, parents, subsidiaries, affiliates, predecessors, successors, liability insurers participating in the funding of the settlement, attorneys, officers, and directors, together with all medical personnel, including, but not limited to hospitals, doctors, nurses, pharmacists, technicians, or any other third-party health care providers liable for any act or omission in connection with the manufacturer, distribution, and/or administration of E-Ferol and all persons or entities in privity with any of these. This release would include any and all past, present, and/or future claims, causes of actions, suits, debts, accounts, attorneys' fees, costs, or other claims or demands which you have ever had or now have, whether known or unknown, whether accrued or unaccrued, through and including the effective date of this settlement. However, the release would not apply to any claims against the certain insurers that are not participating in the funding of the settlement.

### **Plaintiffs' Allegations**

In 1983, Carter-Glogau Laboratories, Inc., (now renamed "Retrac, Inc.") was a wholly-owned subsidiary of Revco D.S., Inc., who was responsible for the manufacture of E-Ferol. O'Neal, Jones and Feldman, now known as O'Neal, Inc. ("OJF") began marketing and distributing E-Ferol in November 1983. According to the package insert, E-Ferol was an infusible (intravenous or IV) form of vitamin E which was to be used to combat retrolental fibroplasia ("RLF"), a disease that affects the retina of the eye and causes vision impairment or permanent blindness in premature infants. Oral and intramuscular forms of vitamin E were either ineffective or impossible to administer. Tens of thousands of vials of E-Ferol were distributed between November 1983 and April 1984. During that time, reports surfaced stating that E-Ferol might be linked to serious illness and possibly the deaths of some infants.

Ultimately, E-Ferol was recalled in April 1984 by OJF and under the direction of the Food and Drug Administration (FDA).

Plaintiffs claim that, in the fall of 1983, James Madison, Executive Vice-President of O'Neal, Jones & Feldman, and Ron Carter, President of Carter-Glogau Laboratories, discussed and ultimately agreed that Carter-Glogau would produce and O'Neal, Jones & Feldman would distribute an intravenous form of vitamin E. Plaintiffs contend that Defendants planned to avoid FDA new drug requirements by claiming this infusible product was a "vitamin." In November, 1983, O'Neal began distributing this new drug, labeled "E-Ferol aqueous solution," as a "safe intravenous form of vitamin E" to be used to prevent blindness due to RLF and other serious risks in premature infants. Plaintiffs allege that no application had been made to the FDA for authority to market E-Ferol as a drug, and that neonatologists in hospitals began to use the drug, assuming that it had been properly tested and approved.

Plaintiffs claim that E-Ferol immediately began to cause clinical deterioration in premature infants, including unexplained thrombocytopenia, liver and/or kidney failure, enlargement of the liver and/or spleen, respiratory distress, cardiopulmonary deterioration, ascites and distinct findings on autopsy of progressive veno-occlusive liver disease, a condition that Plaintiffs' experts have labeled the E-Ferol Syndrome. Plaintiffs contend that the E-Ferol Syndrome is distinguished in that many of the symptoms were and remain unusual in newborns. Plaintiffs allege that, as evidence began to mount that the drug was causing illness in premature infants, the FDA and Center for Disease Control (CDC) stepped in. On April 12, 1984, after being on the market for a little over four months, E-Ferol aqueous solution was withdrawn from the market by a Class-1 Recall. Plaintiffs assert that their medical experts, including Drs. Martone, Bodenstein, Bove, Balistreri, and Brown, conducted studies that resulted in the first

epidemiologic and clinical determination that E-Ferol caused the symptoms observed and reported by neonatologists in late 1983 and the spring of 1984.

Plaintiffs claim that following the FDA recall, the Center for Disease Control in Atlanta, Georgia sent a team of epidemiologists, led by William Martone, M.D., then head of Institutional Epidemiology for the CDC, to investigate the phenomenon. The resulting investigation by Dr. Martone allegedly resulted in the first epidemiologic determination that E-Ferol caused the symptoms observed and reported by neonatologists in late 1983 and the spring of 1984. Dr. Martone published his findings in *Pediatrics*, Martone, et al., “Illnesses with Fatalities in Premature Infants: Association with Vitamin E Preparation, E-Ferol,” 78 *Pediatrics* 591 (1986). His study was followed by a second epidemiological study performed by the FDA, and published by Janet Arrowsmith, M.D., in *Pediatrics* three years later. Arrowsmith, et al., “Morbidity and Mortality Among Low Birthweight Infants Exposed to Intravenous Vitamin E Products, E-Ferol,” 83 *Pediatrics* 244 (1989). Concurrently, pathologist Kevin Bove, M.D., together with neonatologist Carl Bodenstein, M.D., and pediatric liver specialist William Balistreri, M.D., analyzed autopsy slides and examined medical records from several nurseries that administered E-Ferol and compared those to nurseries that had not distributed E-Ferol. Plaintiffs contend that, like the epidemiologic studies performed by Drs. Martone and Arrowsmith, E-Ferol was confirmed as the cause of a phenomenon to be designated as the E-Ferol Syndrome. Bove, et al., “Vasculopathic Hepatotoxicity Associated with E-Ferol Syndrome in Low Birthweight Infants,” 254 *JAMA* 2422 (1985).

Plaintiffs also allege that, following the recall of E-Ferol, Robert Brown, M.D., a pathologist at Fort Worth Children’s Hospital in Fort Worth, Texas, undertook a study to determine what component of E-Ferol had caused the E-Ferol Syndrome, ultimately determining

that Polysorbate 80 caused the E-Ferol Syndrome. Brown, et al., “Polysorbate 80 in E-Ferol Toxicity,” 77 Pediatrics 593 (1986). Brown, et al., “Polysorbates and Renal Oxalate Crystals and the E-Ferol Syndrome,” 18 JAMA 255 (1986).

