

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: E. I. DU PONT DE
NEMOURS AND COMPANY C-8
PERSONAL INJURY LITIGATION

Case No. 2:13-md-2433

CHIEF JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Elizabeth Preston Deavers

This document relates to: **ALL ACTIONS.**

CASE MANAGEMENT ORDER NO. 23

Earlier in this litigation, this Court entered Pretrial Order No. 6 (“PTO 6”)[ECF No. 32]¹ to establish two funds — one for fees and one for costs — pursuant to the common benefit doctrine. As part of that Order, PTO 6 §IV.B.3 required that, at the appropriate time, this Court appoint a fee committee whose make-up would be appointed by Plaintiffs’ Co-Lead Counsel with unanimous approval by the Plaintiffs’ Steering Committee (“PSC”). In particular, PTO 6 states as follows:

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.

See PTO 6 §IV.B.3.

The Court finds that now is the appropriate time for the Court to appoint a Fee Committee consistent with PTO 6, which will allow the law firms who provided common benefit to this MDL and incurred expenses for the common benefit of this MDL to apply for and receive

¹ Following the entry of PTO 6, it has been amended three times by way of PTO 6-A [ECF No. 49], PTO 6-B [ECF No. 4349], and PTO 6-C [ECF No. 5108]. None of these amendments pertain in any way to the composition, appointment, and/or proposed structure of any proposed Fee Committee.

an award of common benefit fees and expenses as contemplated by PTO 6. Likewise, consistent with PTO 6, Plaintiffs' Co-Lead Counsel, with unanimous approval by the PSC, have appointed the following individuals to the Fee Committee (whom this Court has come to know well):

1. Robert A. Bilott, Esq. of Taft Stettinius & Hollister LLP
2. Michael A. London, Esq. of Douglas & London, P.C.
3. Jon C. Conlin, Esq. of Cory Watson, P.C.
4. Ned McWilliams, Esq. of Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor, P.A.

The Court has given due consideration to these appointments and independently considered each appointment to ensure that the attorneys who will serve on the Fee Committee are committed to this process and have an understanding of the work performed and the common benefit provided by that work. Accordingly, the Court hereby approves the appointments of the four (4) individuals identified above to serve as members of the Fee Committee.

In accordance with PTO 6, as well as the Common Benefit Doctrine, this Court hereby authorizes the Fee Committee to establish its own processes to complete the task that the Court has assigned to the Committee. As part of that process, the Court anticipates that the Fee Committee will fully review, audit, and otherwise vigorously and robustly analyze all of the common benefit time and expense that have been submitted by lawyers and law firms who have worked for the common good of the litigation. Likewise consistent with PTO 6, “[e]ach member of the Fee Committee shall only have one vote and each vote shall bear the same weight.” *See* PTO 6, at §IV.B.3. Further, “[a] decision of the Fee Committee need only be made by a majority of votes.” *Id.*

This Court has approved the appointments of these individual lawyers to serve on the Fee Committee based on their skill and experience. It is the expectation of this Court that the

members of the Fee Committee will use their experience, skills, and any all other means that are available and at their disposal to hopefully come to an agreed upon allocation of common benefit fee and expense awards to all lawyers who performed common benefit work and who incurred common benefit expenses.

In carrying out its work, the Court encourages the Fee Committee to provide the opportunity for each law firm that has submitted common benefit time and expenses to be heard such that the contribution of each individual firm can be fully explained to and understood by the Fee Committee before the Committee makes its final determination. Any such presentation shall focus on the actual contribution made by the attorneys and staff of the law firm who submitted and not the hours billed, to which the Committee already has access. The Fee Committee should permit any law firm that wishes to make such a presentation to do so either in writing and/or in-person. The Fee Committee is empowered to place reasonable limitations on such presentations so that it can complete its task in a timely manner. Such reasonable limitations shall include, but are not limited to, setting page limitations on written submissions, time limitations on presentations, and establishing a limited number of dates and locations for in-person presentations. An individual law firm that wishes to make a presentation is doing so for its own benefit and not the common benefit.

