

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

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| IN RE: ORAL SODIUM PHOSPHATE | : | |
| SOLUTION-BASED PRODUCTS | : | |
| LIABILITY ACTION | : | Case No. 1:09-SP-80000 |
| | : | (MDL Docket No. 2066) |
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| THIS DOCUMENT RELATES TO | : | |
| ALL ACTIONS | : | JUDGE POLSTER |
| | : | |
| | : | <u>ORDER REGARDING</u> |
| | : | <u>COMMON BENEFIT</u> |
| | : | <u>FEES AND EXPENSES</u> |

On July 12, 2010, defendant Fleet and the Plaintiffs Executive Committee (“PEC”) entered into a global Master Settlement Agreement (“MSA”), which provides a fair and reasonable mechanism for settling all pending claims arising out of the ingestion of Fleet Phospho-Soda (“FPS”). The settlement mechanism documented in the MSA will serve to settle not only cases pending in this Multi-District Litigation (“MDL”), but also cases pending in state court, and also FPS claims that were never made the subject of formal litigation.

This Order is entered to provide for the fair and equitable sharing among settling claimants of the cost of special services performed and expenses incurred by attorneys acting for the administration of this MDL and also for the common benefit of all claimants in this complex litigation. This Court’s authority to so provide derives from the 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 (1885); *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 MGM Grand Hotel Fire Litigation*, 660 F. Supp. 522, 525-29 (D. Nev. 1987); *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1019-21 (5th Cir. 1977); and *In re Sulzer Hip Prosthesis and Knee Prosthesis Prods. Liab. Litig.*, 268 F.Supp.2d 907 (N.D. Ohio 2003). See also Manual for Complex Litig., Fourth §14.12 (F.J.C. 2004) (discussing “[t]he common-fund exception to the American Rule”).

Any disputes arising under this Order that cannot be resolved by agreement of Counsel will be resolved by this Court, in the exercise of its jurisdiction under the equitable principles of the common fund/common benefit doctrine. This Order supplements and amends the MDL Court’s earlier Order addressing the issue of Common Benefit fees and expenses. See docket no. 34 (“*First Common Benefit Order*”) (setting out initial guidelines, procedures, and protocols relating to common benefit fees and expenses).

The Court now **ORDERS** as follows:

A. Common Benefit Fund Escrow Account.

The PEC shall establish an interest-bearing escrow account, to be known as the Common Benefit Fund Escrow Account, to receive and disburse funds as provided in this Order. These funds will be held as funds subject to the direction of the Court and are hereinafter referred to as the “Common Benefit Fund.” No party or attorney has any individual right to any of these funds except to the extent of amounts directed to be disbursed to such person by Order of the Court. These funds

do not constitute the separate property of any party or attorney and are not subject to garnishment or attachment for the debts of any party or attorney, except when and as directed to be disbursed as provided by Court Order to a specific person. These limitations do not preclude a party or attorney from transferring, assigning, or creating a security interest in potential disbursements from the fund if permitted by applicable state laws and if subject to the conditions and contingencies of this Order.

B. Assessments for the Common Benefit Fund.

1. All Participating Claimants and Participating Lawyers¹ who have agreed to settle in accordance with the MSA are subject to an assessment as provided below.

2. In addition to any other fees or expenses for which a Participating Lawyer may be responsible, each Participating Lawyer who is subject to this Order is responsible for a “Judicial Assessment” equal to two percent (2%) of the total recovery payable to a Participating Claimant whom the Participating Lawyer represents, which assessment is payable into the Common Benefit Fund. This 2% Judicial Assessment is not an expense. It is assessed against the Participating Lawyer’s gross attorney’s fees.

