

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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	:	22md3043 (DLC)
IN RE: Acetaminophen - ASD-ADHD	:	22mc3043 (DLC)
Products Liability Litigation	:	
	:	<u>ORDER: CONFERENCE</u>
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DENISE COTE, District Judge:

An initial conference in In Re: Acetaminophen - ASD-ADHD Products Liability Litigation is scheduled for November 17, 2022 at 2:30 P.M. The parties have proposed agendas for the conference. On November 2, Mikal C. Watts, Ashley C. Keller, and W. Mark Lanier submitted a proposal for a leadership structure for plaintiffs' counsel ("Structure") and nominated attorneys to identified positions within that Structure. On November 14, nominees submitted applications. Any objections to the nominations were due November 16 at 12:00 P.M. There having been no objections, it is hereby

ORDERED that the Structure is approved subject to modification as appropriate to meet the needs of the litigation.

IT IS FURTHER ORDERED that the November 2 nominations to positions within the approved Structure are approved for one year, subject to renewal by Court Order.

IT IS FURTHER ORDERED that the following items will compose the agenda for the November 17 conference, subject to further

modification as suggested by the parties or as deemed appropriate by the Court.

1. Introductions of the case by Plaintiffs' Co-Lead Counsel, Retailer Defendants, and then Johnson & Johnson Consumer Inc.
2. Management of Plaintiffs' Leadership Structure
  - a. Modifications to the leadership team proposed on November 2
  - b. Common Fund
    - i. Proposed Common Fund Order
      1. Fees
      2. Tasks
    - ii. Appointment of a Special Master pursuant to Fed. R. Civ. P. 53(a) ("Special Master") to oversee submissions to and disbursements from the Common Fund
3. Defendants' Liaison
  - a. Retailers
  - b. Manufacturer/s
4. Amendments/Objections to the Proposed Direct Filing Orders of November 16, 2022
5. Additional motions to dismiss
  - a. Whether a Master Complaint is necessary or appropriate

- b. Should a stipulation apply the decision of November 14, 2022 regarding preemption to each case filed within the MDL?
  - c. Are other motions to dismiss contemplated?
    - i. How many state regimes need to be addressed to cover the major differences in the application of state law?
    - ii. Schedule for the motions
    - iii. The parties are advised that discovery is unlikely to be stayed during the briefing of such motions, but will be given an opportunity to be heard regarding a stay.
6. Census of Cases
- a. Appointment of the Special Master to create and manage a census of cases within the MDL and filed in state court ("Census")
  - b. A database that is quantifiable and searchable
  - c. Cooperation of and Access by Plaintiffs' Counsel and Defense Counsel
  - d. Nomination of the Special Master, Conflict Checks, and Payment
7. State Court Cases
- a. Contact Information for State Court Judges
  - b. Cooperation and coordination with State Court Judges

8. Proposed Label Change
9. Discovery
  - a. Schedule for submission of Proposed Orders
    - i. Confidentiality Order
    - ii. ESI Protocol
    - iii. Preservation Order
    - iv. Coordination Order with State Court Litigation
  - b. Plaintiff Fact Sheets
    - i. Medical Records
    - ii. Proof of Purchase/Use of Acetaminophen
    - iii. Creation of Master Secure Database with access for Plaintiffs and Defendants
  - c. Discovery from Retailers
  - d. Discovery from Manufacturer/s
  - e. Discovery from Third Parties
  - f. Depositions
    - i. Proposals for limits on number of depositions
    - ii. Scheduling protocol: Notice within 7 days of alternate dates that fall within a one week window on either side of the proposed date
    - iii. A witness's deposition taken once for all cases filed within the MDL and in state court
    - iv. Protocols for objections, breaks, and management of disputes

g. Disputes generally

i. Any party wishing to raise a dispute with the Court must first confer in good faith with the relevant parties in an effort to resolve the dispute.

ii. If this meet-and-confer process does not resolve the dispute, the party may file a letter, no longer than two pages, explaining the nature of the dispute and requesting a conference.

iii. Presumption for Telephone Conferences

h. Expert Discovery

i. Scheduling on Parallel Track with Fact Discovery

ii. Regulatory Experts

iii. Science Experts

1. Schedule for Identification

2. Schedule for Reports and Depositions

3. Daubert Motions

4. Science Day

10. Bellwether Selection

a. For settlement

b. For trial

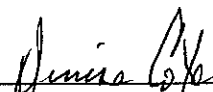
i. Assistance from the Special Master

ii. Schedule for Bellwether Selection

iii. Schedule for Trials

11. Settlement
  - a. Management by Magistrate Judge Katharine H. Parker
  - b. Schedule for Initial Meetings
12. Engagement with Food and Drug Administration ("FDA")
  - a. Joint Interest in FDA Position
  - b. Process for Engagement

Dated: New York, New York  
November 16, 2022

  
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DENISE COTE  
United States District Judge



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November 2, 2022

**By ECF**

The Honorable Denise L. Cote  
United States District Court Judge  
Southern District of New York  
500 Pearl Street, Room 1910  
New York, New York 10007

Re: *In Re: Acetaminophen – ASD/ADHD Products Liability Litigation*, Case No. 1:22-md-03043-DLC (S.D.N.Y.)

