

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

IN RE: E. I. DUPONT DE NEMOURS ) CASE NO. 2:13-MD-2433  
AND COMPANY C-8 PERSONAL )  
INJURY LITIGATION ) JUDGE EDMUND A. SARGUS, JR.  
(MDL No.: 2433) ) Magistrate Judge Elizabeth P. Deavers

This document relates to: **ALL ACTIONS**

**PRETRIAL ORDER NO. 6**

**Common Benefit Fund Order**

**I. SCOPE OF ORDER**

1. This Order is entered to provide for the fair and equitable sharing among plaintiffs of the cost of services performed and expenses incurred by attorneys acting for MDL administration and common benefit of all plaintiffs in this complex litigation. Therefore, the Court finds it appropriate to establish a Common Benefit Fund from which payments may be made to attorneys who provide authorized and approved services or incur authorized and approved expenses for the joint and common benefit of plaintiffs in addition to their own client(s).

**A. Governing Principles – The Common Benefit Doctrine.**

2. This Court has authority under applicable law, the common benefit doctrine, and other principles of efficiency and equity to create a common benefit fund to compensate Plaintiffs' Steering Committee ("PSC") for the services they provide, and expenses they incur, for the benefit of all plaintiffs in this coordinated litigation.

3. The governing principles are derived from the United States Supreme

Court's common benefit doctrine, as established in *Trustees v. Greenough*, 105 U.S. 527 (1881); refined in, *inter alia*, *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1884); *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); and approved and implemented in the MDL context, in *inter alia*, *In re MGM Grand Hotel Fire Litigation*, 660 F. Supp. 522, 525-29 (D. Nev. 1987); and *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1019-21 (5th Cir. 1977). See also Manual for Complex Litigation, Fourth §§ 14.211, 20.312, 22.927 (2008).

**B. Relationship to Leach Class Action Proceedings.**

4. These centralized and coordinated MDL proceedings arise from and are directly related to litigation originally filed in 2001 in West Virginia state court, styled *Leach, et al., v. E. I. du Pont de Nemours and Company*, Civil Action No. 01-C-608 (Wood Cty, W. Va. Cir. Ct.), which was certified to proceed as a class action in 2002 and which generated a Class Action Settlement Agreement approved by that Court in 2005 (the *Leach* Class Settlement"). The efforts of *Leach* class counsel in the prior *Leach* and related litigation against DuPont involving C8 issues resulted in advancement of the interests of the plaintiffs in the current MDL proceedings, such as important expert and fact discovery, considerable document production and review, and resolution of some legal issues, as provided under the terms of the *Leach* Class Settlement.

**C. Application.**

5. This Order applies to all cases now pending, or later filed in, transferred to, or removed to, this Court and treated as part of the coordinated proceeding known as *In Re: E. I. du Pont de Nemours and Company C-8 Personal Injury Litigation*, MDL

No. 2433 ("the MDL Proceedings"). This Order further applies to all plaintiffs' attorneys who are counsel, co-counsel, or have any type of fee interest in cases now pending, or later filed in, transferred to, removed to, or governed by this Court as part of the MDL Proceedings.

**1. Counsel with Cases in MDL No. 2433.**

6. All plaintiffs' attorneys who are counsel, co-counsel, or have any type of fee interest in at least one case that is now pending, or later filed in, transferred to, or removed to, this Court as part of the MDL Proceedings shall be subject to the Assessment established in this Order. Additionally, all PSC members, including plaintiffs' Co-Lead Counsel, shall be subject to this Assessment order for every personal injury or wrongful death type case subject to these MDL Proceedings in which they have a fee interest.

**2. Non-MDL Counsel.**

7. Counsel who are not counsel or co-counsel and do not have any type of fee interest in at least one case now pending, or later filed in, transferred to, removed to, or governed by this Court as part of the MDL proceedings, but have personal injury and/or wrongful death cases related to the *Leach* matter pending against DuPont for C8 probable-linked disease(s) in any other court, including any state court proceeding, and who choose not to execute a participation agreement approved by the PSC ("Non-MDL Counsel") are not entitled to receive any common benefit or MDL work product. Additionally, Non-MDL Counsel shall not be eligible to receive common benefit payments for any work performed or expenses incurred.

8. If, within forty-five (45) days of entry of this Order or forty-five (45) days of their first case for personal injury and/or wrongful death related to the *Leach* matter

pending against DuPont for C8 probable-linked disease(s) being docketed in any other court (the "45-Day period"), including any state court, whichever is sooner, a Non-MDL Counsel executes a participation agreement approved by the PSC ("Participation Agreement"), such counsel shall be subject to the Assessment defined below. If such counsel executes a Participation Agreement after such 45 Day Period, the amount of the Assessment shall be doubled for such counsel, as provided below.

