

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

IN RE:)	MDL Docket No. 1953
)	
HEPARIN PRODUCTS)	CHIEF JUDGE JAMES G. CARR
LIABILITY LITIGATION)	CASE NO. 1:08-60000
)	
)	ALL CASES

**First Amended PRETRIAL ORDER NO. 6 COMMON BENEFIT ORDER
(ESTABLISHING COMMON BENEFIT FUND TO COMPENSATE AND REIMBURSE
ATTORNEYS FOR SERVICES PERFORMED AND EXPENSES INCURRED FOR
MDL ADMINISTRATION AND OTHERWISE FOR PLAINTIFFS' GENERAL BENEFIT
with Provisions for State Court Coordination)**

This Order is entered to provide for the fair and equitable sharing among plaintiffs of the cost of services performed and expenses incurred by attorneys acting for MDL administration and common benefit of all plaintiffs in this complex litigation, and also including services performed and expenses incurred by attorneys acting in certain Consolidated State Court Litigation pending in Cook County, Illinois before the Honorable Judge Duncan-Brice (herein "CSCL"). This Court's authority in this regard derives from the 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 decades ago, 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). This Order will be effective upon its adoption by Judge Duncan-Brice.

The Court Orders as follows:

A. Common Benefit Fund For Expenses to be Established

Adele Jasion, CPA, of the firm of Gilmore, Jasion & Mahler is hereby appointed as Escrow Agent for the purpose of receiving and disbursing 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 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 to a specific person as provided by court order.

The Escrow Agent is directed to establish an interest bearing account at Waterford Bank in Toledo, Ohio, to which she will deposit funds received in accordance with this Order. The name on the account will be "Heparin Common Benefit Fund." All funds deposited to the account shall be held subject to the direction and further order of the Courts.

The hourly rates to be charged by Gilmore, Jasion & Mahler shall be \$215 per hour for Ms. Jasion and comparable professionals within the firm, and \$85 - 110 per hour for associate assistance, depending on experience. The Escrow Agent shall keep detailed records of all deposits and withdrawals and prepare tax returns and other tax filings and shall provide quarterly reports on income and expenses to the PEC. The Escrow Agent shall submit quarterly detailed bills to the Court and to Plaintiff's Liaison

Counsel. Upon approval, the CPA's bills shall be paid from the Heparin MDL PSC Fund until such time as there are sufficient funds in the Common Benefit Fund, and shall be considered a shared cost in accordance with ¶ B.2.c, below.

1. **Assessments for the Common Benefit Expense Fund.**

- a. After September 1, 2008 all plaintiffs and their attorneys 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 compensatory and punitive damages, with respect to any Heparin claims are subject to an assessment of the "gross monetary recovery," to be withheld by defendants and paid into the Common Benefit Fund by defendants, as provided herein.
- b. Defendants are directed to withhold the amount of this assessment from any amounts paid to plaintiffs and their counsel for any claim being handled by a plaintiff's attorney who has or had at least one case pending in the MDL or in the CSCL, and from any amounts paid to plaintiffs and their counsel for any claim either filed in any state court or unfiled where the plaintiff's counsel has executed an agreement to cooperate with the MDL (Exhibit A hereto), arising from injury or death caused, or claimed to be caused, by the use of the drug heparin which was contaminated by, or claimed to be contaminated by, over sulfated chondroitin sulfate. The assessment shall be paid to the Escrow Agent who shall deposit such assessments directly into the Common Benefit Fund as a credit against the settlement or judgment by the Settling Defendant. Once the

assessment payment is made by defendants, a settling defendant's obligations under this Order shall be fully discharged. If for any reason the assessment is not or has not been so withheld, the plaintiff and his or her counsel are deemed jointly responsible for paying the assessment into the Common Benefit Fund promptly. The payments to be made to the Escrow Agent shall not be disclosed by the Escrow Agent except upon written order of this court. The purpose of maintaining confidentiality is to protect the defendants' legitimate concerns regarding disclosure of the amounts that it deposits into the escrow fund inasmuch as knowledge of such amounts would allow calculation of any sums defendants determine should be paid in satisfaction of any obligation it has to a plaintiff covered by this order. The Escrow Agent shall report to the Court, from time to time, the sums that are deposited in the account, and such other information as shall be necessary and sufficient for the Agent and Court to determine if the amount deposited is the correct amount required under the terms of this order. The Escrow Agent shall confer with the Plaintiffs' Liaison Counsel, Defendants' Liaison Counsel, and the Court to determine the appropriate form that should be completed and accompany any payment to be made to the Escrow Agent to allow the Escrow Agent to verify the accuracy of any payment made. Defense Counsel shall provide, no less than quarterly, a notice to the Court and Plaintiffs' Liaison Counsel a confidential list of all counsel or individual persons who settled cases in the prior month. The Escrow Agent shall provide to Plaintiffs'

Liaison Counsel, Defense Liaison Counsel, and the Court the aggregate of the deposits, disbursements, interest earned, charges, and current balance.