3. In addition to any other fees or expenses for which a Participating Claimant is responsible, each Participating Claimant who is subject to this Order shall pay a two percent (2%) Judicial Assessment of the Participating Claimant’s recovery into the Common Benefit Fund. This 2% Judicial Assessment is not an expense. It is a judicial “tax” assessed against a Participating

¹ As used in this Order, the terms “Participating Claimants,” “Participating Lawyers” and “Applicable Insurers” have the same meanings as defined in the MSA.

Claimant's recovery.²

4. It is the obligation of Fleet and/or the Applicable Insurer to arrange for deposit of the appropriate sum representing these Judicial Assessments into the Common Benefit Fund Escrow Account before any payment is made to a Participating Claimant or Participating Attorney.

5. Fleet shall not file any Stipulations of Dismissal or Discontinuance of any Participating Claimant's claim in which any recovery is received, and which is subject to this Order, unless and until Fleet or the Applicable Insurer notifies the PEC (by email at fleet@climacolaw.com) that the Common Benefit assessment for such Participating Claimant and/or Participating Lawyer has been deposited into the Common Benefit Fund Escrow Account.

6. Regardless of whether Fleet and/or the Applicable Insurer deposits the appropriate sums into the Common Benefit Fund Escrow Account, it remains the obligation of the Participating Lawyer and Participating Claimant to pay these Judicial Assessments. Failure by the Participating Lawyer or Participating Claimant to remit any portion of their Common Benefit assessment, if Fleet and/or the Applicable Insurer has not done so, shall be subject to judicial sanction and penalty, including Orders of contempt and monetary sanction.

7. In addition to the Judicial Assessments discussed above, the MSA provides that Fleet will pay "\$6 Million into a separate interest bearing escrow account under supervision of the MDL Court as a separately negotiated sum for the payment of a portion of settlement administration

² As an example: if a Participating Claimant settles his claim pursuant to the MSA and receives \$600,000 in settlement compensation, the Participating Lawyer is responsible for \$12,000 (2% of \$600,000) as a Judicial Assessment payable into the Common Benefit Fund, and the Participating Claimant is also responsible for a \$12,000 Judicial Assessment payable into the Common Benefit Fund. If the Participating Lawyer is entitled to a 40% contingent fee, his final fee receipts would be \$228,000 ((40% x 600,000) - \$12,000).

expenses, costs and common benefit fees.” MSA at §4.4.2(b)(3). This amount shall be paid to the Common Benefit Fund Escrow Account.

C. Disbursements from the Common Benefit Fund.

1. Disbursements from the Common Benefit Fund Escrow Account may be made only upon Order of the Court or the Special Master, or such other mechanism as the Court may order. Payments from the Common Benefit Fund Escrow Account may be made to: (1) attorneys who provide services or incur expenses for the joint and common benefit of Participating Claimants and Participating Lawyers, in addition to the benefit of their own clients; and (2) persons approved by the PEC and the Court who provide services or incur expenses for the administration of the settlement process contemplated by the MSA (such as the Common Benefit Fund Escrow Account Agent, accountants, and so on). Attorneys eligible for common benefit fees and expenses are limited to members of the PEC and other attorneys called upon and designated by the PEC to assist in performing their responsibilities. All time and expenses are subject to proper and timely submission of contemporaneous records, as discussed further below.

2. Payments will be allowed only to entities for special services performed, and to reimburse for special expenses incurred, for the joint and common benefit of all Participating Claimants and/or Participating Lawyers.

3. Payment may, for example, be made to attorneys for services and expenses related to: the Special Master’s time and expenses; negotiating the Settlement Term Sheet and MSA; and conducting “due diligence” depositions. The Common Benefit Fund will not, however, be used to pay for services and expenses primarily related to a particular case, such as the deposition of a

treating physician, even if such activity results in some incidental and consequential benefit to other Participating Claimants or Participating Lawyers.

4. Payments will not exceed the fair value of the services performed or the reasonable amount of the expenses incurred, and, depending upon the amount of the fund, may be limited to a part of the value of such services and expenses.

