

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE: PROTON-PUMP INHIBITOR
PRODUCTS LIABILITY LITIGATION
(No. II)

1:17-MD-2789 (CCC)(MF)
(MDL 2789)

Judge Claire C. Cecchi

This Document Relates to: ALL ACTIONS

CASE MANAGEMENT ORDER # 14

CASE MANAGEMENT ORDER NO. 14

**ORDER REGARDING MANAGEMENT OF TIMEKEEPING, COST
REIMBURSEMENT AND RELATED COMMON BENEFIT ISSUES**

I. Scope of this Order

This Order is entered to provide for the fair and equitable sharing among plaintiffs, and their counsel, of the burden of services performed and expenses incurred by attorneys acting for the common benefit of all plaintiffs in this complex litigation.

A. Governing Principles and the Common Benefit Doctrine

The governing principles are derived from the United States Supreme Court's common benefit doctrine, as established in *Trustees v. Greenough*, 105 U.S. 527 (1881); refined in, *inter alia*, *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1884); *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); and approved and implemented in the MDL context, in *inter alia*, *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig.*, 582 F.3d 524 (3d. Cir. 2009); *In re Benicar (Olmesartan) Prod. Liab. Litig.*, MDL No. 15-md-2606 (D.N.J. Aug. 15, 2017); *In re Invokana (Canagliflozin) Prod. Liab. Litig.*, MDL No. 16-md-02750 (D.N.J. Mar. 21, 2017); *In re Avandia Marketing, Sales Practices and Products Liability Litig.*, MDL No. 07-md-01871 (E.D. Pa. Oct. 19, 2012); *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1019-21 (5th Cir. 1977); and *In re*

MGM Grand Hotel Fire Litigation, 660 F.Supp. 522, 525-29 (D. Nev. 1987). Common benefit work product includes all work performed for the benefit of all plaintiffs, including pre-trial matters, discovery, trial preparation, a potential settlement process, and all other work that advances this litigation to conclusion. As set forth in Section V., below, no pre-determined or specific common benefit percentage(s) are being sought at this time to be held back for common benefit legal fees and common benefit expenses.

B. Application of this Order

This Order applies to all cases now pending, as well as to any case later filed in, transferred to, or removed to this Court and treated as part of the coordinated proceeding known as *In Re: Proton-Pump Inhibitor Products Liability Litigation (No. II)*, MDL 2789. This Order further applies to each attorney and law firm who represents a plaintiff with a case now pending in or later filed in, transferred to, or removed to this Court (for all such attorneys this Order shall apply to every case – filed or unfiled – in which they or their law firm have any fee interest); and to each attorney and law firm who represents a plaintiff with a case filed in a state court who benefits from common benefit work prepared in this litigation (for all such attorneys this Order shall apply to every case – filed or unfiled – in which they or their law firm have any fee interest).

II. Plaintiffs’ Counsel’s Time and Expense Submissions

The award of common benefit attorneys’ fees and cost reimbursements will be limited to “Participating Counsel” as defined herein. Furthermore, participating counsel shall only be eligible to receive common benefit attorneys’ fees and cost reimbursement if the time expended, costs incurred and activity in question were in adherence with the guidelines and standards sets forth within this Order regarding the submission and compensability of common benefit time and expenses

A. General Standards

1. Time and/or Expense Incurred for the Common Benefit - These Time and Expense Guidelines are intended for activities performed and expenses incurred by counsel that relate to matters common to all claimants in MDL 2789 (*See* Section III).
2. Appropriately Authorized and Approved by the Court – All time and expenses submitted must be incurred only for work authorized in advance by the PSC Executive Committee.
3. Timely Submitted – Counsel’s time and expense submissions must be timely submitted by the 15th day of each month to PPIcommonbenefit@uselaws.com. Each time and expense submission must include a report of counsel’s time and expense records for the preceding month in the attached format (*See* Exhibit A). The first submission is due by June 15, 2018 and should include all time and expenses incurred up through May 31, 2018. (*See* Section IV)
4. The failure to secure authority to incur common benefit time and expenses or maintain and timely provide such records or to provide a sufficient description of the activity will be grounds for denying the recovery of attorneys' fees or expenses in whole or in part.

