

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

IN RE: GLUCAGON-LIKE	: CIVIL ACTION
PEPTIDE-1 RECEPTOR AGONISTS	:
(GLP-1 RAS) PRODUCTS	:
LIABILITY LITIGATION	:
	:
THIS DOCUMENT RELATES TO:	: MDL No. 3094
	: 24-md-3094
<i>Marissa Wrubel v. Eli Lilly and Company,</i>	:
2:24-cv-00841	:
	:

**RESPONSE IN OPPOSITION TO MOTION FOR APPOINTMENT OF
PLAINTIFF LEADERSHIP (Doc. 61)**

The undersigned counsel¹ respectfully submits this response in opposition to the motion for appointment of plaintiff leadership that was filed on March 21, 2024. (Doc. 61).

PRELIMINARY STATEMENT

The Court should deny the motion because the application process leading to the proposed leadership “slate” was closed off when, instead, it should have been open and transparent. The proposed co-leads essentially “ordered” attorneys interested in a leadership role to submit to them the type of material normally provided to the Court: resumes, a description of relevant experience, etc. They determined whether the proposed leadership “applicant” was sufficiently qualified, experienced, diverse, and committed to serve. They did what the Court is generally tasked with doing. What’s more, the motion initially omitted any biographical information from anyone slotted for an executive or steering committee position. Undersigned counsel raised this objection with the proposed leadership only to have them subsequently submit an amended exhibit to their motion. This amended submission does even reflect on the objection raised by undersigned counsel and does not cure the issues raised herein.

¹ Ms. Foster’s *pro hac vice* application is pending (Doc. 63).

For these reasons, and those that follow, the undersigned objects to the motion. The Court should respectfully call for a written application for any attorney seeking a leadership position. An open application process would ensure fairness and would be consistent with best practices.

RELEVANT FACTUAL BACKGROUND

The Court held an initial conference on March 14, 2024. (Doc. 49). At the hearing, it was represented that plaintiffs' counsel had "met and conferred and have agreed to a process" for selecting leadership. Hrg. Tr. 11:20-21. Apparently, the Court was informed "there were a lot of extensive negotiations, but [plaintiffs' counsel] have reached a consensus..." *Id.*, 12:10-12. The Court was told about the "self-ordering" of plaintiffs' leadership. *Id.*, 14:10-12. But the Court quickly learned this was not exactly so. One lawyer who was not included in the "self-ordering" requested the "fair opportunity to apply for leadership" and the Court invited him to do so. *Id.* 20:2-18. The Court asked that lawyer to submit his application to the Court and to the "lawyers who have been working on this as well." *Id.* The Court also noted that "if there is somebody who feels that they have been overlooked in some substantive way, you should let me know at the same time that I get the proposal. Again, I don't want to overdo this, nor do I want anybody to feel that they have been muzzled." *Id.*, 18:17-22. Shortly thereafter, the Court followed up and said: "I am very interested in making sure that people feel they have the opportunity to participate in the leadership." *Id.*, 22:11-13.

Recognizing they could not submit any "consensus" slate at the hearing, the very next day, on March 15, Mr. Orent, one of the proposed co-leads, sent the following email affording attorneys with one business-day's notice to submit to their leadership applications to the proposed leads. The email titled, "PSC Applications DUE 3/18," provided:

To ensure fairness and consistency in the process of making final selections to the leadership slate that we will be submitting next week, please provide the following to us no later than 5pm Monday 3/18.

1. A current cv

2. A statement of relevant experience in pharmaceutical or medical device litigation in mdls
3. A list of other current appointments or obligations that might take significant time away from this mdl
4. A brief statement of areas where you believe you are best able to help the MDL
5. A list of work that you have already participated in to assist in the organization, coordination, or conferences attended related to this litigation.

Please provide this information again even if you have previously provided it to us. Additionally individuals who have not previously indicated an interest in participating are encouraged to apply if you believe you have the requisite skill, interest and financial ability to help move this litigation forward. *See* Exhibit A.

Ms. Foster is one of the attorneys seeking the opportunity for leadership. (Doc. 64). But Ms. Foster remains concerned about the process and the opportunity to participate. She attended the March 14 hearing. Following the Court's invitation to submit a leadership application, Ms. Foster began working on hers. On March 18, Ms. Foster emailed Mr. Sedgh, of the Morgan & Morgan firm:

"As you know, I previously expressed an interest in being a part of the Ozempic MDL's leadership committee, and I plan to submit an application to the Court by this Thursday. Could you please provide us with a copy of the proposed slate that will be submitted to the Court?" *See* Exhibit B.

