

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE:

17-MD-2767 (PAE)
17-MC-2767 (PAE)

MIRENA IUS LEVONORGESTREL-RELATED
PRODUCTS LIABILITY LITIGATION (NO. II)
This Document Relates To All Actions

ORDER NO. 7

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**ORDER REGARDING RESPONSIBILITIES OF PLAINTIFFS' COUNSEL
AND ADOPTION OF CASE MANAGEMENT PROTOCOLS**

PAUL A. ENGELMAYER, District Judge:

The Court has previously appointed plaintiffs' Co-Lead and Liaison Counsel, plaintiffs' Executive Committee and plaintiffs' Steering Committee. *See* Order No. 4 (June 16, 2017). Having reviewed all parties' views on these matters, the Court hereby orders the following as to the responsibilities attendant to each position.

I. Responsibilities of Plaintiffs' Counsel

A. Lead Counsel

In its June 16, 2017 Order (Doc. 37), the Court appointed plaintiffs' Lead Counsel and Liaison Counsel as follows:

Lawrence L. Jones II (Jones Ward PLC) – Plaintiffs' Co-Lead Counsel

Martin Crump (Davis & Crump P.C.) – Plaintiffs' Co-Lead Counsel

Max Kennerly (Kennerly Loutey LLC) – Plaintiffs' Liaison Counsel

Lead Counsel will be responsible for prosecuting any potential common benefit claims, as well as coordinating the pretrial proceedings conducted by counsel for the individual plaintiffs. With respect to the common benefit claims and coordinated pretrial proceedings, Lead Counsel must:

1. Determine (after such consultation with members of the PEC and other co-counsel as may be appropriate) and present (in briefs, oral argument, or such other fashion as may be appropriate, personally or by a designee) to the Court and opposing parties the Plaintiffs' position on matters arising during the coordinated pretrial proceedings;

2. Coordinate the initiation and conduct of discovery on behalf of the plaintiffs consistent with the requirements of Fed. R. Civ. P. 26, including the preparation of joint interrogatories, requests for production of documents, requests for admissions and the examination of witnesses in depositions, except that discovery and motions initiated by the defendants directed to or regarding named individual Plaintiffs will be handled by the attorney(s) for those individuals;

3. Delegate specific tasks to the PEC, PSC and other counsel in a manner to ensure that pretrial preparation for the plaintiffs is conducted effectively, efficiently and economically;

4. Enter into stipulations with opposing counsel necessary for the conduct of the coordinated pretrial proceedings;

5. Convene meetings of the PEC and PSC for the purpose of proposing joint action and discussing and resolving matters of common concern;

6. Organize themselves and agree on a plan for conducting the coordinated pretrial proceedings on behalf of all plaintiffs, including the selection and appointment of internal committee chairs, subcommittee chairs, the members of any such committees or subcommittees and any other positions deemed to be necessary and appropriate for the fair and efficient conduct of this litigation;

7. Assess members of the PEC and PSC for payments into a Common Benefit Expense Fund, collect payments, maintain a bank account, pay common benefit expenses, and account to the PEC, PSC and the Court upon request as to the collection and use of such funds;

8. Brief and argue motions for the plaintiffs and file opposing briefs and argue motions and proceedings initiated by other parties (except as to matters specifically directed to individual Plaintiffs and their counsel);

9. Consult with and retain expert witnesses;

10. Maintain time and expense records for work performed, costs incurred and other disbursements made for any potential common benefit claim, proof of potential common benefit claims, and related matters on behalf of the PEC and PSC, and report with reasonable regularity, in writing, to the PEC concerning expenses, disbursements and receipts;

11. Monitor work performed by the PEC and PSC and those whose work that has been specifically authorized;

12. Perform all tasks necessary to carry out the functions of Lead Counsel and to properly coordinate Plaintiffs' pretrial activities;

13. Authorize plaintiffs' counsel to initiate case-specific motions and discovery;

14. Negotiate settlements subject to court approval on behalf of all plaintiffs;

15. If there is a settlement, propose a plan of allocation;

16. Prepare and distribute periodic status reports to the parties; and

17. Coordinate and communicate with defendants' counsel, as necessary and appropriate, with respect to the matters addressed in this paragraph.