9. Nothing in this Order shall limit the PSC's right or ability to seek an equitable contribution from a plaintiff or plaintiff's counsel from any gross monetary recovery by a Non-MDL Counsel settling a non-MDL personal injury and/or wrongful death case against DuPont for C8 probable-linked disease(s) in which such counsel obtained access to, or the benefit of, any common benefit or MDL work product or negotiations.

10. The PSC shall provide Defendant's Lead Counsel a list of the plaintiffs' attorneys and/or firms who have entered into Participation Agreements, and shall provide updates to this list as they occur, but no less frequently than quarterly. The PSC shall also provide to Defendant's Lead Counsel, at the same time and updated on the same basis, a list of all other cases and plaintiffs' attorneys whom it deems are also required to pay the Assessment. For clarity, The list provided by the PSC will include any names of attorneys for whom the PSC believes an Assessment would be due. DuPont may elect to confer with co-lead counsel for the PSC before any Assessment is paid or not paid.

**II. PLAINTIFFS' LITIGATION FEE AND EXPENSE FUNDS**

**A. Establishing the Fee and Expense Funds.**

11. By subsequent Order of this Court, the Court will appoint a qualified certified public accountant (the "CPA") who is directed to establish two interest-bearing accounts to receive and disburse funds as provided in this Order (the "Funds"). The first fund shall be designated the "MDL 2433 Fee Fund" and the second fund shall be designated the "MDL 2433 Expense Fund." These Funds will be held subject to the direction of this Court.

12. The CPA shall serve as Escrow Agent over the Funds and keep detailed records of all deposits and withdrawals and prepare tax returns and other tax filings in connection with the Funds. The subsequent Order appointing the CPA shall specify the hourly rates to be charged by the CPA and for the CPA's assistants, who shall be utilized where appropriate to control costs. The CPA shall submit quarterly detailed bills to the Court and to Plaintiffs' Co-Lead Counsel. The CPA reports will be considered confidential information, and will not be filed with the Court's public records. Upon approval by the Court, the CPA's bills shall be paid from the MDL 2433 Expense Fund and shall be considered a Shared Cost in accordance with the provisions below. In no event will Defendant be responsible for the CPA's bills or any expenses related to the escrow.

**B. Payments into the Fee and Expense Funds: The Assessment.**

13. All plaintiffs and their attorneys who are subject to this Order (either by virtue of being counsel, co-counsel, or having a fee interest in any case now pending, or later filed in, transferred to, removed to, or governed by this Court as part of the MDL proceedings, or who choose to execute a Participation Agreement approved by the

PSC), and who agree — for a monetary consideration — to settle, compromise, or dismiss a claim, or who recover a judgment for monetary damages or other monetary relief that survives any appeal or post-trial motions, including compensatory and punitive damages, with respect to any personal injury and/or wrongful death claim related to the *Leach* matter against DuPont for C8 probable-linked disease(s), are subject to an assessment of the "gross monetary recovery," as provided below (the "Assessment").

**1. Gross monetary recovery.**

14. Gross monetary recovery includes any and all amounts paid to plaintiffs' counsel by Defendant through a settlement or pursuant to a judgment. In measuring the "gross monetary recovery," the parties are to (a) exclude court costs that are to be paid by the Defendant; and (b) include the present value of any fixed and certain payments to be made in the future. The Assessment shall apply to all of an attorney's clients with personal injury and/or wrongful death claims against DuPont for C8 probable-linked disease(s), including any filed cases and/or unfiled claims.

**2. Assessment Amount.**

15. All plaintiffs' attorneys who are counsel, co-counsel, or have any type of fee interest in at least one case now pending, or later filed in, transferred to, or removed to, this Court as part of the MDL Proceedings or who choose to execute a Participation Agreement approved by the PSC within the 45 Day Period shall be subject to an Assessment of 7% percent (4% for common benefit attorneys' fees and 3% percent for costs). All Non-MDL Counsel executing a Participation Agreement after the 45 Day Period shall be subject to a 5% increase in the Assessment (12% total), provided that any party affected by this increase may seek relief from the Court, which will be granted

upon a showing of good cause that such a fee should not be imposed.