The E-Ferol Class contends that the Defendants were negligent in formulating and distributing E-Ferol when they allegedly had done no testing of the drug and had no clinical basis for its formulation or efficacy as a treatment for certain conditions in premature infants. The E-Ferol Class further alleges that E-Ferol, as formulated and distributed, was an unreasonably dangerous product for which the Defendants are strictly liable. The E-Ferol Class further claims that the Defendants negligently misrepresented the efficacy of E-Ferol for its intended purpose. Plaintiffs contend that E-Ferol caused a certain level of toxicity in the premature infants who were exposed, which ultimately caused their deaths or injuries. The E-Ferol Class seeks actual damages for death and brain damage allegedly caused by the administration of E-Ferol and medical monitoring expenses for those E-Ferol recipients not currently experiencing injury due to E-Ferol based on scientific evidence that Plaintiffs contend link early insult to the liver to an increased instance of cirrhosis and carcinoma of the liver.

### **The Defendants’ Positions**

Defendants deny Plaintiffs’ allegations and further deny any wrongdoing. While E-Ferol toxicity has been documented in the medical literature, Defendants assert that Plaintiffs face a number of evidentiary and legal hurdles that will prevent Plaintiffs from recovering any damages in this lawsuit.

Defendants contend that E-Ferol Class members cannot establish with a reasonable degree of medical certainty that E-Ferol caused their injuries. These pre-term infants were generally born between twenty-six to thirty-two weeks into gestation. Infants born at this stage

in the 1980's faced severe challenges to ultimate survival, absent any E-Ferol exposure. In addition, Defendants allege that all death claims are time-barred by statutes of limitations or repose. Defendants also challenge whether the evidence that the E-Ferol Class members will rely upon, including the reports and testimony of the medical experts, will be admissible in a court proceeding.

Defendants already have succeeded in obtaining dismissal of 33 claims either because 8 death claims were barred by the two-year statute of limitation in Texas or because 25 claims were barred by Tennessee's statute of repose. The Defendants further claim that the District Court erred in not dismissing all death cases based on the statute of limitations. The Defendants have sought to obtain an interlocutory appeal of Judge Fitzwater's May 22, 2008 Memorandum Opinion and Order and intend to ask the Fifth Circuit to certify the question of law concerning fraudulent concealment to the Texas Supreme Court. The Defendants contend that the massive and widespread publicity concerning E-Ferol was sufficient, as a matter of law, to inform the public and E-Ferol recipients about the receipt of this drug, and thus, Class Members cannot claim fraudulent concealment. The Defendants also point to the Fifth Circuit ruling in *Bridges v. Metabolife Int'l, Inc.*, 119 Fed. App. X. 660, 663 (5<sup>th</sup> Cir. 2005), as authority for their claim that the Plaintiffs cannot establish fraudulent concealment so as to defeat the Defendants' motion to dismiss based on statute of limitations. The Defendants point out that they had no duty to disclose the problems with E-Ferol since they had no fiduciary or other professional relationship with the Class Members.

Defendants believe their motion seeking an immediate appeal will be granted by the District Court if this case proceeds. If the Fifth Circuit Court of Appeals then agrees to review

the appeal, Defendants believe that Court will rule in their favor, which would eliminate all death claims in the class.

However, even if Defendants do not succeed on appeal, Defendants contend that the Plaintiffs will have difficulty showing that E-Ferol was a substantial contributing factor in the deaths of the infants in this class. The Defendants dispute the Plaintiffs' claim of reliable, scientific medical evidence linking E-Ferol to each of these deaths and claim that the Plaintiffs' evidence will not survive a challenge, under the Supreme Court precedent of *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to specific causation in individual cases. The Defendants, based on analyses by their own expert medical consultants, contend that E-Ferol deaths were caused by complications from low birth weight including the severity of prematurity and other complications during hospitalization unrelated to E-Ferol; and that infants received an insufficient dose of E-Ferol to cause toxicity. Defendants will have the opportunity to assert a legal challenge to the sufficiency of the scientific evidence that supports the allegations that E-Ferol caused the death of class members. Thus, Defendants believe there is a good chance these claims will be dismissed by the Court prior to trial.

Defendants further contend that Plaintiffs will be unlikely to recover for the cerebral palsy and other brain-injury claimants because the Plaintiffs and the E-Ferol Class cannot show a causal link between cerebral palsy and/or brain dysfunction and the receipt of E-Ferol. The Defendants claim that the Plaintiffs' medical evidence lacks established standards of reliability required by *Daubert* and its progeny, and that the epidemiological evidence provided by Dr. Martone is unreliable and inadmissible to show a causal link between brain dysfunction and E-Ferol exposure.

Defendants' retained medical experts disagree that the medical evidence provided by the Class Members demonstrates that injury or death or other medical condition was caused by E-Ferol. Defendants claim their experts will testify that the medical evidence is not sufficient to link deaths to E-Ferol because, among other things, the deceased infants received low doses of E-Ferol too low to cause injury; the infants died too soon after birth for E-Ferol to have been a contributing cause of death; and the evidence cannot rule out causation by other conditions common to very premature infants and that existed in the deceased infants. Defendants' medical experts also dispute the claim that E-Ferol generally caused brain injuries, including CP, and Defendants and their experts also claim that the living Class Members cannot link any injury or other medical condition to E-Ferol with a reasonable degree of medical certainty.

Defendants' retained medical experts include Dr. Michael Dillon O'Shea, Jr., M.D., MPH, who is Chief of the Neonatology Section and Vice Chair for Clinical Research (Pediatrics) at the Wake Forest University School of Medicine and has been on the staff of Wake Forest University Baptist Medical Center since 1988.

Based on review by Dr. O'Shea, Defendants maintain that the report from Plaintiffs' expert, Dr. William Martone, is seriously flawed for many reasons, including that it was prepared solely for litigation purposes, it relies on data that lack reliability, and it has not been peer reviewed. The Defendants point out that the regression analysis from the data of the E-Ferol class concerning brain dysfunction developed by Dr. Martone is the sole epidemiological study concerning this issue and did not have a control group from which to compare. The Defendants claim that Dr. Martone's theory of causation has not been generally accepted in the relevant scientific community and could not withstand a challenge under *Daubert*. Thus, if Dr. Martone's report is excluded, twenty-two CP claimants could be eliminated from the class.

