

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In Re: LEVAQUIN PRODUCTS
LIABILITY LITIGATION

MDL No. 08-1943 (JRT)

This Document Relates to:

ALL CASES

**SECOND AMENDED PRETRIAL
ORDER #3 ON PLAINTIFFS'
COMMON EXPENSE FUND FOR
REIMBURSEMENT OF COMMON
BENEFIT COSTS ONLY**

This Order is entered to provide for the fair and equitable sharing among Plaintiffs of the cost of expenses incurred by attorneys acting for MDL and the New Jersey Levaquin Litigation administration and common benefit of all plaintiffs in this complex litigation. This Court's authority derives from the Supreme Court's common benefit doctrine, as established in *Trustees v. Greenough*, 105U.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). Any disputes arising under this Order, which cannot be resolved by agreement of Counsel, will be resolved by both Courts, in the exercise of their jurisdiction under the equitable principles of the common fund/common benefit doctrine.

The Court Orders as follows:

A. Common Benefit Fund to be Established

Plaintiffs' MDL Liaison Counsel is directed to establish an interest-bearing account at BMO Harris Bank, Minneapolis, Minnesota, (formerly known as M & I Bank) to receive and disburse funds as provided in this Order. These funds will be held as funds subject to the direction of the Courts and are hereinafter referred to as the "common benefit expense 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 Courts. 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. Plaintiffs' MDL Liaison Counsel shall only disburse from this fund upon express order of both Courts. Notwithstanding the above, BMO Harris Bank N.A. may act on the instructions of Plaintiff's MDL Liaison Counsel with respect to the account and shall have no responsibility to determine whether such instructions are in accordance with this Order.

1. Assessments for the Common Benefit Fund.

a. All plaintiffs and their attorneys over whom the MDL Court and the New Jersey Court have jurisdiction who either agree or have agreed to settle, compromise, dismiss, or reduce the amount of a claim or, with or without trial, recover a judgment for monetary damages or other monetary relief, including but not limited to compensatory and punitive damages, with respect to any claims of tendon rupture, tendinitis or

tendinopathy caused by the drug Levaquin are subject to an assessment of the total recovery as provided herein.

b. The amount of such assessment shall be a total of 9.5% of the gross settlement which shall all be allocated to reimbursement of the Common Costs incurred for the common benefit prosecution of this litigation.

c. Defendants are directed to withhold the amount of this assessment from any amounts paid to plaintiffs and their counsel, and to pay the assessment directly into the common cost fund as a credit against the settlement or judgment. If, for any reason, the assessment is not or has not been so withheld, the plaintiff and his counsel are jointly and severally responsible for paying the assessment into the common benefit fund promptly.

d. Plaintiff in any case subject to the assessment described herein and who objects to this Court's jurisdiction to assess such case may, by motion, raise such objection within 30 days after this Order has been filed by the Court in which their respective case at issue has been filed.

e. No orders of dismissal of any plaintiff's claim in which any recovery is received, and which is subject to this Order, shall be filed unless accompanied by a certificate of plaintiff's and defendants' counsel that the assessment has been withheld and deposited into the common cost fund.

f. This obligation attaches to cases, claims or attorneys within the full scope and extent of the MDL Court's and the New Jersey Court's jurisdiction. This Order shall remain in full force and effect, and each person subject to this Order shall continue to be subject to the jurisdiction of the appropriate Court(s), for the purposes of this Order, in

perpetuity, and the Court shall not be divested of jurisdiction of any person or of the subject matter of this Order by the occurrence or conclusion of this case, or by the filing of a notice of appeal, or by any other pleading which would have the effect of divesting either Court of jurisdiction of this matter.

g. Before defendants make payment on any claim of tendon disorder resulting from Levaquin, regardless of where that claim is venued, and regardless of whether that claim is subject to a lawsuit, Defendant shall notify the designees of the PSC, a designee of New Jersey, and both the MDL Court and the New Jersey Court of the proposed payment of that claim.