- c. 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 paid to the escrow agent for deposit into the Common Benefit Fund or, alternatively, a certification that the assessment order does not apply to the action signed by such counsel and Plaintiffs' Liaison Counsel.
- d. In measuring the "gross monetary recovery:"
 - (1) Court costs that are to be paid by the defendant shall be excluded.
 - (2) The present value of any fixed and certain payments to be made in the future shall be included.
 - (3) Nothing in this Order shall be deemed to modify, alter, or change the terms of any fee contracts between any plaintiffs' counsel and their individual clients.
- e. All Counsel who are subject to the jurisdiction of this Court or the CSCL Court shall execute the attached Exhibit A and deliver it to Plaintiffs' Liaison Counsel, unless they have already executed the previous version. Execution of Exhibit A shall be a precondition to receipt of discovery, participation in discovery, the performance of Common Benefit Time, or the submission of Common Benefit Time.

This obligation attaches in the following instances:

(1) The assessment in all cases shall be three percent (3%) as fees and three percent (3%) as costs (a total of six percent (6%)) of the “gross monetary recovery.” The assessment shall apply to all Heparin contamination cases now pending or later filed in, transferred to, or removed to, this Court as well as all unfiled and tolled cases and claims treated as part of the coordinated proceeding known as *In re: Heparin Products Liability Litigation*, MDL 1953, and resolved after the date this Order is signed, including cases later remanded to a state court or any cases on tolling agreements, filed in any state court, or clients whose cases are as yet unfiled. As noted above, three percent (3%) shall be deemed fees to be subtracted from the attorneys’ fees portions of individual fee contracts, and three percent (3%) shall be deemed costs to be subtracted from the client portion of individual fee contracts. This obligation shall apply to all cases (state, federal, filed or unfiled) by all members of the PEC, PSC, any PSC sub-committee members, CSCL Plaintiffs’ Counsel, and any State Court approved Counsel or Committees.

If any counsel fails and refuses to execute such order, it shall not prevent application of the order to the cases of such counsel, nor shall it be a defense to any claim that the assessment is not due.

(a) Non-participating State Court Cases. Any Counsel who has cases in a state court outside the CSCL and who determines not to participate with the MDL PSC and execute a participation

agreement with the PSC, may seek access to MDL or CSCS and/or PSC non-work-product materials from the PSC by contacting Plaintiffs' Liaison Counsel in writing; however, the MDL PEC shall be under no obligation to allow such counsel access to any MDL materials unless such counsel executes and delivers a Participation Agreement.

f. Nothing in this Order shall limit the PEC's right or ability to seek an equitable contribution against any state court case in which the Plaintiff's counsel was provided access to the MDL work product.

2. Disbursements from Common Benefit Expense Fund.

a. Upon subsequent Order of the Courts, payments may be made from the Common Benefit Fund to attorneys who provide services or incur expenses for the joint and common benefit of plaintiffs in addition to their own client or clients. Attorneys eligible thereto are limited to members of the Plaintiffs' Steering Committee (including members of the Plaintiffs' Executive Committee), attorneys who are member of a sub-committee established by the Plaintiffs' Executive Committee who are called upon by them to assist in performing their responsibilities, Plaintiffs' State Lead Counsel, and other attorneys performing PEC-approved responsibilities in MDL or state court actions, including CSCL attorneys whose work was authorized and approved by State Court Lead Counsel. Such attorneys who maintain actions in state court and obtain rulings that inure to the benefit of all plaintiffs in the MDL shall be permitted to submit for common benefit treatment the time and costs associated with obtaining such rulings. Only common benefit work and expenses that have been authorized and approved by the PEC and/or State Court Lead Counsel

shall be considered for payment. All time and expenses are subject to proper and timely submission of contemporaneous records certified to have been timely received.