Again, the Court encourages the Fee Committee to work towards achieving a consensus-based common benefit allocation proposal, both for common benefit fees and reimbursement of common benefit expenses that have been incurred. Similarly, while the Court encourages the Fee Committee to try and reach consensus, it also strongly encourages attorneys and the law firms who have submitted common benefit time to recognize that not all time billed and submitted must be considered equally and that not all time conferred the same benefit, if any. In fact some time may

be categorized as common detriment and even some time, while perhaps large in number, had very little overall impact versus the lawyers who conducted, among other things, key factual discovery (including depositions and document collection, review, and organization) and development of the key factual, scientific, regulatory, and legal underpinnings for key claims, arguments, and issues, handled arguments at Court proceedings and the massive briefing efforts on numerous key legal, factual, and scientific issues that needed to be resolved prior to trial as well as during trial and post-trial. These lawyers also handled the appellate work related to MDL trial outcomes, handled arguments/negotiations on CMOs and PTOs, prepared cases for trial through tendering of expert reports, summary judgment, *Daubert*, all the pre-trial rulings this Court issued in advance of each of the four trials in this MDL, the trial preparation work for each of the four trials in this MDL, the prosecution of these four individual trials, three of which went to verdict before global settlement was reached, and the efforts related to the global resolution of all claims pending in the MDL, and the successful management of the overall settlement process. The Court notes that the Fee Committee shall have the authority to consider and equitably weigh in its full discretion all aspects of all of the various types of work and activities performed by the law firms seeking common benefit allocations and expects that the Fee Committee's ultimate recommendation shall focus on the quality and significance of the work performed, as well as the value conferred on all plaintiffs by the work generated, recognizing that simply multiplying a number of hours by an hourly rate is not necessarily the appropriate manner to assess the quality of the work and the value conferred.

The Court expects that the Fee Committee will provide the Special Master with a report concerning its recommendation on the issue of how any money in the MDL 2433 Fee and Expense funds should be distributed to each law firm by no later than June 29, 2018. Additional time may be sought if special circumstances warrant.

In addition to the appointment of the Fee Committee, it is the Court's opinion that the operation of the Fee Committee will be aided by the appointment of a Special Master to assist and oversee the workings of the Fee Committee. To this end, on April 12, 2017, in Case Management Order ("CMO") No. 22, the Court previously appointed Hon. Daniel Stack (Ret.) to serve as Special Master to perform appellate review of Phase One Awards pursuant to the Master Settlement Agreement, and to allocate dollar values to Phase Two Awards pursuant to the Master Settlement Agreement. *See* CMO 22 §B. By this Order, the Court hereby expands Special Master Stack's duties to include overseeing and assisting the Fee Committee in carrying out its duties under this Order, which shall include but not be limited to participation in the Fee Committee's allocation process and any presentations made to the Fee Committee by attorneys and/or the law firms who claim to have performed common benefit work or incurred common benefit expenses.

The Court also confers on Special Master Stack the power and duty to mediate any objections to the Fee Committee's recommendation with the goal of obtaining a globally agreed-to allocation of the common benefit fees and expenses. In addition to the recommendation that the Fee Committee will submit to Special Master Stack on June 29, 2018, the Court hereby directs Special Master Stack to submit to this Court a Report and Recommendation relating to the award of common benefit fees and expenses to each individual law firm at the end of the process by no later than August 17, 2018. Hon. Daniel Stack (ret.) is suited for this role based on his appellate role with respect to Phase One Awards pursuant to the Master Settlement Agreement, as well as his allocation of Phase Two Awards under the Master Settlement Agreement, his familiarity with the work by the lawyers involved, and his familiarity with what contributions different work performed makes to the overall common benefit of the litigation based upon his experience related to adjudicating common benefit fees and expenses in


complex MDL settings.

Following submission of the Report and Recommendation from Special Master Stack, the Court will either endorse that submission or issue its own ruling on the matter. However, the attorneys and law firms applying for common benefit fees and expenses and the PSC agree that any decision by this Court following the submission of the Report and Recommendation by Special Master Stack concerning an issue related to common benefit fees and expense will be final, binding and non-appealable.

DuPont has confirmed that it takes no position on this Order.

IT IS SO ORDERED.

DATE: 6-6-18



EDMUND A. SARGUS, JR.
CHIEF UNITED STATES DISTRICT JUDGE