Defendants also believe that Plaintiffs will face substantial difficulties in establishing liability for the medical monitoring claimants. Defendants assert that a number of states do not even recognize such a theory of recovery, which means that fifty-five of the 239 medical monitoring claimants likely will be eliminated. Of the remaining states, at least seven have not addressed whether these claimants have a viable cause of action; thus, there is no guarantee that ninety-four additional claimants will survive summary judgment. Finally, even for those claimants born in states that do recognize such claims, these claimants are not guaranteed recovery, as their claims are subject to the same causation hurdles as the other claimants. The Defendants dispute the Plaintiffs' studies claim that supposedly link early insult to the liver caused by E-Ferol exposure to any latent injury or potential injury among those named in the medical monitoring class.

All told, it is Plaintiffs' burden to exclude other causes of death in this critically-ill population. Defendants claim that even where the evidence might show symptoms of E-Ferol toxicity, the Plaintiffs cannot rule out the other possible causes of these claimants' injuries -- nor can Plaintiffs' medical experts credibly do so. Defendants allege that, because the Plaintiffs cannot meet their fundamental burden on causation, many of the class claims will be dismissed on summary judgment if there is no settlement.

In addition to legal and factual defenses, the Defendants point out that the District Court has requested briefing on the issue of whether it is appropriate to continue to maintain this case as a class action or to decertify the class. While Defendants believe that decertification is not appropriate, should the District Court decertify the Class, it would be years before any member of the E-Ferol Class obtains a recovery, if at all, as each case will be vigorously defended.

Further, any recovery by the E-Ferol Class will have to come from liability insurance, the

existence and amount of which is uncertain. Some of the Defendants' liability insurers have denied coverage and all of the Defendants' liability insurers have reserved the right to deny coverage. In the absence of a settlement in which liability insurers agree to participate, there is no assurance that any funds will be available to pay claims asserted by the E-Ferol Class members.

### **Progress of E-Ferol Litigation**

The *Klein* case was filed on May 29, 2003. A Class Certification Hearing was conducted on December 11, 2003. On May 11, 2004, United States District Judge Jerry Buchmeyer certified the E-Ferol Class Action. *Klein, et al. v. O'Neal, Jones & Feldman, et al.*, 222 F.R.D. 564 (N.D. Tex. 2004). The Court named Victoria Klein and Ashley Swadley as Class Representatives and Art Brender as Lead Class Counsel and Dwain Dent and Fred L. Streck, III as Class Counsel for the E-Ferol Class Action. The Defendants promptly pursued an appeal before the United States Court of Appeals for the Fifth Circuit, which denied the appeal on July 20, 2004. The Defendants' petition for en banc review of the panel's decision was denied on August 20, 2004.

Once the appeal of class certification had concluded, Class Counsel undertook the task of requesting the names of the E-Ferol recipients from the 89 hospitals throughout the country who had, according to FDA records, distributed E-Ferol aqueous solution. When hospitals cooperated and names were obtained, the Plaintiffs undertook the difficult task of locating the recipients or the parents or heirs of deceased recipients.

While some hospitals agreed to provide the names requested by Class Counsel, other hospitals opposed these attempts to obtain information concerning E-Ferol recipients. Class Counsel was required to issue subpoenas for hospital records in order to determine whether the

infants received E-Ferol. Many of these hospitals filed motions to quash the subpoenas and Class Counsel were required to litigate the question of whether they could obtain the names of recipients of E-Ferol in a number of federal jurisdictions throughout the country.

Once identified, potential Class Members were asked to provide the medical questionnaire and the medical authorizations so that Class Counsel could obtain medical records to confirm the receipt of E-Ferol. Beginning on July 10, 2006, pursuant to the order of the District Court, notice was provided to the potential Class Members, both by U.S. mail and by publication in daily newspapers in each of the metropolitan areas of each hospital that administered E-Ferol. The notice was also published in *USA Today*, on July 13, 2006. The medical questionnaire and medical authorizations were required to be returned by a deadline set by the District Court. No opt-outs received by the deadline set out by the District Court for Class Members to opt-out pursued their individual claim. A class of 328 recipients of E-Ferol aqueous solution was designated on March 15, 2008.

Pursuant to the Court's Scheduling Order, the Defendants filed a motion for summary judgment, claiming that all of the E-Ferol death cases should be dismissed because these claims were filed after the two-year statute of limitations permitted by Texas law. The Plaintiffs responded to this motion, claiming that the actions of the Defendants in fraudulently concealing their wrongdoing should prevent them from invoking the statute of limitations. On May 22, 2008, Chief Judge Sidney Fitzwater granted, in part, and denied, in part, the Defendants' motion for summary judgment. The Court found that the doctrine of fraudulent concealment applied to the manufacture and distribution of E-Ferol by the Defendants and thus, overruled the Defendants' request for judgment on limitations as a matter of law. The Court found, however, that twenty-five (25) Class Members received E-Ferol in the State of Tennessee and were subject

to the Tennessee statute of repose, which eliminated their causes of action and prevented them from seeking recovery due to injuries caused by E-Ferol. The Court also found that the parents of eight (8) E-Ferol recipients had sufficient knowledge of the receipt of E-Ferol by their infants that they were precluded, as a matter of law, from using the doctrine of fraudulent concealment. Their cases were similarly dismissed by the Court's interlocutory order that is not final.

Following the Court's Order in May, 2008, the parties asked the District Court to stay further proceedings while the parties entered into extensive settlement negotiations. After two unsuccessful settlement conferences, Judge Fitzwater ordered the parties and their insurers to a two-day mediation on March 31 and April 1, 2009. Retired U.S. District Judge John Martin served as mediator. Although settlement was not reached at mediation, negotiations, with the assistance of Judge Martin, have continued through early October, 2009. This settlement is a result of those negotiations.

