

and applications to this Court by attorneys for payment of common benefit fees or expenses, from the assessments. The Court may issue additional procedures and guidelines in the future, if appropriate.

For the foregoing reasons, and in recognition of the need for a mechanism to assess cases and reimburse Plaintiffs' counsel, as appropriate, for common benefit time and expenses, and for good cause shown;

IT IS on this ^{3rd} day of March, 2021, Ordered:

I. Scope of this Order

This Order is entered to provide for the fair and equitable sharing among plaintiffs, and their counsel, of the burden of services performed and expenses incurred by attorneys acting for the common benefit of all plaintiffs in this complex litigation.

A. Governing Principles and the Common Benefit Doctrine

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 Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig.*, 582 F.3d 524 (3d. Cir. 2009); *In re Benicar (Olmesartan) Prod. Liab. Litig.*, MDL No. 15-md-2606 (D.N.J. Aug. 15, 2017); *In re Invokana (Canagliflozin) Prod. Liab. Litig.*, MDL No. 16-md-02750 (D.N.J. Mar. 21, 2017); *In re Avandia Marketing, Sales Practices and Products Liability Litig.*, MDL No. 07-md-01871 (E.D. Pa. Oct. 19, 2012); *In re Air Crash Disaster at*

Florida Everglades on December 29, 1972, 549 F.2d 1006, 1019-21 (5th Cir. 1977); and *In re MGM Grand Hotel Fire Litigation*, 660 F. Supp. 522, 525-29 (D. Nev. 1987).

The common benefit principles expressed in the federal context mirror those espoused in New Jersey Multicounty Litigations (MCLs), including, *inter alia*, *In re: Stryker Rejuvenate & ABG /I Modular Hip Implant Litigation*, MCL Case No. 296, Master Docket No. BER-L-0936-13, Superior Court of New Jersey, Bergen County; *In re: Vioxx Litigation*, MCL Case No. 619, Superior Court of New Jersey, Atlantic County; and *In re: Pelvic Mesh/Gynecare Litigation*, MCL 291, Superior Court of New Jersey, Bergen County.

Common benefit work product includes all work performed for the benefit of all plaintiffs, including pre-trial matters, discovery, trial preparation, a potential settlement process, and all other work that advances this litigation to conclusion.

B. Application of this Order

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: Prolene Hernia System Mesh Litigation*, MCL 633.

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, or removed to this Court, regardless of whether the plaintiff's attorney signs the "Participation Agreement" (for all such attorneys this Order shall apply to every case filed in any jurisdiction—as well as any unfiled or tolled cases—in which they or their law firms have any fee interest); and to each attorney and law firm who represents a plaintiff with a case filed in any other jurisdiction who benefits from common benefit work prepared in this litigation. To the extent a common benefit order is issued in any other venue, this Court and the PEC, guided by the principles of the

common benefit doctrine, will take steps to ensure the common benefit order entered in the other venue will not apply to the cases that are subject to this Order.

C. Participation Agreement

Exhibit A, attached to this Order and incorporated by reference, is a voluntary Participation Agreement between: (1) the Plaintiffs' PEC ("PEC"), members of any future-appointed Plaintiffs' Steering Committee ("PSC"), and other plaintiffs' attorneys who perform common benefit work in connection with MCL 633; and (2) plaintiffs' attorneys who elect to sign the Participation Agreement. The Participation Agreement is a private and cooperative agreement between plaintiffs' attorneys only; and not Defendants or Defendants' counsel.

All plaintiffs' attorneys who have Ethicon Prolene Hernia System Mesh cases pending in the MCL and in any federal court who want to become Participating Counsel shall, within 60 days of this Order, execute the Participation Agreement. All plaintiffs' attorneys with newly filed Ethicon Prolene Hernia System Mesh cases shall, within 100 days of filing a Complaint in the MCL, execute the Participation Agreement. Further, all members of the PEC shall execute the Participation Agreement within 30 days of this Order.

Any plaintiffs' attorney who does not yet have an Ethicon Prolene Hernia System case filed in this MCL, any other state court, or federal court and who wants to become a Participating Counsel may also execute the Participation Agreement and shall do so in a timely manner.

Failure to execute the Participation Agreement indicating that an attorney will be a Participating Counsel, in a timely manner, may result in higher percentages for common benefit assessment as a result of such later participation, absent good cause or special circumstance.

