

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

**IN RE: ELMIRON (PENTOSAN
POLYSULFATE SODIUM)
PRODUCTS LIABILITY
LITIGATION**

Case No. 2:20-md-02973 (BRM)(ESK)

MDL No. 2973

**JUDGE BRIAN R. MARTINOTTI
JUDGE EDWARD S. KIEL**

**THIS DOCUMENT RELATES TO:
ALL ACTIONS**

MOTION FOR THE APPOINTMENT OF A PLAINTIFF LEADERSHIP COMMITTEE

The undersigned plaintiffs' counsel ("Movants") jointly submit this motion requesting the entry of a Case Management Order ("CMO") appointing a Plaintiff Leadership Committee. A copy of the proposed CMO is attached as Exhibit A.

As demonstrated by Exhibit A, Movants seek the creation of a Plaintiff Steering Committee ("PSC") that reflects significant diversity in gender, ethnicity, geography and experience, and, thus, would best serve the plaintiffs in this multi-district litigation ("MDL"). The proposed diverse leadership team is consistent with the Court's repeated directives regarding inclusiveness and diversity, which Movants have taken very seriously, and is representative of the inevitable diversity of the plaintiffs. Movants respectfully submit that the proposed PSC structure meets the Court's guideposts regarding promoting diversity in this highly complex multi-district litigation ("MDL"), and, therefore, will benefit all parties to this litigation as the team will be able to "bring to bear both wisdom and judgment, and also new approaches and ideas." *See* Dkt. 685, *In re: Zantac (Ranitidine) Prods. Liab. Litig.*, 20-md-02924-RLR (S.D. Fla. 2020) at pp. 3-4.

Movants' efforts to construct an effective and efficient leadership structure have been informed by Federal Judicial Center Guides, such as Barbara J. Rothstein & Catherine R. Borden, *MANAGING MULTIDISTRICT LITIGATION IN PRODUCTS LIABILITY CASES A POCKET GUIDE FOR TRANSFEREE JUDGES* (United States Judicial Panel on Multidistrict Litigation & Federal Judicial Center, 2011), the Duke Practice Guides: *Chapter 2, Selection and Appointment of*

Leadership, GUIDELINES AND BEST PRACTICE FOR LARGE AND MASS-TORT MDLS 29-50 (Bolch Judicial Institute, Duke Law School, 2d ed., Sept. 2018), and the Federal Judicial Center: *Section 10.22, Coordination in Multiparty Litigation—Lead/Liaison Counsel and Committees*, MANUAL FOR COMPLEX LITIGATION (4th ed. 2004). In this regard, Movants have endeavored to craft an optimal, diverse, and well-balanced leadership structure that would efficiently prosecute this litigation while maintaining accountability.

The proposed PSC would be comprised of 25 members and be divided into the following three tiers:

- Three Co-Lead Counsel and One Liaison Counsel
- Seven Executive Committee Members
- Fourteen Steering Committee Members

Biographies for each proposed PSC member are attached as Exhibit B, and Movants submit that each and every attorney identified will endeavor to move this litigation forward efficiently and economically without jeopardizing fairness to all plaintiffs. *See* Section 10.221 of the MANUAL FOR COMPLEX LITIGATION (4th ed. 2004).

As mentioned above, the proposed PSC structure reflects significant diversity in gender, ethnicity, geography and experience as directed by the Court.

Regarding gender, of the 25 proposed PSC members, 18 are women (72%), including two of the three proposed Co-Lead Counsels, the proposed Liaison Counsel, and five of the seven proposed PEC members (71%). Thus, the proposed PSC is predominately female led, which is important here because it is anticipated that most of the plaintiffs in this MDL will be women given that interstitial cystitis, the condition for which Elmiron was prescribed, disproportionately impacts women. As to ethnicity and race, the committee reflects great diversity.

As to geography, the proposed PSC members are spread across the country and practice law in states such as New Jersey, New York, Pennsylvania, Florida, Texas, Puerto Rico, Colorado, Missouri, Ohio, Alabama, California, Louisiana and Massachusetts.

And as to experience, 12 of the 25 (48%) proposed members have never served on a PSC. Additionally, 11 of the 25 (44%) proposed members have practiced law for less than 10 years versus 14 of the 25 (56%) proposed members that have practiced law for 10 years or more. The proposed PSC structure takes into account the proposed members' varying levels of expertise, and balances providing great responsibility to capable but less experienced attorneys while ensuring that experienced lead counsel are also part of the prosecution of thousands of claims against a Fortune 100 Company that is defended by two of the largest law firms in the world, King & Spalding and Skadden Arps, as well as likely many other law firms working in the background on behalf of the Defendants.

In short, in accordance with the Court's directives, the proposed PSC is arguably one of the most diverse PSCs of which Movants are aware, and Movants are proud to be fulfilling this very important, long-standing directive of the Court.

