

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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In re: FLUOROQUINOLONE PRODUCTS  
LIABILITY LITIGATION

MDL No. 15-2642 (JRT)

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This Document Relates to All Actions

**PRETRIAL ORDER NO. 12  
COMMON BENEFIT ORDER**

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**I. Scope of Order**

This Order is entered to provide for the fair and equitable sharing among Plaintiffs of the cost of special services performed and expenses incurred by attorneys acting for the MDL administration and common benefit of all plaintiffs in this complex litigation.

**A. Governing Principles and the Common Benefit Doctrine**

This Court's authority derives from the 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 (1885); *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); *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1019-21 (5th Cir. 1977). Common benefit work product includes all work performed for the benefit of all Plaintiffs, including pre-trial matters, discovery, trial preparation, a potential and/or established settlement process, and all other work that advances this litigation to conclusion.

## **B. Application of This Order**

This Order applies to all Fluoroquinolone (“FLQ”) claims alleging peripheral neuropathy or symptoms of peripheral neuropathy now pending, as well as to any FLQ claim alleging peripheral neuropathy or symptoms of peripheral neuropathy later filed in, transferred to, or removed to this Court (but not remanded) and treated as part of the coordinated proceeding known as *In Re Fluoroquinolone Products Liability Litigation*, MDL No. 2642 (the “MDL”), regardless of whether the Plaintiff’s attorney or the Plaintiff signs the “Participation Agreement” attached hereto as Exhibit A. This Order further applies to: (1) all FLQ claims alleging peripheral neuropathy or symptoms of peripheral neuropathy settled pursuant to a MDL supervised Settlement Agreement between the parties; and (2) all FLQ claims alleging peripheral neuropathy or symptoms of peripheral neuropathy, regardless of whether those claims are subject to the jurisdiction of this MDL Court, tolled, unfiled, or filed in another jurisdiction, in which the following lawyers have a fee interest: (a) those attorneys (“Participating Counsel”) who sign on to the “Participation Agreement”, attached hereto as Exhibit A; (b) those attorneys who are members of the Plaintiffs’ Steering Committee; and (c) those attorneys who execute the Endorsement to the Protective Order entered in this matter. This Order covers all cases, clients and claims of any such attorneys, regardless of whether that attorney is lead counsel on the case, is a referring attorney, has a shared interest, or is otherwise to be paid any fee or other compensation (in-kind or otherwise) on such case, client or claim.

## **C. Participation Agreement (Exhibit A)**

Exhibit A, attached hereto and incorporated herein, is a voluntary Participation Agreement between: (1) the PSC/or and other Plaintiffs' attorneys who perform common benefit work in connection with the MDL; (2) Plaintiffs' attorneys with cases in this MDL; and (3) 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 currently have cases pending in this MDL or any federal or state court and who want to become a Participating Counsel shall, within 90 days of this Order, execute the Participation Agreement. Any Plaintiffs' attorney who does not yet have a fluoroquinolone ("FLQ") case filed in any federal or state court and who wants to become a Participating Counsel shall execute the Participation Agreement within 90 days of the date their first case is filed in any State or Federal Court, or 60 days from the date of this Order, whichever is later, if that attorney intends to voluntarily become a Participating Counsel at the fee and expense percentages set forth herein. Failure to execute a Participation Agreement indicating that an attorney will be a Participating Counsel within the time frame set forth in this paragraph will result in higher percentages for common benefit assessment as a result of such later participation. More specifically, the higher assessment percentage for failure to execute a Participation Agreement indicating that an attorney will be a Participating Counsel within the time frame set forth in this paragraph shall increase from 8% to 12% for any FLQ claims not pending in this MDL.

Participating Counsel shall be entitled to receive the common benefit work product performed by the PSC. Counsel who choose not to execute the Participation Agreement are not entitled to receive common benefit work product.

The Court recognizes the jurisdictional rights and obligations of the state courts to conduct their state court litigation as they so determine and that the state court litigations may include counsel who are Participating Counsel. The Participation Agreement and this Order shall not be cited by a Party to the Participation Agreement in any other court in support of a position that adversely impacts the jurisdictional rights and obligations of the state courts and state court Participating Counsel.