#### **Terms of the Total Settlement**

The proposed settlement consists of a potential maximum of \$110,000,000.00 in settlement proceeds, to be distributed as set forth below and in return for which, the defendants, their employees, insurers, and anyone acting in concert with them, including any successor or predecessor corporation, and including any and all doctors, pharmacists, nurses and hospitals that distributed E-Ferol, will be fully and finally released.

Approximately \$20 million of the \$110 million in potential settlement proceeds will be subject to and is contingent upon the outcome of further litigation with two insurance companies, Federal Insurance, a wholly-owned subsidiary of The Chubb Corporation, whose liability could be as much as \$15 million, and Westchester Fire Insurance Company, (formerly International Insurance Co.) a subsidiary of ACE, Ltd., whose liability could be approximately \$2.5 million.

Both insurance carriers claim that their insurance policies do not cover the injuries caused by E-Ferol. A third insurance carrier, Mission Insurance, who is responsible for approximately \$2.5 million of the total settlement, is insolvent and has been in receivership for over two decades. Class Counsel will attempt to obtain from the receiver in the liquidation of Mission Insurance proceedings any available funds which are able to be recovered.

If further litigation is successful, Class Counsel will advise the class of the subsequent recovery, the distribution of that recovery, and request appropriate fees and expenses. Class Counsel make no recommendations or predictions about the success of this litigation other than it is their professional opinion that it is worthwhile for the E-Ferol Class to pursue this litigation and they are willing to continue to do so on a contingent basis.

The Class Members were notified in person and by published notice of the opportunity to opt-out of the E-Ferol Class Action, said notices having been mailed and published in July 2006. No E-Ferol recipient who chose to opt-out pursued an individual lawsuit. The terms of the proposed settlement do not permit Class Members to opt-out of the Settlement Class.

### **The Proposed Distribution of the \$90 Million Settlement Fund**

The settlement fund distribution among Class Members was determined based on the strength of the medical evidence linking E-Ferol to the illness of each infant. The medical experts retained by Class Counsel reviewed data that was compiled from the medical records of Class Members and from the medical questionnaires that were submitted by Class Members to determine whether the injury or death was caused by E-Ferol.

### **Medical Experts**

Class Counsel retained medical experts who have conducted a very thorough examination of the medical records received from the Class Members and medical questionnaires provided by

Class Members. The settlement fund distribution among Class Members was determined based on the strength of the medical evidence linking E-Ferol to the illness of each infant. The medical experts retained by Class Counsel based their opinions upon data that was compiled from the medical records that were obtained by the medical authorizations signed by Class Members and from medical questionnaires that were submitted by Class Members and evaluated each case to determine whether the injury or death or other medical condition was caused by E-Ferol.

Plaintiffs contend that only a handful of physicians in the world have dealt with E-Ferol. The key participants in the initial investigation of the collection of unusual symptoms, which came to be known as E-Ferol Syndrome, are those physicians who treated E-Ferol victims or participated in the investigation of symptoms observed in neonatal ICU units in the last two months of 1983 and early 1984. Those physicians have been retained by the E-Ferol Class as medical experts and include: Robert Brown, M.D.; Carl Bodenstein, M.D.; Kevin Bove, M.D.; William Balistreri, M.D.; William Martone, M.D.; and Dr. Charles F. Dreyer, M.D.

Robert Brown, M.D., who was at the time of his investigation of E-Ferol a pediatric pathologist at Fort Worth Children's Hospital, in Fort Worth, Texas, is currently a professor and Vice Chair and Harvey S. Rosenberg Chair of Pathology and Laboratory Medicine at the University of Texas Health Science Center, in Houston, Texas. Dr. Brown co-authored two publications on the subject of E-Ferol, including the study finding that Polysorbate 80, an emulsifier used to make vitamin E soluble in a water-based solution, was the cause of the E-Ferol Syndrome.

Carl Bodenstein, M.D., a neonatologist, who blew the whistle on E-Ferol, is a staff member of Sacred Heart Hospital, in Spokane, Washington. Dr. Bodenstein was also a medical

witness for the government in the Defendants' criminal trial in *U.S. v. Hiland*, and the co-author of three of the medical studies involving E-Ferol.

Kevin Bove, M.D., a pediatric pathologist at Cincinnati Children's Hospital, in Cincinnati, Ohio, conducted some of the early studies on pathology of E-Ferol and was the author of the study published in *Journal of American Medical Association* referenced above.

William Balistreri, M.D., a pediatrician at Cincinnati Children's Hospital, in Cincinnati, Ohio, also participated in the Bove article as an expert in the area of disease of the liver in neonates.

William Martone, M.D., former Head of the Epidemiology Department of the Center for Disease Control (CDC), was the Chief Epidemiologist dealing with hospitals and medical facilities in 1984. Dr. Martone was one of the government's witnesses in the federal prosecution of Defendants O'Neal and Retrac, Inc.

This group of physicians comprises the core group of physicians, who, as clinicians, dealt with E-Ferol victims in 1983-1984. They have specific knowledge, experience and expertise in the diagnosis of this disease. All have a continuing interest in a follow-up study of the surviving E-Ferol recipients to advance and continue the work they originally undertook while treating E-Ferol victims.

In addition, Class Counsel has also retained Charles F. Dreyer, M.D., a pediatric neurologist, currently an Associate Professor in Child Neurology, at the University of Texas Health Science Center in Houston, Texas, to examine the medical records and other data pertaining to neurological injury.

The above physicians, retained by the Class, have thoroughly examined the medical records, the medical questionnaires, and the peer review literature concerning E-Ferol and have,

within their own specialties and expertise, concurred in the placement of Class Members within the five categories listed below for purposes of distribution of the settlement fund.

### **Class Member Categories**

The E-Ferol Class Action proposes to distribute settlement proceeds based on strength of the liability case and the severity of the injury allegedly caused by E-Ferol. The Plaintiffs' medical experts categorize Class Members as follows:

**Category 1** consists of claimants whose infants died and the E-Ferol Class medical experts are of the opinion that E-Ferol was a substantial cause of the death of the infant. Category 1 claimants will receive an award of approximately \$2,001,594.20, less court-awarded attorneys' fees and expenses.

