

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

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|-------------------------------------|---|------------------------------------|
| IN RE: ORAL SODIUM PHOSPHATE | : | |
| SOLUTION-BASED PRODUCTS | : | |
| LIABILITY ACTION | : | Case No. 1:09-SP-80000 |
| | : | (MDL Docket No. 2066) |
| | : | |
| THIS DOCUMENT RELATES TO | : | |
| ALL ACTIONS | : | JUDGE ALDRICH |
| | : | |
| | : | <u>ORDER OF APPOINTMENT</u> |

In Pretrial Order No. 1, the Court asked the parties to indicate whether they believed the use of a Special Master in this MDL proceeding was appropriate. Plaintiffs and defendants both submitted statements supporting the use of a Special Master and proposing the appointment of David R. Cohen, Esq.¹ At a case management conference on August 20, 2009, the Court heard suggestions from counsel regarding the Special Master's immediate role and function in this litigation.

Accordingly, the parties having had notice and an opportunity to be heard, and with the advice and consent of the parties, the Court now appoints as Special Master David R. Cohen, Esq., of the following law firm:

David R. Cohen Co. LPA
23220 Chagrin Blvd.
Two Commerce Park, Suite 360
Cleveland, OH 44122
216-831-0001 tel
866-357-3535 fax E-Mail: david@specialmaster.biz

¹ See docket no. 19 at 25 (plaintiffs "agree with the Court's suggestion of a special master, and support the appointment of Mr. David R. Cohen to that position"); docket no. 26, exh. K at 6 (defendants' proposed case management order "designat[ing] Special Master David R. Cohen . . . to hear and decide discovery related disputes").

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

I. Background.

On June 25, 2009, the Judicial Panel on Multidistrict Litigation transferred 38 related cases to the undersigned for coordinated or consolidated pretrial proceedings. The Panel concluded that all of the cases

share factual questions relating to oral sodium phosphate solution-based (OSPS) products manufactured and sold by Fleet. Plaintiffs in all actions challenge the safety of those products and allege personal injuries stemming from their use of those products. In particular, plaintiffs allege that high doses of OSPS products could lead to acute phosphate nephropathy, a type of kidney injury, and that Fleet knew of the risks associated with high doses of OSPS but downplayed or obscured those risks.³

Since that time, this transferor court has received over 30 additional cases, and plaintiffs’ counsel

² “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). The Court’s inherent power to appoint a Special Master, however, is not without limits. See *Cobell v. Norton*, 334 F.3d 1128, 1142 (D.C. Cir. 2003) (in the absence of consent by the parties, the inherent authority of the court does extend to allow appointment of Special Master to exercise “wide-ranging extrajudicial duties” such as “investigative, quasi-inquisitorial, quasi-prosecutorial role[s]”).

³ *In re: Oral Sodium Phosphate Solution-Based Prods. Liab. Litig.*, — F.Supp.2d —, 2009 WL 1838333 at *1 (J.P.M.L. Jun 23, 2009) (MDL No. 2066).

represented to the Court at the initial case management conference that there may be hundreds of other plaintiffs. The parties' briefs make clear that these cases will involve complicated medical expert testimony, evidence regarding the history of federal regulation of OSPA products, and other demanding topics. The parties also represented that discovery to date has involved heated disputes, with difficult questions of privilege.

It is clear this MDL presents many difficult issues and will require an inordinate amount of attention and oversight from the Court. Other MDL courts, facing similar challenges, have easily concluded that appointment of a Special Master was appropriate to help the Court with various pretrial, trial, and post-trial tasks.⁴ Indeed, the appointment of a Special Master in MDL cases such as this is common. The 2003 amendments to Rule 53 specifically recognize the pretrial, trial, and post-trial functions of masters in contemporary litigation. Thus, the Court agrees with the parties that appointment of a Special Master to assist the Court in effectively and expeditiously resolving the parties' disputes is appropriate.