Mr. Sedgh replied by asking Ms. Foster if she got Mr. Orent's email. *See* Ex. B. She did not, because she was not included on the distribution list.

The next day, on March 19, Mr. Orent emailed Ms. Foster, and told her:

We are happy to extend the deadline for applications if you are interested in applying for the psc. Would you be able to send by noon? We have tried hard to include all known to have interest in the litigation and would be happy to give you fair consideration. Please let me know if you have any questions on the application." *See* Exhibit C.

Ms. Foster sent Mr. Orent and others a draft of her application, which specifically stated she

was applying for an executive or steering committee position. On March 20, Mr. Orent called Ms. Foster and told her he was “extending a formal invitation” onto the leadership committee and that she was “qualified” and “deserved a seat at the table.” Mr. Orent further told her about the first PSC meeting.

Ms. Foster followed up with Mr. Orent on March 21 about the submission of her leadership application – the day submissions for leadership were due. He responded in the afternoon that:

“We will be having the first psc meeting on..... The order is going in today. We are not seeking court approval of the ldc but note it in the app. Working on details for first group call. Also because you are ldc there will not be a capital contribution requirement. Thanks and looking forward to working with you.”
See Exhibit D.

Ms. Foster wrote: “Thanks for the response. Just want to make sure I’m clear on this point — there is no need for me to submit my application letter and resume or should I?” Ex. D. And Mr. Orent answered: “Correct we are handling everything.” Ex. D.

The proposed co-leads submitted an application with a proposed leadership slate in the evening of March 21. (Doc. 61). The motion states that the co-leads solicited applications from over 100 attorneys for PEC and PSC positions and it describes the information they sought from the applicants. Eleven attorneys were included on the proposed PEC; thirteen attorneys were included on the proposed PSC. The motion boasts, “The resulting Proposed PEC and Proposed PSC are comprised of the most well-qualified applicants, and reflect significant diversity of geography, experience, and perspectives.” (Doc, 61, at 5). But the motion failed to include any information for the Court to verify this statement. The “experience, qualification, and capabilities” that the proposed co-leads purportedly considered, were not initially provided to the Court regarding the attorneys slated for a PEC, PSC, or liaison position. The slate simply contained the names of the attorneys and their respective firms. *See* Doc. 61-1. It appears the slate is comprised of repeat players and, as the recently filed resumes reveal, attorneys without any prior PSC or leadership experience. Also, in at

least one circumstance, multiple attorneys from the same firm are in positions of leadership. The fact is the proposed leadership felt compelled to submit an Amended Exhibit including the resumes of the proposed applicants. They failed, however, to tell the Court that this attempted course correction was due to objections that were raised to the process. This exemplifies the overall lack of transparency necessary in MDLs.

Based on Mr. Orent's assurances and based on telling her that he would be "handling everything", Ms. Foster thought her application and resume would be included with the motion, as is common practice for motions for leadership. But, Ms. Foster was not named in the proposed slate. Her name was also not mentioned in the so-called "LDC" or leadership development committee, which Mr. Orent did not define or describe in his prior email, and which she did not apply for in the application she submitted to the proposed leads.

Ms. Foster accordingly filed her application for a leadership position with the Court. *See* Doc. 64. This was consistent with the Court's directive to share the application with the lawyers who have been working on the case. Her application details her experience in prosecuting complex cases; her ability to work with others; and her firm's commitment to provide necessary resources to this MDL. She also included her resume for the Court to consider. *See* Doc. 64-1. After Ms. Foster filed her application, Mr. Orent said that he did not oppose her application.

ARGUMENT

The Court should deny the motion the co-leads filed because it runs counter to the guidance provided in the Manual for Complex Litigation (4th Ed.)² and the Guidelines and Best Practices For Large And Mass-Tort MDLs (2d Ed., Sept. 2018)³. The MCL notes that "[f]ew decisions by the court

² Manual for Complex Litigation, 4th §, available at: <https://www.uscourts.gov/sites/default/files/mcl4.pdf> ("MCL").