## **II. Plaintiffs' Counsel's Time and Expense Submissions – Standards and Rules.**

Reimbursement for costs and/or fees for services of all Plaintiffs' counsel performing functions in accordance with this Order will be set at a time and in a manner established by the Court after due notice to all counsel and after a hearing. The following standards and procedures are to be utilized by any counsel who will seek common benefit fees and/or expense reimbursement:

### **A. General Rules and Standards**

In order to be eligible for reimbursement of common benefit time and expenses, said time and expenses must meet the requirements of this section. All time and expenses must be authorized and accurately and contemporaneously maintained. Specifically, said time and expenses must be: (a) for the common benefit; (b) appropriately authorized; (c) timely submitted within the defined limitations set forth in this Order; and (d) verified by

a partner or shareholder in the submitting firm if the time and expenses submitted are not submitted by a member of the PSC. Examples of common benefit work include, but are not limited to, maintenance of the document review database; review and document coding; expert retention and development authorized by Plaintiffs' Co-Lead Counsel; preparing for and conducting authorized depositions of Defendants, third-party witnesses, and experts; and activities associated with preparation for trial and the trial of any cases designated as "common benefit trials" by Plaintiffs' Co-Lead Counsel. Not all common benefit hours billed/submitted are equal. There is no guarantee that all of the time and expenses submitted by any attorney and/or firm will be compensated and the hourly rate for the work that is compensated is not guaranteed.

- i. All time and expenses submitted must be incurred only for work authorized by Co-Lead Counsel.
- ii. These Time and Expense Guidelines are intended for all activities performed and expenses incurred by counsel that relate to matters common to all claimants in MDL No. 2642.
- iii. Time and expense submissions must be made on the forms prepared by the PSC (Exhibits B-C hereto) and pursuant to the protocols set forth in this Order and submitted to Plaintiffs' Liaison Counsel.
- iv. Representation as to Time and Expense Submissions. Each attorney submitting a time or expense submission shall be considered as representing to the Court, under oath, that the time and expense submitted meets the criteria set forth herein.

- v. Monthly Time Reports (Exhibit B) must be submitted on the 15th of each month. The first submission is due on December 15, 2016, and should include all time relative to common benefit work involving this litigation beginning after August 17, 2015 through November 30, 2016. Thereafter, time and expense submissions are to be made on the 15th of each month, beginning on January 15, 2017. Each submission should contain all time and expenses incurred during the calendar month prior to the submission date (*e.g.*, the January 15, 2017 submission should include all time and expenses incurred during the month of December 2016). Submissions of time and expense made after the 15th day of the month following the month in which the time or expense were incurred may be rejected.
- vi. The Monthly Expense Report (Exhibit C hereto) and accompanying copies of supporting receipts, logs or documentation must be submitted on the 15<sup>th</sup> of each month for expenses incurred in the previous month.
- vii. All time and expense submissions should be verified by a partner or shareholder in the submitting firm unless such submissions are made by a member of the PSC. In addition, each firm that makes a common benefit time and/or cost submission for a given month shall also be required to submit a brief summary (no more than 2 or 3 sentences) summarizing the contribution that each time keeper from that law firm made toward the common benefit and advancement of the litigation.

**B. Compliance.** A failure to submit any of the monthly reports timely may result in partial or complete disallowance of claimed time or expenses.

**C. Time Reporting**

Only time spent on matters common to all claimants in MDL No. 2462, occurring after August 17, 2105, (“common benefit work”) will be considered in determining fees. No time spent on developing or processing individual issues in any case for an individual client (claimant) will be considered or should be submitted.