5. The Common Benefit Fund Escrow Account Agent shall provide monthly statements to the PEC, Plaintiffs' Liaison Counsel, Defense Liaison Counsel, the Special Master, and the Court showing the aggregate of the monthly deposits, disbursements, interest earned, financial institution charges, if any, and current balance. Defense Liaison Counsel shall provide monthly notice to the PEC, the Special Master, and the Court: (1) listing the names of the claimants who have settled their claims; (2) confirming that the Judicial Assessments related to settled claims have been deposited into the Common Benefit Fund; and (3) stating the total amounts deposited into the Common Benefit Fund for the month and to-date. Defense Liaison Counsel shall not reveal details of any individual settlement agreement, individual settlement amounts, or individual amounts deposited into escrow; these figures are confidential and shall not be disclosed. On a monthly basis, Defense Liaison Counsel and the Common Benefit Fund Escrow Account Agent shall reconcile their statements of Judicial Assessments paid into and received by the Common Benefit Fund.

6. If the Common Benefit Fund exceeds the amount needed to make all payments as provided in this Order (including Court-approved administrative expenses, costs, and fees), the Court may order a refund to those who have contributed to the Common Benefit Fund. Any such refund will be made in proportion to the amount of the contributions.

D. Submission of Time and Expense.

1. Application.

Each attorney or law firm (collectively, “Applicant”) seeking an award of Common Benefit expenses or fees must present an application therefor. The application must include:

(a) Time and Expense Submission Sheets (discussed further, below).

(b) A list of the current hourly billing rates for each attorney and paraprofessional whose professional time is the subject of the Time Submission Sheet, from the inception of this litigation to the present. If an attorney or paraprofessional whose professional time is the subject of the Time Submission Sheet was temporarily employed for the sole or primary purpose of working on this case, the applicant shall so indicate.

(c) A statement of the total amount the Applicant: (1) is obligated or expects to pay to any other person as a portion of any fee (whether contingent or awarded by the Court or otherwise); or (2) expects to receive from any other person as a portion of any fee (whether contingent or awarded by the Court or otherwise).

(d) A statement of the total amount of all fee receipts that the Applicant has ever received or expects to receive (whether contingent or awarded by the Court or otherwise) in connection with FPS litigation, and information on whether and to what extent the Applicant has reduced or waived attorney’s fees or expenses.³

³ In connection with sections D.1.(c)&(d), the Applicant shall also submit to the Special Master, *ex parte* and under seal, a complete description of all arrangements or agreements the Applicant has with others regarding fee-sharing, contingent fees, and fee reductions.

2. Time and Expense Submission.

Reimbursement for costs and/or fees shall be in accordance with the following standards and procedures, which are to be followed by any Applicant seeking reimbursement of fees and/or expenses.

a. General Rules and Standards.

(1) All time and expenses submitted must be incurred only for work authorized by the PEC.

(2) Time and expense submissions shall be made using forms prepared by Plaintiff's Liaison Counsel, which forms shall be designed to comply with the requirements set out in this Order. The required forms will include monthly Time Submission Sheets and monthly Expense Submission Sheets.

(3) An applicant's monthly Time Submission Sheets and monthly Expense Submission Sheets must be submitted no later than 30 days following the close of the month that is the subject of the Submission Sheet. The first submission is due on September 1, 2010 and should include all time relative to common benefit work involving MDL 2066 from July 1, 2009 through July 31, 2010. Thereafter, Submission Sheets are due on the first day of the month following the close of the month that is the subject of the Submission Sheet (for example, Submission Sheets for October 1-31, 2010 are due December 1, 2010).

(4) The monthly Expense Submission Sheet shall be submitted with accompanying copies of supporting receipts, logs, or documentation. The monthly Time Submission Sheet shall be submitted with accompanying time records, discussed below.

b. Time Reporting.

(1) Only time spent on matters common to all Participating Claimants in MDL No. 2066 (“Common Benefit Work”) will be considered in determining fees. No time spent on developing or processing individual issues in any case for an individual Participating Claimant will be considered or should be submitted.