2. Disbursements from Common Benefit Fund.

a. Upon order of both Courts, payments may be made from the fund to reimburse costs to attorneys who incurred expenses for the joint and common benefit of all Plaintiffs. All expenses are subject to proper and timely submission of contemporaneous records certified to have been timely received.

b. Payments will be allowed only to reimburse for expenses incurred for the joint and common benefit of all plaintiffs in the MDL and in New Jersey.

c. Payment may, for example, be made for expenses related to the obtaining and payment for hard copies of computerized images of documents for the defendants; to transcripts and other costs incurred in conducting depositions used for the common benefit or for bellwether trials; and to activities connected with the coordination of federal and state litigation. The 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 plaintiffs, except for bellwether trial cases.

d. Payments will not exceed 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 expenses.

e. No amounts will be disbursed without review and approval by the Courts or such other mechanism as both Courts may order, including but not limited to audit by a neutral third party to be chosen by the Cost Committee described below.

f. Defense Counsel shall provide at least quarterly notice to the Courts or its designee of the names and docket numbers of the cases for which it has made an assessment. Details of any individual settlement agreement, individual settlement amount and individual amounts deposited into escrow shall be confidential and shall not be disclosed to the PSC or New Jersey counsel. However, monthly statements from the escrow agent shall be provided to Plaintiffs' Co-Lead Counsel, designated New Jersey counsel, Defense Liaison Counsel, the Courts, and any Courts' designee showing only the aggregate of the monthly deposits, disbursements, interest earned, financial institution charges, if any, and current balance.

g. Payment of costs shall be made in the following order:

i. payment of any outstanding unpaid bill to any third party vendor approved for payment under the terms of this Order;

ii. Reimbursement of Shared Costs approved under the terms of this Order;

iii. Reimbursement of Held Costs approved under the terms of this Order.

h. No payments shall be made for common benefit time, e.g. for any attorneys' fees whatsoever and/or fees that may have been incurred for legal services of any lawyer or law firm. Payments to trial counsel, attorneys' time of any type or time expended in (or for) the trial of any bellwether case may not be considered a common benefit expense cost incurred in the case.

B. Plaintiffs' Common Cost Fund and Submission of Expenses.

1. Plaintiffs' Counsel's Expense Submissions – General Rules and Standards.

The following standards and procedures are to be utilized by any counsel who will seek expense reimbursement for costs.

(a) All expenses submitted must be incurred only for work authorized by Co-Lead Counsel and/or the PSC in the MDL and/or incurred for work authorized by former Co-Liaison Counsel in New Jersey. Expenses incurred prior to the formation of the MDL shall be considered to the extent they contributed to successful resolution of common liability, causation or damages issues.

(b) These Expense Guidelines are intended for all expenses incurred by counsel that relate to matters common to all claimants in MDL No. 1943 and the New Jersey Levaquin litigation.

(c) Expense submissions must be made on the forms prepared by the PSC and New Jersey counsel (Exhibits C-E hereto) and pursuant to the protocols set forth in this Order and submitted to the independent auditor described above.

(d) Each attorney submitting an expense submission shall be considered as representing to the Court, under oath, that the expense submitted meets the criteria set forth herein.

2. Expense Reporting: Rules, Shared and Held Costs and Assessments.

a. Receipts. 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 Court. Copies of receipts need to be submitted on a monthly basis. Originals must be available for production upon request. Cash advances will not be considered for reimbursement without evidence of payment made with the case.

b. Shared Costs.

i. Shared Costs are costs incurred for the common benefit of the MDL and the New Jersey litigation as a whole. No client-related costs can be considered as Shared Costs, except for bellwether trials. All costs of a substantial nature that meet these requirements and fall under the following categories shall be considered Shared Costs and qualify to be submitted and paid. Shared Costs include:

- (a) Court filing and service costs;
- (b) Deposition and court reporter costs;
- (c) Document Depository: creation, operation, staffing, equipment and administration;
- (d) Plaintiffs' Liaison or Lead Counsel administrative matters, e.g. bank or financial institution charges, expenses for equipment, technology, courier services, telecopier, electronic services, photocopy and printing, etc.);