Participating Counsel shall be entitled to receive all the common benefit work product performed and generated by the PEC, PSC, and other Participating Counsel. Participating

Counsel are also permitted to perform common benefit work. However, they shall be governed by the requirements, guidelines and perimeters of this Order, as well as CMO No. 1 in this regard.

Counsel who choose not to execute the Participation Agreement are not entitled to receive common benefit work product and may be subject to an increased assessment on all Ethicon Prolene Hernia System Mesh cases in which they have a fee interest if they receive common benefit work product or otherwise benefit by the work performed by the PEC, PSC, and other Participating Counsel.

Duly executed Participation Agreements shall be emailed to kstokes@fleming-law.com and maintained by Kelsey L. Stokes on behalf of the PEC.

II. Creation of the Common Benefit Fee Committee

At this time, the Court hereby appoints Kelsey L. Stokes and Joshua S. Kincannon as common benefit liaison co-counsel, recognizing that attorneys Stokes and Kincannon have guided this litigation from its inception, and have the most detailed knowledge of the work performed, expenses paid; interaction and involvement with related litigation around the country, and the value of that work in advancing the litigation on behalf of all plaintiffs.

At the appropriate time, this Court, with the input of the common benefit liaison co-counsel, shall appoint a Common Benefit Fee Committee. The Fee Committee shall be charged in the collection, maintaining and review of common benefit time and expenses as submitted by Participating Counsel. The Fee Committee shall further be charged with development of a plan and process for the review, audit and ultimate recommendation of any award for common benefit legal fees and reimbursement of common benefit expenses that were incurred. The Common Benefit 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 any recommendation to a special master and/or this Court, including the appointment of a Special Master.

III. Plaintiffs' Litigation Fee and Expense Funds

A. Establishing the Fee and Expense Funds

At an appropriate time, by subsequent Order of this Court, the Court will appoint an escrow agent, this entity will be responsible for each of the following: (1) creating two interest-bearing accounts, the first account as the "MCL No. 633 Fee Fund," and the second account as the "MCL No. 633 Expense Fund", hereinafter collectively referred to as "The MCL CB Fund Accounts"; (2) receiving and disbursing funds; (3) keeping detailed records of all deposits and withdrawals; and (4) providing quarterly account statements to the Court and/or its designee as well as the PEC.

B. Payments into the Fee and Expense Funds

1. General Standards

All plaintiffs and their attorneys who are subject to this Order and who agree to settle, compromise, dismiss, or reduce the amount of a claim or, with or without trial, recover a judgment for monetary damages or other monetary relief, including such compensatory and punitive damages, with respect to Ethicon Prolene Hernia System Mesh claims are subject to an assessment of the gross monetary recovery, as provided in this Order, regardless of whether the plaintiff's attorney signs the Participation Agreement.

2. Gross Monetary Recovery

Gross monetary recovery includes any and all amounts paid to plaintiffs' counsel by Defendants 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; (b)

include any payments to be made by the defendant on an intervention asserted by third-parties, such as physicians, hospitals, or other healthcare providers in subrogation related to treatment of a plaintiff, and any governmental liens or obligations (e.g., Medicare/Medicaid); and (c) include the present value of any fixed and certain payments to be made in the future. The assessment shall apply to all of the cases of the plaintiffs' attorneys who are subject to this Order, whether as sole counsel or co-counsel, including cases pending in the MCL, pending in federal court, unfiled, or tolled. In other words, if a lawyer or law firm has only one case that is subject to this Order, notwithstanding all of that lawyers or law firm's cases (unfiled, tolled or filed in another venue), all cases will be subject to this Order. If a court in another venue attempts to assess a case that is subject to this Order, this Court will be guided by the underlying principles of the common benefit doctrine and, along with the PEC, will take steps to ensure that no case that is subject to this Order will be subject to any further common benefit assessment in any other venue.

3. Assessment Amount

The assessment amount will be a total of 10% (8% for attorneys' fees and 2% for expenses). The assessment represents a holdback and shall not be altered absent further order by the Court. However, if any counsel fails to timely execute the Participation Agreement, such counsel and members of his/her firm may be subject to an increased assessment. Moreover, if a Non-Participating Counsel receives common benefit work product or otherwise benefits from the common benefit work product, such counsel and the cases in which she/he has a fee interest may be subject to an increased assessment.