(2) All time must be accurately and contemporaneously maintained. All counsel shall keep a daily record of their time spent in connection with Common Benefit Work on this litigation, indicating with specificity the hours and particular activity.

(3) Time measurement for Common Benefit Work shall be maintained in at most quarter-of-an-hour increments, or smaller increments if the individual or firm regularly keeps time in smaller increments.

c. Expense Reporting.

(1) Unless otherwise addressed below, each expense claim must be properly documented by a receipt or some other form of proof of payment acceptable for ultimate presentation and approval by the Special Master or the Court. Copies of receipts shall be submitted on a monthly basis, together with the Expense Submission Sheet. Original receipts must be available for production upon request. Cash advances will not be considered for reimbursement without evidence of payment made (credit card statements are acceptable).

d. Expense Limitations.

Except in extraordinary circumstances, all expense reimbursements are subject to the

following limitations. Applicants should seek reimbursement for amounts only up to the limits set forth below.

(1) Air Travel. Air travel shall be reimbursed based upon what is reasonable and necessary. Reimbursement shall be based on the lowest available coach-class fare. Cost of upgrades shall be borne by counsel.

(2) Hotel. Hotel room charges will be reimbursed at reasonable costs, considering location and availability. Charges for movies and toiletries will not be reimbursed.

(3) Meals. Costs must be reasonable. A copy of a receipt or other original proof of payment must be submitted. Meals may not be charged unless necessitated by travel; charges for meals in one's home city, especially those solely with members of one's own firm, will not be reimbursed.

(4) Cash Expenses. Miscellaneous cash expenses for which receipts generally are not available (e.g., tips, luggage handling) will be reimbursed up to \$50.00 per trip, as long as the expenses are properly itemized.

(5) Taxi. Reasonable cost with applicable receipt.

(6) 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.

(7) Mileage. Reimbursement for automobile expenses will be on the basis of mileage traveled. Mileage claims must be documented by stating origination point, destination, total actual miles for each trip, and the rate per mile paid by the individual's firm. The maximum allowable rate

will be the then-current allowable rate set by the I.R.S.

(8) Long Distance. Long distance telephone expenses must be documented. Only actual, reasonable charges are reimbursable. Copies of the telephone bills must be submitted with notations as to which charges relate to MDL No. 2066.

(9) Shipping, Courier, and Delivery Services. All claimed expenses must be documented with bills showing the sender, origin of the package, recipient, and destination of the package.

(10) Postage Charges. A contemporaneous postage log or other supporting documentation must be maintained and submitted. Postage charges are to be reported at actual cost.

(11) Facsimile Charges. Contemporaneous records must be submitted showing faxes sent and received. The per-fax charge must be for actual cost and may not exceed \$1.00 per page. Charges for faxes are not reimbursable if email could have been used.

(12) Photocopies. A contemporaneous photocopy log or other supporting documentation must be maintained and submitted. Photocopy charges must be for actual cost and may not exceed \$0.15 per page.

(13) Secretarial and Clerical Overtime. An itemized description of the task and time spent must be submitted for secretarial and clerical overtime. All overtime must be approved by the PEC before submission.

(14) LEXIS/WestLaw. Claims for expenses relating to computerized legal research should be in the exact amount charged by the supplier (e.g., LEXIS or WestLaw) for these research services.

(15) Deposition Costs, Expert Witness Fees, and Exhibit Costs. Only fees and costs authorized beforehand by the PEC will be considered. No party will be reimbursed for obtaining

his or her own personal copy of a deposition transcript.

(16) Equipment Purchases. Purchases of equipment are not to be claimed, absent special circumstances. Laptop computers purchased for and utilized by the individual attorneys and their staff, even if used primarily for this case, are not reimbursable.

(17) Monetary Sanctions. No monetary sanction levied by any court on any attorney shall be reported as an expense.

