

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

**In re Ortho Evra Products
Liability Litigation**

MDL Docket No. 1742

N.D. Ohio Case No. 1:06-40000

**This Document Applies to:

ALL CASES**

**MEMORANDUM IN SUPPORT OF
PSC's MOTION FOR REIMBURSEMENT OF
COMMON BENEFIT EXPENSES**

I. INTRODUCTION

The Plaintiffs' Steering Committee ("PSC") for "post label" cases respectfully submits this Memorandum in Support of the PSC's Fourth Motion for Reimbursement of Common Benefit Expenses. The "post-label" PSC, created pursuant to Court Order on July 23, 2009, requests that this Honorable Court approve reimbursement of common benefit expenses incurred in the preparation of the "post-label" cases. These expenses are new expenses that have not been previously reimbursed by the Court. This submission includes expenses for expert witnesses and court reporting fees paid by a common fund created by the PSC members, as well as "held expenses" for travel and internal costs incurred by individual firms during preparation of the post label cases.

II. BACKGROUND

A. Past Reimbursement of Common Benefit Expenses.

Second Amended Case Management Order #9 ("CMO 9") (Doc. No. 50) was entered on September 19, 2006 to "provide for the fair and equitable sharing among plaintiffs of the costs of services performed and expenses incurred by attorneys acting

for MDL administration and common benefit of all plaintiffs in this complex litigation.” Under CMO 9, the Court may authorize reimbursement of expenses and attorneys’ fees from the common benefit fund to attorneys who provide services or incur expenses for the joint and common benefit of all plaintiffs.

The Court has approved reimbursement of common benefit expenses on three occasions. The Court first approved reimbursement of expenses in an amount of \$522,959.56 on May 7, 2008. (Doc. No. 282). The PSC’s second request for reimbursement of expenses was approved May 22, 2009 in the amount of \$811,444.21. (Doc. No. 370). Most recently, the Court approved common benefit expenses in the amount of \$43,238.20 on April 22, 2010. (Doc. No. 441.) All of these expenses were approved to reimburse members of the PSC and other authorized MDL plaintiffs’ counsel who incurred expenses performing common benefit functions in furtherance of the pre-label issues in this litigation.

On July 23, 2009, after the majority of the pre-label cases had been resolved, the Court restructured the PSC for the specific purpose of pursuing post label issues in the MDL. See CMO No. 38 “Appointment of New Counsel to the Plaintiffs’ Leadership Committees” (Doc. No. 376). The Court also increased the MDL assessment for post-label cases to 6%. See “Order Regarding MDL Common Benefit Assessment” (Doc. No. 389). The PSC now seeks on behalf of the PSC and individual common benefit Plaintiffs’ counsel reimbursement of expenses incurred during the post-label phase of this litigation. The PSC is informed that sufficient funds are on deposit to reimburse Plaintiffs’ counsel fully for the expenses submitted herein.

B. The PSC's and MDL Plaintiffs' Counsel's Fourth Request for Reimbursement of Common Benefit Expenses

The PSC respectfully requests that this Court approve reimbursement of additional common benefit expenses incurred by the PSC Fund, members of the PSC, and individual MDL Plaintiffs' counsel in the amount totaling \$253,645.20. (See Exhibit A.) This includes expenses that were incurred by the PSC Fund for expert fees and post-label witness deposition costs. (Ex. B.) The remaining expenses were incurred by members of the PSC and individual MDL Plaintiffs' counsel.¹ (Ex. C.) These expenses were incurred for the common benefit of all post-label plaintiffs, including travel and hotel expenses, expert witness fees, court reporting costs, expenses for telephone conferences, postage, and mileage, and other such items. These expenses are clearly reasonable, were necessary, and are appropriate in that all of the expenses were incurred for the common benefit of MDL plaintiffs and the ultimate resolution of post-label cases.

Substantial expenses were incurred in three areas in particular: (1) discovery efforts for bellwether post-label cases, (2) working with experts to prepare expert reports on post-label issues, and (3) taking additional depositions of certain defense witnesses on post-label issues.

Specifically, on July 24, 2009 the Court ordered that the parties designate eight post-label cases to serve as potential bellwether cases in this action. (Doc. No. 377.) The Order further instructed that fact discovery was to be completed by April 30, 2010 in order to narrow the bellwether cases down to two cases for bellwether trials. During the

¹ A Common Benefit Expense summary submitted on behalf of the PSC Fund and the Common Benefit Expense summaries submitted by of each individual MDL law firm are being provided directly to the Court under separate cover.

course of the bellwether discovery, members of the PSC traveled all over the country to cover plaintiff depositions and prescribing doctor depositions. In some cases, the plaintiff had more than one prescribing doctor and/or certified nurse practitioner who was deposed. Discovery in the bellwether cases occurred during the time period of December of 2009 through March of 2010. Significant expenses were incurred by members of the PSC conducting discovery in, and preparing, the post-label bellwether cases for trial. The law firms Burg Simpson Eldredge Hersh & Jardine, P.C., Douglas & London, P.C., and The Howard Nations Firm were the PSC firms who prepared bellwether cases.

