

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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IN RE:)	MDL NO. 2753
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ATRIUM MEDICAL CORP. C-QUR MESH)	
PRODUCTS LIABILITY LITIGATION)	MDL Docket No.
)	1:16-md-02753-LM
)	ALL CASES
)	

CASE MANAGEMENT ORDER NO. 4
(ESTABLISHING COMMON BENEFIT FEE AND EXPENSE FUND)

I. SCOPE OF ORDER

This Order is entered to provide for the fair and equitable sharing among plaintiffs, and their counsel, of the burden of services performed and expenses incurred by attorneys acting for the common benefit of all plaintiffs in this complex litigation. This order shall relate to all cases now pending, as well as to any case later filed in, transferred to, or removed to this Court and treated as part of the coordinated proceeding known as *Atrium Medical Corp. C-Qur Mesh Products Liability Litigation*, MDL 2753.

A. Governing Principles and the Common Benefit Doctrine

The governing principles are derived from the United States 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 (1884); *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 Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1019-21 (5th Cir. 1977); and *In re MGM Grand Hotel Fire Litigation*, 660

F.Supp. 522, 525-29 (D. Nev. 1987). Common benefit work product includes all work performed for the benefit of all plaintiffs, including pre-trial matters, discovery, trial preparation, a potential settlement process, and all other work that advances this litigation to conclusion.

B. Application of this Order

This Order applies to all cases now pending, as well as to any case later filed in, transferred to, or removed to this Court and treated as part of the coordinated proceeding known as *Atrium Medical Corp. C-Qur Mesh Products Liability Litigation*, MDL 2753. This Order further applies to each attorney who represents a plaintiff with a case now pending in or later filed in, transferred to, or removed to this Court, regardless of whether the plaintiff's attorney signs the "Participation Agreement" attached hereto as Exhibit A.

This Order shall also apply to any private lien holder who obtains reimbursement from any plaintiff whose case is subject to this Order, because that lien holder is benefiting from the common benefit work performed by Participating Counsel. Such entities shall be subject to this Order regardless of execution of the Participation Agreement, as they are seeking to obtain part of the recovery obtained by a plaintiff who is subject to this Order and the jurisdiction of this Court. Counsel for private lien holder shall pay amounts consistent with the terms of Paragraph IV.(B)(3) of this Order into the Atrium Medical Fee Fund and the Atrium Medical Expense Fund (as those terms are defined herein). Private lien holders counsel shall not be eligible to make a claim to receive any distribution from the Common Benefit Fee Fund or the Common Benefit Cost Fund.

C. Participation Agreement (Exhibit A)

Exhibit A, attached hereto and incorporated herein, is a voluntary Participation Agreement between plaintiffs' attorneys who have cases pending in the MDL and/or in state court. The Participation Agreement is a private and cooperative agreement between plaintiffs' attorneys only ("Participating Counsel"); and not Defendants or Defendants' counsel. Participating Counsel shall automatically include all members of the Plaintiffs' Leadership Group (as designated in CMO No. 3), by virtue of their appointment by the Court to the Plaintiffs' Executive Committee, and any other attorneys appointed to the Plaintiffs' Steering Committee, and plaintiff's attorneys who execute the Participation Agreement (Exhibit A hereto). This shall not include State Court Liaison appointed by the Court except with respect to cases filed in the MDL or cases transferred into the MDL. Only such cases in which State Court Liaison's firm is counsel that are in the MDL at the time of resolution are subject to this order and any assessment provided under this order, unless State Court Liaison counsel were to execute the participation agreement subjecting all of State Court Liaison's firm's cases to an assessment and allowing for payment of accepted common benefit fees. All plaintiffs' attorneys who currently have cases pending in this Court or in any state court shall, within 45 days of this Order, designate whether or not they are a Participating Counsel or a Non-Participating Counsel by signing the appropriate section of the Participation Agreement. Any plaintiffs' attorney who does not yet have an Atrium case filed in any federal or state court shall designate whether or not they are a Participating Counsel or a Non-Participating Counsel by signing the appropriate section of the Participation Agreement: (a) within 45 days of the date their first case is filed in or otherwise docketed in this Court via direct filing, transfer or removal; or (b) within 45 days of the date their first case is filed in any state court, if that lawyer intends to voluntarily become a Participating Counsel at the fee and expense percentages set

forth herein. Failure to execute a Participation Agreement indicating that an attorney will be a Participating Counsel within the time frame set forth in this paragraph may result in higher percentages for common benefit assessment as a result of such later participation.

Participating Counsel shall be entitled to receive all the common benefit work product of those counsel who have also sign the Participation Agreement. Counsel who choose not to execute the Participation Agreement, are not entitled to receive common benefit work product and may be subject to an increased assessment on all Atrium Medical cases in which they have a fee interest if they receive common benefit work product or otherwise benefit by the work performed by Participating Counsel.

