

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS**

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IN RE: PRADAXA (DABIGATRAN)	3:12-MD-02385-DRH-SCW
ETEXILATE) PRODUCTS LIABILITY)	
LITIGATION)	MDL No. 2385
)	
This Document Relates to:)	Judge David R. Herndon
All Cases)	
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**THE PSC's SUPPLEMENTAL MOTION TO VACATE
OR FURTHER MODIFY CMO 4.**

The Plaintiffs' Steering Committee ("PSC") hereby respectfully moves this Court to vacate or modify CMO 4, which appointed the PSC and established its duties and obligations, because the PSC has fulfilled all of its duties as set forth in CMO 4. For the detailed reasons set forth below, the PSC should be relieved of any further obligations established pursuant to CMO 4.

BACKGROUND

On September 27, 2012, the Court entered CMO 4, appointing Plaintiffs' leadership after consideration of applications submitted by scores of plaintiff lawyers from across the country. In its Order, the Court appointed five co-lead counsel, a 12 member Executive Committee (including the five co-lead counsel), two liaison counsel, and a Steering Committee comprised of 13 other lawyers. As a whole, this group has been commonly referred to as the "PSC". CMO 4 sets forth various responsibilities, including those for liaison counsel as well as those for leadership counsel. *See* CMO No. 4, Section II.A - C.

Since its appointment, the PSC has prosecuted this litigation aggressively and expeditiously, both because of the nature of the plaintiff population (with the average plaintiff being 77 years old) and because the Court expected this litigation to move expeditiously. *See* CMO 1. This fast-track discovery, pre-trial, and trial process was set forth in CMOs 6 and 11, which mandated the first trial occur less than two years after the MDL's first status conference

In the time since the PSC's appointment, the PSC undertook (among many other tasks) the following work:

- Service of master interrogatories and document requests (as well as supplements);
- Negotiation of numerous procedural CMOs (including orders establishing Plaintiff Fact Sheets, Defense Fact Sheets, Direct Filing, Protective/Confidentiality Orders, deposition protocol, document production protocols, and more);
- Filed and argued multiple and complex discovery-related motions;
- Organized and reviewed over 4.5 million documents (more than 30 million pages) produced by the defendants;
- Reviewed at least six different databases produced by the defendants;
- Conducted nine Rule 30(b)(6) depositions of defense witnesses and 38 corporate depositions of both the U.S. Boehringer defendant ("BIPI") and the foreign Boehringer defendant ("BII"). These depositions were conducted in several different cities in the U.S. and in Europe;
- Coordinated bellwether discovery and oversaw the bellwether trial process, which included approximately 100 case specific depositions of plaintiffs and non-party witnesses;
- Assisted in the preparation of four cases for trial as part of the bellwether-trial process;
- Defended a mandamus appeal to the United States Court of Appeals for the Seventh Circuit;

- Coordinated/cooperated with Pradaxa litigation in all state court jurisdictions;
- Negotiated and obtained court approval of a global resolution of all known Pradaxa cases and claims as of May 28, 2014 for \$650 million;
- Negotiated lien resolutions with Medicare, Medicaid, and private insurers;
- Oversaw the settlement process, such that over 94% of all claimants in settlement have received payment in less than one year from the settlement's announcement;¹
- With the assistance of the Special Master, oversaw awards and distribution of common benefit fees and reimbursement of common benefit expenses incurred to over 50 law firms who claimed to have performed common benefit work and incurred common benefit expenses; and
- Advanced substantial money, with substantial risk, to fund the litigation expenses, as well as contributing huge amounts of attorney and staff time.

Further, the PSC previously has been advised that there were no individuals who were identified on any law firm's settlement certification list who decided to opt out of the settlement. There are, however, 15 plaintiffs/claimants, who opted into the voluntary settlement program, but then failed to fully comply with the terms and the Master Settlement Agreement; those claims were dismissed. *See* Order, Doc. 27 in Case 3:12-cv-50014-DRH-SCW. These plaintiffs have appealed the dismissals, and that appeal is pending before the United States Court of Appeals for the Seventh Circuit. Following the settlement the Court entered CMOs 73 and 79, which stayed the entire litigation.

The PSC recently has learned that there is a certain group of lawyers with a handful of post-settlement Pradaxa plaintiffs and additional potential Pradaxa claimants that have an interest in pursuing a second wave of litigation, although they have asserted an intention of not litigating

¹ The settlement has been hailed as a tremendous success for the plaintiffs/claimants in this case, as well as a model for mass tort cases, both in the fairness of the result and the efficiency with which it has been effectuated and overseen.

those cases in this MDL (despite the ability to file cases directly into this MDL pursuant to CMO 7).² Notwithstanding, tag along cases are no longer being transferred to this Court, and therefore any future case filed in federal court will likely not be part of this MDL.