**Category 2** consists of claimants whose infants died and for whom the E-Ferol Class medical experts have determined that E-Ferol was a substantial contributing cause of the infant's death. Category 2 claimants will receive an award of approximately \$1,000,797.14, less court-awarded attorneys' fees and expenses.

**Category 3** consists of E-Ferol recipients who suffered brain dysfunction and/or cerebral palsy. The E-Ferol medical experts determined that E-Ferol was a substantial contributing cause of the brain injury of each of these infants. These infants were further evaluated based on their functional disability.

**Subcategory 3(a)** claimants, who are classified as severely disabled, will receive an award of approximately \$1,501,195.62, less court-awarded attorneys' fees and expenses.

**Subcategory 3(b)** claimants, who are classified as having a moderate degree of disability, will receive an award of approximately \$1,250,996.34, less court-awarded attorneys' fees and expenses.

**Subcategory 3(c)** claimants, who are classified as having a mild degree of disability, will receive an award of approximately \$1,000,789.68, less court-awarded attorneys' fees and expenses.

**Category 4** claimants are those claimants who have received E-Ferol, but have not sustained a permanent E-Ferol-related injury. Scientific studies have shown a link between early insult to the liver and latent liver or kidney disease, mainly cirrhosis and/or liver carcinoma. Thus, the E-Ferol medical experts recommend that each Subcategory 4 Class Member pursue a medical monitoring strategy to determine at the earliest possible stage any latent disease of the liver or kidney. Each member of Subcategory 4 will receive an award of approximately \$35,027.19, less court-awarded attorneys' fees and expenses. Subcategory 4 also includes the claims of parents or heirs of E-Ferol recipients who died from causes unrelated to E-Ferol and who will receive the same award, less court-awarded attorneys' fees and expenses.

**Category 5** is comprised of the 33 claimants whose claims were dismissed on statute of limitations or statute of repose grounds in the Court's May 22, 2008 Memorandum Opinion and Order. Since these claimants were not subject to a final judgment as a result of the interlocutory order of May 22, 2008, E-Ferol class representatives included them in the class and negotiated a settlement for them in which they would receive approximately 12% (11.8135418%) of the award that each Class Member would have received based on their medical category, had their case not been subject to the statute of limitations and/or repose defense. Category 5 claims are

further divided into Subcategories based on the Category or Subcategory under which the dismissed claim otherwise would fall.

**Subcategory 5(1)** are those class members whose infants died as a result of E-Ferol and would have been classified in Category 1 above, but for the defense of the statute of limitations and/or repose. Each of these claimants will receive an award of approximately \$236,647.45, less court-awarded attorneys' fees and expenses.

**Subcategory 5(2)** consists of those claimants whose infant died and E-Ferol was determined to be a contributing cause to the death such that they would have been classified in Category 2 above had they not been subject to the statute of limitations and/or repose. Each of these claimants will receive an award of approximately \$118,323.27, less court-awarded attorneys' fees and expenses.

**Subcategory 5(3c)** consists of a claimant who was classified as having a mild brain dysfunction and thus, would have been placed in Category 3(c). This claimant will receive an award of approximately \$118,323.27, less court-awarded attorneys' fees and expenses.

**Subcategory 5(4)** claimants are those medical monitoring claimants who would have been categorized as Category 4, but for the statute of limitations and/or repose defense. Subcategory 5.4 claimants will each receive an award of approximately \$4,141.50, less court-awarded attorneys' fees and expenses.

Any current Class Member who disagrees with the Class medical experts on any of these classifications, as well as any new potential Class Member seeking to be declared a Class Member, can follow the procedures set out in the Change of Category section of this Notice.

The category to which you have been assigned with the medical reason(s) for the assignment of each Class Member (E-Ferol recipient) has been sent to you with this notice on a separate sheet for purposes of privacy of the medical information contained therein.

### **Attorneys' Fee Request**

The settlement amounts set out above are subject to an award of attorneys' fees, expenses, and costs to be determined by Chief Judge Fitzwater at the Fairness Hearing. The E-Ferol Class is based on liability claims on common law causes of action, *i.e.*, negligence; negligent misrepresentation; and product liability.

Class counsel base their claim for attorneys' fees on the creation of a Common Benefit Fund. *See, Trustee v. Greenough*, 105 U.S. 527, 26 L.Ed. 1157 (1882); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980).

Class Counsel will request that the District Court award a fee of thirty percent (30%) of the approximately \$90 million Settlement Fund be distributed at this time, in addition to out-of-pocket expenses and costs, which include court costs, costs of notice, costs of locating and identifying class members, cost of obtaining and copying medical records, costs of reviewing and categorizing the medical data from the medical records and other sources, costs of review of the medical records and other data by the experts retained by the Class, expenses of Class Representatives Victoria Klein and Ashley Swadley, costs of administration, communication, and travel. The amount of court costs and expenses to date are approximately \$1.75 million. Class Counsel request expenses of \$75,000.00 each for Class Representatives Klein and

Swadley. In addition, Class Counsel requests an advance of \$300,000.00 as an administrative fund to cover the costs of administering the settlement fund.

The administration expense will be used to pay for expenses of the Administrator, travel and other expenses necessary to the distribution of the settlement fund. The administrative fund can be used to advance legal fees to local attorneys where representative Class Members have probate and trust matters necessary to the distribution of the settlement fund and are financially unable to pay the costs prior to distribution. All such advances will be reimbursed by the Class Member to the administrative fund when the distribution is made to the Class Member. At the conclusion of all litigation and subject to the approval of all expenditures from the administrative fund by the District Court all remaining funds in the administrative fund will be distributed to Class Members pro rata.

Class Counsel's request for reasonable attorneys' fee and out-of-pocket expenses incurred in pursuit of the litigation on behalf of the E-Ferol Class, is consistent with the Manual for Complex Litigation §§ 21.7 and 14.12 (4<sup>th</sup> ed. 2009). Class Counsel seek an award of attorneys' fees from the current settlement fund only. In the event other funds are recovered in the ensuing litigation over insurance coverage and pursuit of the insolvent Mission Insurance Co., Class Counsel will seek an award of attorneys' fees for work performed in that portion of the litigation.

