

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In re Polyurethane Foam Antitrust
Litigation

Case No. 1:10 MD 2196

This document relates to:
ALL CASES

APPOINTMENT ORDER
FOR SPECIAL MASTER
PURSUANT TO FEDERAL
CIVIL RULE 53(b)(2)

JUDGE JACK ZOUHARY

On July 31, 2014, this Court, pursuant to Federal Civil Rule 53(a)(1)(A), proposed the appointment of David Cohen as Special Master to assist this Court with pre-trial motions, jury selection, post-trial motions and other issues needing prompt attention (Doc. 1288-2). No objection was raised to his appointment, and this Court enters this Order of Appointment.

Having given the parties notice and an opportunity to be heard, and with the consent of all parties, Special Master is appointed as follows:

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 Federal Civil Rule 53 and the inherent authority of this Court. *See 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 this Court’s inherent power). As Rule 53 requires, this Court outlines the scope of work of the Special Master.

SPECIAL MASTER DUTIES

Rule 53(a)(1)(A) states this Court may appoint a Special Master to “perform duties consented to by the parties.” In addition, Rule 53(a)(1)(C) states this Court may appoint a Special Master to “address pretrial and post-trial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.” This 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. *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). Consistent with this legal authority and the currently-anticipated needs of this Court, the Special Master shall have the authority to perform, including but not limited to, the following duties.

- Evaluate expert reports and motions to exclude expert testimony, and provide this Court with formal and informal recommended rulings on those motions, including whether to hold *Daubert* hearings.
- Consult on motions for summary judgment, or other motions, with formal and informal recommended rulings on those motions.
- Provide periodic status reports to this Court if requested.
- 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.
- Coordinate with Jury Commissioner and trial counsel the review of written questionnaires submitted by jurors.
- Assist with preparation for status 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 economic evidence.
- Help to coordinate related litigation.
- Direct, supervise, monitor, and report upon implementation and compliance with this Court's orders, and make findings and recommendations on remedial action if required.
- Propose structures and strategies for attorney fee issues and fee settlement negotiations, review fee applications, and evaluate claims for fees.
- 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.

COMMUNICATIONS WITH THE PARTIES AND THIS COURT

Rule 53(b)(2)(B) directs this Court to set forth “the circumstances, if any, in which the [Special Master] may communicate ex parte with this court or a party.” The Special Master may communicate ex parte with this 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 this Court with legal analysis of pleadings and motions. 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 this Court any substantive matter the Special Master learned during an ex parte communication between the Special Master and any party.

SPECIAL MASTER RECORD KEEPING

Rule 53(b)(2)(c) states that this 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 billing records of his time spent on this matter, with reasonably detailed descriptions of his activities and matters worked upon. If this 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.

REVIEW OF SPECIAL MASTER RULINGS

Rule 53(b)(2)(D) directs this 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. Pursuant to Rule 53(f)(2), any party may file an objection to an order, finding, report, ruling, or recommendation by the Special Master within fourteen (14) calendar days of the date it was filed; no extensions granted, and failure to meet this deadline results in permanent waiver of any objection to the Special Master’s orders, findings, reports, rulings, or recommendations. Absent timely objection, the orders, findings, reports, rulings, and recommendations of the Special Master shall be deemed approved, accepted, and ordered by this Court, unless this Court otherwise explicitly provided.

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 (3) 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), this Court shall decide de novo all objections to conclusions of law made or recommended by the Special Master; and this Court shall set aside a ruling by the Special Master on a procedural matter only for an abuse of discretion. This 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, this Court shall review such issue de novo, if any party timely objects within the fourteen (14) calendar day time period discussed above. *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.

COMPENSATION

Rule 53(b)(2)(E) states that this 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 his current rate of \$450 per hour, with Defendants bearing fifty percent (50%) of this cost and Plaintiffs bearing fifty percent (50%) of this cost. 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 this Court may issue. This 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 one of the duties of the Special Master may be to assist this Court with legal analysis of various filings, this Court expects these Itemized Statements may reveal confidential communications between the Special Master and this Court. Accordingly, this 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 this Court, accompanied by the statement “approved for disbursement.” If this Court determines the Itemized Statement is regular and reasonable, this 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 twenty (20) calendar days of Court approval. *See In re: Welding Rod Prods. Liab. Litig.*, 2004 WL 3711622 at *5 (N.D. Ohio Nov. 10, 2004).

OTHER MATTERS

Affidavit

Rule 53(b)(3)(A) notes that this 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 and is attached as Exhibit A.

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 this 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 this 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. *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).

Access to Information

Parties will make readily available to the Special Master any and all individuals, information, documents, materials, programs, files, databases, services, facilities, and premises 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/ Jack Zouhary
JACK ZOUHARY
U. S. DISTRICT JUDGE

August 12, 2014

Affidavit of David R. Cohen
Tendered Pursuant to Fed. R. Civ. P. 53

STATE OF OHIO)
) SS.
COUNTY OF CUYAHOGA)

AFFIDAVIT

David R. Cohen, being first duly sworn according to law, states the following:

1. I am an attorney at law, duly licensed to practice law in the States of Ohio, Colorado, and New York. My bar admissions are as follows:

Ohio Supreme Court, Atty. No. 0055347	Nov. 18, 1991
Colorado Supreme Court, Atty. No. 022420	Feb. 24, 1993
New York Supreme Court, Atty. No. 5082193	Dec. 5, 2012
United States District Court, Northern District of Ohio	Dec. 10, 1992
Sixth Circuit Court of Appeals	Mar. 2, 1993
United States Supreme Court	Jan. 16, 2007

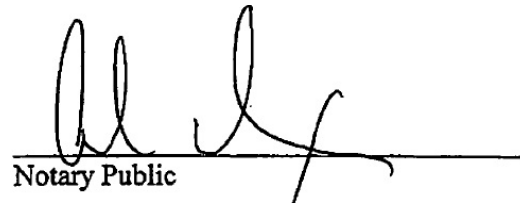
2. I have familiarized myself with the issues and persons involved in the case captioned *In re: Polyurethane Foam Antitrust Litigation*, case no. 10-MD-2196 (N.D. Ohio). As a result of my knowledge of that case, I can attest and affirm that there are no non-disclosed grounds for disqualification under 28 U.S.C. §455 that would prevent me from serving as Court Monitor in the captioned matter.

FURTHER AFFIANT SAYETH NAUGHT.



David R. Cohen

Sworn to before me and subscribed in my presence this 7th day of August, 2014.



Notary Public