The Court recognizes the jurisdictional rights and obligations of the state courts to conduct their state court litigation as they so determine and that the state court litigations may include counsel who are Participating Counsel. The Participation Agreement and this Order shall not be cited by a Party to the Participation Agreement in any other court in support of a position that adversely impacts the jurisdictional rights and obligations of the state courts and state court Participating Counsel.

II. COMMON BENEFIT EXPENSES

A. Qualified Expenses Eligible for Reimbursement

In order to be eligible for reimbursement of common benefit expenses, said expenses must meet the requirements of this section and the limitations set forth in the Participation Agreement. Specifically, said expenses must be: (a) for the common benefit; (b) appropriately authorized (as defined in footnote 1 in the Participation Agreement); (c) timely submitted within the defined limitations set forth in this Order; and (d) verified by a partner or shareholder in the submitting firm.

Time and expense submissions are to be made on the 15th of each month, beginning on June 15, 2017. Each submission should contain all time and expenses incurred during the calendar month prior to the submission date (i.e., the June 15, 2017 submission should include all time and expenses incurred during the month of May 2017), though the first submission should include all time and expenses incurred through May 31, 2017. All time and expense submissions should be accompanied by contemporaneous records and verified by a partner or shareholder in the submitting firm. Submissions of time and expense made after the 15th day of the month following the month in which the time or expense were incurred may be rejected. Only time and expense incurred after the entry of CMO #3 by this Court appointing Plaintiffs' Leadership on March 13, 2017 (plus any time and expense incurred by those appointed to leadership in complying with the terms of CMO #1) shall be submitted and considered for common benefit consideration. Moreover, only that time and those expenses incurred for the common benefit of all cases, consistent with the terms of this Order (*e.g.*, activities associated with completing the items to comply with CMO #1), shall be considered for common benefit reimbursement at the end of the litigation.

B. Shared and Held Common Benefit Expenses

1. Shared Costs

Shared Costs are costs incurred for the common benefit of all plaintiffs. Shared Costs are costs that will be paid out of a separate Atrium Medical Operating Expense Fund established and administered by a member of Plaintiffs' Executive Committee and funded by all members of the PEC and PSC and others as determined by Plaintiffs' Executive Committee. All Shared Costs must be approved by Plaintiffs' Executive Committee prior to payment. Shared Costs include: (a) certain filing and service costs; (b) deposition, court reporter, and video technician

costs for non-case specific depositions; (c) costs necessary for creation of a document depository, the operation and administration of the depository, and any equipment required for the depository; (d) Plaintiffs' Executive Committee and Liaison Counsel administrative matters (e.g., expenses for equipment, technology, courier services, telecopier, electronic service, photocopy and printing, secretarial/temporary staff, etc.); (e) PEC and PSC group administration matters such as meetings and conference calls; (f) accountant fees; (g) generic expert witness and consultant fees and expenses; (h) printing, copying, coding, scanning (out of house or extraordinary firm cost); (i) research by outside third party vendors/consultants/ attorneys; (j) translation costs; (k) bank or financial institution charges; (l) certain investigative services, and (m) special master and/or mediator charges.

2. Held Costs

Held Costs are those that will be carried by each Participating Counsel in MDL 2753. Held Costs are those that do not fall into any of the above categories of shared costs, but are incurred for the benefit of all plaintiffs. Held costs can also include unreimbursed, but authorized, shared costs. No specific client- related costs shall be considered as Held Costs, unless the case is determined by Plaintiffs' Executive Committee to be a "common benefit case," e.g., certain bellwether cases as determined by Plaintiffs' Executive Committee.

C. Authorization and Submission

The Participation Agreements sets forth the guidelines for authorizing and submitting expenses for the common benefit which shall be followed.

D. Expenses Limitations

1. Travel Limitations

Except in extraordinary circumstances approved in advance by Plaintiffs' Executive Committee, all travel reimbursements are subject to the following limitations:

- i. Airfare: Only the price of a Business Class seat for a reasonable itinerary will be reimbursed. First Class Airfare will *not* be fully reimbursed, except for international flights, which requires prior approval by Plaintiffs' Executive Committee in order to be considered for reimbursement. Use of a private aircraft will not be reimbursed. If First Class Airfare is used on domestic flights then the difference between the First Class Airfare must be shown on the travel reimbursement form, and only the Business Class coach fare will be reimbursed.
- ii. Hotel: Hotel room charges for the average available room rate of a business hotel, including the Hyatt, Westin, and Marriott hotels, in the city in which the stay occurred will be reimbursed. Luxury hotels will not be fully reimbursed but will be reimbursed at the average available rate of a business hotel.
- 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 on the travel reimbursement form, and only the non-luxury rate may be claimed, unless such larger sized vehicle is needed to accommodate several counsel.
- 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 (currently 53.5 cents per mile).
- vii. Uber/Taxi: The use of Uber/Lyft or other ride share services shall be at the standard rate unless the standard rate is not available due to availability or surge rate implementation. Use of Uber Black and/or Uber Select or any advanced level of rate charge shall not be utilized unless there is no available alternative.