- i. All time must be accurately and contemporaneously maintained. Time shall be kept according to these guidelines set forth below. All counsel shall keep a daily record of their time spent in connection with common benefit work on this litigation, indicating with specificity the hours and particular activity.
- ii. All common benefit work time for each firm shall be maintained in at least one-tenth (.1) hour increments, or smaller increments if the individual or firm regularly keeps time in smaller increments. Beginning with the first time and expense submission and all submissions thereafter, the following eleven (12) codes should be used:

- 1) Investigation and Research
- 2) PSC/PEC meetings and conference calls
- 3) Discovery
- 4) Pleadings, Briefs, Pre-trial motions
- 5) Court Appearances (including preparation for same)
- 6) Litigation Strategy and Analysis

- 7) Depositions
- 8) Trial Preparation and Trial
- 9) Appeals
- 10) Settlement
- 11) Administrative (data, file management or other administrative tasks as directed by Co-Lead Counsel)
- 12) Travel.

The codes will help simplify the reporting process, but an adequate description of the activity undertaken is still required.

**D. Shared and Held Costs:** Advanced costs will be deemed as either “Shared” or “Held.” Shared Costs are costs incurred for the common benefit of all plaintiffs. Shared Costs will be paid out of a separate Plaintiffs’ Steering Committee MDL No. 2642 Fund account to be established by Plaintiffs’ Liaison counsel, and to be funded by all members of the PSC and others as determined by the PSC. The PSC MDL No. 2642 Fund account will be administered by Plaintiffs’ Liaison Counsel. Held Costs are those that will be carried by each attorney in MDL No. 2642 and reimbursed as and when determined by Co-Lead Counsel.

- i. **Receipts:** Unless otherwise addressed below, each expense claim must be properly documented by a receipt or some other form of proof of payment acceptable for ultimate presentation and approval by the Court. Copies of receipts need to be submitted on a monthly basis as outlined herein. Originals, if available, must be available for production upon request. Cash advances will



not be considered for reimbursement without evidence of payment made with the case.

- ii. **Assessments:** Each member of the PSC and any others, such as members of PSC committees, as determined by the Plaintiffs' Co-Lead Counsel, shall contribute to the Plaintiffs' Steering Committee MDL No. 2642 Fund at times and in amounts sufficient to cover Plaintiffs' expenses for the administration of the MDL. The timing and amount of each assessment will be determined by Plaintiffs' Co-Lead Counsel, and each assessment will be paid to Plaintiffs' Liaison Counsel. Failure to pay assessments may be grounds for suspension from the PSC or a position within the Plaintiffs' leadership structure in the litigation.
- iii. **Shared Costs:** Shared Costs are costs incurred for the common benefit of the MDL as a whole. No client-related costs can be considered as Shared Costs. All costs of a substantial nature that meet these requirements and fall under the following categories shall be considered Shared Costs and qualify to be submitted and paid directly from the MDL account. All Shared Costs must be approved by Plaintiffs' Co-Lead Counsel. Shared Costs include:
  - (a) Certain Court, filing and non-case specific service costs;
  - (b) Deposition, court reporter, and video technician costs for non-case specific depositions;
  - (c) Document Depository: creation, operation, staffing, equipment and administration;

- (d) Plaintiffs' Liaison or Co-Lead Counsel administrative matters, e.g., bank or financial institution charges, expenses for equipment, technology, courier services, long distance, telecopier, electronic service, photocopy and printing, secretarial/temporary staff, etc.);
- (e) Co-Lead counsel and PSC group administration matters (e.g., expenses for equipment, technology, courier services, telecopier, electronic service, photocopy and printing, secretarial/temporary staff, etc.);
- (f) PSC group administration matters such as PSC or PEC meetings;
- (g) Legal and accountant fees;
- (h) Generic expert witness and consultant fees and expenses;
- (i) Printing, copying, coding, scanning (out of house or extraordinary firm cost);
- (j) Research by outside third party vendors/consultants/ attorneys;
- (k) Common witness expenses including travel;
- (l) Translation costs;
- (m) Bank or financial institution charges;
- (n) Investigative service; and
- (o) Special master and/or mediator charges.