4. Defendants' Obligations

Upon learning of a case being filed in any federal court, Defendants Counsel shall notify the PEC of such filing within 30 days of service of the complaint upon Defendant(s), so that the PEC can notify the attorneys on the case of this Order and offer them the opportunity to become Participating Counsel.

The PEC, through its designee, shall provide the Defendants' Counsel with a list of cases and/or counsel who have executed the Participation Agreement with the PEC and/or who the PEC otherwise deems bound under this CMO. This same list shall be made available, upon request, to all plaintiffs' counsel with cases in this MCL as well as any other plaintiffs' counsel who signs the Participation Agreement. In the event there is a dispute as to whether a case should be on the list, the PEC shall seek to resolve the matter with the particular plaintiff's counsel informally, and if that is unsuccessful, upon motion to the Court.

If Defendants' counsel settle a personal injury and/or wrongful death case falling within the scope of these Proceedings, Defendants are directed to withhold the Assessment from any and all amounts paid to plaintiffs and their counsel, and to pay the Assessment directly into The MCL CB Fund Accounts. 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 judgement, such payment shall be made within 30 days of exhaustion of any appeal and/or trial right and the judgment becomes final.

5. Additional Provisions

Defendants' counsel shall provide, at least quarterly, to the PEC's designee and any Special Master appointed under Section V.F., below, notice of the names and docket numbers of the cases for which they have paid an assessment into the Funds since the last such report. Details of any individual settlement agreement, individual settlement amount and individual

amounts deposited into escrow shall be confidential and shall not be disclosed unless the Court requests that it receive that information.

If, for any reason, the Assessment is not or has not been withheld, Defendants are jointly responsible for paying the Assessment into the Funds promptly. 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.

IV. Common Benefit Work

A. Authorization for Compensable Common Benefit Work

Authorized Common Benefit Work includes assignments made by a PEC member and as set forth in CMO No. 1. No time spent on developing or processing individual issues in any case for an individual client (claimant) will be considered or should be submitted as Common Benefit Work, nor will time spent on any unauthorized work, unless expressly approved by the PEC as part of a bellwether process.

Examples of authorized and unauthorized work include but are not limited to:

1. Depositions: Participating Counsel may attend any deposition space permitting; however, if such counsel has not been designated as one of the authorized questioners or otherwise authorized to attend the deposition by the PEC, your time and expenses shall not be considered common benefit work, but rather considered as attending on behalf of such counsel's individual clients;
2. Periodic MCL Conference Calls: These calls are held so that individual attorneys are kept up-to-date on the status of the litigation, and non-PSC participation by listening to such calls is not common benefit work. Each attorney has an obligation to keep themselves informed about the litigation

so that they can best represent their clients, and that is a reason to listen in on those calls. The attorneys designated by the PEC to run those calls are working for the common benefit by keeping other lawyers informed and educated about the case, and their time will be considered for common benefit. Nothing in this paragraph shall be construed to prevent members of the PSC from submitting common benefit time for participation in PSC communications that are germane to all members of the PSC and are necessary to fulfill their PSC obligations;

3. Periodic Status Conferences: Regular status conferences are held so that the litigation continues to move forward and legal issues are resolved with the Court. Individual attorneys are free to attend any status conference held in open court in order to keep up-to-date on the status of the litigation and participation, however, attending and listening to such conferences is not common benefit work. Each attorney has an obligation to keep themselves informed about the litigation so that they can best represent their clients. Mere attendance at a status conference will not be considered a common benefit expense or common benefit time. The attorneys designated by the PEC to address issues that will be raised at a given status conference or requested by the PEC to be present at a status conference are working for the common benefit and their time will be considered for common benefit. Similarly, any attorney whose attendance at a status conference is specifically requested by the Judge in that case may submit their time to the Fee Committee for evaluation as common benefit time;

4. Committee Meetings or Calls: During committee phone calls or other meetings there is a presumption that only one participant per firm will qualify for common benefit time, unless otherwise authorized by the PEC;
5. Identification and Work Up of Experts: Participating Counsel are encouraged to identify experts in consultation with the PEC. If a Participating Counsel travels to and retains an expert without the knowledge and approval of the PEC they understand that the MCL may not need or use that expert, and their time and expenses may not be eligible for common benefit expenses/work;
6. Attendance at Seminars: Attendance at a seminar does not qualify as common benefit work or a common benefit expense;
7. Document Review: Only document review specifically authorized by the PEC and assigned to an attorney will be considered common benefit work. If an attorney elects to review documents that have not been assigned to that attorney by the PEC, that review is not considered common benefit. In order to conduct common benefit document review, a document reviewer must apply to, and receive written approval from the PEC.
8. Review of Pleadings and Orders: Each attorney has an obligation to keep themselves informed about the litigation so that they can best represent their clients, and review of pleadings and orders is part of that obligation. Only those attorneys designated by the PEC to review or summarize those pleadings or Orders for the MCL are working for the common benefit and their time will be considered for common benefit. All other counsel are reviewing those pleadings and orders for their own benefit and the benefit of their own

