

FEB 13 2013

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

TONY R. MOORE, CLERK
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE, LOUISIANA

IN RE ACTOS (PIOGLITAZONE-
PRODUCTS LIABILITY LITIGATION

This Document Applies to:
All Cases

MDL No. 6:11-md-2299

JUDGE DOHERTY

MAGISTRATE JUDGE HANNA

CASE MANAGEMENT ORDER:
CLAIMS FOR COMMON BENEFIT FEES AND EXPENSES

This Court has established a Plaintiffs Steering Committee (“PSC”), the members of which have been given the duty to act in this matter on behalf of all of the plaintiffs in these proceedings (*i.e.*, to act for the common benefit of all plaintiffs), in addition to acting on behalf of their own clients. *See* Court Order: Plaintiffs Steering Committee (Rec. Doc. 560), as amended (Rec. Doc. 2320) (“PSC Order”). Pursuant to both the PSC Order and Case Management Order: PSC’s Management of Timekeeping, Cost Reimbursement and Related Common Benefit Issues (Rec. Doc. 1357) (“Timekeeping Order”), common benefit tasks may be assigned to plaintiffs’ attorneys who are willing and able to perform such tasks.¹

In the event that the Plaintiffs recover any sum of money from the Defendants in these proceedings (whether by judgment or by settlement)—and this Court expresses no opinion or expectation as to the likelihood of such recovery—Participating Counsel may be entitled to compensation for authorized contributions to the common benefit effort and the associated time spent and expenses incurred. This Court is aware of the conflicts and disputes that can arise when such compensation requests are made. In an effort to minimize the scope of those potential difficulties, this Court has appointed Deputy Special Master Kenneth W. DeJean, whose duties are

¹ As in the Timekeeping Order, any attorney providing approved or authorized common benefit services is a “Participating Counsel” for purposes of the instant order.

directed at management and oversight of matters related to the PSC, including, but not limited to, the assignment of duties and tasks that inure to the common benefit of all Plaintiffs, together with monitoring requests for reimbursement of common benefit fees and expenses as they arise and recommending approval or denial of those requests. Deputy Special Master DeJean was chosen for this role by this Court because he has extensive experience as a member of the plaintiffs' bar; and has filled the roles of counsel, as well as special master, in various complex litigations (including both class actions and multi-district litigation). Thus, this Court considers Deputy Special Master DeJean an expert in the litigation of complex matters from the plaintiff's perspective and will take his recommendations very seriously.

Considering the foregoing,

IT IS HEREBY ORDERED that, in the event this Court establishes a Common Benefit Fund, (a) tasks performed for the common benefit of all plaintiffs ("Common Benefit Work") and (b) time expended, or expenses incurred, in performing Common Benefit Work ("Common Benefit Costs") shall be compensated from the Fund ONLY in accordance with the rules set forth below.

I. COMMON BENEFIT WORK

The common benefit tasks that are necessary or advisable in these proceedings shall be determined by the PSC and assigned pursuant to the PSC Order and the Timekeeping Order. The PSC has internally delegated responsibility over decisions made pursuant to the instant Case Management Order to the PSC Executive Committee ("PEC"), thus, hereafter reference will be to the PEC.

A. Application for Common Benefit Work

Every counsel of record who wishes to provide Common Benefit Work must seek approval from the PEC, by way of either request or suggestion (an "Application"), *prior* to performing such

tasks.² See PSC Order and Timekeeping Order. Approval must occur *prior* to the commencement of the task, except where exigent circumstances are shown. Where approval is obtained, Participating Counsel are expected to submit requests for reimbursement of Common Benefit Costs incurred as a result of the performance of such tasks, as described in Section II of this Order (a “Request”).