No generic discovery or other common action or work in this litigation will be undertaken except at the direction or with permission of Lead Counsel; provided, however,

that any attorney aggrieved by any refusal of permission may seek Court review of the refusal.

A. Liaison Counsel

Liaison Counsel shall maintain an up-to-date service list of all plaintiffs' attorneys involved in this MDL, and shall be the point of contact between the Court and the Court-appointed plaintiffs' leadership. Liaison Counsel shall ensure that all Orders entered by this Court and all papers filed by the defendants are timely distributed to all plaintiffs' counsel in the MDL and that all papers filed by the Court-appointed plaintiffs' leadership in this MDL are timely distributed to counsel for the defendants. In addition, Liaison Counsel shall assume any other duties delegated by Lead Counsel.

Liaison Counsel shall maintain time and expense records for work performed, costs incurred and other disbursements made for any potential common benefit claim.

B. Plaintiffs' Executive Committee

The duties and responsibilities of the PEC are as follows. The PEC shall:

1. Consult with and assist plaintiffs' Lead Counsel in conducting the plaintiffs' coordinated pretrial activities and in planning for trial;
2. Consult with and assist plaintiffs' Lead Counsel to establish procedures for documenting and monitoring costs and the computing of potential common benefit time;
3. Maintain time and expense records for work performed, costs incurred and other disbursements made for any potential common benefit claim;
4. Make recommendations to Lead Counsel regarding the formation of internal committees (e.g., Law, Discovery, Science, Briefing, Experts, and Trial), on which attorneys who are not designated as PEC members will have the opportunity to serve and have input in the litigation through the committee. Counsel appointed to leadership positions assume an

obligation to act fairly, efficiently, and economically and committees of counsel should try to avoid unnecessary duplication of effort.;

5. Promptly contribute to the Common Benefit Expense Fund as assessed by Lead Counsel; and

6. At the request of Lead Counsel, assist Lead Counsel in their discharge of the duties outlined above.

C. Plaintiffs' Steering Committee

The duties and responsibilities of the PSC are as follows. The PSC shall:

1. Maintain time and expense records for work performed, costs incurred and other disbursements made for any potential common benefit claim;

2. Remain available for service on any committee(s) to which they are selected by Lead Counsel and/or the PEC for purposes of conducting the plaintiffs' coordinated pretrial activities and in planning for trial;

3. Promptly contribute to the Common Benefit Fund for "shared costs" (as defined below); and

4. At the request of Lead Counsel, assist Lead Counsel and the PEC in their discharge of the duties outlined above.

II. Adoption of Case Management Protocols

The Court hereby adopts the following guidelines for the management of case-staffing, timekeeping, cost reimbursement, and related common benefit issues. The recovery of common benefit attorneys' fees and cost reimbursements will be limited to "Participating Counsel."

"Participating Counsel" shall be defined as the members of the PEC and PSC (along with members and staff of their firm), any other counsel authorized by Lead Counsel who desire to be

considered for common benefit compensation, or counsel who have been specifically approved by this Court as Participating Counsel prior to incurring any such cost or expense. Counsel are forewarned that no application for approval to incur common benefit fees, costs, or expenses will be considered by this Court unless counsel have first obtained approval from Lead Counsel.

Participating Counsel shall be eligible to receive common benefit attorneys' fees and reimbursement of costs and expenses only if the time expended, costs incurred, and activity in question were (a) for the common benefit of plaintiffs; (b) appropriately authorized; (c) timely submitted; (d) reasonable; and (e) approved by this Court. As detailed below, Participating Counsel who seek to recover Court-awarded common benefit attorneys' fees, costs, 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, billing rate, and particular activity, along with a brief note indicating the source of authorization for the activity in question.