2. Non-Travel Limitations

- 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. Telefax Charges: Contemporaneous records should be maintained and submitted showing faxes sent and received. The per fax charge shall not exceed \$1.00 per page.
- iv. In-House Photocopy: A contemporaneous photocopy log or other supporting documentation must be maintained and submitted. The maximum copy charge is 15¢ per page.
- v. Computerized Research – Lexis/Westlaw: Claims for Lexis or Westlaw, and other computerized legal research expenses should be in the exact amount charged to or allocated by the firm for these research services.

E. Verification

The forms detailing expenses shall be certified by a senior partner in each firm attesting to the accuracy of the submissions. Attorneys shall keep receipts for all expenses. Credit card receipts are an appropriate form of verification if accompanied by a declaration from counsel that work was performed and paid for the common benefit.

III. COMMON BENEFIT WORK

A. Qualified Common Benefit Work Eligible for Reimbursement

Only Participating Counsel are eligible for reimbursement for time and efforts expended for the common benefit. Participating Counsel shall be eligible for reimbursement for time and efforts expended for common benefit work if said time and efforts are: (a) for the common benefit; (b) appropriately authorized (as described in footnote 1 of the Participation Agreement); (c) timely submitted; and (d) verified by a partner or shareholder in the submitting firm.

B. Compensable Common Benefit Work Defined

As the litigation progresses and common benefit work product continues to be generated, the Plaintiffs' Executive Committee may assign Participating Counsel with common benefit work; common benefit work shall include only work specifically assigned. Examples of common benefit work include, but are not limited to, maintenance and working in the depository; review and document coding; expert retention and development authorized by Plaintiffs' Executive Committee; preparing for and conducting authorized depositions of Defendants, third-party witnesses, and experts; and activities associated with preparation for trial and the trial of any cases designated as "common benefit trials" by Plaintiffs' Executive Committee.

C. Authorization and Time Keeping

All time must be authorized and accurately and contemporaneously maintained. Time shall be kept according to these guidelines as set forth in the Participation Agreement and approved by Plaintiffs' Executive Committee.

IV. PLAINTIFFS' LITIGATION FEE AND EXPENSE FUNDS

A. Establishing the Fee and Expense Funds

At an appropriate time, Plaintiffs' Executive Committee will direct the establishment of two interest-bearing accounts to receive and disburse funds as provided in this Order (the "Funds"). The first fund shall be designated the "Atrium Medical Fee Fund" and the second fund shall be designated the "Atrium Medical Expense Fund." These funds will be held subject to the direction of this Court.

By subsequent Order of this Court, the Court will appoint a qualified certified public accountant (the "CPA") to serve to keep detailed records of all deposits and withdrawals and to prepare tax returns and other tax filings in connection with the Funds. Such subsequent Order

shall specify the hourly rates to be charged by the CPA and for the CPA's assistants, who shall be utilized where appropriate to control costs. The CPA shall submit quarterly detailed bills to the Court and to Plaintiffs' Executive Committee. Upon approval by the Court, the CPA's bills shall be paid from the Atrium Medical Expense Fund and shall be considered a shared cost. The Plaintiffs' Executive Committee shall provide a copy of this Order to the CPA.

B. Payments into the Fee and Expense Funds

1. General Standards

All plaintiffs and their attorneys who are subject to this Order and who agree 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 such compensatory and punitive damages, with respect to Atrium Medical claims are subject to an assessment of the gross monetary recovery, as provided herein.

2. Gross Monetary Recovery

Gross monetary recovery includes any and all amounts paid to plaintiffs' counsel by Defendants through a settlement or pursuant to a judgment. In measuring the "gross monetary recovery," the parties are to (a) exclude court costs that are to be paid by the defendant; (b) include any payments to be made by the defendant on an intervention asserted by third-parties, such as to physicians, hospitals, or other healthcare providers in subrogation related to treatment of a plaintiff, and any governmental liens or obligations (e.g., Medicare/Medicaid); and (c) include the present value of any fixed and certain payments to be made in the future. The assessment shall apply to all of the cases of the plaintiffs' attorneys who are subject to this Order, whether as sole counsel or co-counsel, including cases pending in the MDL, pending in

state court, unfiled, or tolled, except the assessment shall not apply to any non-MDL-filed cases in which State Court Liaison counsel's firm is counsel.