B. Deputy Special Master DeJean

In the event an Application for Common Benefit Work is denied by the PEC, an attorney of record may appeal the denial to Deputy Special Master DeJean. A copy of any such appeal (containing an explanation of the work requested, together with an explanation of the necessity or advisability of having the work performed and for having it performed by the Applicant) shall be provided to the PEC, through Co-Lead Counsel. The PEC shall be granted an opportunity to be heard on the appeal, by providing a written response to Deputy Special Master DeJean and a copy to the Applicant. If approval is granted by Deputy Special Master DeJean, Participating Counsel are expected to perform the task(s), then submit a Request(s) for reimbursement of Common Benefit Costs incurred during the performance of such tasks, as described in Section II of this Order. If Deputy Special Master DeJean denies an Application for approval of Common Benefit Work, then the Applicant may lodge his or her objections using the procedures described in Section III.

C. Presumption of Approval of Application

The approval of an Application for Common Benefit Work by either, Co-Lead Counsel, the PEC, or Deputy Special Master DeJean shall carry with it the presumption of approval by this Court.

II. COMMON BENEFIT COSTS

² Counsel should use the processes established by the PEC for requesting such approval.

As noted above, "Common Benefit Costs" are those fees and expenses incurred by Participating Counsel in completing tasks assigned or approved by either Co-Lead Counsel, the PEC, or Deputy Special Master DeJean, as authorized by the PSC Order, the Timekeeping Order, or the instant Case Management Order. This Court will presume that any Request for reimbursement of Common Benefit Costs that has **not** been processed as described did not provide a common benefit to the Plaintiffs.

A. Submission of Request for Reimbursement of Common Benefit Costs

Any Participating Counsel who has incurred Common Benefit Costs is required to submit a Common Benefit Time Report in accordance with the instructions contained within the Timekeeping Order. (Rec. Doc. 1357)

B. Deputy Special Master DeJean

With regard to Requests for reimbursement of Common Benefit Costs, Deputy Special Master DeJean shall have two primary duties. First, he shall provide oversight for Common Benefit Time Reports generally. Second, he shall review contested Common Benefit Time Reports.

1. Oversight

Deputy Special Master DeJean shall conduct periodic reviews of the Common Benefit Time Reports submitted by Participating Counsel. He shall conduct these reviews at a time and frequency of his choosing so as to permit him to become reasonably current (*i.e.*, with a backlog of fewer than 60 days' worth of Time Reports) by the end of calendar year 2013. Should Deputy Special Master DeJean discover, during his oversight review of Time Reports, any matter requiring further attention, he shall have the authority to confer with Participating Counsel for the purpose of obtaining the necessary information, adjustments, or changes to the Time Reports. In the event that such consultation does not result in Time Reports that are satisfactory, he shall confer with Special Master Russo and this Court for the purpose of (i) determining whether the issue must be addressed

immediately (or, alternatively, can await this Court's attention at the time that Objections are addressed as described in Section III), and (ii) developing a plan for addressing such issues.

2. Review

On or before March 31, 2013, the PEC shall provide Deputy Special Master DeJean with a copy of any contested Common Benefit Time Report (*i.e.*, any Request not approved by Co-Lead Counsel or the PEC) for Common Benefit Costs incurred on or before the date of this order. Thereafter, on the last day of each month, Co-Lead Counsel or the PEC shall provide Deputy Special Master DeJean with a copy of contested Common Benefit Time Reports submitted to the PEC at the end of the previous month.

Deputy Special Master DeJean shall review each contested Common Benefit Time Report and shall recommend that each be affirmed or overruled (completely or in part). Unless Deputy Special Master DeJean recommends full approval of a particular contested Common Benefit Time Report, he shall issue written reasons for his recommendation. The written reasons shall be provided to the PEC, through Co-Lead Counsel, and the Requesting Counsel whose Request is overruled. Should a Requesting Counsel wish to object to the recommendation, he, she, or they may submit such objections by complying with the procedures established in Section III.