Participating Counsel, as defined above, shall agree to the terms and conditions herein, including submitting to this Court's jurisdiction and agreeing that this Court has plenary authority regarding the award and allocation of common benefit attorneys' fees and awards for cost and expense reimbursements in this matter.

A. Common Benefit Work

1. Authorization for Compensable Common Benefit Work

Authorized "Common Benefit Work" includes assignments made by Lead Counsel as set forth above. Unless specifically and explicitly authorized in writing, no time spent on developing or processing individual issues in any case for an individual client (claimant), and no time spent on any unauthorized work, will be considered or should be submitted.

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

a) Depositions: While it is impracticable to impose inflexible rules to cover every conceivable situation, Lead Counsel shall exercise discretion, judgment, and prudence to designate only that number of attorneys to participate in any given deposition that is commensurate with the nature of that deposition so as to avoid over-staffing. Thus, for example, the deposition of a causation expert proffered by Defendants would typically justify the assignment of more attorneys than would the defense of the deposition of one of plaintiffs' fact witnesses. Time and expenses for Participating Counsel not designated as one of the authorized questioners or otherwise authorized to attend the deposition by Lead Counsel shall not be considered Common Benefit Work but, rather, considered as attending on behalf of such counsel's individual clients. Unnecessary attendance by counsel may not be compensated in any fee application to the Court.

b) Periodic PEC/PSC Conference Calls and PEC/PSC meetings: Calls are held so that individual attorneys are kept up-to-date on the status of the litigation, and participation by listening to such calls is not common benefit work. All attorneys have an obligation to keep themselves informed about the litigation so that they can best represent their respective clients, and that is a reason to listen in on those calls. The attorneys designated by Lead Counsel to run or participate in those calls are working for the common benefit by keeping other attorneys educated about the litigation and their time will be considered for common benefit. During such telephone or conference calls and at PEC/PSC meetings, there is a presumption that only the PEC/PSC member's time will qualify for common benefit time, unless non-PEC/PSC member participation is requested by the PEC/PSC member and expressly authorized for each call or meeting by Lead Counsel.

c) Periodic MDL Status Conferences: Status conferences will be held so that the litigation moves 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 stay up to date on the status of the litigation, but attending and listening to such conferences is not Common Benefit Work. All attorneys have an obligation to keep themselves informed about the litigation so that they can best represent their respective clients. Mere attendance at a status conference will not be considered common benefit time, and expenses incurred in relation thereto will not be considered common benefit expenses. The attorneys designated by the Lead Counsel to address issues that will be raised at a given status conference or requested by the Lead Counsel to be present at a status conference are working for the common benefit and their time will be considered for the common benefit. Similarly, any attorney whose attendance at a status conference is specifically requested by the undersigned or by Magistrate Judge Cott (or by a Court-appointed Special Master) to address a common issue may submit his or her time for evaluation as common benefit time.

d) Identification and Work-Up of Experts: If a Participating Counsel retains an expert without the knowledge and approval of Lead Counsel, time and expenses attributable to the same may not be approved as Common Benefit Work, or the

expenses pertaining thereto as Common Benefit Expenses.

e) Attendance at Seminars: Attendance at seminars (e.g., American Association for Justice Section Meetings, Mass Torts Made Perfect, Harris Martin, and similar seminars and Continuing Legal Education programs) generally shall not qualify as Common Benefit Work, or the expenses pertaining thereto as Common Benefit Expenses.

f) Document Review: Only document review specifically authorized by Lead Counsel 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 Lead Counsel, that review is not considered common benefit. Unless approved in writing by Lead Counsel, only licensed attorneys may conduct common benefit document review. Descriptions associated with “document review” must contain sufficient detail to allow those reviewing the time entry to generally ascertain what was reviewed. For example, indicating the custodian, search query, or number of document folders reviewed is the kind of description needed.