Additionally, both the size of this MDL and the disparate nature of the claims at issue support the approval of Movant's proposed leadership structure. Rothstein & Borden at 11. A more detailed structure is favored in product liability and mass tort MDLs. Duke Practice Guide at 30 ("Courts often appoint a single leadership structure for the plaintiffs in these cases, although the committees tend to be larger than in other types of cases. . . . [I]n addition to, lead and liaison counsel, courts sometimes appoint an executive committee, assigning specific responsibilities to each member (such as overall leadership of the case, communication with the court, communication with other plaintiffs' counsel, and coordination with lawyers prosecuting related cases in state court).").

Further, while Movants are cognizant that the proposed PSC is on the larger side when compared to other MDL PSCs, Movants submit that the size of the proposed PSC is warranted here. Elmiron has been on the market since 1996; the scope of discovery is necessarily large and includes numerous complex medical and scientific issues; there is substantial work that must be financed and performed; coordination with state court litigation will be essential; and the proposed PSC is on

consensus of all proposed members. On this last point regarding a consensus, the proposed PSC structure promotes inclusion rather than exclusion, allows for significant diversity as directed by the Court, and is “[b]y far the most common . . . approach” for selecting among competing applicants for leadership appointment. *Approaches to Selecting Counsel*, Ann. Manual Complex Lit. § 21.272 (4th ed.).

That said, with over 50 law firms interested in the litigation, it would, regrettably, be neither efficient nor cost-effective for the PSC to include every attorney who wanted to join. Accordingly, in constructing the proposed PSC, Movants did so in a way that would allow for adequate staffing and funding of the MDL, but at the same time ensure that waste or duplication would be avoided, thus, ensuring efficiency and controlling costs. *See Guidelines and Best Practices for Large and Mass-Tort MDLs, Best Practice 2B*, Bolch Judicial Institute, Duke Law School (Second Edition, 2018); *see also* Manual for Complex Litigation § 14.21.¹

Of course, the proposed PSC will maintain an “All Elmiron Plaintiff Counsel List Serve” (as is currently being maintained by the Douglas & London firm, and which was used leading up to the initial Case Management Conference), and will communicate all relevant information to all interested plaintiff counsel. Additionally, any interested law firms may have the ability to work on this litigation even without maintaining a formal PSC position.² At this time, the proposed PSC has agreed to the following proposed chairperson of the two overarching categories of the work that needs to be done:

¹ Movants submit that the proposed PSC of 25 members, while maybe on the higher side, is appropriate in this case. Indeed, PSC’s with over 20 members make sense in large mass tort cases and have been approved by MDL Courts in the past. *See e.g. In re: Testosterone Replacement Therapy Prods. Liab. Litig.* (MDL-2545), Case Management Order 6 (appointing 31 members); *In re 3M Combat Arms Earplug Prods. Liab. Litig.* (MDL-2885), Pretrial Order 7 (appointing 27 members); *In re: Valsartan Prods. Liab. Litig.* (MDL-2875), Case Management Order 6 (appointing 28 members to oversee personal injury claims); *In re: Pradaxa (Dabigatran Etelixate) Prods. Liab. Litig.* (MDL-2385), Case Management Order 3 (appointing 27 members); *In re: DePuy Orthopaedics, Inc. ASR Hip Implant Products* (MDL-2197), Case Management Order 3 (appointing 22 members); *In re: DePuy Orthopaedics, Inc. Pinnacle Hip Implant Products* (MDL-2244), Case Management Order 3 (appointing 22 members); *In re: Juul Labs, Inc. Marketing, Sales Practices & Prods. Liab. Litig.* (MDL-2913), Order Appointing Plaintiff Leadership and Steering Committee Members (appointing 21 members); and *In re: Proton-Pump Inhibitor Prods. Liab. Litig.* (MDL-2789), Case Management Order 2 (appointing 21 members).

² Movants have received communications from numerous lawyers who have indicated that they wish to remain engaged in the overall MDL, but they could not commit to a formal PSC position. Therefore, they have offered to provide legal work in various areas as might be needed by the proposed PSC.

- **Chair of Discovery:** Timothy M. O'Brien
- **Chair of Trial Preparation and Trial:** W. Mark Lanier

In sum, the PSC proposed by Movants is an assembly of professional, experienced, capable, qualified, dedicated, and diverse counsel who are committed to working together in a coordinated and self-organized fashion to efficiently and effectively represent all plaintiffs in this MDL. Movants appreciate the Court's consideration of the proposed leadership structure and look forward to advancing the interests of all plaintiffs in this MDL.

For the aforementioned reasons, Movants respectfully request that the Court enter the proposed CMO annexed hereto as Exhibit A and appoint the proposed Plaintiff Leadership Committee.

Dated: January 13, 2020

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