

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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IN RE: ZOSTAVAX (ZOSTER VACCINE	:	MDL 2848
LIVE) PRODUCTS LIABILITY	:	Civil Action No: 18-md-2848
LITIGATION	:	Judge Harvey Bartle, III
This Document Relates to: ALL ACTIONS	:	

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PRETRIAL ORDER No 5

This Court having entered Pretrial Order No. 2 on August 15, 2018 [Doc. 4], requiring counsel for plaintiffs to confer and submit the names of those counsel who seek appointment as Plaintiffs' Liaison Counsel and/or to the Plaintiffs' Steering Committee ("PSC"), and counsel having submitted consensus recommendations to the Court on September 11, 2018, the Court having reviewed the submission and the attached CVs, finding that the consensus recommendations present an array of highly skilled counsel with diverse background and experience which will provide the Court with an effective committee to advance this litigation in an efficient and just manner, for good cause shown, the Court hereby **ORDERS**:

**1. Scope of Order**

This order shall apply to all cases currently pending in *In Re: Zosatavax (Zoster Vaccine Live) Products Liability Litigation*, MDL No. 2848, and to all related actions that have been or will be originally filed in, transferred to, or removed to this Court and assigned thereto (collectively, "the MDL proceedings"). This order is binding on all parties and their counsel in all cases currently pending or subsequently made part of the MDL proceedings.

**2. Plaintiffs' Leadership Counsel Appointments**

The Court appoints the following members as Plaintiffs' Co-Lead Counsel, Plaintiffs' Liaison Counsel and to the Plaintiff's Executive and Steering Committees.

**A. Plaintiffs' Co-Lead Counsel<sup>1</sup>**

Mark T. Sadaka, Esq. MSPH  
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**B. Plaintiffs' Executive Committee ("PEC")**

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**C. Plaintiffs' Liaison Counsel**

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<sup>1</sup> Plaintiffs' Co-Lead Counsel will also serve as members of the Plaintiffs' Executive Committee.

**D. Plaintiffs' Steering Committee**

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**E. Plaintiffs' Federal/State Liaison Counsel<sup>2</sup>**

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**3. Designations, Future Changes in PSC Structure.**

These designations are of a personal nature. Accordingly, this Court looks to these counsel to undertake personal responsibility to perform the designated functions and reserves the

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<sup>2</sup> Mindful that state court consolidated actions for the Zostavax litigation exists in both California and New Jersey, Mr. Cappelli will act as Federal/State Liaison Counsel and not as a member of the Plaintiffs' Steering Committee, primarily to keep this Court informed of state court activities and to help facilitate federal-state cooperation.

discretion to replace them on either their own request or this Court's own motion, should they become unable or unwilling to do so, or should such other circumstances arise that warrant the same. This Court may amend or expand the PSC upon request of the PSC or on its own motion, if and as circumstances warrant.

**4. Duties of Co-Lead Counsel and Plaintiffs' Executive Committee**

It shall be the responsibility of Co-Lead Counsel and the Executive Committee to provide oversight to and coordinate the responsibilities of the PSC. The duties of Co-Lead Counsel and the Executive Committee and as delegated by such to the PSC, include but are not limited to the following:

**Administration**

- a. Call meetings of counsel for plaintiffs for any appropriate purpose;
- b. Perform any task necessary and proper for the PSC to accomplish its responsibilities as defined by the Court's orders, including organizing sub-committees comprised of plaintiffs' attorneys not on the PSC and assigning them tasks consistent with the duties of the PSC;
- c. Monitor the activities of the PEC and PSC and other co-counsel to ensure that schedules are met and unnecessary expenditures of time and funds are avoided;
- d. Maintain adequate files of all pretrial matters, including establishing and maintaining a document or exhibit depository, in either real or virtual format, and having those documents available, under reasonable terms and conditions, for examination by all Plaintiffs or their attorneys in the MDL proceedings; and

- e. Provide period reports to non-PSC plaintiffs' counsel concerning the status of the litigation on no less than a quarterly basis.

**Discovery**

- a. Initiate, coordinate, and conduct all pretrial discovery on behalf of all Plaintiffs who file civil actions in this Court or that are transferred to this Court pursuant to 28 U.S.C. § 1407 and which are consolidated with this multi district litigation and are part of the MDL proceeding;
- b. Develop and propose to the Court schedules for the commencement, execution, and completion of all discovery on behalf of all Plaintiffs;
- c. Initiate, coordinate, and cause to be issued in the name of all Plaintiffs the necessary discovery requests, motions, and subpoenas pertaining to any witnesses and documents needed to properly prepare for the pretrial discovery of relevant issues found in the pleadings of this litigation. Similar requests, notices, and subpoenas may be caused to be issued by the PSC upon written request by the individual attorney in order to assist him/her in preparation of the pretrial stages of his/her client's particular claims; and
- d. Conduct all discovery in a coordinated and consolidated manner on behalf of and for the benefit of all Plaintiffs with the assistance from the PSC.