(18) Actual Amounts. **In no event may an applicant seek reimbursement for a cost or expense that exceeds in amount the *actual* cost or expense.**

e. Time or Expense That Will Be Disallowed or Discounted.

(1) Any time or expense in which the hours of service or expenses are not properly documented.

(2) Any expense for which proper receipts or other proof of payment is not submitted.

(3) Any time or expense which was incurred in connection with the trial of individual cases or groups of cases or the case-specific preparation of those cases for trial, unless shown to have a direct common benefit. This does not mean that coordinated discovery will be disallowed.

(4) Any time where the submission does not provide hourly rates and/or descriptions of the professional status (i.e., partner, associate, paralegal, law clerk) of each person whose time is the subject of the submission.

(5) Any expenses or time where the submission does not provide cumulative totals for the reimbursable expenses or time claimed.

(6) Any time or expense which does not meet the requirements of this Order.

(7) Any time or expense which is not described in sufficient detail to determine the nature and purpose of the service or expense involved (entries such as “research,” “telephone call to counsel,” “conference with JB,” without further description, will be disallowed).

(8) Any time where the amount of “review” time is excessive as a whole, when judged in reference to the role which the attorney, or other timekeeper, had in the litigation.

(9) Any time or expense which is grossly excessive on its face, when considered as a whole in light of the role which the attorney, or other timekeeper, had in the litigation.

(10) Any time for which an attorney, or other timekeeper, has charged fees above a reasonable or customary hourly rate.

(11) Any time or expense associated with attendance or monitoring of any Court proceeding or any deposition or any other litigation-related event, if: (a) the attendance or monitoring of the submitting attorney at the proceeding or deposition or event is not truly and reasonably necessary (e.g., mere attendance at a deposition, without engaging in substantial, non-cumulative questioning or assistance); *or* (b) there are already two other attorneys from the submitting attorney’s law firm attending or monitoring the proceeding or deposition or event who are seeking common benefit reimbursement.

(12) Any time or expense associated with mere attendance or monitoring of any internal organizational meetings, or litigation committee meetings, or meetings that are not directed primarily at this litigation, unless shown to be truly and reasonably necessary.

(13) **In no event may an applicant seek reimbursement for a cost or expense that exceeds in amount the actual cost or expense.**

E. Miscellaneous Provisions.

1. Any intentional violation of the guidelines and procedures set out in this Order will be grounds for the Court to deny a request for payment of counsel fees or reimbursement of litigation expenses in whole or in part, as well as for such other sanctions and penalties as may be appropriate.

2. The only exceptions to the guidelines and procedures set out in this Order shall be as specifically approved by the Court or the Special Master.

3. Each attorney submitting a time or expense statement shall be considered as representing to the Court, under oath, that the time or expense submitted meets the criteria set forth herein.

4. Going forward, the PEC shall monitor all submissions of time and expenses to ensure that work being done for common benefit purposes is proper and reasonable.

5. The Court retains the right to request additional information as may be deemed necessary.

6. All Expense and Fee Applications, and the Court's final ruling on the Applications, shall be publicly filed.

7. If the parties believe any modifications to the protocols and procedures set out in this Order become necessary, the parties may recommend any changes to the Special Master and to the Court.

8. When making its determinations regarding the propriety and amount of common benefit awards, the Court intends to use the same factors and analytical approach set out in *In re Sulzer Hip Prosthesis and Knee Prosthesis Prods. Liab. Litig.*, 268 F.Supp.2d 907 (N.D. Ohio 2003), *affirmed*, 398 F.3d 778 (6th Cir. 2005), and follow-up opinions (including 2006 WL 3803420 (Dec. 26, 2006)).

IT IS SO ORDERED.

/s/ Dan Aaron Polster
DAN AARON POLSTER
UNITED STATES DISTRICT JUDGE

DATED: August 2, 2010