The law firms that comprise the PSC have registered all of their cases as part of the global settlement and are not pursuing any new cases at the current time. Accordingly, the individual attorneys and law firms who have been appointed to the PSC no longer have any individual cases in this MDL. As this Court required in CMO 1 (*see* CMO 1 ¶ 12), any attorney seeking appointment to the PSC must have at least one case pending in the MDL in order to be appointed to the PSC. It is respectfully submitted that, while some cases that are part of the global settlement have yet to be formally dismissed (pending lien resolution and distribution), for all intents and purposes, the members of the current PSC no longer have cases pending in this MDL and would no longer satisfy this prong of the appointment to the PSC.³

Because the PSC has fulfilled the tasks that it was appointed to complete under CMO 4, the PSC filed a motion to modify CMO 4, so that the PSC would no longer be responsible for the management and costs of maintaining the Document Depository [Doc. 643]. The Post-settlement Pradaxa plaintiffs, by and through their counsel, filed a response [Doc. 645]. Thereafter BIPI filed a response [Doc. 650]. This motion is fully briefed and pending court determination. However, now, in addition to its pending motion, the PSC hereby respectfully moves this Court to further modify and/or vacate CMO 4, such that the Court can determine the PSC's duties and obligations, as required by CMO 4, have been fully and satisfactorily completed, and that the PSC be discharged from any further obligations or duties.

² These lawyers are: Ellen Presby, Esq. (of the Nemeroff Law Firm in Dallas, Texas), Andy Childers, Esq. (of Childers, Schlueter & Smith in Atlanta, Georgia), Neal Moskow, Esq. (of Ury & Moskow in Fairfield, Connecticut), and Russ Abney (of Ferrer Poirot Wainsbrough in Dallas, Texas).

³ In the event that an individual member of the current PSC should desire to remain active in their appointment, they can certainly notify the Court upon receipt of service of the instant motion.

Indeed, before deciding the PSC's motion to modify [Doc. 643], or contemporaneously therewith, the PSC believes the instant motion should also be addressed.

ARGUMENT

No one will deny the PSC had duties and obligations pursuant to CMO 4. Likewise, no one can make a rational argument that the PSC failed to satisfy (and in fact, the PSC significantly exceeded) those duties and obligations. The PSC respectfully submits that the entry of CMO 4 was never intended to require the PSC to prosecute Pradaxa cases in perpetuity. The PSC further respectfully submits that all of the work that resulted in the global settlement and the effectuation of the global settlement itself (which fairly compensated 4,124 individuals for injuries alleged to have been caused by Pradaxa) constitutes satisfaction of the very tasks that were intended to be completed by the entry of CMO 4. Now that these tasks have been completed, and now that over 80% of all claimants have received full distribution of their settlement funds and over 94% of all claimants have received at least a partial distribution of their settlement funds (the balance are merely awaiting resolution of their liens), and now that the Court has ordered the distribution of the common benefit funds that were held back to compensate the lawyers who prosecuted this case, the PSC respectfully submits that it has fully and completely (and satisfactorily) fulfilled all of its obligations under CMO 4.

The PSC respectfully submits that, to the extent it had any obligations to litigants who were within the MDL's jurisdiction, those obligations (a) only extended to those litigants who had retained counsel before May 28, 2014 and were eligible for participation in the global settlement, and (b) those obligations have been fully satisfied. The PSC cannot be obligated in any manner to every new case now or in the future — that certainly is not what was contemplated when the Court entered CMO 4.

Cases filed and acquired after the settlement are, simply put, “not on the PSC's watch.”

The PSC is unsure of what the position of post-settlement counsel is in this regard, except that such counsel have stated their belief that they are entitled to all of the PSC's work-product, and the PSC is aware BIPI believes strongly that post-settlement counsel is not entitled to that information. In fact, as the Court is aware, pursuant to CMO 2 ¶ 19 (the confidentiality order) BIPI has requested the return or destruction of all confidential or highly confidential material. The PSC takes no position on the dispute between Boehringer and the lawyers for the post-settlement litigants as to who is entitled to what, but the PSC seeks relief from this Court of its conundrum, as the defendants want the PSC to destroy all information pursuant to a prior order of this Court (CMO 2), while post-settlement plaintiffs want all of the PSC's work product. To further complicate matters, the PSC has been informed that the Judge Miller, presiding in Connecticut, has ordered that no discovery be destroyed. *See* Order dated May 4, 2015, filed in *McDevitt v. Boehringer Ingelheim Pharmaceuticals, Inc., et al.*, CPL-HHD CV15 6057664, Superior Court, Judicial District of Hartford, Conn. The PSC will certainly abide by this Court's ruling on what should be done with the work product we created (which is not discovery) as well as any confidential or highly confidential discovery material that BIPI or BII has produced to the PSC.

Accordingly, the PSC respectfully submits that, because it has satisfied all of its obligations under CMO 4, the members of the PSC should be relieved of any and all obligations under CMO 4. With this request, there are three issues that it is likely the Court needs to decide following the disbandment of the current PSC:

- (a) Whether a new PSC should be constituted, or whether counsel can just litigate as individual counsel;
- (b) What should be done with the discovery produced by BIPI and BII; and
- (c) Who, if anyone, is entitled to receive the work-product generated by the PSC.