Secondly, on December 9, 2009 the Court entered Case Management Order No. 39 setting deadlines for final selection of bellwether cases for trial, expert report and discovery deadlines, and *Daubert* hearings. (Doc. No. 398.) The Court set a deadline of February 19, 2010 for service of Plaintiffs' expert reports. Therefore, members of the PSC worked diligently with their several experts from December, 2009 through February, 2010 to produce supplemental expert reports that focused specifically on the post-label issues. Plaintiffs were also preparing to move forward first with *Daubert* hearings and then trial in the bellwether cases. Significant expenses were incurred for the common benefit of all plaintiffs in the MDL while developing the post-label supplemental reports. The law firms that worked with experts to prepare their supplemental reports include Burg Simpson Eldredge Hersh & Jardine, P.C., Douglas & London, P.C., Parker Waichman Alonso, LLC, and Lief Cabraser Heimann & Bernstein, LLP.

Finally, as early as the spring of 2009, then throughout the fall and winter of 2009-2010, Plaintiffs undertook the task of taking additional depositions of defense witnesses in preparation of the post-label cases. Specifically, attorney Janet Abaray of Burg Simpson Eldredge Hersh & Jardine, P.C. took the deposition of Dr. Joann Waldstreicher in October of 2009, Dr. Donald Heald in January of 2010, and Dr. Andrew Friedman and Dr. Katherine LaGuardia in March of 2010. Ms. Abaray specifically focused on the label changes, new studies, and other documents relevant to post-label issues. Attorneys Wendy Fleishman and Deborah O'Neil, working through the coordinated proceedings in New Jersey, deposed several corporate representatives in regard to post label issues. This included depositions of corporation representatives on label changes, regulatory contacts, manufacturing, adverse events, epidemiology and other topics.

Through the efforts of the members of the PSC and the common benefit Plaintiff firms described herein, the PSC was able to prepare the post-label issues and place the Plaintiffs in a position to resolve their post-label cases through settlement or trial. The law firms set forth in Exhibit A are the firms who participated in these post-label efforts and have submitted requests for reimbursement of common benefit funds with supporting documentation. The requested amounts for reimbursement have been audited and approved by the PSC.²

For the reasons stated herein, the PSC recommends reimbursement of these expenses.

² The specific amounts approved by the PSC are set forth in Ex. A, submitted to the Court under separate cover.

III. LEGAL ARGUMENT

The legal authority under which this Court may enter an Order for reimbursement of common benefit expenses has been fully briefed in prior submissions to the Court. In sum, an attorney who creates a common fund for the benefit of a class or group is entitled to receive reimbursement of reasonable litigation expenses from that fund. *In re Orthopedic Bone Screw Products Liability Litig.*, 2000 U.S. Dist. LEXIS 15980 at *39 (E.D. Pa., Oct. 23, 2000), *citing Lachance v. Harrington*, 965 F. Supp. 630, 646 (E.D. Pa. 1997); *Yong Soon Oh v. AT&T*, 225 F.R.D. 142, 154 (D.N.J., 2004). Subject to relevance and reasonableness in amount, reimbursable common benefit expenses that have been awarded include: (1) witness fees; (2) expert or specialist fees; (3) special master; (4) transcripts of hearings and depositions; (5) copying charges; (6) travel; (7) long-distance and conference telephone charges; (8) postage; (9) delivery services; (10) computerized legal research; and (11) settlement administrative costs. See, *Acosta v. Master Maintenance*, 192 F. Supp. 2d 577 (M.D. La. 2001); *New England Health Care Employees Pension Fund v. Fruit of the Loom*, 234 F.R.D. 627, 634-35 (W.D.K.Y., 2006); *Yong Soon On v. AT&T*, 225 F.R.D. at 154.

In the present case, members of the PSC and other common benefit plaintiffs counsel have worked hard to prepare the post-label issues and have incurred substantial costs in the process. All of the costs submitted herein are reasonable and were necessary to advance the litigation to the point of near conclusion. These costs have been incurred for the common benefit of all plaintiffs with post-label cases remaining in this litigation and therefore should be reimbursed from the post-label common benefit fund.

IV. CONCLUSION

For the reasons stated herein, the PSC respectfully requests that the Court approve reimbursement of common benefit expenses in the amount of \$253,645.20 and that the expenses be awarded as described herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically under seal on this 28th day of June, 2010. All counsel of record will be notified of this filing through the Court's electronic filing system.

/s/ Janet G. Abaray