There has been no discussion or any agreement between Plaintiffs' Class Counsel and Defendants' Counsel concerning attorneys' fees. The only provision with regard to attorneys' fees in the Settlement is that the settlement fund includes any and all attorneys' fees and expenses, including court costs.

The request for attorneys' fee is subject to approval by the District Court. Any Class member may object to any portion of the proposed settlement or the attorneys' fees and costs requested.

Class Counsel has agreed upon a distribution of attorneys' fees among counsel as follows:

Lead Counsel – Art Brender 45%

Class Counsel – Dwain Dent 40%

Class Counsel – Fred L. Streck, III 15%

Lead Class Counsel Art Brender and Class Counsel Dwain Dent will each request their respective expenses for out-of-pocket expenditures and costs each incurred subject to approval by the District Court.

### **Change of Category**

Should any Class Member disagree with their subcategorization as set out in the separate sheet enclosed with this notice and seek a change of subcategorization, that Class Member must submit to Lead Counsel for the Class, Art Brender, with a copy to Lead Counsel for the Defense, Barry Chasnoff, the following:

- 1) medical record or report to substantiate bodily injury or death;
- 2) medical record or report to substantiate the E-Ferol was a substantial factor or substantial contributing factor to the injury or death alleged; and
- 3) any additional information necessary to determine resubcategorization.

These materials must be forwarded to Class Counsel by U.S. mail or private carrier and be post-marked no later than December 30, 2009. Class Counsel will analyze and review the materials provided by that Class Member and determine to accept or reject the Class Member's

proposed resubcategorization. In the event Class Counsel and the Class Member seeking resubcategorization cannot agree on the resubcategorization, the Class Member may apply to the Court for an evaluation by an independent medical expert selected by the Court whose determination will be binding upon the Class Member and the parties. If the Class Member's application to the Court results in the resubcategorization sought by the Class Member, the cost of the independent medical expert will be paid out of the settlement funds. If the Class Member's application to the Court fails to result in the resubcategorization sought by the Class Member, then the costs of the independent medical examiner shall be borne by the Class Member out of the Class Member's recovery as a member of the Settlement Class.

#### **Additional Class Members**

This Proposed Settlement is intended to encompass known and any unknown E-Ferol recipients not currently identified as a Class Member. Class Members were identified by the hospital and/or found by other means by Class Counsel and once located, were sent a medical questionnaire and medical releases to enable Class Counsel to obtain their medical records at the expense of Class Counsel and evaluate the records to determine whether the proposed Class Member received E-Ferol. The medical questionnaire and authorizations were required to be returned by a deadline set out by the District Court. If the medical records indicated that the Class Member did not receive E-Ferol aqueous solution IV, then the potential Class Member was so notified and was not included as a Class Member. If the proposed Class Member failed to respond to the repeated requests by Class Counsel to return the medical questionnaire and releases as required by the District Court (or in the event of Class Members discovered after that deadline, by the March 15, 2008 deadline to designate Class Members), then such potential Class Members were not included in the list of Class Members. Any person not currently identified as

a Class Member (“proposed Class Member”) who claims that he or she is an E-Ferol recipient and seeks to make a claim in the E-Ferol Class Action, must submit no later than December 30, 2009 to Lead Counsel for the E-Ferol Class, Art Brender, and Lead Counsel for the Defense, Barry Chasnoff, in duplicate, the following information (collectively, “Proof of Claim”):

1. The Confidential Health Information Medical Questionnaire that is located on the E-Ferol Class Action website ([www.eferolclassaction.com](http://www.eferolclassaction.com)). If the E-Ferol recipient is alive, the potential Class Member must use Form A (non-death cases). If the E-Ferol recipient is deceased, the potential Class Member seeking to recover on behalf of the deceased E-Ferol recipient must use Form B (death cases).
2. Proof of E-Ferol administration between November 1, 1983 and April 30, 1984.
3. Medical records to substantiate bodily injury or death.
4. Medical records to substantiate E-Ferol was a substantial factor or substantial contributing factor for the injuries or death alleged; and
5. Any additional information deemed reasonable and necessary by Lead Class Counsel or Lead Counsel for the Defendants.

Class Counsel and Lead Class Counsel for the Defendants will analyze the Proofs of Claim and will determine whether the proposed Class Member should be included or excluded as a Class Member and if included, into which Category claimant should be placed. In the event Lead Class Counsel and Lead Counsel for the Defendants cannot agree on the determination as to a proposed Class Member, they each shall choose a qualified medical expert (each at their own expense) to review the information and determine by mutual agreement based on a reasonable degree of medical certainty, the inclusion and appropriate resubcategorization, if any, for any such proposed Class Member. In the event the two qualified medical experts so chosen

disagree, they shall jointly pick a third medical expert (the cost of which will be divided between the Settlement Class and the Defendants) whose determination will be final and binding upon the parties.

In the event the proposed Class Member disagrees with the determination by Class Counsel and Lead Counsel for the Defendants, that a proposed Class Member should not be accepted as a member of the Class (upon joining of the Class, a “New Class Member”) or Category into which the new Class Member is be assigned, the proposed Class Member (or new Class Member) may apply to the Court for an evaluation by an independent medical expert selected by the Court, whose determination and resubcategorization will be binding upon Class Counsel, the proposed Class Member (or new Class Member) and the Defendants. If the proposed Class Member’s or New Class Member’s application to the Court results in the proposed Class Member’s inclusion in the Settlement, the costs of the independent expert will be paid out the settlement proceeds. In all other circumstances, the cost of medical experts shall be taxed against the potential Class Member.

### **No Opt-Out**

The Class Members were notified in person and by published notice of the opportunity to opt-out of the E-Ferol Class Action, said notices having been mailed and published in July 2006. Subject to order of the District Court, no Class Member shall be permitted to opt-out of the Settlement Class.