On points (b) and (c) above, the PSC proposes that a “time capsule” be made for the cases on appeal in the event that they are successful in the Seventh Circuit and are entitled to re-enter the litigation system. To this end, the PSC respectfully submits that these materials be deposited into the possession of this Court by providing all of these materials to Special Master Ellis, or some other designee of this Court, so that the materials will be available to any party who the Court Orders who should be provided access to it or such that the material can be destroyed at any time this Court determines such destruction is appropriate under CMO 2 ¶19.⁴

While the PSC appreciates that the post-settlement lawyers claim they have a right to the common benefit work prepared (because they, as lawyers, settled cases in the global settlement and paid a small portion of their attorneys’ fees into the common benefit fund), that fund was for reimbursement for the work that led to the global settlement of cases before this Court, and not future cases acquired and filed after the global settlement was reached. Those attorneys received the benefit of this common benefit work performed by the PSC for the cases that were part of the settlement program. However, all MDL cases have been resolved, and for all intents and purposes the MDL has served its purpose and been concluded. Less than a handful of lawyers represent some finite number of alleged cases, and sharing their fees from one plaintiff in a prior matter does not buy them the common benefit work for future. By way of analogy, by paying the common benefit assessment on one set of cases, an attorney is not purchasing a membership

⁴Because these materials will include the PSC’s work product, at any point the Court determines that CMO 2 ¶ 19 applies, the material should be destroyed, not returned to BIPI and BII or their counsel.

in a club they can access for all time. And surely, it does not force the PSC to stay in place in perpetuity.

The PSC seeks an Order of this Court that makes clear that this PSC is not obligated in perpetuity and that this PSC has completed its task, and its obligations under CMO 4 are over. The Court can either (a) simply conclude the PSC's obligations; (b) relieve the PSC of its obligations under CMO 4 and retain one or two lawyers to serve as liaison to the Court with obligations limited to administrative duties only, including making sure the final few cases in the settlement have their liens resolved, settlement proceeds and stipulations are disbursed and filed, outstanding bills and reimbursements are accomplished, etc.; or (c) it can relieve the current PSC members who no longer have cases pending in the MDL and either appoint a new PSC or allow counsel to litigate individually as the need or cases arise.

As noted above, the remaining two issues concern the PSC's work product and the defendants' discovery. The PSC asks the Court to make a determination on the issue of what should come of the PSC's work product and the discovery materials produced by BIPI and BII. To this end, the Court can (a) place all of the discovery and the work-product in a "time capsule" (which the PSC proposes is the very least the Court should do during the pendency of the appeal of the 15 plaintiffs referenced above), (b) order that all materials be destroyed or returned to BI pursuant to CMO 2 ¶ 19, or (c) the Court can determine that future litigants be given unfettered access to these materials.⁵ It is not uncommon for an MDL Court to disband a PSC when its obligations are complete. In those circumstances the work-product may be passed on to future

⁵ Should the Court determine that any other future litigants are entitled to receive access to the PSC's database, the Court should also determine whether they owe any assessment pursuant to CMO 16 for such access. Further, we respectfully request that any such order make clear that all costs associated with that access — for both hardware and software — be borne upfront by that group of litigants and that any transfer of that information and data occur immediately and the costs of said transfer be borne by the recipients of that material and data.

groups or it may not be. Indeed, this issue recently presented itself in *In re: BioMet M2a Magnum Hip Implant Products Liability*, MDL-2391. There, Judge Robert L. Miller, Jr., the MDL judge assigned to the case, issued an order allowing that a new PSC be created should new lawyers wish to pursue more cases following a global mediation settlement process. Similarly, Judge David Katz disbanded the PSC in *In re: Ortho Evra Products Liability Litigation*, MDL-1742.

CONCLUSION

The PSC respectfully requests that this Court's Order of September 27, 2012, appointing Lead Counsel, Liaison Counsel, and PSC members be vacated, or in the alternative, that the Court issue an Order disbanding and relieving the PSC from its obligations.

The PSC respectfully submits that it has fulfilled its obligation to plaintiffs and to this Honorable Court, that their own clients' cases have concluded, as well as those of all plaintiffs/claimants part of and known to this MDL. Neither the PSC's obligations nor the MDL itself can continue in perpetuity, and despite a handful of lawyers with a few new cases filed primarily in state court, this PSC should be relieved of its duties and obligations under CMO 4. Effective management of the few post-settlement cases can best be achieved through representation by case-specific individual counsel.

It has been the great honor of the PSC to serve on behalf of plaintiffs in this matter before this Court.

Dated: May 5, 2015

Respectfully submitted,

PLAINTIFFS' STEERING COMMITTEE

By: /s/ Steven D. Davis

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served electronically via the Court's ECF system on the 5th day of May, 2015 including to Defendants' Lead and Liaison Counsel, who are charged with coordinating service for all other Defendants counsel of record:

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