³ Guidelines and Best Practices For Large And Mass-Tort MDLs (2d Ed., Sept. 2018) available at

in complex litigation are as difficult and sensitive as the appointment of designated counsel.” MCL 4th § 10.224. The MCL instructs that “the judge is advised to take an active part in the decision on the appointment of counsel.” *Id.* The MCL stresses the need for “independent examination” and not simply to “defer[] to proposals by counsel...even those that seem to have the concurrence of a majority of those effected. *Id.*

The Guidelines and Best Practices similarly emphasize the need for the MDL judge to steer the appointment of leadership. For example, Best Practice 3B provides that the MDL judge “should issue an order describing the leadership structure, the procedures for counsel to follow if they intend to seek appointment to any of the roles identified in the order, and the criteria that the transferee judge intends to use in selecting counsel to fill the roles.” According to Best Practice 3C(ii), “Counsel should submit written applications that describe their qualifications to serve in the positions they seek to fill.” Best Practice 3C(iii) provides, “The transferee judge should direct counsel to identify cases in which they have served in a similar leadership capacity, describe their experience in managing complex litigation and their knowledge of the subject matter, and provide information about the resources they have available to contribute to the litigation.”

Much has been written about ensuring openness and transparency in selecting plaintiffs’ leadership in MDLs and class actions. Elizabeth Burch, a law professor at the University of Georgia School of Law, wrote a book on the subject titled: *Mass Tort Deals, Backroom Bargaining in Multidistrict Litigation*. Professor Burch asks: “So, how is it that a handful of well-connected lawyers have come to dominate the multi-billion-dollar mass tort industry? *Id.*, at 90. She writes that “[p]rivate ordering favors attorneys with long-standing business relationships, encourages backscratching, and condones behind the scenes politicking.” *Id.* She also notes that “consensus arrangements can result in bloated committees.” *Id.*, at 91. The Guidelines and Best Practices have

taken account, stating: “Some courts still prefer that counsel endeavor to organize a leadership structure themselves; this may take the form of a proposed leadership slate for the court’s review and approval with opportunity for objections. But most courts now insist on a competitive process and require individual applications.” Guidelines and Best Practices at page 37.

The motion for leadership cuts against the guidance material provided above. Here, the proposed co-leads decided for themselves: the structure of the proposed leadership; the number of slots available for the various positions; who would fill those slots; and what criteria would be used to make those appointments. The self-ordering in and of itself is not the problem, if done properly. The problem here is that the proposed co-leads failed to initially inform the Court of essential items the Court must know regarding who is slated to lead. The Court knows nothing of the qualifications or experience of any proposed PEC or PSC member. The Court knows nothing of whether the leadership pulls from diverse backgrounds and skills. The Court knows nothing of whether the leadership has the actual time or resources to commit to this important case. That is due to the limited information contained in the resumes submitted, the absence of any individual applications from each applicant, and the lack of any knowledge regarding who proposed leadership excluded from their selected group. A review of the resumes submitted in the Amended Exhibit demonstrates that at face value, Ms. Foster’s credentials in product liability trial advocacy and preparation far exceed many of the other applicants. Moreover, submitting resumes alone does not cure the problem. Proposed co-leads “ordered” applicants to submit other substantive material including, among other things, a statement of relevant experience and whether the applicant has sufficient time to commit. None of this other material was submitted to the Court.

Ms. Foster described the events she experienced to the Court. The purpose was not to cast aspersions on counsel or inform the Court of the squabbles among counsel that seem inherent in all MDLs. But rather, to show the Court just how closed-off this process was. The proposed slate

contains several firms that continuously obtain leadership positions in MDLs. Even the so-called “Leadership Development Committee” usurps the Court’s oversight. In the *Zantac* MDL, the district court established this committee and appointed attorneys. Here, the motion relegates the LDC to a footnote. The proposed leads didn’t tell the Court who will be on that committee or what those attorneys’ qualifications are. That information is still missing from the Amended submission. The footnote references that the LDC is to mentor younger lawyers “without sacrificing quality” but a review of the backgrounds of some proposed PSC members indicates this MDL is their first in such a role. This is all wrong, considering the very purpose of the guidance materials outlined in the MCL and Guidelines and Best Practices is to ensure openness and transparency.

In line with the best practices, the Court should, respectfully, insist on written applications from any attorney seeking a leadership, steering or executive committee position. Appointment following the review of one’s application would ensure a fair process. It would ensure that the Court knows and has weighed the background and qualifications of all the applicants so this MDL is effectively managed. This will provide the confidence not only of the attorneys involved, but, more importantly, the many people likely to bring cases in this MDL.

CONCLUSION

For these reasons, the Court should deny the motion and order any attorney seeking a leadership position to submit a written application.