**Motion Practice and Hearings**

- a. Call meetings of counsel for plaintiffs for any appropriate purpose, including coordinating responses to questions of other parties or of the Court. Initiate proposals, suggestions, schedules, or joint briefs, and any other appropriate matter(s) pertaining to pretrial proceedings;
- b. Submit and argue or designate other counsel to argue any motions presented to the Court or Magistrate Judge on behalf of all Plaintiffs as well as oppose when necessary any motions submitted by the Defendant or third parties;

- c. Examine or designate other counsel to examine witnesses and introduce evidence at hearings on behalf of Plaintiffs; and
- d. Act or designate other counsel to act as spokesperson(s) for Plaintiffs at pretrial proceedings and in response to any inquiries by the Court.

**Contact with Defense Counsel**

- a. Initiate, coordinate and conduct (or designate others to do so) the requisite meet and confers with Defendant, confer with Defendant regarding procedural matters, and negotiate and enter into stipulations with Defendant regarding this litigation; and
- b. Explore or designate other counsel to explore, develop, and pursue settlement options with Defendant on behalf of Plaintiffs.

**5. Communications with the Court**

All communications from Plaintiffs with the Court should be through Co-Lead Counsel or Liaison Counsel. If circumstances require direct correspondence with the Court by an individual counsel, copies of any such communications shall simultaneously be served upon Plaintiffs' Co-Lead Counsel and Liaison Counsel.

**6. Duties of Plaintiffs' Liaison Counsel**

The responsibilities of Plaintiffs' Liaison Counsel, or as delegated by the Executive Committee or Co-Lead counsel, shall be the following on behalf of all Plaintiffs in the MDL proceedings:

- a. To coordinate services and filings;
- b. To maintain and distribute to co-counsel and to Defendant's Counsel an up-to-date service list;
- c. To receive and distribute pleadings, all Court orders, and motions, provided all counsel shall continue to receive all notices through the Court's CM/ECF system;

- d. To maintain in conjunction with their accountant records of receipts and disbursements advanced by members of the PSC and received by the PSC and to report in writing to the PSC concerning disbursements and receipts;
- e. To act as the treasurer for any common benefit assessments and expenses;
- f. To maintain and make available to all Plaintiffs' counsel of record at reasonable hours a complete file of all documents served by or upon each party (except such documents as may be available at a document depository);
- g. To be available for any telephone conferences convened by the Court and to communicate the substance of any such telephone conference to all other Plaintiffs' counsel; and
- h. Perform such other functions as may be expressly authorized by further orders of the Court

7. The Court recognizes that cooperation by and among plaintiffs' counsel is essential for the orderly and expeditious resolution of this litigation. The communication of information among and between plaintiffs' counsel shall not be deemed a waiver of the attorney-client privilege and/or the work product doctrine, if the privilege or doctrine is otherwise applicable, and all of such persons shall maintain the confidentiality of such communications. Cooperative efforts contemplated above shall in no way be used against any plaintiff by any defendant. Nothing contained in this provision shall be construed to limit the rights of any party or counsel to assert the attorney-client privilege or attorney work product doctrine.


8. The Court recognizes that independent investigations have been undertaken by various plaintiffs' counsel. Certain investigative materials gathered by individual counsel in the course of their independent case investigations may constitute attorney work product. All documents and investigative materials obtained prior to the date of this Order will be shared

only to the extent allowable under any applicable protective orders, only with counsel having the same interests, and only as provided under an agreement among the PEC and PSC governing the sharing of costs and expenses for obtaining and producing such investigative material and attorney-work product. The PEC and PSC shall make a good faith effort to resolve the cost-sharing issues relevant to any such independent investigative materials. Any challenges to claims of work product as to investigative materials will be determined by the Court.

9. Under no circumstances are Co-Lead counsel, the PEC or any member of the PSC responsible for the filings, discovery, or any other issue or matter related to an individual plaintiff's case or claim. More specifically, the PSC is in no way responsible for the attorney-client relationship and the duties and responsibilities each individual attorney or law firm owe to their clients in prosecution of their individual case.

**SO ORDERED:**

Dated: Philadelphia, Pennsylvania  
September 25, 2018

  
HARVEY BARTLE, III  
United States District Judge