III. Common Benefit Work

A. Authorization for Compensable Common Benefit Work

Authorized Common Benefit Work includes assignments made by an Executive Committee member. No time spent on developing or processing individual issues in any case for an individual client (claimant) will be considered or should be submitted as Common Benefit Work, nor will time spent on any unauthorized work, unless expressly approved by the Executive Committee as part of a bellwether process.

Examples of authorized and unauthorized work include but are not limited to:

1. Depositions: Participating Counsel may attend any deposition space permitting; however, if such counsel has not been designated as one of the authorized questioners or otherwise authorized to attend the deposition by the Executive Committee, your time and expenses shall not be considered common benefit work, but rather considered as attending on behalf of such counsel's individual clients;
2. Periodic MDL Conference Calls: These calls are held so that individual attorneys are kept up-to-date on the status of the litigation, and non PSC participation by listening to such calls is not common benefit work. Each attorney has an obligation to keep themselves informed about the litigation so that they can best represent their clients, and that is a reason to listen in on those calls. The attorneys designated by the Executive Committee to run those calls are working for the common benefit by keeping other lawyers informed and educated about the case, and their time will be considered for common benefit. Nothing in this paragraph shall be construed to prevent members of the PSC from submitting common benefit time for participation in PSC communications that are germane to all members of the PSC and are necessary to fulfill their PSC obligations;
3. Periodic Status Conferences: Regular status conferences are held so that the litigation continues to move forward and legal issues are resolved with the Court. Individual attorneys are free to attend any status conference held in open court in order to keep up-to-date on the status of the litigation and participation, but attending and listening to such conferences is not common benefit work. Each attorney has an obligation to keep themselves informed about the litigation so that they can best represent their clients. Mere

attendance at a status conference will not be considered a common benefit expense or common benefit time. The attorneys designated by the Executive Committee to address issues that will be raised at a given status conference or requested by the Executive Committee to be present at a status conference are working for the common benefit and their time will be considered for common benefit. Similarly, any attorney whose attendance at a status conference is specifically requested by the Judge in that case may submit their time to the Fee Committee for evaluation as common benefit time;

4. Committee Meetings or Calls: During committee phone calls or other meetings there is a presumption that only one participant per firm will qualify for common benefit time, unless otherwise authorized by the Executive Committee;
5. Identification and Work Up of Experts: Participating Counsel are encouraged to identify experts in consultation with the Executive Committee. If a Participating Counsel travels to and retains an expert without the knowledge and approval of the Executive Committee they understand that the MDL may not need or use that expert, and their time and expenses may not be eligible for common benefit expenses/work;
6. Attendance at Seminars: Attendance at a seminar does not qualify as common benefit work or a common benefit expense;
7. Document Review: Only document review specifically authorized by the Executive Committee and assigned to an attorney will be considered common benefit work. If an attorney elects to review documents that have not been assigned to that attorney by the Executive Committee, that review is not considered common benefit. Except in extraordinary circumstances,

approved in writing by the Executive Committee, only licensed attorneys may conduct common benefit document review.

8. Review of Pleadings and Orders: Each attorney has an obligation to keep themselves informed about the litigation so that they can best represent their clients, and review of pleadings and orders is part of that obligation. Only those attorneys designated by the Executive Committee to review or summarize those pleadings or Orders for the MDL are working for the common benefit and their time will be considered for common benefit. All other counsel are reviewing those pleadings and orders for their own benefit and the benefit of their own clients, and the review is not considered common benefit. Nothing in this paragraph shall be construed to prevent the Executive Committee and the PSC from submitting common benefit time for reviewing orders of the Court that are germane to all members of the PSC and are necessary for review to fulfill their committee obligations;
9. Emails: Time recorded for reviewing emails, and providing non-substantive responses, generally is not compensable unless germane to a specific task being performed by the receiving or sending attorney or party that is directly related to that email. Thus, for example, review of an email sent to dozens of attorneys to keep them informed on a matter on which they are not specifically working would not be compensable. Each attorney has an obligation to keep themselves informed about the litigation so that they can best represent their clients and that is a reason to review emails to a larger group which involves a matter on which the recipient is not directly and immediately working. If time submissions are heavy on email review and usage with little related

substantive work, that time may be heavily discounted or not compensated at all.