**iv. Held Costs:** Held Costs are costs incurred for the global benefit of the MDL. 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 can be considered as Held Costs, unless the case is determined by Plaintiffs' Co-Lead Counsel to be a "common benefit case," *e.g.*, certain bellwether cases as determined by Plaintiffs' Co-Lead Counsel. Held Costs are those that will be carried by each Participating Counsel in MDL 2642. All costs of a substantial nature that meet these requirements and fall under the following categories shall be considered Held Costs and qualify to be submitted for consideration by the PSC and the Court for future reimbursement. Held Cost records shall be submitted pursuant to the protocols established above and, as with Shared Costs, request for payments for any matters described must include sufficient information to allow the Plaintiffs' Liaison Counsel to account properly for costs and to provide adequate detail to the Court. All requests shall be subject to review and approval by the Plaintiffs' Liaison Counsel.

**v. Travel Expense Limitations:** Except in extraordinary circumstances approved by the PSC, all travel reimbursements are subject to the following limitations:

- a. Airfare.** Only the full price of a coach seat for a reasonable itinerary will be reimbursed. Business/First Class Airfare will *not* be fully reimbursed, except for international flights, which requires prior approval by Plaintiffs Co-Lead Counsel in order to be considered for reimbursement. Use of a private aircraft will not be reimbursed. If Business/First Class Airfare is used on domestic flights then the difference between the Business/First Class Airfare and the full coach

airfare must be shown on the travel reimbursement form, and only the coach fare will be reimbursed.

- b. Hotel.** Hotel room charges will be reimbursed up to the greater of (a) \$300 per night excluding taxes or surcharges, or (b) the average available room rate of the Hyatt, Hilton, Marriott, and Westin hotels in that city. Charges for associated expenses in connection with the stay, e.g., laundry, toiletries, movies, etc., in excess of \$15 will not be reimbursed.
- c. Meals.** Meal expenses must be reasonable.
- d. Cash Expenses.** Miscellaneous cash expenses for which receipts generally are not available (tips, luggage handling, pay telephone, etc.) will be reimbursed up to \$50.00 per trip, as long as the expenses are properly itemized.
- e. 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 counsel and/or staff of counsel.
- f. 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.

**vi. Non-Travel Limitations:** The following apply:

- a.** Long Distance and Cellular Telephone: Long distance and cellular telephone charges must be documented. Copies of the telephone bills must be submitted with notations as to which charges relate to MDL No. 2642.
- b.** Shipping, Courier, and Delivery Charges: All claimed expenses must be documented with bills showing the sender, origin of the package, recipient, and destination of the package.
- c.** Postage Charges: A contemporaneous postage log or other supporting documentation must be maintained and submitted. Postage charges are to be reported at actual cost.
- d.** Telefax Charges: Contemporaneous records should be maintained and submitted showing faxes sent and received. The charge per fax shall not exceed \$1.00 per page.
- e.** In-House Photocopy: A contemporaneous photocopy log or other supporting documentation must be maintained and submitted. The maximum copy charge is 15¢ per page.
- f.** Computerized Research – Lexis/Westlaw: Claims for Lexis, Westlaw, and other computerized legal research expenses should be in the exact amount charged to the firm for these research services.

### **E. Monitoring Time and Expenses.**

Plaintiffs' Co-Lead Counsel shall monitor all time and expenses to ensure that the work being done is for common benefit purposes and is proper and reasonable. Any changes that may be needed to these protocols may be recommended to the Court by Co-Lead Counsel or their designees. Questions regarding these guidelines or procedures or the completion of any forms should be directed to Co-Lead Counsel (in the first instance), or to the Court.

### **III. PLAINTIFFS' LITIGATION FEE AND EXPENSE FUNDS**

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

At an appropriate time, Plaintiffs' Liaison Counsel will be directed to establish an interest-bearing account to receive and disburse funds as provided in this Order (the "Fund"). The Fund shall be designated the "FLQ Fund." These funds will be held subject to the direction of this Court. By subsequent Order of this Court, the Court will appoint a qualified certified public accountant (the "CPA") to serve as Escrow Agent over the Funds and to keep detailed records of all deposits and withdrawals and to prepare tax returns and other tax filings in connection with the Funds. Such subsequent Order shall specify the hourly rates to be charged by the CPA and for the CPA's assistants, who shall be utilized where appropriate to manage costs. The CPA shall submit quarterly detailed bills to the Court and to Plaintiffs' Liaison Counsel. Upon approval by the Court, the CPA's bills shall be paid from the FLQ Fund and shall be considered a shared cost. The Plaintiffs' Liaison Counsel shall provide a copy of this Order to the CPA.

