

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re: WHIRLPOOL CORP. FRONT-)
LOADING WASHER PRODUCTS) CASE NO. 1:08-WP-65000
LIABILITY LITIGATION) (MDL 2001)
)
) JUDGE CHRISTOPHER A. BOYKO
)
) APPOINTMENT ORDER

CHRISTOPHER A. BOYKO, J.:

On June 24, 2014, the Court entered a *Show Cause Order* (docket no. 331) noting that the parties in this MDL: (1) proposed an accelerated schedule for the first bellwether trial, which the Court adopted; and (2) recently filed numerous pretrial motions that raise an overwhelming number of very complex issues, all of which must be resolved before this upcoming trial. Accordingly, the Court proposed appointment of David R. Cohen as Special Master to assist the Court with these pending motions and any other issues that may arise. The Court directed the parties to show cause why the Court should not make this appointment.

In response, both plaintiffs and defendants consented to the Court's proposal to appoint Mr. Cohen as Special Master, pursuant to Fed. R. Civ. P. 53(a)(1)(A). *See* docket nos. 333, 338. Accordingly, the Court enters this Order of Appointment.

I. Appointment of the Special Master.

Having given the parties notice and an opportunity to be heard, and with the parties' mutual consent, the Court now appoints as Special Master David R. Cohen, Esq., of the following law firm:

David R. Cohen Co. LPA
24400 Chagrin Blvd., Suite 300
Cleveland, OH 44122
216-831-0001 tel
866-357-3535 fax
E-Mail: david@specialmaster.biz

This appointment is made pursuant to Fed. R. Civ. P. 53 and the inherent authority of the Court.¹ As Rule 53 requires, the Court sets out below the duties and terms of the Special Master and reasons for appointment, and orders the Master to "proceed with all reasonable diligence," Rule 53(b)(2).

II. Rule 53(b)(2).

Rule 53 requires an order of appointment to include certain contents. *See* Fed. R. Civ. P. 53(b)(2). The following discussion sets forth the matters required.

A. Special Master's Duties.

Rule 53(a)(1)(A) states the Court may appoint a Special Master to "perform duties consented to by the parties." In addition, Rule 53(a)(1)(C) states the Court may appoint a Special Master to "address pretrial and posttrial matters that cannot be effectively and timely addressed by an available

¹ "Beyond the provisions of [Fed. R. Civ. P. 53] for appointing and making references to Masters, a Federal District Court has 'the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.'" *Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir. 1956) (quoting *In re: Peterson*, 253 U.S. 300, 311 (1920)); *see Ruiz v. Estelle*, 679 F.2d 1115, 1161 n.240 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983) (same); *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir. 1979) (the authority to appoint "expert advisors or consultants" derives from either Rule 53 or the Court's inherent power).

district judge or magistrate judge of the district.” The Court has reviewed legal authority addressing the duties of a Special Master that are permitted under the Federal Rules of Civil Procedure and Article III of the Constitution.² Consistent with this legal authority and the currently-anticipated needs of the Court, as well as the parties’ consent, the Court states that the Special Master shall have the authority to perform the following duties.³

Initial Duties

As indicated in the *Show Cause Order*, the Special Master’s initial duties shall be as follows:

- Evaluate the parties’ expert reports and the pending motions to exclude expert testimony, and provide the Court with formal and informal recommended rulings on those motions, including whether to hold *Daubert* hearings.
- Evaluate the plaintiffs’ motion to modify the class definition and the defendants’ motion to decertify the class, and provide the Court with formal and informal recommended rulings on those motions.
- Evaluate the parties’ cross-motions for summary judgment, and provide the Court with formal recommended rulings on those motions.
- Evaluate any other motions the parties may file, and provide the Court with formal and informal recommended rulings on those motions.
- Provide periodic status reports to the Court.
- Make formal or informal recommendations and reports to the parties, and make recommendations and reports to the Court, regarding any matter pertinent to the above-listed duties.

² See generally Fed. R. Civ. P. 53, advisory committee’s notes, 2003 amendment (discussing the range of duties and authority of a Special Master); *Appointing Special Masters and Other Judicial Adjuncts: A Handbook for Judges* (5th ed. 2013).

³ This list is meant to be illustrative, not comprehensive. The Court may amend this Order to add additional duties. With regard to the “Initial Duties” listed here, the Court will meet with the Special Master to determine: (1) which motions the Court will rule upon itself, without first receiving a formal, written recommended ruling, and (2) which motions it will ask the Special Master to provide a formal, written recommended ruling.

- Communicate and meet with the parties and attorneys as needs may arise in order to permit the full and efficient performance of these duties.
- Employ staff as may be necessary to assist the Special Master in performing his duties. The Special Master shall incur only such fees and expenses as may be reasonably necessary to fulfill his duties.