clients, and the review is not considered common benefit. Nothing in this paragraph shall be construed to prevent the PEC and the PSC from submitting common benefit time for reviewing orders of the Court that are germane to all members of the PSC and are necessary for review to fulfill their committee obligations;

9. Emails: Time recorded for reviewing emails, and providing non-substantive responses, generally is not compensable unless germane to a specific task being performed by the receiving or sending attorney or party that is directly related to that email. Thus, for example, review of an email sent to dozens of attorneys to keep them informed on a matter on which they are not specifically working would not be compensable. Each attorney has an obligation to keep themselves informed about the litigation so that they can best represent their clients and that is a reason to review emails to a larger group which involves a matter on which the recipient is not directly and immediately working. If time submissions are heavy on email review and usage with little related substantive work, that time may be heavily discounted or not compensated at all.
10. Review of Discovery Responses: Each attorney has an obligation to keep themselves informed about the litigation so that they can best represent their clients and that is a reason to review discovery responses served in this litigation. Only those attorneys designated by the PEC to review and summarize those discovery responses for the MCL are working for the common benefit and their time will be considered for common benefit. All other counsel are reviewing those

discovery responses for their own benefit and the benefit of their own clients, and the review is not considered common benefit;

11. Bellwether Trials: While the work-up of individual cases is *not* considered common benefit, in the event that a case is selected as part of an approved early preference or bellwether trial process in the MCL or participating state court proceedings, the time and expenses in trying the case (including work performed as part of the approved bellwether process) may be authorized by the PEC and thus be considered for common benefit to the extent it complies with the other provisions of this Order or Participation Agreement.

V. **Plaintiffs’ Counsel’s Time Keeping and Submission of Time and Expense Reports**

The award of common benefit attorneys’ fees and cost reimbursements will be limited to “Participating Counsel” as defined herein. Furthermore, Participating Counsel shall only be eligible to receive common benefit attorneys’ fees and cost reimbursement if the time expended, costs incurred and/or activity in question were in adherence with the guidelines and standards set forth within this Order regarding the submission and compensability of common benefit time and expenses.

A. General Standards

1. Time and/or Expense Incurred for the Common Benefit - These Time and Expense Guidelines are intended for activities performed and expenses incurred by counsel that relate to matters common to all claimants in MCL 633.

2. Appropriately Authorized and Approved by the Court – All time and expenses submitted must be incurred only for work authorized in advance as provided above.

3. Timely Submitted – Counsel’s time and expense submissions must be timely submitted by the 21st day of each month¹ to MCL633CB@fleming-law.com. Each time and expense submission must include a report of counsel’s time and expense records for the preceding month in the attached format (Exhibit B). The first submission is due by May 21, 2021 and should include all time and expenses incurred up through April 30, 2021.

4. The failure to secure authority to incur common benefit time and expenses or maintain and timely provide such records or to provide a sufficient description of the activity will be grounds for denying the recovery of attorneys' fees or expenses in whole or in part.

B. Requirements

Plaintiffs' counsel who seek to recover Court-awarded common benefit attorneys' fees and expenses in connection with this litigation shall keep a daily contemporaneous record of their time and expenses, noting with specificity the amount of time, location, and particular activity (such as “conducted deposition of John Doe”) along with confirmation that authority was obtained to have undertaken that common benefit effort. Time entries that are not sufficiently detailed may not be considered for common benefit payments. All common benefit work time for each firm shall be maintained in a tenth-of- an-hour increment.

C. Submission

Counsel shall, by the 21st day of each month, submit to MCL633CB@fleming-law.com, a report of their time and expense records for the preceding month in the attached format (Exhibit B). Counsel shall also submit with his/her report of their time and expense records a brief summary (no more than 4 to 6 sentences) summarizing the contribution that each time keeper from that law firm made toward the common benefit and advancement of the litigation. The first

¹ If the 21st day of any given month occurs on a holiday or a weekend, the next business day shall be the deadline.

submission is due on May 21, 2021 and should include all time and expense incurred through April 30, 2021.