**3. Modification of Assessment Amount by PSC.**

16. The Assessment represents a hold back (*In re Zyprexa Prods. Liab. Litig.*, 267 F. Supp.2d 256 (E.D.N.Y. 2006)) and shall not be altered by the PSC in any way unless each of the following occurs: (1) the members of the PSC are consulted and provided an opportunity to be heard prior to the filing of any motion to change the Assessment amount; (2) the members of the PSC approve the proposed change to the Assessment by a majority vote; (3) noticed motion with an opportunity to be heard is granted by the Court; and (4) the Assessment change is approved by the Court.

**4. Defendant's Obligations.**

17. If Defendant settles a personal injury and/or wrongful death case against DuPont for C8 probable-linked disease(s) falling within the scope of these MDL Proceedings, Defendant is directed to withhold the Assessment from any and all amounts paid to plaintiffs and their counsel, and to pay the Assessment directly into the Funds as a credit against the settlement or judgment. For a settlement, such payment of the Assessment shall be made concurrently with any settlement payment to the plaintiffs or their counsel. For payments made because of a judgment, such payment shall be made within thirty (30) days of exhaustion of any appeal and/or retrial rights and the judgment becomes final.

**5. Additional Provisions**

18. If for any reason the Assessment is not or has not been so withheld, the plaintiff and his/her counsel, are jointly responsible for paying the Assessment into the Funds promptly.

19. For clarity, no Assessment is due if claims or complaints are dismissed

voluntarily, as a result of motion practice, or otherwise by Court order, as long as no monetary or pecuniary benefit is exchanged or considered. For further clarity, this Order does not apply, and no Assessment is due under this Order with respect to any medical monitoring development in the *Leach* case or any other cases or claims that are not C-8 personal injury or wrongful death claims against DuPont for C8 probable-linked disease(s) related to the *Leach* settlement.

20. Within thirty days after the end of the first quarter in which the Defendant has paid any assessment into the Funds, the Defendant shall meet and confer with Plaintiffs' Co-Lead Counsel regarding whether the Defendant shall make any report to the Court regarding the cases for which it has paid an Assessment into the Funds and, if so, the content of such a report.

21. Whether any cases have been settled and the specifics of any settlement, including but not limited to the amount of any such settlement, shall be confidential and shall not be disclosed by the CPA or others to members of the PSC, any other plaintiffs' lawyer, the Court, the Court's designee, or to anyone else. Adjustments may be made to the reporting frequency otherwise required by this Order in order to preserve the confidentiality of this information.

22. Quarterly statements from the CPA shall be provided to Plaintiffs' Co-Lead Counsel, Defendant's Lead Counsel and the Court showing only the aggregate of the deposits, disbursements, interest earned, financial institution charges, if any, since the last report, and the current balances. Upon request, these statements may be provided on a monthly basis.



**III. COMMON BENEFIT EXPENSES**

**A. Qualified Expenses Eligible for Reimbursement.**

23. In order to be eligible for reimbursement of common benefit expenses, such expenses must meet the requirements and limitations set forth and determined by Plaintiffs' Co-Lead Counsel.

**B. Shared and Held Common Benefit Expenses.**

**1. Shared Costs.**

24. Shared Costs are costs incurred for the common benefit of the MDL Proceedings as a whole. Shared Costs are costs that will be paid out of a separate MDL 2433 Fund account that has already been established by Plaintiffs' Co-Lead Counsel and to be funded by all members of the MDL PSC and others as determined by the PSC and its designated subcommittees. All Shared Costs must be approved by Plaintiffs' Co-Lead Counsel for payment.

25. Shared Costs include: (a) Certain Court, filing, and service costs; (b) Deposition and court reporter costs for non-plaintiff-specific depositions; (c) Document Depository: creation, operation, equipment, and administration; (d) Plaintiffs' Co-Lead Counsel administrative matters (e.g., expenses for equipment, technology, courier services, long distance, telecopier, electronic service, photocopy and printing, support staff, etc.); (e) PSC administration matters such as meetings and conference calls; (f) Legal and accountant fees for the PSC; (g) non-plaintiff-specific expert witness and consultant fees and expenses; (h) Printing, copying, coding, scanning (out of house or extraordinary firm cost); (i) Research by outside third party vendors/consultants; (j) Common witness expenses, including travel; (k) Translation costs; (l) Bank or financial institution charges for the PSC; (m) Investigative services; and (n) such other common

benefit costs as are approved as appropriate by Plaintiffs' Co-Lead Counsel.