Dated: March 27, 2024

Respectfully submitted,

s/Sarah J. Foster

Sarah J. Foster (*pro hac vice anticipated*)

Jeffrey L. Haberman (*pro hac vice forthcoming*)

SCHLESINGER LAW OFFICES, P.A.

1212 SE Third Avenue

Ft. Lauderdale, FL 33316

Tel. 954-467-8800

sarah@schlesingerlaw.com

CERTIFICATE OF SERVICE

I, Jeffrey Haberman, certify that on March 27, 2024, a copy of the foregoing was filed on the Clerk of Court by CM/ECF, which will provide notice to all parties and counsel of record.

s/Jeffrey L. Haberman

Jeffrey L. Haberman

EXHIBIT A

From: Orent, Jonathan D. jorent@motleyrice.com

Subject: *EXT* PSC Applications DUE 3/18

Date: March 15, 2024 at 2:38 PM

To: OzempicMDLallplaintiffs@listserv.motleyrice.com

Cc: Paul Pennock x4677 ppennock@forthepeople.com, Aminolroaya, Parvin paminolroaya@seegerweiss.com, Sarah Ruane srune@wcllp.com, Jonathan M. Sedgh jsedgh@forthepeople.com, Couch, Sara O. scouch@motleyrice.com

JO

CAUTION: Use caution when clicking on links or opening attachments in this external email.

This email is intend for plaintiffs' counsel in mdl 3094. If you are receiving this email and are not an intended recipient please advise immediately.

To ensure fairness and consistency in the process of making final selections to the leadership slate that we will be submitting next week, please provide the following to us no later than 5pm Monday 3/18.

1. A current cv
2. A statement of relevant experience in pharmaceutical or medical device litigation in mdls
3. A list of other current appointments or obligations that might take significant time away from this mdl
4. A brief statement of areas where you believe you are best able to help the MDL
5. A list of work that you have already participated in to assist in the organization, coordination, or conferences attended related to this litigation.

Please provide this information again even if you have previously provided it to us. Additionally individuals who have not previously indicated an interest in participating are encouraged to to apply if you believe you have the requisite skill, interest and financial ability to help move this litigation forward.

Thank you all for your assistance.




Jonathan D. Orent
Attorney at Law

40 Westminster St., 5th Fl, Providence, RI 02903
o. 401.457.7723 c. 401.465.8549
jorent@motleyrice.com

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EXHIBIT B

From: Jonathan M. Sedgh jsedgh@forthepeople.com 
Subject: RE: Ozempic MDL
Date: March 18, 2024 at 2:20 PM
To: Sarah J. Foster Sarah@schlesingerlaw.com, Paul Pennock x4677 ppennock@forthepeople.com
Cc: Jonathan R. Gdanski Jonathan@schlesingerlawoffices.com, Jeffrey L. Haberman JHaberman@schlesingerlaw.com

Did you see the attached email that went out last week to all Plaintiff's counsel?

Jonathan M. Sedgh
Partner

P: (212) 738-6839
A: 199 Water Street, Suite 1500, New York, NY 10038

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A referral is the best compliment. If you know anyone that needs our help, please have them call our office 24/7.

From: Sarah J. Foster Sarah@schlesingerlaw.com
Sent: Monday, March 18, 2024 2:17 PM
To: Jonathan M. Sedgh <jsedgh@forthepeople.com>; Paul Pennock x4677 <ppennock@forthepeople.com>
Cc: Jonathan R. Gdanski <Jonathan@schlesingerlawoffices.com>; Jeffrey L. Haberman <JHaberman@schlesingerlaw.com>
Subject: *EXT* Ozempic MDL

CAUTION: Use caution when clicking on links or opening attachments in this external email.

Hi Jonathan and Paul,

As you know, I previously expressed an interest in being a part of the Ozempic MDL's leadership committee, and I plan to submit an application to the Court by this Thursday. Could you please provide us with a copy of the proposed slate that will be submitted to the Court?

Thanks,
Sarah



Sarah Foster

Attorney

1212 Southeast Third Avenue
Fort Lauderdale, Florida 33316

O (954) 467-8800

F (954) 320-9509

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Mail Attachment

EXHIBIT C

Ozempic mdl psc

Orent, Jonathan D. <jorent@motleyrice.com>

Tue 3/19/2024 8:22 AM

To: Sarah J. Foster <Sarah@schlesingerlaw.com>

Cc: Paul Pennock <ppennock@forthepeople.com>; Jonathan M. Sedgh <jsedgh@forthepeople.com>

Sarah,

Your email was forwarded to me by Jonathan Sedgh. I apologize for not including you on the listserv originally, but unfortunately I didn't know you had interest in these cases until I got Sedgh's email.