g) Review of Filings and Orders: All attorneys have an obligation to keep themselves informed about the litigation so that they can best represent their respective clients, and review of filings made and Orders entered in this litigation is part of that obligation. Only those attorneys designated by Lead Counsel to review or summarize those filings or Orders for the benefit of all plaintiffs in this MDL are working for the common benefit and their time will be considered for Common Benefit Work. All other counsel are reviewing those filings and Orders for their own benefit and that of their respective clients and such review will not be considered Common Benefit Work.

h) Emails: Except for PEC/PSC members and their assigned attorneys and staff working on this MDL, time recorded for reviewing emails 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 and that is for the common benefit of plaintiffs. 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 as Common Benefit Work. All attorneys have 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.

i) Review of Discovery: All attorneys have an obligation to keep themselves informed about the litigation so that they can best represent their respective clients, and that is a reason to review discovery served in this litigation. Except for PEC/PSC members, only those attorneys designated by Lead Counsel to review discovery are working for the common benefit and their time accordingly considered Common Benefit Work. All other counsel are reviewing those discovery responses for their own benefit and the benefit of their own clients, and

such review will not be considered Common Benefit Work.

In the event that Participating Counsel are unsure if the action they are about to undertake is considered Common Benefit Work, they shall ask Lead Counsel in advance as to whether such time may be compensable.

2. Timekeeping and Submission of Time Records

All time must be accurately and contemporaneously maintained. Participating Counsel shall keep contemporaneous billing records of the time spent in connection with Common Benefit Work on this MDL, indicating with specificity the hours and billing rate, along with a brief note indicating the source of authorization for the activity in question and a brief description of the particular activity (such as “conducted deposition of John Doe as authorized by [name of Lead Counsel]”). Time submissions shall be made to Lead Counsel on a monthly basis in accordance with the guidelines to be distributed by Lead Counsel so that Lead Counsel may retain those forms for later submission to this Court if and when necessary. Time entries that are not sufficiently detailed will not be considered for payment of Common Benefit fees. All time for Common Benefit Work by each firm shall be recorded and maintained in tenth-of-an-hour increments. The failure to secure authorization from Lead Counsel to incur Common Benefit time and expenses, or to 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. Common Benefit Expenses

1. Shared Costs

“Shared Costs” are costs that will be paid out of the PEC/PSC Fund administered by Plaintiffs’ Lead Counsel. Each PEC/PSC member shall contribute to the PEC/PSC Fund at times and in amounts sufficient to cover plaintiffs’ expenses for the administration of this

MDL. The timing and amount of each assessment will be determined by plaintiffs' Lead Counsel, and each assessment will be paid within 30 days as instructed by plaintiffs' Lead Counsel. Failure to pay assessments will be grounds for removal from the PEC/PSC. Shared Costs are costs incurred for the common benefit of plaintiffs in this MDL as a whole. No client-related costs, except certain costs relating to future cases selected as bellwether cases that will be for the common benefit (*e.g.*, related to liability and causation), shall be considered Shared Costs, unless exceptional circumstances exist and are approved by later order of this Court. All Shared Costs must be approved by plaintiffs' Lead Counsel prior to payment.

All costs that meet these requirements and fall under the following categories shall be considered Shared Costs and qualify for submission and payment directly from the PEC/PSC Fund:

- a) court, filing and service costs related to common issues;
- b) deposition and court reporter costs for depositions (excluding those that are client specific);
- c) document depository creation, operation, staffing, equipment and administration;
- d) Plaintiffs' Lead Counsel, Liaison Counsel, or PEC/PSC administration matters (*e.g.*, expenses for equipment, technology, courier services, long distance, telecopier, electronic service, photocopy and printing, secretarial/temporary staff, etc.);
- e) PEC/PSC administration matters, such as meetings, conference room rental, meals and conference calls;
- f) legal and accountant fees relating to the Common Benefit Expense Fund;
- g) expert witness and consultant fees and expenses for experts whose opinions and testimony would be generic and for the common benefit of a substantial number of cases. There shall be no reimbursement for case specific experts, except for liability and causation experts in bellwether cases, at the discretion of the Lead Counsel;

- h) printing, copying, coding, scanning related to the above (out-of-house or extraordinary firm costs);
- i) research by outside third-party vendors/consultants/attorneys, approved by Lead Counsel;
- j) translation costs related to the above;
- k) bank or financial institution charges;
- l) investigative services, approved by Lead Counsel; and
- m) Any assessment paid by any member firm of the PEC/PSC, including particularly funds used for the creation of the common document depository platform and for retaining generic expert witnesses.