C. Timeliness

As previously ordered by this Court in the Timekeeping Order, all Applications for approval of Common Benefit Work must be filed *prior* to the commencement of the task, except where exigent circumstances can be shown. Additionally, Requests for reimbursement of Common Benefit Costs must be filed by the end of the month following the month during which the task was performed or costs incurred. Otherwise, the Application or Request shall be deemed untimely and shall be denied as untimely, unless good cause is shown. Mere negligence will not constitute good cause.

With regard to Common Benefit Work that was performed prior to the issuance of this Order, Participating Counsel are expected to be in compliance with the Timekeeping Order, which allowed for late submission of Requests for work completed before the Timekeeping Order was issued.

III. OBJECTIONS

In any instance where Deputy Special Master DeJean recommends denial of a contested Application for Common Benefit Work or of a Request for reimbursement of Common Benefit Costs, or approves a contested Application or Request over the objection of Co-Lead Counsel or the PEC, the procedure described in this Section shall be available to the Applicant, Requesting Counsel, or PEC to lodge his, her, or their objections to the recommendation. This procedure is designed to permit as much immediate review as practicable while the case is proceeding, without creating unnecessary risk of *ex parte* communication with the Court.

A. Objections to Deputy Special Master DeJean's Recommendations

In the event that Deputy Special Master DeJean recommends denial of a contested Application or Request, or approval over the objection of the PEC, he shall issue written reasons for his recommendation. The written reasons shall be as complete as possible, without revealing unnecessary factual allegations or insight into the Plaintiffs' or Defendants' strategy, tactics, or theory of their case. Deputy Special Master DeJean shall maintain the original of his written reasons in his files and shall provide copies of his reasons to (a) the Applicant or Requesting Counsel; (b) the Plaintiffs' Executive Committee, through Co-Lead Counsel, and (c) Special Master Russo.

If Deputy Special Master DeJean recommends approval of a contested Application or Request, no further review will occur absent good cause shown. If the PEC elects to challenge Deputy Special Master DeJean's recommendation for cause, it must submit its objection in

accordance with the instructions found in this Section no later than 14 calendar days after the written reasons are served upon the PEC, through Co-Lead Counsel, *via* email.

If Deputy Special Master DeJean recommends denial of a Request or Application, then his written reasons shall include an instruction to the Applicant or Requesting Counsel that, if he, she, or they wish to lodge objections to the recommendation, those objections must be submitted, in accordance with the instructions contained in this Section, no later than 14 calendar days after the written reasons are served upon counsel *via* email.

B. Special Master Russo's Recommendations

In the event a Requesting Counsel, Applicant, or the PEC elects to lodge objections to a recommendation by Deputy Special Master DeJean, his, her, or their objections shall be submitted directly to Special Master Russo, with a copy to be provided to the two objecting sides (the PEC's objections must be copied to the Requesting Counsel or Applicant while objections by an Applicant or Requesting Counsel must be provided to the PEC, through Co-Lead Counsel). Once the PEC, Applicant, or Requesting Counsel has responded to the objections, Special Master Russo shall issue written reasons documenting (a) his *de novo* review of the Application or Request, together with Deputy Special Master DeJean's written reasons, (b) his adoption or rejection of Deputy Special Master DeJean's recommendation, and (c) his recommendation that the Application or Request be approved or denied. In doing so, Special Master Russo shall take care to avoid revealing unnecessary factual allegations or insight into the Plaintiffs' or Defendants' strategy, tactics, or theory of their case.

Special Master Russo shall maintain the original of his recommendation and written reasons, if any, in his files and shall provide copies of both to (a) the Applicant or Requesting Counsel; and (b) the PSC Executive Committee, through Co-Lead Counsel. When Special Master Russo's recommends that an Application or Request be denied, his written reasons shall include an

instruction to the Applicant or Requesting Counsel that: (a) he or she remains free to conduct the task(s) for which approval is sought, with the understanding that the Court will make its determination, at the end of these proceedings, whether any common benefit accrued to the plaintiffs; and/or (b) the Request for reimbursement of Common Benefit Costs will be addressed at the end of these proceedings, by this Court, with full opportunity to assert objections at that time.