Other Duties

The Court may also call upon the Special Master to undertake any of the following additional duties.

- Assist with preparation for attorney conferences (including formulating agendas), court scheduling, and case management.
- Compile data and assist with, or make findings and recommendations with regard to, interpretation of scientific and technical evidence.
- Assist with legal analysis of the parties' motions or other submissions, whether made before, during, or after trials, and make recommended findings of fact and conclusions of law.
- Assist with responses to media inquiries.
- Help to coordinate other, related litigation.
- Direct, supervise, monitor, and report upon implementation and compliance with the Court's Orders, and make findings and recommendations on remedial action if required.
- Interpret any agreements reached by the parties.
- Propose structures and strategies for settlement negotiations on the merits, and on any subsidiary issues, and evaluate parties' class and individual claims, as may become necessary.
- Propose structures and strategies for attorneys fee issues and fee settlement negotiations, review fee applications, and evaluate parties' individual claims for fees, as may become necessary.
- Administer, allocate, and distribute funds and other relief, as may become necessary.

- Adjudicate eligibility and entitlement to funds and other relief, as may become necessary.
- Monitor compliance with structural injunctions, as may become necessary.

B. Communications with the Parties and the Court.

Rule 53(b)(2)(B) directs the Court to set forth “the circumstances, if any, in which the [Special Master] may communicate ex parte with the court or a party.” The Special Master may communicate ex parte with the Court at the Special Master’s discretion, without providing notice to the parties, regarding logistics, the nature of his activities, management of the litigation, and other appropriate procedural matters, and also to assist the Court with legal analysis of the parties’ submissions. The Special Master may communicate ex parte with any party or his attorney, as the Special Master deems appropriate, for the purposes of ensuring the efficient administration and management and oversight of this case, and for the purpose of mediating or negotiating a resolution of any dispute related to this case. The Special Master shall not communicate to the Court any substantive matter the Special Master learned during an ex parte communication between the Special Master and any party.⁴

C. Special Master’s Record.

Rule 53(b)(2)(c) states that the Court must define “the nature of the materials to be preserved and filed as a record of the [Special Master’s] activities.” The Special Master shall maintain normal

⁴ The Court may later limit the Special Master’s ex parte communications with the Court with respect to certain functions, if the role of the Special Master changes. *See, e.g., In re: Propulsid Products Liab. Litig.*, 2002 WL 32156066 (E.D. La. Aug. 28, 2002) (after the Special Master was given additional mediation duties, the scope of his ex parte communications with the parties and the Court, as well as his record-keeping obligations, changed); Rule 53(b)(4) (noting that an order of appointment may be amended). On the other hand, such imposition of different limits on ex parte communications does not necessarily require amendment of this Order.

billing records of his time spent on this matter, with reasonably detailed descriptions of his activities and matters worked upon. If the Court asks the Special Master to submit a formal report or recommendation regarding any matter, the Special Master shall submit such report or recommendation in writing, for filing on the case docket. The Special Master need not preserve for the record any documents created by the Special Master that are docketed in this or any other court, nor any documents received by the Special Master from counsel or parties in this case.

D. Review of the Special Master’s Rulings.

Rule 53(b)(2)(D) directs the Court to state “the time limits, method of filing the record, other procedures, and standards for reviewing the [Special Master’s] orders, findings, and recommendations.” The Special Master shall either: (1) reduce any formal order, finding, report, ruling, or recommendation to writing and file it electronically on the case docket via Electronic Case Filing (“ECF”); or (2) issue any formal order, finding, report, ruling, or recommendation on the record before a court reporter. Given the expedited schedule in this case and pursuant to the Court’s authority under Rule 53(f)(2), any party may file an objection to an order, finding, report, ruling, or recommendation by the Special Master within 14 calendar days of the date it was filed; failure to meet this deadline results in permanent waiver of any objection to the Special Master’s orders, findings, reports, rulings, or recommendations.⁵ Absent timely objection, the orders, findings, reports, rulings, and recommendations of the Special Master shall be deemed approved, accepted,

⁵ Rule 53(f)(2) provides that parties may file objections “no later than 21 days after a copy of the [Special Master’s order, report, or recommendations] is served, *unless the court sets a different time.*” (Emphasis added). Motions for extensions of time to file objections will not normally be granted unless good cause is shown. The Special Master may, however, provide in his order, finding, report, or recommendation that the period for filing objections to that particular document is some period longer than 14 calendar days, if a longer period appears warranted.

and ordered by the Court, unless the Court explicitly provides otherwise.

If the Special Master issues an informal ruling or order that is not on the record (such as the resolution of a discovery dispute) either orally, via email, or through other writing, and a party wishes to object to that ruling or order, the party shall ask the Special Master to formalize the ruling or order by filing it on the docket or appearing before a court reporter. Such request shall be made within three days of issuance of the informal order or ruling, else the opportunity to object shall be waived. The procedures and deadlines outlined in this section shall then apply.