**2. Held Costs.**

26. Held Costs are those that will be carried by each PSC member in MDL 2433 and reimbursed as and when determined by Co-Lead Counsel, the PSC and/or the Fee Committee, and then approved by this Court. Held costs can also include unreimbursed and authorized Shared Costs. Held Costs are costs incurred for the global benefit of the litigation and have global benefit for all plaintiffs in general. Held Costs are those that do not fall into the above Shared Costs categories but are incurred for the benefit of all plaintiffs in general. No specific client-related costs shall be considered as Held Costs, except those pre-approved costs incurred for the common benefit as may be part of a bellwether process in the MDL Proceedings and which may be considered for treatment as a Held Cost by the Fee Committee. All costs that meet these requirements and fall under the above categories shall be considered Held Costs and qualify to be submitted for consideration by Co-Lead Counsel, the PSC, and the Court for future reimbursement from the MDL 2433 Expense Fund.

**C. Verification.**

27. The forms detailing expenses shall be certified by a partner in each firm attesting to the accuracy of the submissions. Attorneys shall keep receipts for all expenses. Credit card receipts are an appropriate form of verification so long as accompanied by a declaration from counsel that work was performed and paid for the common benefit and that the credit card statement can reasonably be itemized and identified if necessary.

**D. Costs and/or Expenses in Excess of Amounts Available in the Expenses Fund.**

28. Any compensable costs and/or expenses that exceed the amounts available in the MDL 2433 Expense Fund may be compensable by the MDL 2433 Fee Fund upon Order of the Court.

**IV. COMMON BENEFIT WORK.**

**A. Qualified Common Benefit Work Eligible for Reimbursement.**

29. Only members of the PSC and other firms approved to perform common benefit work by the PSC are eligible for reimbursement for time and efforts expended for the common benefit. These firms shall be eligible for reimbursement for time and efforts expended for common benefit work, if such time and efforts are (a) for the common benefit, (b) within the limitations and guidelines set forth herein and provided by Co-Lead Counsel, (c) timely submitted and (d) approved by this Court.

**B. Distributions.**

**1. Procedures and Forms.**

30. Plaintiffs' Co-Lead Counsel has established forms and procedures to implement and carry out any time and expense submissions required by the Court and for reimbursement from the MDL 2433 Funds. These forms have been distributed to members of the PSC and are available by contacting Plaintiffs' Co-Lead Counsel. The forms are to be certified by a partner in each firm attesting to the accuracy of the submissions. Questions regarding the guidelines or procedures or the completion of any form should be directed to Plaintiffs' Co-Lead Counsel.

**2. Court Approval.**

31. The amounts deposited in the MDL 2433 Fee and Expense Funds shall be available for distribution only to counsel who have performed professional services

and/or incurred expenses for the common benefit. No amounts will be disbursed without review and approval by the Court or such other mechanism as the Court may order. Specifically, such sums shall be distributed only upon Order of the Court in MDL 2433. This Court retains jurisdiction over any common benefit award.

32. Any counsel who does common benefit work has the right to present their claim(s) for compensation prior to any recommendation to the Court. Upon order of the Court, payments may be made from the Funds to law firms or attorneys who provide services or incur expenses for the joint and common benefit of plaintiffs in addition to their own client or clients. Attorneys eligible are limited to Plaintiffs' Co-Lead Counsel, members of the Plaintiffs' Steering Committees, appointed members of the Plaintiffs' various Committees, and other counsel performing similar responsibilities so authorized by Plaintiffs' Co-Lead Counsel or this Court.

33. Any counsel who does not agree to the Assessment of any related personal injury and/or wrongful death type case against DuPont for C-8 linked disease(s) of his/her firm shall not be eligible to receive common benefit payments for any work performed or expenses incurred.

**3. Fee Committee.**

34. At the appropriate time, a Fee Committee shall be appointed to make recommendations to this Court on the issue of how any money in the MDL 2433 Fee and Expense Funds shall be distributed (the "Fee Committee"). The Fee Committee shall be appointed by Plaintiffs' Co-Lead Counsel with unanimous approval by the PSC.

35. Each member of the Fee Committee shall only have one vote and each vote shall bear the same weight. A decision of the Fee Committee need only be made by a majority of votes. The Fee Committee shall determine on its own the most fair and

efficient manner by which to evaluate all of the time and expense submissions in making its recommendation to this Court before funds can be distributed. The Fee Committee also has, in its discretion, the authority to consider the weight and value of work performed, and/or non-reimbursed expenses for work performed, in underlying and related cases impacting the subject matter in these MDL Proceedings when determining fee and expense recommendations.

**V. NOTICE**

36. Until final order of judgment is entered in this case, this Order may be modified for good cause shown upon proper motion of any party.

**IT IS SO ORDERED** this 5 day of August, 2013.

  
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EDMUND A. SARGUS, JR.  
U.S. DISTRICT JUDGE