- (e) Accounting fees;
- (f) Expert witness and consultant fees and expenses;
- (g) Printing, copying, coding, scanning (out of house or extraordinary firm cost);
- (h) Research by outside third party vendors/consultants/attorneys;
- (i) Common witness expenses including travel;
- (j) Translation costs; and,
- (k) Investigative service.

ii. Request for payments for any matters described must include sufficient information to allow the auditor to account properly for costs and to provide adequate detail to the Court. All requests shall be subject to review and approval by the auditor.

c. Held Costs.

i. Held Costs are costs incurred for the global benefit of the MDL and the New Jersey Levaquin litigation. Held costs are those that do not fall into the above Shared Costs categories but are incurred for the benefit of all plaintiffs in general. No specific client related costs can be considered as Held Costs, except for bellwether trials. All costs of a substantial nature that meet these requirements and fall under the following categories shall be considered Held Costs and qualify to be submitted for consideration by the PSC and New Jersey counsel and the Courts for future reimbursement.

ii. Held Cost records shall be submitted pursuant to the protocols established above, and, as with Shared Costs, request for payments for any matters described must include sufficient information to allow the auditor to account properly for costs and to

provide adequate detail to the Courts. All requests shall be subject to review and approval by the auditor.

d. Travel Expense Limitations. Except in extraordinary circumstances, all travel reimbursements are subject to the following limitations:

i. Airfare. Only the price of a coach seat for a reasonable itinerary will be reimbursed.

ii. Hotel. Hotel room charges will be reimbursed up to the greater of (a) \$300 per night excluding taxes or surcharges, or (b) the average available room rate of the Hyatt, Hilton, and Marriott hotels in that city. Charges for associated expenses in connection with the stay, e.g., laundry, toiletries, movies, etc., in excess of \$15 will not be reimbursed.

iii. Meals. Meal expenses must be reasonable.

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

v. 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.

vi. 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.

e. **Non-Travel Limitations.** The following apply:

i. **Shipping, Courier, and Delivery Charges:** All claimed expenses must be documented with bills showing the sender, origin of the package, recipient, and destination of the package.

ii. **Postage Charges:** A contemporaneous postage log or other supporting documentation must be maintained and submitted. Postage charges are to be reported at actual cost.

iii. **In-House Photocopy:** A contemporaneous photocopy log or other supporting documentation must be maintained and submitted. The maximum copy charge is 10¢ per page.

iv. **Computerized Research – Lexis/Westlaw:** Claims for Lexis, Westlaw, and other computerized legal research expenses should be in the exact amount charged to the firm for these research services.

4. Monitoring Time and Expenses.

All expenses shall be submitted to a Cost Reimbursement Committee, composed of four lawyers from the MDL (Charles Zimmerman, Lewis Saul, Bob Binstock, and Ronald Goldser) and four lawyers from New Jersey (Michael London, Richard Meadow, Hunter Shkolnik, and Matthew McCauley). The Committee shall review all submissions in accord with the principles set forth in this Order. If a majority of the Committee approves of the proposed reimbursement, such proposal shall be submitted to the Courts as described herein. If a majority of the Committee does not approve of the proposed reimbursement, the expense shall be submitted to an outside auditor, appointed jointly by

the Courts, who shall recommend an appropriate resolution to the Courts. The costs for the auditor shall be borne as a Common Benefit expense to be paid by the Common Benefit Fund created herein, but shall not exceed \$15,000 without approval from the Courts.

Any funds in excess of that specifically needed to pay or reimburse Common Costs and Expenses as defined herein shall be returned to clients pro rata.

This Order shall not have any effect unless and until it is entered by both Courts.

DATED: April 23, 2013
at Minneapolis, Minnesota.

s/John R. Tunheim
JOHN R. TUNHEIM
United States District Judge