⁴ See, e.g., *In re: Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liab. Litig.*, 1999 WL 782560 at *2 (E.D. Pa. Sept. 27, 1999) (MDL No. 1203) (noting that the court had earlier appointed a Special Master to oversee discovery matters and "facilitate the timely remand of individual civil actions to their respective transferor courts;" the court later broadened the Special Master's duties to include oversight and administration of the settlement trust funds); *In re: Bridgestone/Firestone Inc., ATX, ATX II, and Wilderness Tires Products Liab. Litig.*, Order at 3-5, docket no. 14 (MDL No. 1373) (S.D. Ind. Nov. 1, 2000) (available at www.insd.uscourts.gov/Firestone) (appointing a Special Master to assist the court with all phases of the litigation, from "formulating a governance structure of [the] MDL" in its earliest stage to assisting with "attorneys fees" issues and "settlement negotiations" during the latter stages of the litigation); *In re: Baycol Products Liab. Litig.*, 2004 WL 32156072 (D. Minn. Mar. 25, 2002) (MDL No. 1431) (appointing a Special Master early in the case and assigning him all available "rights, powers, and duties provided in Rule 53;" the court has since appointed two additional masters to assist the first Special Master); *In re: Propulsid Products Liab. Litig.*, 2004 WL 1541922 (E.D. La. June 25, 2004) (MDL No. 1355) (appointing a Special Master and setting out a variety of duties); *In re: Welding Fumes Prods. Liab. Litig.*, 2004 WL 3711622 (N.D. Ohio Nov. 10, 2004) (same).

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. Master's Duties.

Rule 53(a)(1)(A) states that the Court may appoint a master to “perform duties consented to by the parties.” The Court has reviewed recent 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.⁵ Consistent with this legal authority, the currently-anticipated needs of the court, and the parties’ broad consent, the Court states that the Special Master in these proceedings shall have the authority to:⁶

- assist with preparation for attorney conferences (including formulating agendas), court scheduling, and negotiating changes to the case management order;
- establish discovery and other schedules, review and attempt to resolve informally any discovery conflicts (including issues such as privilege, confidentiality, and access to medical and other records), and supervise discovery;
- oversee management of docketing, including the identification and processing of matters requiring court rulings;
- compile data and assist with, or make 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 recommend findings of fact and conclusions of law;

⁵ *See, e.g.*, Fed. R. Civ. P. 53, advisory committee’s notes (discussing the range of duties and authority of the Special Master).

⁶ This list is meant to be illustrative, not comprehensive.

- assist with responses to media inquiries;
- help to coordinate federal, state and international litigation;
- direct, supervise, monitor, and report upon implementation and compliance with the Court's Orders, and make 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;
- make formal or informal recommendations and reports to the parties, and make recommendations and reports to the Court, regarding any matter pertinent to these proceedings; and
- communicate with parties and attorneys as needs may arise in order to permit the full and efficient performance of these duties. *See* discussion below.

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 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, in order to assist the Court with legal analysis of the parties’ submissions. The Special Master may also communicate ex parte with the Court, without providing notice to the parties, regarding

logistics, the nature of his activities, management of the litigation, and other appropriate procedural matters. 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.⁷

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 of this MDL, including the making of informal suggestions to the parties to facilitate compliance with Orders of the Court; such ex parte communications may, for example, address discovery or other procedural issues. Such ex parte communications shall not, however, address the merits of any substantive issue, except that, if the parties seek assistance from the Special Master in resolving a dispute regarding a substantive issue, the Special Master may engage in ex parte communications with a party or his attorney regarding the merits of the particular dispute, for the purpose of mediating or negotiating a resolution of that dispute, only with the prior permission of those opposing counsel who are pertinent to the particular dispute.⁸

⁷ If, for example, the Court later finds it desirable to use the Special Master as a mediator regarding the merits of a particular dispute, which mediation would require disclosure of information by the parties to the Special Master that the parties would prefer to keep from a final adjudicator, the Court may redefine the scope of allowed ex parte communications with the Court regarding that dispute. *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.

⁸ To the extent it may be considered a "substantive issue," the Special Master may engage in ex parte communications with a party or counsel, without first obtaining the prior permission of opposing counsel, to resolve privilege or similar questions and in connection with in camera inspections.

C. 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 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. *See also* section II.E of this Order, below. 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 electronic 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. The Court may later amend the requirements for the Special Master’s record if the role of the Special Master changes.⁹

D. Review of the Special Master’s Orders.

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 master’s orders, findings, and recommendations.” The Special Master shall either: (1) reduce any formal order, finding, report, 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, or recommendation on the record before a court reporter. Pursuant to Rule 53(g)(2), any party may file an objection to an order, finding, report, or recommendation by the Special Master within 14 calendar days of the date it was electronically filed; failure to meet this

⁹ *See, e.g., In re: Propulsid Products Liab. Litig.*, 2004 WL 1541922 (E.D. La. June 25, 2004) (setting out additional record-keeping requirements after the Special Master was charged with new duties of administering a settlement program).

