

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: DEPUY ORTHOPAEDICS, INC. § MDL Docket No. 3:11-MD-2244
PINNACLE HIP IMPLANT PRODUCT §
LIABILITY LITIGATION §

§ Honorable Ed Kinkeade
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This Document Relates To:
ALL CASES

COMMON BENEFIT FEE AND EXPENSE
ALLOCATION PROTOCOL ORDER

The Court has set the final common benefit assessment for fees and expenses (Dkt. 1031) and now turns its attention to the associated allocation process.

This Court entered Case Management Order 7 (“CMO 7”) near the inception of this litigation (Dkt. 153; 6/20/2012). Pursuant to CMO 7, the parties were ordered to keep common benefit time and expenses in compliance with the protocol described therein and submit the detailed records monthly.

On July 9, 2019, the Plaintiffs’ Executive Committee (“PEC”) was instructed, based on the Court's June 21, 2019 Sealed Order Regarding Motion for Final Assessment (Dkt. 1017), to submit a detailed estimate of all claimed common benefit fees and expenses for *in camera* review. The PEC’s 50-page submission was then circulated to all known common benefit applicants. The common benefit applicants were instructed to contact the Special Master by email, no later than July 11, 2019, if they had any objection to the common benefit fee and expense submissions. There

were only two objections for attorneys requesting that their hours submitted be increased, and those records are deemed submitted.

Pursuant to CMO 7, the Court appointed a Common Benefit Fee Committee composed of the litigation's leaders: Mark Lanier, Richard Arsenault, Jayne Conroy, and Wayne Fisher ("Fee Committee"). The Court adds Steve Harrison to the Fee Committee. These lawyers collectively provided the broadest range of common benefit efforts and, consequently, are in an excellent position to evaluate the various common benefit contributions. In connection with that process, the Fee Committee is instructed to consider the Fifth Circuit's 12-factor test in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), *overruled on other grounds*, *Blanchard v. Bergeron*, 489 U.S. 87 (1989).

Any eligible common benefit applicant making a claim for common benefit compensation may allow the time and expense entries already submitted to speak to each one's common benefit effort. Given the Special Master and Fee Committee's comprehensive and real-time observation of the common benefit efforts, no additional submissions are required. However, eligible common benefit applicants may supplement those submissions with a written narrative of any particular aspect of work that such applicant wishes to emphasize for common benefit purposes. These submissions will be made to the Fee Committee for consideration. The Fee Committee is to include any narratives with its recommendations.

Any such narrative must be in Affidavit form and limited to 3 pages. Again, no

common benefit applicant should feel compelled to provide this narrative, as time entries, if properly submitted, should be sufficient. This is particularly so with a Fee Committee composed of the primary hands-on lawyers, and where the Court was hands-on and attentive to each step of discovery as well as overseeing five bellwether trials which consumed some 134 days.

Any such narrative submitted by an eligible common benefit applicant must be provided to the Fee Committee within ten (10) days from the entry of this Order. Failure to do so will be deemed a decision by the attorneys to rely upon their time submissions.

Consistent with the protocol described herein and outlined in CMO 7, the Fee Committee is instructed to receive and review any such submissions, review the common benefit time and expense submissions, confer and arrive at recommendations for allocations and submit same to the Special Master within twenty (20) days from the entry of this Order. The Fee Committee will simultaneously circulate a copy of its recommendations to common benefit applicants.

In connection with the Common Benefit Allocation Process, the Court also hereby appoints James M. Stanton, in addition to his other Special Master responsibilities, to serve as the Common Benefit Allocation Special Master and refers to him the Fee Committee's anticipated allocation recommendations.

With this assignment, the Special Master shall conduct his own independent evaluation, consider any compliant submissions and relevant evidence, review the

common benefit time and expense submissions, and evaluate same through the *Johnson* factors lens along with his years of real-time observations as this MDL's Special Master.

In performing this duty, the Special Master has the full authority conveyed in **Federal Rule of Civil Procedure 53**, including the power to, in his discretion, conduct interviews, review relevant documents, conduct evidentiary hearings, and compel, take, and record evidence. The Allocation Special Master shall be guided by the same principles and jurisprudence that apply to the Fee Committee.

In the event that a common benefit applicant objects to the Fee Committee's allocation recommendation, a detailed written objection, not to exceed 3 pages, setting forth with specificity the basis of the objection shall be submitted to the Special Master within ten (10) days of the transmission of the Fee Committee's allocation recommendation.


After independently considering the Fee Committee's recommendation and timely filed objections the Special Master shall submit his allocation recommendation to the Court. Common benefit applicants will have five (5) days from the date of such filing to object to the Special Master's allocation recommendation. Thereafter, the Court will review the Special Master's allocation recommendation along with any filed objections to same, conduct its own independent evaluation, and issue its final allocation order.

Time and associated expenses continue to accrue in furtherance of the common benefit effort regarding this litigation, and those reasonable time and expense

submissions will likewise be provided to Special Master Stanton for his review and approval.

SO ORDERED.

Signed September 11th, 2019.



ED KINKEADE
UNITED STATES DISTRICT JUDGE