

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

**IN RE: BLUE CROSS BLUE SHIELD
ANTITRUST LITIGATION
(MDL No.: 2406)**

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Master File No.: 2:13-CV-20000-RDP

This document relates to all cases.

**ORDER REGARDING NON-WAIVER OF WORK PRODUCT DOCTRINE
PROTECTION AND ATTORNEY-CLIENT PRIVILEGE AS A RESULT OF THE
SUBMISSION OF PLAINTIFFS' COMMON BENEFIT TIME AND EXPENSE
RECORDS TO THE SPECIAL MASTER AND THE COURT**

With the Order dated May 31, 2013 (Doc. 80) (the "Billing Records Order"), this court required Plaintiffs' Common Benefit Counsel to submit to the Special Master on a monthly basis billing records providing time and expenses, together with reasonable backup, for prosecuting this matter on behalf of all allegedly likewise situated plaintiffs. The Billing Records Order also contemplated that the Special Master would provide this court under seal a brief synopsis of these submissions on a monthly basis.

It has come to this court's attention that there is some concern regarding the potential for the waiver of the work-product doctrine or the attorney-client privilege as a result of the disclosure of time and expense records to the Special Master and the court for their review under the Billing Records Order. With this Order, the court hereby makes clear that disclosure of such time and expense records to the Special Master for purposes of enabling him to carry out his appointed duties shall not operate as a waiver of any claim of work product doctrine protection or the attorney-client privilege. Likewise, the Special Master's submission of time and expense records summaries to the court under seal does not violate the work product doctrine or the attorney-client privilege.

1. It is settled law that a Special Master assumes the duties and obligations of a judicial officer when he or she accepts appointment by the court. *Hoffman v. EMI Resorts, Inc.*, 689 F. Supp. 2d 1361, 1374 (S.D. Fla. 2010) (citing *In re Gilbert*, 276 U.S. 6, 9, 48 S. Ct. 210, 72 L. Ed. 441 (1928)). Furthermore, courts have also determined that, as the Special Master is an arm of the court, “disclosure...to the Special Master shall not waive any claim of confidentiality...” *Denney v. Jenkins & Gilchrist*, No. 03-5460, 2004 WL 1197251, at *10 (S.D. N.Y. May 19, 2004).

2. Consistent with these principles, the January 9, 2013 Order Appointing the Special Master (Doc. 7) (the “Order Appointing the Special Master”) in this matter provided that “the actions of the Special Master...in carrying out the duties established by this and any subsequent orders will constitute judicial actions of this court...,” and further stated that the Special Master is “explicitly allowed to (and is expected to) consult with such persons as he may choose in carrying out his duties.” Order Appointing the Special Master, p. 2.

3. The Order Appointing the Special Master provided that the Special Master’s duties included the “[d]evelopment and maintenance of a uniform system of Plaintiffs’ counsel time keeping and expense recordation,” and “[e]stablishment and maintenance of a Plaintiffs’ counsel common litigation fund, and the provision of accounting and related services.” Order Appointing the Special Master, ¶¶ 3-4.

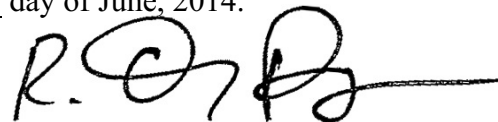
4. The Special Master’s duties were further spelled out in the Billing Records Order, which provided that the Special Master was to, among other tasks, “assist and provide accounting services to the Plaintiffs’ Liaison Counsel, the track leadership, and the court in MDL 2406.” Billing Records Order, ¶ I(C.). In so doing, the Special Master is to compile and submit to the court reports concerning both the time and expenses for the various Plaintiffs’ counsel firms.

Therefore, according to the terms of the Orders appointing the Special Master and delineating his duties, the Special Master necessarily must be given access to the time and expense records of the Plaintiffs' attorneys. Denial of access to those materials would prevent the Special Master from performing a key task for which he was specifically appointed to perform.

To facilitate the Special Master's performance of his duties, with this Order the court hereby makes clear that the disclosure of time and expense records to the Special Master, as required by the Order Appointing the Special Master and the Billing Records Order, shall in no way constitute a waiver of any claim of work product doctrine protection or the attorney-client privilege with respect to the materials disclosed to the Special Master. Further, the Special Master's submission of time and expense records summaries to the court under seal does not violate the work-product doctrine or the attorney-client privilege.

The court reserves the power to modify the terms of this Order.

DONE and ORDERED this 10th day of June, 2014.

A handwritten signature in black ink, appearing to read 'R. David Proctor', written over a horizontal line.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE