

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF ILLINOIS**

IN RE: PRADAXA (DABIGATRAN	*	3:12-md-02385-DRH-SCW
ETEXILATE) PRODUCTS LIABILITY	*	MDL No. 2385
LITIGATION	*	
	*	Judge David R. Herndon

This Document Relates to: All Cases

**SPECIAL MASTER’S REPORT AND  
RECOMMENDATIONS ON THE DISTRIBUTION OF  
COMMON BENEFIT FEES AND EXPENSES**

In accordance with Paragraph 8 of CMO 77, Randi S. Ellis, the Special Master appointed by the Court, provides her Special Master’s Report and Recommendations on the Distribution of Common Benefit Fees and Expenses. In this regard, the Special Master hereby reports as follows:

**BACKGROUND**

The above-styled proceedings are a multi-district litigation (“MDL”) involving the drug, Pradaxa, an anti-coagulant indicated to lower the risk of stroke among patients suffering from a heart condition known as atrial fibrillation. Several plaintiffs brought product liability suits against the manufacturer of Pradaxa, Boehringer Ingelheim GmbH (“BI”), and its distributor in the United States, Boehringer Ingelheim Pharmaceuticals, Inc. (“BIPI”). Attorneys then filed a motion before the Joint Panel on Multidistrict Litigation (“JPML”) to consolidate such cases in one court for pretrial proceedings. The JPML granted the motion, and assigned the MDL to Honorable David R. Herndon, Chief Judge, Southern District of Illinois.

In Case Management Order (“CMO”) No. 1, the Court scheduled an initial conference for October 3, 2012, (CMO 1, ¶9), and ordered that applications for the positions of “plaintiffs’ lead counsel and/or a plaintiffs’ steering committee, as well as plaintiffs’ liaison counsel” filed on or before September 21, 2012. (CMO 1, ¶12). A large number of lawyers sought appointment to the Plaintiffs’ Steering Committee through a proposed PSC Slate, in which each stated as follows:

I further understand and consent to the agreement that I aver to not, move, join or otherwise support a motion, which seeks a common benefit fee assessment in excess of 4%. Additionally, I agree to support a common benefit expense holdback of 2%.

On September 27, 2012, the Court largely accepted the proposed slate, adding one lawyer and removing another, in appointing the Plaintiffs’ Leadership Counsel for a one-year term. (CMO 4, ¶I). Only six weeks later, the PLC to the Court for entry as a CMO a proposed Order Establishing Common Benefit Fee and Expense Fund. The proposed order, entered by the Court as CMO 16, contained an assessment of “4% for attorneys fees and 2% for expenses” and stated that the assessment “shall not be altered.” (CMO 16, ¶IV (B) (3)).

Furthermore, CMO 16 incorporated by reference as Exhibit A thereto a Common Benefit Participation Agreement, whereby individual firms sign the agreement, thereby binding themselves to the common benefit assessments called for in CMO 16. This Common Benefit Participation Agreement, provides as follows:

The assessment amount shall be six (6) percent of the Gross Monetary Recovery in each case, four (4) percent for common benefit attorneys’ fees and two (2) percent for common benefit expenses, and represents a holdback (*See In re Zyprexa Prods. Liab. Litig.*, 267 F.Supp.2d 256 (E.D.N.Y. 2006)). By entering this Participation Agreement, the undersigned understands and avers to not move, join, or otherwise support

a motion that seeks a common benefit fee assessment in excess of 4%, nor a motion that seeks common benefit costs in excess of 2%, unless it should become apparent that costs and expenses in excess of 2% are required to reasonably and adequately advance the litigation.

CMO 16, Ex. A, ¶II (A). The PLC timely executed Common Benefit Participation Agreements from each of its members<sup>1</sup>, and from the vast majority of the firms involved in this litigation.

Pursuant to negotiated and agreed upon Unified Case Management Plans, the Court entered CMO 6 on October 3, 2012, and CMO 11 on October 19, 2012. Both CMO 6 and CMO 11 contained Paragraph 8(b) requiring the parties to “meet and confer at least one time per month to discuss settlement” with a designated Mediator. (CMO 6, ¶8 (b); CMO 11, ¶8 (b)). On July 15, 2013, the Court appointed John Perry as mediator in this case. (CMO 39). The undersigned is Mr. Perry’s law partner and worked together with him in mediating this case.

Beginning in August, 2013, the parties began meeting and conferring concerning the settlement of this case. The parties conducted numerous and extensive in-person and telephonic sessions, wherein they negotiated settlement terms in this case. By May, 2014, the parties had achieved such extensive progress, that the Court stayed the entire case in aid of settlement negotiations. (CMO 73).

On May 28, 2014, the PCNC and the Defendants executed a Pradaxa Products Liability Litigation Master Settlement Agreement (“MSA”), and created a voluntary

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<sup>1</sup> Paragraph I(c) of CMO 16 provides: “Participating Counsel shall automatically include all members of the Plaintiffs’ Leadership Group (as designated in CMO No. 4) by virtue of their appointment by the Court to the Plaintiffs’ Steering Committee, any State-Federal Liaisons that this Court may appoint, and any other plaintiff’s attorneys who execute the Participation Agreement (Exhibit A hereto).”

settlement program wherein individual Pradaxa Claimants opted in and will receive payments from the settlement fund, created by a \$650,000,000 financial contribution to be made by the Defendants and their insurers. The MSA named undersigned as Special Master with several responsibilities with respect to many aspects of the settlement program.

The MSA called for the Defendants to fund four accounts: (1) \$561,000,000 for a “Phase One Payments Account”; (2) \$50,000,000 for a “Phase Two Supplemental Payments Account”; (3) \$26,000,000 for a “Pradaxa Common Benefit Fees Account”; and (4) \$13,000,000 for a “Pradaxa Common Benefit Expense Account.” (MSA, ¶6.2 (a-d)).

On May 29, 2014, the Court entered CMO 77, and with respect to the undersigned, ordered among other things that the Special Master is hereby appointed by the Court to provide it with a Report Recommending the Distribution of Common Benefit Fees and Expenses. In response to the appointment, the Special Master did the following:

1. In accordance with Paragraph 6 of CMO 77, Plaintiffs’ Liaison Counsel, Mark Niemeyer, provided the Special Master with a summary of the common benefit time and expenses submitted. Over the past five months, the Special Master requested, received and audited the actual time submissions provided to Plaintiffs’ Liaison Counsel by various lawyers performing common benefit time.
2. In accordance with Paragraph V (B) of CMO 16, Plaintiffs’ Co-Lead Counsel, via a majority vote, made recommendations to the Court, via this Special Master, for distributions to Participating Counsel who have performed common benefit work. The Special Master requested, received, and reviewed the methodologies

employed to arrive at the recommendations made by the various Plaintiffs' Co-Lead Counsel.

3. The Special Master invited each of the firms submitting common benefit time to participate in telephonic meetings with the Special Master and/or submit written information, so that each firm's own views of its contribution to the common benefit could be individually presented to the Special Master. The response to this invitation was substantial and all information provided was taken into consideration.
4. The Special Master reviewed information on all depositions taken in this matter. The Special Master also gathered information from Special Master Daniel Stack who was appointed by the Court to attend depositions and facilitate discovery throughout this litigation. This included specific information on who examined the witness, who attended the deposition, the length of the deposition, the language the deposition was taken in, the role of the examiner (first, second, and third chair), the difficulty of the deposition, the importance of the deposition, and other facts regarding discovery.
5. The Special Master also consulted with attorneys for the defendants in this litigation. The Special Master was advised of additional information pertaining to the work performed during the course of the litigation, the participation of certain attorneys, and their thoughts on the benefits and detriments with respect to the advancement of the litigation.
6. The Special Master considered the fact that 26 law firms who were named to the PLC funded the Plaintiffs' common benefit efforts by contributing

significant cash contributions in assessments. The investment by each of these firms was necessary for the PLC to pursue the litigation for the common benefit of all Pradaxa Claimants. This investment, together with additional costs held by many of these firms, was an investment made with no assurance that the investment would be recovered, and with the possibility that the investment would be lost should the litigation be unsuccessful. As such, the Special Master considered this fact and incorporated such into the recommended methodology.

7. The Special Master reviewed case law, law review articles, and other publications regarding common benefit fees in Multidistrict Litigation. This information, as well as other resources, provided guidance and assisted to arrive at the recommendations herein.
8. The Special Master met and conferred with the Court numerous times during the investigation and incorporated the Court's assessments and wisdom into the recommendations herein.

After gathering and processing the above information, the Special Master created an independent tiered methodology for all 54 firms. This approach took into consideration all time sheets, logged hours by timekeeper, years of practice, support staff, type of work, significance of the work, authorization of the work, staffing as it pertained to the project, attendance at depositions, bellwether work, held costs, international travel, document depository maintenance, attendance at status conferences, briefs and submissions, arguments and presentations to the Court, and other relevant information pertaining to advancing or harming the overall litigation process. Based on this review, the Special Master made an assessment of what should be considered common benefit versus in some

instances what served as common detriment. Therefore, the Special Master recommends the following with respect to the common benefit fees and expenses in this matter:

### **COMMON BENEFIT FEES**

The Special Master recommends the Court distribute a common benefit assessment of four percent (4%) for fees. The Special Master concludes that the four percent (4%) common benefit fee allocation agreed to by the lawyers and the Pradaxa Claimants is appropriate given the circumstances. First, it is consistent with comparable MDL set-aside assessments involving cases settled before the first bellwether trial. *See In Re Zyprexa* (4%), 467 F.Supp. 256, 263 (E.D.N.Y. 2007) (1% set aside for PSC I and 3% for PSC II); *In Re Yasmin & Yaz*, MDL No. 2100, Civil Action No. 3:09-md-02100-DRH-PMF (CMO 14, Para II (B) (2) (a)), (S.D.Ill., March 25, 2010) (Herndon, J.). *See generally see also* William B. Rubenstein, *On What a “Common Benefit Fee” Is, Is Not, and Should Be*, 3 Class Action Att’y Fee Dig. 87, 89 (2009) (collecting cases and concluding that most common benefit assessments range from 4% to 6%); 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 14:9 (4th ed. 2002) (“Most [MDL] courts have assessed common benefit fees at about a 4-6% level, generally 4% for a fee and 2% for costs.”); Paul D. Rheingold, *Litigating Mass Tort Cases* § 7:35 (2010) (“[P]ercentages awarded for common funds in recent MDLS ... were in the 4-6% range.”) (citation omitted). Second, while other MDL Courts have ordered higher percentages than the one agreed to here, such awards usually resulted from settlements following trials occurring in either federal or state courts. *See In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 268 F. Supp. 2d 907, 909, 919 n.19 (N.D. Ohio 2003) (awarding common benefit fees out of \$50,000,000 fund created through assessment representing 4.8% of settlement value)(one state court trial

conducted); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 553 F. Supp. 2d 442, 457-58, 491-96 (E.D. Pa. 2008) (6% and 4% federal and state court assessments respectively; awarding less than total fund created by assessments)(following numerous state and federal court trials); *In re Rezulin Prods. Liab. Litig.*, MDL No. 1348, 2002 WL 441342, at \*1 (S.D.N.Y. Mar. 20, 2002) (6% withholding in federal cases, 4% in participating state cases) (following numerous state court trials); *In Re Vioxx*, MDL 1657 (E.D.La, Oct. 19, 2010) (Fallon, J.)(6.5% awarded following 19 federal and state court trials). Third, given the rapid schedule set first by the Court's expressed goal for this case, *see* CMO 1, ¶10 (e) ("the goal of this Court is to try the first case in approximately eighteen to twenty- four months from the time the scheduling order is set."), and later in practice by the Court's entry of CMO 6 and CMO 11 (setting first bellwether trial within 22 months), this case resolved faster than any of the MDLs analyzed for comparable fee awards. While these lawyers should be congratulated for this achievement, a review of the hours submitted in this case reaffirms the appropriateness of the four percent (4%) fee allocation agreed to by all parties.

Four percent (4%) of the \$650,000,000 settlement resulted in a Common Benefit Fee Account of \$26,000,000 to be allocated by the Court for common benefit fees. During the course of this litigation, the Court issued two monetary sanctions, which were paid by the Defendants into the court's registry. Thereafter, the Court indicated it would order the Defendants to pay Plaintiffs' counsel an amount necessary to compensate them for the time expended on the sanctions issue. The parties negotiated a confidential sum, which was paid by the Boehringer Ingelheim defendants directly to the PLC. The total amount to be distributed by these recommendations takes into consideration the additional funds.

Certain Plaintiffs' counsel received disbursements in proportion to the hours submitted relating to sanctions. As such, with respect to the amounts paid to certain law firms reimbursed for their time by the Defendants for the sanctions issue, the amounts recommended herein will be reduced by the amount of money received by individual law firms with respect to the sanction paid to them by the Defendants. Otherwise, such firms would receive double payments in an inequitable fashion.

Based on the circumstances of this case, the Special Master recommends that the Court allocate the common benefit fees available by first calculating base awards utilizing the following amounts per hour, according to the following classification of the person providing the common benefit work:

- a. Co-Leads: \$500 per hour
- b. Lead Liaison: \$450 per hour
- c. Attorneys (10+ years): \$400 per hour
- d. Attorneys (5-10 years): \$250 per hour
- e. Attorneys (0-5 years): \$150 per hour
- f. Paralegals: \$30 per hour
- g. Staff Members: \$20 per hour

While the amounts recommended may be above or below various law firms' posted rates, the Special Master finds these recommended amounts are appropriate levels of compensation for common benefit work performed in this case with one exception. Based on the detailed audit, the Special Master discovered that the amount of time submitted for document review was substantial and should not be compensated at the same rates as other

work. Therefore, the Special Master recommends that all document review time be ascribed a flat rate of \$40 per hour. Although this rate is low, the Special Master believes the amount is appropriate based on the information provided and tasks accomplished.

After calculating each firm's submissions according to the above hourly rates, the Special Master then employed a tiered approach derived from the investigation discussed herein. The tiered approach applied varying multipliers to determine specific allocations. As a final step, the Special Master then blended the recommendations provided by a majority of the Plaintiffs' Co-Lead Counsel (pursuant to CMO 16) with the Special Master's allocations. Exhibit 1<sup>2</sup>, attached to this Report the Special Master's Recommendations, provides the specific common benefit fee awards for each law firm performing common benefit work in this case.

Approximately \$300,000 from the Common Benefit Fees funds remains unallocated at this time. The Special Master recommends that this amount be retained in order to compensate counsel for time and funds expended for common benefit work performed after June 1, 2014 in aid of the administration of the Pradaxa Products Liability Settlement Agreement, and in order to attend future monthly status conferences, and to perform such other work ordered by the Court.

The Special Master recommends that the Court order distribution of such remaining funds when all the settlement funds have been distributed to the Pradaxa Claimants, and when the Court finds that the MDL should be closed.

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<sup>2</sup> Exhibit 1 will be provided to the Court and each firm who submitted common benefit fees or expenses.

### COMMON BENEFIT EXPENSES

The Special Master makes the following recommendations concerning the appropriateness of the submitted common benefit expenses and the allocation of that amount among the various law firms having expended common benefit funds.

The Special Master provides as Exhibit 1 to this Report the approved common benefit expenses. The Special Master finds that these expenses were timely and contemporaneously submitted in accordance with this Court's requirements Paragraph III (A) of CMO 16. Further, the Special Master finds that Mr. Niemeyer caused an audit of submissions to be performed, and the Special Master finds that such audited amounts are appropriate.

Exhibit 1 also provides for the reimbursement of assessments paid by the various members of the Plaintiffs' Leadership Committee, for the repayment of common benefit expenses timely submitted pursuant to Paragraph III (A) of CMO 16, and for the repayment of certain held costs expended, pursuant to Paragraph III (B) of CMO 16.

As to each of the amounts listed in Exhibit 1, the Special Master finds that such amounts are appropriate expenses for the common benefit funds expended in this case. The Special Master recommends that the Court enter an Order reimbursing the various law firms for the expense amounts set forth in Exhibit 1.

While both the Court's Order, (CMO 16, ¶IV(A)(3)), and the Master Settlement Agreement, (MSA, ¶6.2(d)), call for two percent of the Gross Aggregate Settlement Amount of \$650,000,000 to be paid into a Pradaxa Common Benefit Expenses Account, the amount so deposited of \$13,000,000 is greater than the amount expended for the

common benefit. The Special Master recommends that the remaining funds be held for additional expenses to be distributed in accordance with the MSA at a later date, but that all expenses list on Exhibit 1 be paid accordingly.

The Special Master further reports that each of the 54 firms who submitted common benefit fee information has been personally contacted and given the opportunity to participate in the process described herein. Although the task of formulating the recommendations was complex, the methodology and calculations presented are reasonable and fair. Therefore, the Special Master asks the Court to adopt the Report and Recommendations on the Distribution of Common Benefit Fees and Expenses.

Respectfully submitted,

/s/ Randi S. Ellis  
**Randi S. Ellis, Court-Appointed Special Master**

**December 4, 2014**

## General Information

<b>Court</b>	United States District Court for the Southern District of Illinois; United States District Court for the Southern District of Illinois
<b>Federal Nature of Suit</b>	Personal Injury - Product Liability[365]
<b>Docket Number</b>	3:12-md-02385