Plaintiffs' Lead Counsel shall prepare and be responsible for distributing reimbursement procedures and the forms associated therewith. Requests for payments from the PEC/PSC Fund for Common Benefit expenses shall include sufficient information to permit Plaintiffs' Lead Counsel and/or a Certified Public Accountant ("CPA") to account properly for costs and to provide adequate detail to the Court.

2. Held Costs

"Held Costs" are those that will be carried by each attorney in this MDL and reimbursed as and when the PEC/PSC determines to do so. Held Costs are those that do not fall into the above Shared Costs categories but are incurred for the common benefit of all plaintiffs in this MDL. No client-specific costs can be considered Held Costs, other than certain Common Benefit costs relating to future bellwether cases at the discretion of the PEC/PSC. Held Costs shall be recorded in accordance with the guidelines and the from to be distributed by Lead Counsel. They shall be subject to the following limitations:

a. Travel Limitations

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

i) Airfare: Ordinarily, only the price of the lowest available, convenient coach fare seat will be reimbursed. Business/First Class Airfare will generally not be reimbursed, with the exception of international travel approved by Lead Counsel. In the event that non-coach air travel is utilized, the attorney shall be reimbursed only to the extent of the lowest available, convenient coach fare, which must be contemporaneously documented. If non-coach, private or charter travel is elected, the applicant is required to document what the lowest available, convenient coach fare in effect at that time was, and that is all that can be reimbursed.

ii) Hotel: Hotel room charges for the average available room rate of a business hotel, such as the Hyatt, Hilton, Sheraton, Westin, SPG and Marriott hotels, in the city in which the stay occurred, will be reimbursed. Luxury hotels will not be fully reimbursed but, rather, will be reimbursed at the average available rate of a business hotel.

iii) Meals: Meal expenses must be reasonable. There will be no reimbursement for alcoholic beverages, room service, mini-bar items, or movies.

iv) Cash Expenses: Miscellaneous cash expenses for which receipts generally are not available (e.g., tips, luggage handling) will be reimbursed up to \$50.00 per trip, as long as the expenses are properly itemized.

v) Automobile Rental: Luxury automobiles rentals will not be fully reimbursed, unless only luxury automobiles are available. Counsel must submit evidence of the unavailability of non-luxury vehicles. 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.

vi) Mileage: Mileage claims must be documented by stating origination point, destination, and total actual miles for each trip. The rate will be the maximum rate allowed by the Internal Revenue Service.

b. Non-Travel Limitations

a) Long Distance, Conference Call, and Cellular Telephone Charges: Common Benefit long distance, conference call, and cellular telephone charges 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 the MDL and a description of the call. Such charges are to be reported at actual cost.

b) 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.

c) 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.

d) In-House Photocopy: A contemporaneous photocopy log or other supporting documentation must be maintained and submitted. The maximum copy charge is \$0.15 per page.


f) Computerized Research – Lexis/Westlaw: Claims for Lexis, Westlaw, or other computerized legal research expenses should be in the exact amount charged to the firm and appropriately allocated for these research services.

c. Verification

The forms detailing expenses shall be certified by an attorney with authority in each firm attesting to the accuracy of the submissions. Attorneys shall provide receipts for all expenses. Credit card statements or receipts are an appropriate form of verification so long as accompanied by a declaration from counsel that the charge was incurred for the common benefit.

SO ORDERED.

Dated: June 27, 2017
New York, New York



PAUL A. ENGELMAYER
UNITED STATES DISTRICT JUDGE