#### **B. Payments into the Fee and Expense Fund**

**i. 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 FLQ claims are subject to an assessment of the gross monetary recovery, as provided herein.

**ii. Gross Monetary Recovery**

Gross monetary recovery includes any and all amounts paid to Plaintiffs and/or 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 to 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 or referral counsel, including cases pending in the MDL, pending in state court, unfiled, or tolled.

**iii. Assessment Amount**

The assessment amount will be a total of eight percent (8%) of the gross monetary recovery for timely Participation Agreements. Of that amount, five percent (5%) shall be deducted from the attorneys' fees and three percent (3%) from the client's shares of the

gross monetary recovery. The assessment represents a holdback (*In re Zyprexa Prods. Liab. Litig.*, 267 F.Supp.2d 256 (E.D.N.Y. 2006)) and shall not be altered absent further order of 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 the increased assessment of twelve percent (12%) of the gross monetary recovery for any FLQ claim not pending in this MDL, provided, however, that the three percent (3%) assessment otherwise due from the client's shares of the gross monetary recovery shall not be increased.

**iv. Reporting Obligations**

Plaintiffs' Liaison Counsel shall provide to Defendants' Liaison Counsel the following lists on a quarterly basis beginning on December 31, 2016: (a) a list of all attorneys who have filed a FLQ case that is pending in the MDL ("the MDL Counsel List") and (b) a list of all attorneys ("the Participating Counsel List") who have executed the Participation Agreement that is Exhibit A hereto.

Within 14 days of receipt of these two lists from Plaintiffs' Liaison Counsel, Defendants' Liaison Counsel shall provide to Plaintiffs' Liaison Counsel a list of all attorneys and law firms who appear as counsel of record on a complaint in any FLQ case in any court in the United States (state or federal) who do not appear on either the MDL Counsel List or the Participating Counsel List, and also including any counsel who have executed the Endorsement to the Protective Order entered in this MDL. The parties' reporting obligations shall continue quarterly until the conclusion of this MDL.

**v. Defendants' Obligations to Pay Common Benefit Assessments**



For cases subject to an assessment (*i.e.*, any case pending in the MDL, or any case for an attorney where the PSC has informed Defendants that the Plaintiff's attorney has signed the Participation Agreement, in accordance with the procedure set forth in Section IV(B)(4) above), or the Defendants are otherwise aware has executed the Endorsement to the Protective Order entered in this MDL), Defendants are directed to withhold an assessment from any and all gross monetary recovery amounts paid to Plaintiffs and their counsel and to pay the assessment directly into the Funds as a credit against the settlement or judgment. No orders of dismissal of any Plaintiff's claim shall be entered unless the Defendants' counsel have previously confirmed in writing to the PSC that the assessment, if applicable, has been withheld and has been deposited into the Funds. 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 Fund promptly.

To preserve the confidentiality of settlement amounts, if any, Defendants may pay any such assessments on an aggregate basis for each quarter. Details of any individual settlement agreement, individual settlement amount, and/or amounts deposited into escrow by any particular Defendant shall be confidential and shall not be disclosed by the CPA to anyone, including Plaintiffs' Co-Lead Counsel, any member of the PSC, any Plaintiff's counsel, or the Court, unless the Court requests that it receive that information, in which case the report shall be provided only to the Court and only *in camera* (*i.e.*, not publicly filed and not available to any counsel). Quarterly statements from the CPA shall, however, be provided to Plaintiffs' Co-Lead and Plaintiffs' Liaison Counsel (and, if the Court so orders, to the Court) showing only the aggregate of the quarterly deposits from

all Defendants, disbursements, interest earned, financial institution charges, if any, and current balance.

DATED: November 21, 2016  
at Minneapolis, Minnesota.

s/John R. Tunheim  
JOHN R. TUNHEIM  
Chief Judge  
United States District Court