As provided in Rule 53(f)(4, 5), the Court shall decide *de novo* all objections to conclusions of law made or recommended by the Special Master; and the Court shall set aside a ruling by the Special Master on a procedural matter only for an abuse of discretion. The Court shall retain sole authority to issue final rulings on matters formally submitted for adjudication, unless otherwise agreed by the parties, and subject to waiver of objection to written orders or recommendations as noted above. To the extent the Special Master enters an order, finding, report, ruling, or recommendation regarding an issue of fact, the Court shall review such issue *de novo*, if any party timely objects pursuant to the Rules and within the 14 calendar day time period set forth herein; *see* Rule 53(f)(3). Failure to meet this deadline results in permanent waiver of any objection to the Special Master's findings of fact.

E. Compensation.

Rule 53(b)(2)(E) states that the Court must set forth “the basis, terms, and procedure for fixing the [Special Master’s] compensation;” *see also* Rule 53(g) (addressing compensation). The Special Master shall be compensated at the rate of \$450 per hour, with defendants bearing 50% of this cost and plaintiffs bearing 50% of this cost. Normal annual increases to this rate of

compensation shall be calculated by reference to the Laffey Index.⁶ The Special Master shall incur only such fees and expenses as may be reasonably necessary to fulfill his duties under this Order, or such other Orders as the Court may issue. The Court has “consider[ed] the fairness of imposing the likely expenses on the parties and [has taken steps to] protect against unreasonable expense or delay.” Rule 53(a)(3).

From time to time, on approximately a monthly basis, the Special Master shall file under seal an Itemized Statement of fees and expenses (not to include overhead). Given that, at this juncture in the litigation, one of the duties of the Special Master is to assist the Court with legal analysis of the parties’ submissions, the Court expects these Itemized Statements may reveal confidential communications between the Special Master and the Court. Accordingly, the Court shall maintain these Itemized Statements under seal, and they shall not be made available to the public or counsel. The Special Master shall file with the Itemized Statement a Summary Statement, which shall list only the total amount billed, shall not be filed under seal, and shall contain a signature line for the Court, accompanied by the statement “approved for disbursement.” If the Court determines the Itemized Statement is regular and reasonable, the Court will sign the corresponding Summary Statement and transmit it to the parties. The parties shall then remit to the Special Master their proportionate share of any Court-approved amount, within 20 calendar days of Court approval.⁷

⁶ See www.laffeymatrix.com/see.html. Annual increases will be limited to the *percentage* increases shown in the Laffey Matrix, not the *numerical* increases.

⁷ The Court adopts this procedure from Judge Kathleen M. O’Malley, who used it in her MDL proceedings. See *In re: Welding Rod Prods. Liab. Litig.*, 2004 WL 3711622 at *5 (N.D. Ohio Nov. 10, 2004).

F. Other Matters.

1. Affidavit.

Rule 53(b)(3)(A) notes that the Court may enter an Order of appointment “only after the [Special Master] files an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. §455.” *See also* Rule 53(a)(2) (discussing grounds for disqualification). The required affidavit has been submitted. *See* docket no. 332.

2. Cooperation.

The parties and their counsel, including their successors in office, agents, and employees, shall provide full cooperation to the Special Master, and any staff or consultant employed by the Special Master, and observe faithfully the requirements of any orders of the Court and rulings by the Special Master. The Parties shall timely comply with rulings of the Special Master issued pursuant to this Order. Pursuant to Rule 53(c)(2), the Special Master may, if appropriate, “impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.” As an agent and officer of the Court, the Special Master (and those working at his direction) shall enjoy the same protections from being compelled to give testimony and from liability for damages as those enjoyed by other federal judicial adjuncts performing similar functions.⁸

3. Access to Information.

The parties will make readily available to the Special Master any and all individuals, information, documents, materials, programs, files, databases, services, facilities, and premises

⁸ *See, e.g., Atkinson-Baker & Assocs., Inc. v. Kolts*, 7 F.3d 1452, 1454-55 (9th Cir. 1993) (applying the doctrine of absolute quasi-judicial immunity to a Special Master).

under their control that the Special Master requires to perform his duties. The parties will make readily available to the Special Master any and all facilities, files, databases, computer programs, and documents necessary to fulfill the Special Master's functions under this Order.

The Special Master may require reports from any party in a format specified by the Special Master, as reasonably required to enable the Special Master to perform all assigned duties.

IT IS SO ORDERED.

s/ Christopher A. Boyko
CHRISTOPHER A. BOYKO
UNITED STATES DISTRICT JUDGE

Dated: July 10, 2014