### **Distribution of Settlement Funds and Proceeds**

The settlement fund and proceeds will not be distributed until thirty (30) days after the Settlement Agreement is final, all contingencies have been provided for, the Court has approved the Settlement following the Fairness Hearing, and no Class Member has appealed the Court’s

decision to approve the Settlement. Should any appeal proceed, the settlement fund and proceeds will not be distributed until thirty (30) days after all such appeals have become final. Each Class Member must execute and deliver a Release as provided below, releasing all those set forth in this Notice in order to receive any disbursement of the settlement proceeds.

### **Disbursement of Unpaid Funds**

Portions of the settlement proceeds that are not distributed pursuant to the terms of the Settlement Agreement and the Order of the Court following the Fairness Hearing, shall be distributed to qualifying Class Members who provided a Release, as set forth above, on a pro rata basis, subject to the approval of the District Court.

### **Adjustments to Distribution**

Class Members who are assigned to a different subcategorization (“reassigned Class Members”) and new Class Members assigned to a Category pursuant to the procedures outlined above shall be added to the claimants in that Category, without adjusting the total amount of distribution assigned to each Category, except that a reassigned Class Member’s allocation from the prior category should be added to the total of the new Category. Each Class Member’s share of that Category shall be adjusted pro rata according to the funds allocated for each Category.

In the event the Court allows any Class Members to opt-out, the opt-outs shall be considered to remain assigned to their respective subcategories for purposes of calculating an adjustment. For any permitted opt-out, that individual claimant’s settlement amount, along with the pro rata share of fees and expenses, will be subtracted from the settlement proceeds, and the Defendants need not pay that amount.

The Settlement Agreement will settle and resolve all claims, including all attorneys’ fees, expenses, cost of court, costs of notice, and cost of administration associated with this Class

Action. The Settlement includes all known or unknown claims, all issues, claims and disputes among the parties, whether or not alleged in this Class Action. This Settlement is intended to be complete and final. The Settlement will not be altered on behalf of Class Member or other Defendants in response to later developments, whether favorable or unfavorable. This Settlement is intended to encompass all known and unknown Class Members. After the Court has entered Final Judgment based on the final approval at the Fairness Hearing, no additional claim shall be allowed.

### **Release and Discharge**

Subject to the Order of this Court following the Fairness Hearing and upon the effective date of the Settlement and the deposit of the settlement proceeds by the Defendants with the settlement administrator, as set forth herein, the Class Representatives (including any class representative who shall represent each of the categories or subcategories provided herein) in their individual and representative capacities on behalf of the Class Members, and behalf of the Class Members' past, present, and future representatives, agents, assigns, trustees, beneficiaries, employees, heirs, executors, administrators, predecessors, successors in interest, and attorneys (the "Releasing Parties") and all other persons or entities in privity with any of the other Releasing Parties, hereby unconditionally and completely release and forever discharge the following (collectively "Released Parties"):

- a) All Defendants and their past, present, or future representatives, agents, assigns, employees, parents, subsidiaries, affiliates, predecessors, successors, insurers, attorneys, officers, and directors;
- b) All medical personnel, including, but not limited to, hospitals, doctors, nurses, pharmacists, technicians, or any other third-party health care provider liable for

any act or omission in connection with the manufacture, distribution and/or administration of E-Ferol; and

c) All persons or entities in privity with any of the Released Parties, from any and all past, present, or future claims, actions, causes of actions, demands, damages (including, but not limited to, compensatory, special, exemplary, punitive, incidental, consequential, economic and non-economic) suits, debts, penalties, accounts, attorneys' fees, costs, and other claims or demands whatsoever, in law or in equity, which the Releasing Parties ever have or now have, whether known or unknown, whether accrued or unaccrued from the beginning of time to the effective date of the Settlement and the Court's Order. This Release in no way claims or determines that any sums paid as part of this Settlement are for punitive or exemplary damages, which is specifically denied, despite the release by Class Members of any potential claim for punitive or exemplary damages.

Any participating Class Member, as a condition of the payment of the settlement proceeds, shall execute a Release releasing all Released Parties as set forth above.

#### **No Admission**

The parties agree, by negotiating the proposed settlement terms, the Defendants deny any and all liability. This agreement and the consideration recited herein may never be used as evidence of any liability or admission against the Defendants.

#### **No Assignment or Pledge**

No assignment or pledge or other attempt to attach settlement funds will be permitted or honored by the settlement administrator. Any attempt to attach, manage, or assign settlement funds will result in the forfeiture of all settlement funds to any persons attempting such action. No funds will be loaned or advanced except as set out in this Notice.

### **Qualified Settlement Fund/Taxes**

The parties agree that the settlement fund is intended to be, and shall be treated as being, a “qualified settlement fund” within the meaning of Treasury Regulation 1.468B-1. The Administrator shall be obligated to withhold from distribution out of the settlement fund any funds necessary to pay or reimburse any taxes or tax expenses, including the establishment of adequate reserves for any taxes or tax expenses, as well as any amounts that may be required to be withheld under Treasury Regulation 1.468B-2(1)(2).

It is the sole responsibility of the Class Members to pay taxes, plus any penalties and interest, on any amounts received pursuant to the Settlement that are construed to be income, and the Class Representatives, Class Counsel, Defendants, Defense Counsel and their insurers shall have no liability for such taxes, penalties or interest.

### **Governing Law**

A written settlement agreement will be entered into by and according to the laws of the State of Texas, without regard to any conflict of law principles and shall be enforced and performable in the State of Texas. Any dispute arising out of this agreement shall be adjudicated in the United States District Court for the Northern District of Texas, Wichita Falls Division.

### **The Fairness Hearing**

At the Fairness Hearing, you may appear in person or by written submission and state why the **Settlement** of this Class Action and determination of attorneys’ fees, expenses, and costs, should either be approved or not approved by the Court and whether final judgment dismissing certain parties to this Class Action with prejudice should not be entered.