D. Expense Limitations

1. Travel Limitations

Only reasonable expenses will be reimbursed. Except in extraordinary circumstances, all travel reimbursements are subject to the following limitations:

- i. Airfare. For domestic flights that are less than three hours, only the price of coach seat will be reimbursed. For longer domestic flights Business/First Class airfare will be permitted as a held cost by the incurring firm. For international flights Business/First Class Airfare will *only be* reimbursed as a held cost if prior written approval by the PEC or their proxy approves same in writing. Use of a private aircraft will not be reimbursed. If Business/First Class airfare is used on domestic flights that are less than three hours of flying time, then the difference between the Business/First Class Airfare and the coach airfare must be shown on the travel reimbursement form, and only the coach fare will be reimbursed.
- ii. Hotel. Hotel room charges for the average available room rate of a business hotel, including the Hyatt, Hilton, Sheraton, Westin, and Marriott hotels, in the city in which the stay occurred will be reimbursed. Luxury hotels will not be fully reimbursed but will be reimbursed at the average available rate of a business hotel.
- iii. Meals. Meal expenses must be reasonable.
- iv. Cash Expenses. Miscellaneous cash expenses for which receipts generally are not available (tips, luggage handling, pay telephone, etc.) will be reimbursed up to \$30.00 per trip, as long as the expenses are properly itemized.
- v. Rental Automobiles. Luxury automobile rentals will not be fully reimbursed, unless only luxury automobiles were available. If luxury automobiles are selected when non-luxury vehicles are available, then the difference between the luxury and non-luxury vehicle rates must be shown on the travel reimbursement form, and only the non-luxury rate may be claimed, unless such larger sized vehicle is needed to accommodate several counselors.
- vi. Mileage. Mileage claims must be documented by stating origination point, destination, total actual miles for each trip, and the rate per mile paid by the member's firm. The maximum allowable rate will be the maximum rate allowed by the IRS.

2. Non-Travel Limitations

- i. Conference Call Telephone Charges: Common benefit conference call and must be documented as individual call expenses in order to be compensable. Copies of the telephone bills must be submitted with notations as to which charges relate to MCL 633. Such charges are to be reported at actual cost.
- ii. Shipping, Overnight, Courier, and Delivery Charges: All claimed common benefit shipping, overnight, courier or delivery expenses must be documented with bills showing the sender, origin of the package, recipient, and destination of the package. Such charges are to be reported at actual cost.
- iii. Postage Charges. A contemporaneous postage log or other supporting documentation must be maintained and submitted for common benefit postage charges. Such charges are to be reported at actual cost.
- iv. In-House Photocopy. A contemporaneous photocopy log or other supporting documentation must be maintained and submitted. The maximum copy charge is 15¢ per page and only for copying during one calendar day that exceeds 500 pages, absent special circumstances. It is encouraged that larger copy jobs be outsourced and appropriate bills be provided.
- v. Computerized Research – Lexis/Westlaw. Claims for Lexis or Westlaw, and other computerized legal research expenses should be in the exact amount charged the firm and appropriately allocated for these research services.

E. Verification

The forms detailing expenses shall be certified by a senior partner in each firm and/or the PSC member herself/himself 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.

F. Appointment of a Special Master

At a later and appropriate time, the Fee Committee may seek the appointment of a Special Master to review the time and expenses submissions under the direction of the Common

Benefit Fee Committee. The duties and obligations of the Special Master for this position will be set forth in a subsequent CMO.

VI. Court Approval

The PEC, and those counsel who subsequently desire to be considered for common benefit compensation, and/or who simply agree to be bound by this Order and as a condition thereof agree to the terms and conditions in this Order (“Participating Counsel”) acknowledge and agree that the Court will have final, non-appealable authority regarding the award of common benefit fees, the allocation of those fees and awards for common benefit cost reimbursements in this matter. Participating Counsel have (or will have) agreed to and therefore will be bound by the Court’s determination on a future common benefit percentage holdback, common benefit attorneys’ fee awards, attorneys’ fee allocations, and expense awards, and the Participating Counsel knowingly and expressly waive any right to appeal those decisions or the ability to assert the lack of enforceability of this Order or to otherwise challenge its adequacy.



Hon. John C. Porto, J.S.C.