Dear Judge Cote:

Pursuant to Paragraph 6 of your October 24, 2022 Order, we provide this letter on behalf of counsel representing all Plaintiffs to provide the Court with Counsel’s views on the necessity and desirability of the appointment of lead and liaison counsel and of a Plaintiffs’ Steering Committee or other committees, as defined and discussed in MCL Fourth §10.221, and our preliminary view of a slate of lawyers who have expressed a desire to participate in this MDL. Plaintiffs’ counsel have met repeatedly to discuss these and other issues, and report to the Court as follows:

**I. APPOINTMENT OF LEAD, TRIAL AND LIAISON COUNSEL**

Plaintiffs believe Co-Lead Counsel and Liaison Counsel should be appointed, but that the Court should leave the selection of Trial Counsel to the leadership team it appoints. In our meetings, we have agreed to ask this Court to appoint three co-lead counsel: Mikal Watts, Ashley Keller and Mark Lanier. While each can also serve as trial counsel, we believe that the Court should permit its appointed leadership counsel to work to organize trial teams as appropriate in the future. Furthermore, we have agreed to ask this Court to appoint Daniel Sullivan as liaison counsel.

**A. LEAD COUNSEL**

Lead counsel are tasked with “formulating (in consultation with other counsel) and presenting positions on substantive and procedural issues during the litigation,” to “act for the group—either personally or by coordinating the efforts of others—in presenting written and oral arguments and suggestions to the Court, working with opposing counsel in developing and implementing a litigation plan, initiating and organizing discovery requests and responses,

conducting the principal examination of deponents, employing experts, arranging for support services, and seeing that schedules are met.” MCL Fourth §10.221, p. 25.

Mikal Watts and Ashley Keller have done so thus far on an informal basis, organizing numerous telephonic meetings of Plaintiffs’ lawyers interested in pursuing these cases, as well as additional in-person meetings in Miami in the Spring of 2022, Chicago in May, Missouri in September, and in Las Vegas last month. They have also scheduled meetings with interested Plaintiffs’ counsel on November 16 and 17 in New York in advance of and following the Court’s initial hearing.

Additionally, Messrs. Watts and Keller met with Mr. Lanier in Las Vegas and secured his agreement to participate with them as Co-Lead Counsel. Mr. Lanier has worked together with Mr. Watts in the *Opioids* and *Levaquin* litigations. Mr. Lanier works closely with Mr. Keller in multiple litigations, including representing 13 states in the *Google Antitrust* litigation, which is also pending in the Southern District of New York. Mr. Lanier is licensed in New York and has a Manhattan office, a feature that will prove helpful in meetings before and after hearings before this Court. Mr. Lanier also has important and amicable past working relationships with many of the other lawyers pursuing these cases.

With the approval of our larger group, Messrs. Watts, Keller, and Lanier have conducted Zoom and telephonic meetings with defense counsel on October 24, 26, 28, 31, and on November 2 in an effort to propose a Case Management Plan pursuant to Paragraph 15 of this Court’s October 18, 2022 Order.

## **B. TRIAL COUNSEL**

Mr. Lanier and Mr. Watts have substantial trial experience in pharmaceutical cases generally and against named and anticipated defendants in this litigation as well.

However, there are many outstanding lawyers advocating for Plaintiffs, and we respectfully ask the Court defer the appointment of Trial Counsel so that the appointed leadership team can select “principal attorneys at trial for the group and organize and coordinate the work of the other attorneys on the trial team.” MCL Fourth §10.221, p. 25. We believe that deferring the selection of Trial Counsel is preferable at this time for at least four reasons: *first*, there is much discovery to be done. Invariably, that work helps crystalize the appropriate selection of Trial Counsel. *Second*, trial teams are best organized after large groups of lawyers in an MDL work together during the pretrial process. *Third*, flexibility is valuable to ensure that Trial Counsel is available for the trial dates this Court selects. *Fourth*, the selection of Trial Counsel is tied closely to selection of bellwethers and waiver of *Lexicon* issues, which cannot be resolved at this early date.