3. Assessment Amount

As the size and complexity of this litigation has yet to be determined, Plaintiffs' Executive Committee will make a motion to court, at a later time, for a determination of appropriate assessment amounts for both attorneys' fees and expenses. The assessment represents a holdback (*In re Zyprexa Prods. Liab. Litig.*, 267 F.Supp.2d 256 (E.D.N.Y. 2006)) and shall not be altered. However, if any counsel fails to timely execute the Participation Agreement, such counsel and members of his/her firm may be subject to an increased assessment. Moreover, if a Non-Participating Counsel receives common benefit work product or otherwise benefits from the common benefit work product, such counsel and the cases in which she/he has a fee interest may be subject to an increased assessment.

4. Initial Assessment

In order to fund the costs of the litigation as it moves forward, Plaintiffs' Executive Committee shall be empowered to seek funds from Participating Attorneys on an "as needed" basis. Such funds will be deposited into the Expense Fund and will be considered held costs.

5. Defendants' Obligations

For cases subject to this Order, Defendants are directed to withhold an assessment from any and all amounts paid to plaintiffs and their counsel and to pay the assessment directly into the Funds as a credit against the settlement or judgment. No orders of dismissal of any plaintiff's claim, subject to this Order, shall be entered unless accompanied by a certificate of plaintiff's and defendants' counsel that the assessment, if applicable, will be withheld and will be deposited into the Funds at the same time the settlement proceeds are paid to settling counsel. If,

for any reason, the assessment is not or has not been so withheld, the plaintiff and his counsel are jointly responsible for paying the assessment into the Fund promptly.

The Plaintiffs' Liaison Counsel shall provide the Defendants' Liaison Counsel, the CPA, and the Court or its designee with a list of cases and/or counsel who have entered into written agreements with the PEC and PSC by executing the Participation Agreement. This same list shall be made available to all plaintiffs' counsel with cases in this MDL, as well as any other plaintiffs' counsel who signs the Participation Agreement, upon request. In the event, there is a dispute as to whether a case should be on the list, Plaintiffs' Executive Committee shall seek to resolve the matter with the particular plaintiff's counsel informally, and if that is unsuccessful, upon motion to the Court.

Defendants and their counsel shall not distribute any settlement proceeds in cases subject to this Order to any plaintiff's counsel (or directly to a plaintiff) until after (1) Defendants' counsel notifies Plaintiffs' Liaison Counsel in writing of the existence of a settlement and the name of the individual plaintiff's attorney (without disclosing the amount of the settlement), and (2) Plaintiffs' Liaison Counsel has advised Defendants' counsel in writing whether or not the individual plaintiff's attorney's cases are subject to an assessment and the amount (stated as a percentage of the recovery) of the assessment pursuant to this Order. Plaintiffs' Liaison Counsel shall share this information with Plaintiffs' Executive Committee, who shall otherwise keep this information confidential.

Counsel for each defendant shall provide at least quarterly to the Court or its designee notice of the names and docket numbers of the cases for which it has paid an assessment into the Funds since the last such report. A report is not due if there are no payments made into the Funds by that Defendant during that quarter. Details of any individual settlement agreement, individual settlement amount and individual amounts deposited into escrow shall be confidential and shall not be disclosed by the CPA to Plaintiffs' Executive Committee, the PSC, the Court, or

the Court's designee, unless the Court requests that it receive that information. Monthly statements from the CPA shall, however, be provided to Plaintiffs' Executive Committee and Plaintiffs' Liaison Counsel and the Court showing only the aggregate of the monthly deposits, disbursements, interest earned, financial institution charges, if any, and current balance.

V. DISTRIBUTIONS

A. Court Approval

The amounts deposited into the Atrium Medical Fee Fund and the Atrium Medical Expense Fund shall be available for distribution to Participating Counsel who have performed professional services or incurred expenses for the common benefit. No amounts will be disbursed without review and approval by the Court, or such other mechanism as the Court may order. Specifically, such sums shall be distributed only upon Order of this Court. This Court retains jurisdiction over any common benefit award or distribution.

B. Application for Distribution

Each Participating Counsel who does common benefit work has the right to present their claim(s) for compensation and/or reimbursement prior to any distribution approved by this Court. Any Counsel who does not sign the Participation Agreement shall not be eligible to receive common benefit payments for any work performed or expenses incurred.

At the appropriate time, this Court shall request that Plaintiffs' Executive Committee make recommendations to this Court for distributions to Participating Counsel who have performed common benefit work. The majority vote of the Plaintiffs' Executive Committee shall dictate the distribution for common benefit work. Plaintiffs' Executive Committee shall determine on its own the most fair and efficient manner by which to evaluate all of the time and

expense submissions in making its recommendation to this Court. This Court will give due consideration to the recommendation of the Plaintiffs' Executive Committee.

So Ordered



Date: May 15, 2017