deadline results in permanent waiver of any objection to the Special Master's orders, findings, reports, or recommendations.¹⁰ Absent timely objection, the orders, findings, reports, and recommendations of the Special Master shall be deemed approved, accepted, 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(g)(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, or recommendation regarding an issue of fact, the Court shall review such issue de novo, if any party timely objects

¹⁰ Rule 53(g)(2) provides that parties may file objections "no later than 20 days from the time the master's order, report, or recommendations are served, unless the court sets a different time." The Court chooses to set a period of 14 calendar days (NOT business days) in order to expedite final resolution of matters formally reported upon by the Special Master. 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.

pursuant to the Rules and within the 14 calendar day time period set forth herein; *see* Rule 53(g)(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 master's compensation;" *see also* Rule 53(h) (addressing compensation). The Special Master shall be compensated at his current rate of \$345 per hour, with the parties bearing this cost equally (50% by the plaintiffs and 50% by the defendants). Normal annual increases to this rate of compensation shall be calculated by reference to the Laffey Index.¹¹ 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 submit to the Court an Itemized Statement of fees and expenses (not to include overhead), which the Court will inspect carefully for regularity and reasonableness. 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 will reveal confidential communications between the Special Master and the Court. Accordingly, the Court shall maintain these Itemized

¹¹ *See* http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_8.html. Annual increases will be limited to the *percentage* increases shown in the Laffey Matrix, not the *numerical* increases.

Statements under seal, and they shall not be made available to the public or counsel. The Special Master shall attach to each Itemized Statement a Summary Statement, which shall not reflect any confidential information 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 half-share of any Court-approved amount, within 20 calendar days of Court approval.¹²

F. Other Matters.

1. Affidavit.

Rule 53(b)(3) notes that the Court may enter an Order of appointment “only after the master has filed 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). Attached to this Order is the affidavit earlier submitted to the Court by the Special Master.

2. Cooperation.

The Special Master shall have the full cooperation of the parties and their counsel. Pursuant to Rule 53(c), the Special Master may, if appropriate, “impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and

¹² The Court adopts this procedure from Judge Sarah Evans Barker, who used it in *In re: Bridgestone/Firestone* (see www.insd.uscourts.gov/Firestone, docket no. 593 – “Entry concerning fees of Special Master”) and also Judge Kathleen M. O’Malley, who used it in *In re: Welding Fumes Prods. Liab. Litig.*, 2004 WL 3711622 (N.D. Ohio Nov. 10, 2004).

sanctions against a nonparty.” As an agent and officer of the Court, the Special Master 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.¹³ The parties will make readily available to the Special Master any and all facilities, files, databases, and documents which are necessary to fulfill the Special Master’s functions under this Order.

IT IS SO ORDERED.

/s/Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

Dated: August 24, 2009

¹³ See *Atkinson-Baker & Associates, Inc. v. Kolts*, 7 F.3d 1452, 1454-55 (9th Cir. 1993) (applying the doctrine of absolute quasi-judicial immunity to a Special Master).

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

STATE OF OHIO)
) SS.
COUNTY OF CUYAHOGA)

AFFIDAVIT

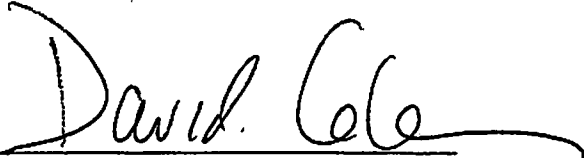
David R. Cohen, being first duly sworn according to law, states the following:

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

| | |
|---|---------------|
| Ohio Supreme Court, Atty. No. 0055347 | Nov. 18, 1991 |
| Colorado Supreme Court, Atty. No. 022420 | Feb. 24, 1993 |
| 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 |

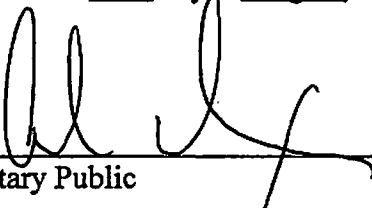
2. I have thoroughly familiarized myself with the issues involved in the case captioned *In re: Oral Sodium Phosphate Solution-Based Prods. Liab. Litig.*, MDL-2066. As a result of my knowledge of that case, I can attest and affirm that there are no non-disclosed grounds for disqualification under 28 U.S.C. §455 that would prevent me from serving as the Special Master in the captioned matter.

FURTHER AFFLIANT SAYETH NAUGHT.



David R. Cohen

Sworn to before me and subscribed in my presence this 20th day of August, 2009.



Notary Public