We are happy to extend the deadline for applications if you are interested in applying for the psc. Would you be able to send by noon?

We have tried hard to include all known to have interest in the litigation and would be happy to give you fair consideration.

Please let me know if you have any questions on the application.

Thank you and happy to "meet" you.

Jon



Jonathan D. Orent
Attorney at Law

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jorent@motleyrice.com

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EXHIBIT D

Re: Ozempic MDL PSC

Orent, Jonathan D. <jorent@motleyrice.com>

Thu 3/21/2024 3:12 PM

To: Sarah J. Foster <Sarah@schlesingerlaw.com>

Cc: Jonathan R. Gdanski <Jonathan@schlesingerlawoffices.com>

Correct we are handling everything



Jonathan D. Orent
Attorney at Law

40 Westminster St., 5th Fl, Providence, RI 02903
o. 401.457.7723 c. 401.465.8549
jorent@motleyrice.com

On Mar 21, 2024, at 3:09 PM, Sarah J. Foster <Sarah@schlesingerlaw.com> wrote:

CAUTION:EXTERNAL

Thanks for the response. Just want to make sure I'm clear on this point — there is no need for me to submit my application letter and resume or should I?

<slo_scale_logo_black_24_c18f0395-fb8c-4c3d-9ff8-2cd7407fa638.jpg>

Sarah Foster

Attorney

1212 Southeast Third Avenue
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O (954) 467-8800

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On Mar 21, 2024, at 2:24 PM, Orent, Jonathan D.
<jorent@motleyrice.com> wrote:

We will be having the first psc meeting [REDACTED]. The order is going in today. We are not seeking court approval of the ldc but note it in the app.

Working on details for first group call. Also because you are ldc there will not be a capital contribution requirement. Thanks and looking forward to working with you.

Call with any questions

Jonathan D. Orent
Attorney at Law

40 Westminster St., 5th Fl, Providence, RI 02903
o. 401.457.7723 c. 401.465.8549
jorent@motleyrice.com

On Mar 21, 2024, at 2:17 PM, Sarah J. Foster
<Sarah@schlesingerlaw.com> wrote:

CAUTION:EXTERNAL

Hi Jonathan, just wanted to follow up on the below.

Thanks,
Sarah

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fb8c-4c3d-9ff8-2cd7407fa638.jpg>

Sarah Foster
Attorney

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On Mar 20, 2024, at 5:25 PM, Sarah J. Foster
<Sarah@schlesingerlaw.com> wrote:

Hi Jonathan,

Thanks again for the phone call earlier today confirming my spot on the leadership committee – looking forward to working with everyone! What are the next steps vis a vis applications?

Thanks,
Sarah

From: Orent, Jonathan D.
<jorent@motleyrice.com>
Sent: Wednesday, March 20, 2024 3:05 PM
To: Sarah J. Foster <Sarah@schlesingerlaw.com>
Subject: RE: Ozempic MDL PSC

Sarah- I will be calling you back this afternoon.

<image003.png>

Jonathan D. Orent

Attorney at Law

40 Westminster St., 5th Fl, Providence, RI 02903
o. 401.457.7723 c. 401.465.8549
jorent@motleyrice.com

From: Sarah J. Foster
<Sarah@schlesingerlaw.com>
Sent: Tuesday, March 19, 2024 4:45 PM
To: Orent, Jonathan D. <jorent@motleyrice.com>;
Paul Pennock x4701
<ppennock@forthepeople.com>; Jonathan M.
Sedgh <jsedgh@forthepeople.com>; Sarah Ruane
<sruane@wcllp.com>
Cc: Jonathan R. Gdanski
<Jonathan@schlesingerlawoffices.com>; Jeffrey
L. Haberman <JHaberman@schlesingerlaw.com>
Subject: Ozempic MDL PSC

CAUTION:EXTERNAL

Good afternoon all,

I have attached a draft of my application, which also addresses all of the criteria in the email that was sent out on March 15th as well as a copy of my resume.

Thanks,
Sarah

<image004.png>

Sarah Foster

Attorney

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F (954) 320-9509

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<image005.png>

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