10. Review of Discovery Responses: Each attorney has an obligation to keep themselves informed about the litigation so that they can best represent their clients and that is a reason to review discovery responses served in this litigation. Only those attorneys designated by the Executive Committee to review and summarize those discovery responses for the MDL are working for the common benefit and their time will be considered for common benefit. All other counsel are reviewing those discovery responses for their own benefit and the benefit of their own clients, and the review is not considered common benefit;

11. Bellwether Trials: While the work-up of individual cases is *not* considered common benefit, in the event that a case is selected as part of an approved early preference or bellwether trial process in the MDL or participating state court proceedings, the time and expenses in trying the case (including work performed as part of the approved bellwether process) may be authorized by the Executive Committee and thus be considered for common benefit to the extent it complies with the other provisions of this Order or Participation Agreement.

IV. Time Keeping and Submission of Time and Expense Reports

A. Requirements

Plaintiffs' counsel who seek to recover Court-awarded common benefit attorneys' fees and expenses in connection with this litigation shall keep a daily contemporaneous record of their time and expenses, noting with specificity the amount of time, location, and particular activity (such as "conducted deposition of John Doe") along with confirmation that authority was

obtained to have undertaken that common benefit effort. Time entries that are not sufficiently detailed may not be considered for common benefit payments. All common benefit work time for each firm shall be maintained in a tenth-of- an-hour increment.

B. Submission

Counsel shall, by the 15th day of each month, submit to PPIcommonbenefit@uselaws.com, a report of their time and expense records for the preceding month in the attached format (*See* Exhibit A). Counsel shall also submit with his/her report of their time and expense records a brief summary (no more than 2 or 3 sentences) summarizing the contribution that each time keeper from that law firm made toward the common benefit and advancement of the litigation. The first submission is due June 15, 2018 and should include all time and expense incurred through May 31, 2018.

C. Verification

The forms detailing expenses shall be certified by a senior partner in each firm and/or the PSC member herself/himself attesting to the accuracy of the submissions. Attorneys shall keep receipts for all expenses. Credit card receipts are an appropriate form of verification so long as accompanied by a declaration from counsel that work was performed and paid for the common benefit.

V. Court Approval

Signatories to the Motion seeking this Order, and those counsel who subsequently desire to be considered for common benefit compensation and/or who simply agree to be bound by this Order and as a condition thereof agree to the terms and conditions herein (“Participating Counsel”) acknowledge and agree that the Court will have final, non-appealable authority regarding the award of common benefit fees, the allocation of those fees and awards for common benefit cost reimbursements in this matter. Participating Counsel have (or will have) agreed to and therefore will be bound by the Court’s determination on a future common benefit

percentage holdback, common benefit attorneys' fee awards, attorneys' fee allocations, and expense awards, and the Participating Counsel knowingly and expressly waive any right to appeal those decisions or the ability to assert the lack of enforceability of this Order or to otherwise challenge its adequacy.

The Executive Committee shall, at a later date, seek a specific common benefit percentage holdback for legal fees incurred on behalf of the common benefit and also seek a specific common benefit percentage holdback for reimbursement of expenses incurred for the common benefit. The Executive Committee shall submit and/or move the Court for an Order setting forth these specific percentages to be held back for common benefit legal fees and common benefit expenses at a later date; this application may include the creation of a Fee Committee which shall be appointed by the Court.