- b. Payments will be allowed only to entities for special services performed, and to reimburse for special expenses incurred, for the joint and common benefit of all plaintiffs, which have been specifically authorized by the PEC.
- c. Payment may, for example, be made for authorized and approved services and expenses related to the obtaining, reviewing, indexing, and payment for hard copies of computerized images of documents for the defendants; to conducting depositions; and to activities connected with the coordination of federal and state litigation. The Common Benefit Fund will not, however, be used to pay for services and expenses related to a particular case, such as the deposition of a treating physician, even if such activity results in some incidental and/or consequential benefit to other plaintiffs, or for an attorney to “learn the case,” except that, at the PEC’s discretion, work performed on behalf of cases selected as bellwether cases for trial may be classified as common benefit.
- d. Payments will not exceed the fair value of the services performed (plus any court approved multiplier) or 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 services and expenses.
- e. No amounts will be disbursed without review and approval by the Courts

or such other mechanism as the Courts may deem just and proper under the circumstances. Defense Counsel shall provide at least quarterly notice to the Court or its designee and Plaintiffs' Liaison Counsel of the names and docket numbers of the cases for which it has withheld an assessment. Monthly statements from the escrow agent shall be provided to Plaintiffs' Liaison Counsel, Defense Liaison Counsel, the Court, and lead counsel and the Court's designee showing, with respect to the funds controlled by the escrow agent, the aggregate of the monthly deposits, disbursements, interest earned, financial institution charges, if any, and current balance.

- f. If the Common Benefit Fund exceeds the amount needed to make all payments as provided in this order (for court approved costs, fees, and any court approved multiplier on any fees), the Courts may order a refund to those who have contributed to the Common Benefit Fund. Any such refund will be made in proportion to the amount of the contributions.
- g. If the Common Benefit Fund is insufficient to make all payments as provided in this order (for court approved costs, fees, and any court approved multiplier on any fees), the Courts may order, after motion, notice and hearing, an increase in the assessment percentage; provided, however, that in no event, shall any increase in the amount of the assessment be made after a case is settled. Rather the assessment amount in effect at the time of the settlement shall apply. In the event that the overall assessment amount is reduced, however, a refund shall be

provided for any clients who settled prior to the reduction.

- h. Only attorneys who have executed a Participation Agreement and who are current in the payment of Assessments assessed by the Plaintiffs' Executive Committee at the time the Common Benefit Work is performed may apply for and be reimbursed for Common Benefit Work or receive discovery.

3. Incorporation by Reference

The guidelines set out in Amended Pretrial Order 3 governing Attorney Fees and Expenses shall apply to all work and expenses referred to herein. The individual attorney agreement ("Participation Agreement") attached hereto as Exhibit A is incorporated by reference and have the same effect as if fully set forth in the body of this Order.

4. Use of Work Product and Coordination with CSCL.

All discovery efforts, and the results thereof, shall be equally available to Plaintiffs' Counsel, irrespective of whether the case is filed in the MDL or CSCL, and State Court Counsel, under the direction of State Court Lead Counsel, Donald L. Nolan, shall be permitted to fully participate in discovery efforts.

5. Dispute Resolution Procedure.

While it is anticipated that Counsel will work closely and cooperatively together, the following dispute resolution procedure is hereby established to resolve any disputes that may arise within the Plaintiffs' group concerning issues arising under this Order or Amended PTO No. 3. In the event that the Plaintiffs' Liaison Counsel and State Court Lead Counsel cannot both agree on the resolution of a dispute, or a procedure to do so, then any deadlocks shall be submitted to Chief Judge Carr and State Court Judge

Duncan –Brice. The State and Federal Courts will either adopt a procedure to resolve the dispute, such as appointment of one or more special masters, or themselves agree on resolution of the dispute.

s/James G. Carr

Chief Judge James G. Carr
United States District Court

11/6/08

PARTICIPATION AGREEMENT

This Agreement is made this _____ day of _____, 200____, by and between the Plaintiffs' Executive Committee ("PEC") appointed by the United States District Court for the Northern District of Ohio in MDL No. 1953 and _____ **[FILL IN THE NAME OF THE FIRM EXECUTING THE AGREEMENT]** (hereinafter "the Participating Attorneys").

WHEREAS, the United States District Court for the Northern District of Ohio has appointed David W. Zoll, Janet G. Abaray, Daniel E. Becnel, Jr., Daniel N. Gallucci, Donald J. Nolan and John C. Evans to serve as members of the PEC to facilitate the conduct of pretrial proceedings in the federal actions relating to Heparin.