## **C. LIAISON COUNSEL**

Plaintiffs believe that the appointment of Liaison Counsel is both necessary and desirable. Large MDLs invariably have thousands of docket entries; consequently, the distribution of filings and orders of the Court upon all lawyers with cases by a single Liaison Counsel is invaluable. Liaison Counsel typically is “[c]harged with essentially administrative matters, such as



communications between the Court and other counsel (including receiving and distributing notices, orders, motions, and briefs on behalf of the group), convening meetings of counsel, advising parties of developments, and otherwise assisting in the coordination of activities and positions.” MCL Fourth §10.221, pp. 24-25. Daniel Sullivan will be adept at performing these important functions. As a complex commercial litigator for twelve years, he recognizes the importance of effective and efficient case management, and his firm’s close proximity to this Court leaves him especially well equipped to liaise with Plaintiffs across the country. We envision Mr. Sullivan also heading an internal committee concerning administrative functions and common benefit time and expense reporting.

## **II. APPOINTMENT OF A PLAINTIFFS’ STEERING COMMITTEE AND OTHER COMMITTEES**

We respectfully also move the Court for the appointment of both a Plaintiffs’ Executive Committee (PEC) and a Plaintiffs’ Steering Committee (PSC), with five topically-focused sub categories: (a) Early Vetting/Bellwether Selection Committee; (b) Science and Experts; (c) Discovery/ESI; (d) Law & Briefing; (e) Settlement/Lien Resolution.

### **A. PLAINTIFFS’ EXECUTIVE COMMITTEE**

Plaintiffs seek the appointment of a PEC of nine individuals, which would include the three Proposed Co-Lead Counsel, Liaison Counsel, and the Chairs of the five focused committees as well. The PEC will work closely with Co-Lead Counsel to manage the litigation. *See* GUIDELINES AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS, Bolch Judicial Institute, Duke Law School, (Second Edition 2018), p. 32.

Having conferred, plaintiffs’ counsel propose the appointment to the PEC of the following lawyers:

- (1) Mikal C. Watts, WATTS GUERRA LLC, Guaynabo, Puerto Rico (Co-Lead Counsel);
- (2) Ashley C. Keller, KELLER POSTMAN LLC, Chicago, Illinois (Co-Lead Counsel);
- (3) W. Mark Lanier, THE LANIER LAW FIRM, New York, New York (Co-Lead Counsel);
- (4) Daniel Sullivan, HOLWELL SHUSTER & GOLDBERG LLP, New York, New York (Liaison Counsel; Head of Administrative Functions & Common Benefit Reporting committee).
- (5) Ashley Barriere, KELLER POSTMAN LLC, Chicago, Illinois (head of Law & Briefing committee);
- (6) Sean Tracey, TRACEY FOX KING & WALTERS, Houston, Texas (head of Early Vetting/Bellwether Selection Committee);
- (7) Eric Holland, HOLLAND LAW FIRM, St. Louis, Missouri (head of Discovery/ESI committee);
- (8) W. Roger Smith, III, BEASLEY ALLEN, Montgomery, Alabama (head of Science & Expert committee);
- (9) Zoe Littlepage, LITTLEPAGE, BOOTH & LECKMAN, Houston, Texas (head of Settlement/Lien Resolution committee).

The Court's October 24 Order states that "[i]t is anticipated that applications for appointment will be due on November 14, 2022, with any objections to those applications due November 16, 2022 at 12:00 P.M." All proposed PEC members are prepared to submit applications on their experience and credentials in whatever form the Court prefers.

## **B. PLAINTIFFS' STEERING COMMITTEE**

Plaintiffs also propose that the Court appoint a PSC composed of the following attorneys to ensure that the extensive work attendant to an MDL of this size and complexity is managed by experienced, highly qualified, and diverse counsel. The PSC shall serve on the committees discussed *supra* II and shall assist "in coordinating the plaintiffs' pretrial activities and planning for trial." MCL Fourth §40.22, p. 742.

- (1) Tricia Campbell, KRAUSE & KINSMAN, Kansas City, Missouri
- (2) Charles J. Cooper, COOPER LAW PARTNERS, Washington, D.C
- (3) Eric Cracken, TOR HOERMAN LAW FIRM, Chicago, Illinois
- (4) Francisco R. Maderal, MADERAL BYRNE, Miami, Florida
- (5) David P. Matthews, MATTHEWS & ASSOCIATES, Houston, Texas
- (6) Neal Moskow, MOSKOW LAW GROUP, LLC, Fairfield, Connecticut
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- (8) Ruth Rizkalla, CARLSON LAW FIRM, Manhattan Beach, California
- (9) Lawrence S. Robbins, FRIEDMAN, KAPLAN, SEILER & ADELMAN LLP, New York, New York
- (10) Lindsey Scarcello, WAGSTAFF & CARTMELL, Kansas City, Missouri

The undersigned have consulted with every law firm that has filed a case thus far, and write the Court herein with the unanimous agreement of each. Moreover, after reviewing all the letters due on November 10 stating an intention to appear before the Court on November 17, we will contact such additional lawyers prior to the Court's application deadline on November 14. Once again, the proposed PSC members are prepared to submit applications on their experience and credentials in whatever form the Court prefers.

Respectfully submitted,

*/s/ Mikal C. Watts*

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