VI. Expense Limitations

A. Travel Limitations

Only reasonable expenses will be reimbursed. Except in extraordinary circumstances, all travel reimbursements are subject to the following limitations:

1. Airfare. For domestic flights that are less than three hours, only the price of a coach seat will be reimbursed. For longer domestic flights Business/First Class airfare will be permitted as a held cost by the incurring firm. For international flights Business/First Class Airfare will *only be* reimbursed as a held cost if prior written approval by co-lead counsel or their proxy approves same in writing. Use of a private aircraft will not be reimbursed. If Business/First Class airfare is used on domestic flights that are less than three hours of flying time, then the difference between the Business/First Class Airfare and the coach airfare must be shown on the travel reimbursement form, and only the coach fare will be reimbursed.
2. Hotel. Hotel room charges for the average available room rate of a business hotel, including the Hyatt, Hilton, Sheraton, Westin, and Marriott hotels, in the city in which the stay occurred will be reimbursed. Luxury hotels will not be fully reimbursed but will be reimbursed at the average available rate of a business hotel.
3. Meals. Meal expenses must be reasonable.

4. Cash Expenses. Miscellaneous cash expenses for which receipts generally are not available (tips, luggage handling, pay telephone, etc.) will be reimbursed up to \$30.00 per trip, as long as the expenses are properly itemized.
5. Rental Automobiles. Luxury automobile rentals will not be fully reimbursed, unless only luxury automobiles were available. If luxury automobiles are selected when non-luxury vehicles are available, then the difference between the luxury and non-luxury vehicle rates must be shown on the travel reimbursement form, and only the non-luxury rate may be claimed, unless such larger sized vehicle is needed to accommodate several counselors.
6. Mileage. Mileage claims must be documented by stating origination point, destination, total actual miles for each trip, and the rate per mile paid by the member's firm. The maximum allowable rate will be the maximum rate allowed by the IRS.

B. Non-Travel Limitations

1. Conference Call Telephone Charges: Common benefit conference call and must be documented as individual call expenses in order to be compensable. Copies of the telephone bills must be submitted with notations as to which charges relate to MDL-2789. Such charges are to be reported at actual cost.
2. Shipping, Overnight, Courier, and Delivery Charges: All claimed common benefit shipping, overnight, courier or delivery expenses must be documented with bills showing the sender, origin of the package, recipient, and destination of the package. Such charges are to be reported at actual cost.
3. Postage Charges. A contemporaneous postage log or other supporting documentation must be maintained and submitted for common benefit postage charges. Such charges are to be reported at actual cost.
4. In-House Photocopy. A contemporaneous photocopy log or other supporting documentation must be maintained and submitted. The maximum copy charge is 15¢ per page and only for copying during one calendar day that exceeds 500 pages, absent special circumstances. It is encouraged that larger copy jobs be outsourced and appropriate bills be provided.
5. Computerized Research – Lexis/Westlaw. Claims for Lexis or Westlaw, and other computerized legal research expenses should be in the exact amount charged the firm and appropriately allocated for these research services.

VII. Participation Agreement

Exhibit B, attached hereto and incorporated herein, is a voluntary Participation Agreement between: (1) the Plaintiffs' Steering Committee ("PSC") and other plaintiffs'

attorneys who perform common benefit work in connection with MDL 2789; and (2) plaintiffs' attorneys who elect to sign the Participation Agreement. The Participation Agreement is a private and cooperative agreement between plaintiffs' attorneys only; and not defendants or defendants' counsel. All plaintiffs' attorneys who currently represent or have cases pending in any state court and who want to become a Participating Counsel shall, within 60 days of this Order, execute the Participation Agreement. Any plaintiffs' attorney who does not yet have a PPI case filed in any federal or state court and who wants to become a Participating Counsel shall execute the Participation Agreement within 60 days of this Order. Failure to execute a Participation Agreement indicating that an attorney will be a Participating Counsel within the time frame set forth in this paragraph may result in higher percentages for common benefit assessment as a result of such later participation when that percentage is set by the Court in a later Case Management Order.

Participating Counsel shall be entitled to receive all the common benefit work product Performed and generated by the PSC and other Participating Counsel. Counsel who choose not to execute the Participation Agreement are not entitled to receive common benefit work product and may be subject to an increased assessment on all PPI cases in which they have a fee interest if they receive common benefit work product or otherwise benefit by the work performed by the PSC and other Participating Counsel.

IT IS SO ORDERED, this 8 day of May 2018.



CLAIRE C. CECCHI
United States District Judge