WHEREAS, the PEC in association with other attorneys working for the common benefit of plaintiffs have developed and are in the process of developing work product which will be valuable in the litigation of state court proceedings involving contaminated Heparin-induced injuries (the "PEC Work Product") and

WHEREAS, the Participating Attorneys are desirous of acquiring the PEC Work Product and establishing an amicable, working relationship with the PEC for the mutual benefit of their clients;

NOW, THEREFORE, in consideration of the covenants and promises contained herein, and intending to be legally bound hereby, the parties agree as follows:

1. With respect to each client who they represent in connection with a Heparin related claim, whether currently with a filed claim in state or federal court or unfiled or on a tolling agreement, each of the Participating Attorneys shall deposit or cause to be deposited in an MDL Fee and Cost Account established by the District Court in the MDL a percentage proportion of the gross amount recovered by each such client which is equal to six percent (6%) of the gross amount of recovery of each such

client (3% fees; 3% costs). For purposes of this Agreement, the gross amount of recovery shall include the present value of any fixed and certain payments to be made to the plaintiff or claimant in the future. It is the intention of the parties that such assessment shall be in full and final satisfaction of any present or future obligation on the part of each Plaintiff and/or Participating Attorney to contribute to any fund for the payment or reimbursement of any legal fees, services or expenses incurred by, or due to, the MDL and/or any Common Benefit Attorneys. However the Parties recognize and acknowledge that the final amount of the Assessment may be adjusted, either up or down, upon motion and after notice and hearing in accordance with Pretrial Order No. 6, which is incorporated herein by reference.

2. The Participating Attorneys, on behalf of themselves, their affiliated counsel, and their clients, hereby grant and convey to the PSC a lien upon and/or a security interest in any recovery by any client who they represent in connection with any Heparin induced injury, to the full extent permitted by law, in order to secure payment in accordance with the provisions of paragraph 1 of this Agreement. The Participating Attorneys will undertake all actions and execute all documents which are reasonably necessary to effectuate and/or perfect this lien and/or security interest.
3. The amounts deposited in the MDL Common Benefit Fund shall be available for distribution to attorneys who have performed professional services or incurred expenses for the benefit of the plaintiffs in MDL 1953

and any coordinated state court litigation pursuant to written authorization from Liaison Counsel of the PSC or state court lead counsel. Such sums shall be distributed only upon an Order of the Courts, which will be issued in accordance with applicable law governing the award of fees and costs in cases involving the creation of a common benefit, and in accordance with Pretrial Order No. 6, as amended or as may be amended in the future, which is incorporated herein by reference. Appropriate consideration will be given to the experience, talent and contribution made by all of those authorized to perform activities for the common benefit, including the Participating Attorneys.

4. As the litigation progresses and work product of the same type and kind continues to be generated, the PEC will provide Participating Attorneys with such work product and will otherwise cooperate with the Participating Attorneys to coordinate the MDL litigation and the state litigation for the benefit of the plaintiffs.
5. Upon execution of this Agreement, the PEC will provide to the Participating Attorneys, to the extent developed, the PSC Work Product, including access to the PSC's depository.
6. The Participating Attorneys shall have the following rights:
 - a. Full participation in discovery matters and appropriate committee assignments with full recognition of the participation of the Participating Attorneys;
 - b. Appropriate participation and consultation in settlement

negotiations;

c. Appropriate participation in trials, class action matters, management, fund administration and allocation of fees and costs.

7. The Participating Attorneys represent that the list appended hereto as Exhibit "A" correctly sets forth the name of each client represented by them who has filed a civil action arising from the use of Heparin, together with the Court and docket number of each such case, and that the list attached hereto as Exhibit "B" contains the name and Date of Birth of each client represented by them who has not yet filed a civil action arising from the use marketing and sales of Heparin.
8. The Participating Attorneys shall supplement the lists appended hereto as Exhibit "A" and "B" on a quarterly basis.
9. This Agreement shall apply to each and every claim or action (whether state or federal, filed or unfiled) arising from the use, marketing or sales of contaminated Heparin in which the Participating Attorneys have a right to a fee recovery, including any claims referred by or to a Participating Attorney or any member of the Participating Attorney's firm.

David W. Zoll, Esq.
Plaintiffs' Liaison Counsel

Participating Attorney
[Firm Name & Address]