C. Hearing

In the event this Court establishes a Common Benefit Fund, this Court, or its designee, shall conduct a hearing – closer in time to the termination of these proceedings – for the purpose of ruling on any denied Applications or Requests, as well as unsatisfactory Time Reports identified by Deputy Special Master DeJean. At the appropriate time, prior to said hearing, this Court will issue an order instructing counsel who wish to challenge such denials to notify this Court in writing of their intention to do so. The failure to timely provide such written notice will result in **any denied Application(s), Request(s), or Time Reports being deemed WAIVED and thus DENIED.**

D. Rulings

Given the number of contested Applications, Requests, and unsatisfactory Time Reports that normally are involved in MDL proceedings, the parties should be aware that, **once a ruling on an Application, Request, or Time Report is made by this Court, the ruling will be final, as to this Court, and not subject to reconsideration.** Similarly, **once payment of a Request has been authorized by this Court, or a Time Report has been approved by this Court, the determination is final and shall not be reconsidered, or open to further challenge.** However, a ruling on a Request pursuant to this Case Management Order is limited to the amount of time (*i.e.*, number of hours expended on Common Benefit Work) incurred and is not a final determination as to the value (*i.e.*, hourly rate or multiplier, if any) of the time expended. This Court will determine the dollar amount at an appropriate time during the latter stages of these proceedings.

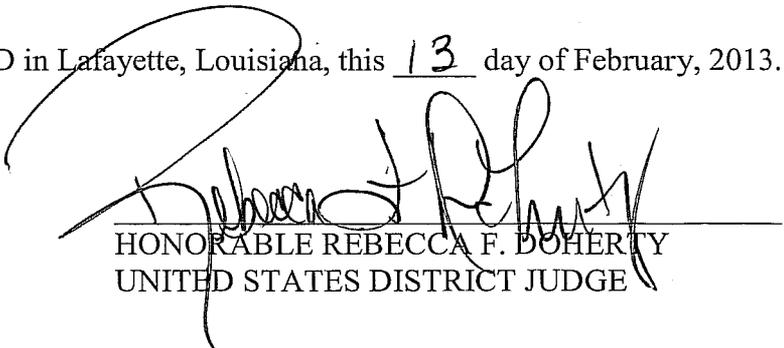
IV. GENERAL INSTRUCTIONS

Counsel should be aware of this Court's expectation that Requests for Common Benefit Costs incurred, whether in this venue or another, will be submitted to this Court for approval throughout the course of these proceedings, **in accordance with the instructions contained herein and the Orders referenced herein.** Counsel should also be on full notice that they bear the full and announced risk for any tasks completed, or costs incurred, without obtaining approval pursuant to this Case Management Order and the Orders referenced herein.

Counsel should take specific notice that any Request for reimbursement of Common Benefit Costs that violates the terms of this Case Management Order **shall be presumed denied and not considered to have been performed for the common benefit of the Plaintiffs.** Such Requests will be entertained only upon a showing, by counsel, of good cause. Counsel should take further notice that negligence, whether on behalf of counsel or his or her staff, will not be considered good cause.

The subject of this Case Management Order amends and supplements, to some degree, this Court's Order Appointing Special Masters (Rec. Doc. 532). To the extent there might be a conflict or disparity between the Order Appointing Special Masters and the instant Order, the instructions contained in the instant Order shall control. Additionally, the subject of this Case Management Order addresses some of the same subject matter as the Timekeeping Order (Rec. Doc. 1357), and is intended to be read in tandem with that order.

THUS DONE AND SIGNED in Lafayette, Louisiana, this 13 day of February, 2013.



HONORABLE REBECCA F. DOHERTY
UNITED STATES DISTRICT JUDGE