**However, you will not be heard and no papers submitted by you or on your behalf will be considered by the Court at or in connection with such hearing unless on or before**

**the 30th day of December, 2009, you submit a written notice of intention to appear and file copies of any such papers and briefs opposing the Proposed Settlement to: (1) the Clerk of this Court, U.S. Courthouse, 1100 Commerce, Room 1525, Dallas, Texas 75242; (2) and to both Lead Class Counsel for the E-Ferol Class, Art Brender, c/o E-Ferol Class Action, P.O. Box 470727, Fort Worth, Texas 76147-2727; and (3) Lead Counsel for the Defendants, Barry Chasnoff, of Akin Gump Strauss Hauer & Feld, LLP, 300 Convent St., Suite 1600, San Antonio, Texas 78205.**

If, following the hearing, the Court approves the proposed Settlement, it will thereafter rule on the issue of attorneys' fees, expenses and costs and determine the manner in which the settlement funds are to be distributed to those entitled to share in the funds. You will be notified as to when to expect a distribution. If any person appeals from the determination of the District Court following the Fairness Hearing, no funds will be distributed until the appeal is concluded. An appeal can take a number of months and perhaps years to conclude.

This Settlement will result in a partial distribution of approximately \$90 million of the potential settlement fund of \$110 million. The remaining portion of the settlement is subject to further litigation and depending upon the outcome of that litigation, there may or may not be an additional distribution. If the continued litigation results in a subsequent distribution, you will be notified as to when to expect such a distribution, if any. The settlement fund, plus any accrued interest, after deductions for administering the settlement, attorneys' fees, expenses, and costs, will be distributed to those persons whose claims have been approved.

If it is necessary under the law of your state for a legal action to be brought in state court where you reside to determine legal heirs or statutory beneficiaries, Class Counsel will assist you

in obtaining legal representation necessary to distribute the settlement funds but the costs of these legal proceedings will be borne by you and will not be paid from the settlement fund.

In order to distribute settlement funds to class members who have sustained a brain injury, it may be necessary to establish a special needs trust in order to preserve a Class Member's eligibility to receive government assistance, such as Medicaid or SSI. The legal cost of setting up and administering the trust will be borne by the individual settlement distribution to such Class Member and not from the settlement fund in general.

Any settlement funds which, for any reason, are unable to be distributed after the passage of eighteen (18) months from the earliest date on which distributions may be made pursuant to the terms of the proposed settlement, will be dispensed pro rata to remaining Class Members, subject to approval by order of the District Court.

**IF YOU AGREE WITH THE PROPOSED SETTLEMENT, YOU DO NOT NEED TO TAKE ANY ACTION. YOU WILL BE CONTACTED BY CLASS COUNSEL IF THE SETTLEMENT IS APPROVED BY THE DISTRICT COURT FOLLOWING THE FAIRNESS HEARING. CLASS COUNSEL WILL MAKE APPROPRIATE ARRANGEMENTS TO DISTRIBUTE YOUR AWARD.**

#### **QUESTIONS CONCERNING SETTLEMENT**

**Any Class Member who has a question concerning the settlement should contact Class Counsel listed below by telephone, e-mail or facsimile.**

**DO NOT CONTACT THE COURT OR COURT CLERK WITH QUESTIONS ABOUT THE SETTLEMENT.**

All of the papers and documents filed with the Court during the E-Ferol Class Action may be viewed at the U.S. District Courthouse, 1000 Lamar, Suite 203, Wichita Falls, Texas 76301, during regular business hours. These documents may also be viewed on the federal court online system known as PACER. You can access this website at <http://pacer.psc.uscourts.gov>.

The E-Ferol Class Action has a website that contains the important documents in the Class Action, including a copy of this Notice. These documents may be accessed at: [www.eferolclassaction.com](http://www.eferolclassaction.com).

### **E-Ferol Class Counsel**

E-Ferol Class Counsel consists of the following attorneys:

Lead Counsel            Art Brender  
Law Offices of Art Brender  
600 Eighth Ave.  
Fort Worth, Texas 76104  
State Bar No. 02954500  
(817) 334-0171, telephone  
(817) 334-0274, telecopier  
(1-866) 329-0171, toll free  
email: [brenderlawfirm@artbrender.com](mailto:brenderlawfirm@artbrender.com)

Class Counsel            Dwain Dent  
State Bar No. 05760500  
  
Fred L. Streck, III  
State Bar No. 19374350  
  
The Dent Law Firm  
1120 Penn Street  
Fort Worth, Texas 76102  
(817) 332-2889, telephone  
(817) 332-5809, telecopier  
(1-800) 245-3368, toll free  
e-mail: [thedentlawfirm@cs.com](mailto:thedentlawfirm@cs.com)

**IF YOU BELIEVE THAT YOU MAY BE A MEMBER OF THIS CLASS, YOU MUST COMPLY WITH THE REQUIREMENTS AND DEADLINES IN THE SETTLEMENT AGREEMENT AS DESCRIBED IN THE NOTICE TO E-FEROL CLASS MEMBERS.**

**DO NOT CONTACT THE COURT OR COURT CLERK WITH QUESTIONS ABOUT THIS SETTLEMENT. QUESTIONS ARE TO BE ADDRESSED TO E-FEROL CLASS COUNSEL.**

**IF YOU HAVE BEEN NAMED AS A CLASS MEMBER AND ARE AGREEABLE WITH THE CATEGORY TO WHICH YOU HAVE BEEN ASSIGNED, YOU DO NOT HAVE TO TAKE ACTION IN ORDER TO RECEIVE YOUR AWARD FROM THE SETTLEMENT FUND.**

**YOU WILL BE CONTACTED WHEN DISBURSEMENT OF THE SETTLEMENT FUNDS BY CLASS COUNSEL AFTER APPROVAL OF THE SETTLEMENT BY THE U.S. DISTRICT COURT AND ALL APPELLATE DEADLINES HAVE PASSED.**

Signed on this the 13<sup>th</sup> day of October, 2009.

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Teena McNeely, Deputy in Charge  
UNITED STATES DISTRICT COURT  
for the Northern District of Texas  
1000 Lamar St., Room 203  
Wichita Falls, Texas 76301