

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
(at Covington)

IN RE: DARVOCET, DARVON AND
PROPOXYPHENE PRODUCTS
LIABILITY LITIGATION

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MDL No. 2226
ALL CASES

ORDER

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**ORDER OUTLINING TERMS OF THE COMMON BENEFIT FUND
ESTABLISHED BY THE DECEMBER 28, 2011 COURT ORDER**

This Order is entered to outline the terms of the Common Benefit Fund (the “Fund”) established by this Court’s Order of December 28, 2011. [Record No. 794] Being sufficiently advised, it is hereby **ORDERED** as follows:

1. Having considered the information supplied by the plaintiffs’ counsel, the Court appoints Andrew J. VonLehman, VonLehman & Company, 250 Grandview Drive, Suite 300, Fort Mitchell, Kentucky 41017, as Administrator of the Common Benefit Fund (the “Administrator”) and directs him to establish an insured, interest-bearing account to receive and disburse funds as provided in this Order, and in accordance with the Court’s previous Order establishing a common benefit fund. [Record No. 794] It shall be the obligation of Plaintiffs’

Co-Lead Counsel to notify Mr. VonLehman of his appointment as Administrator, as well as the responsibilities of the Administrator, as outlined in this and in subsequent orders.

2. In connection with his duties, the Administrator shall:
 - a. have all such power and authority over such funds as necessary or convenient to exercise the authority granted herein;
 - b. audit individual settlements and assessment payments to ensure appropriate payments are being made the Fund;
 - c. keep and report periodically to the Court, under seal and to the Court only, an accounting of the funds received, maintained, and disbursed;
 - d. maintain the confidentiality of all payments to the Fund, and not identify any individual settlement or deposit amount to anyone other than the Court; however, information regarding the total balance in the Fund and all disbursements made from the Fund shall be provided to Co-Lead Counsel upon request;
 - e. have the authority to instruct the Escrow Agent with respect to permitted investments of funds;
 - f. make decisions and take action with respect to treatment of such funds for purposes of compliance with the Internal Revenue Code and any applicable local or state tax codes, including creating, maintaining, and reporting such funds and the income, if any, as a Qualified Settlement Fund (“QSF”) or such other entity as deemed appropriate;
 - g. procure, upon consultation with Co-Lead Counsel, professional accounting,

legal, and other services for the purposes of carrying out the tasks described in this Order,¹ and to be reimbursed for the expenses of such services; and

h. adopt and implement reasonable procedures consistent with this Order and the Order of December 28, 2011 [Record No. 794], and in consultation with Co-Lead Counsel.

3. The Administrator shall designate an Escrow Agent to receive and disburse funds. The Escrow Agent shall be a commercial bank, which (a) has deposits insured by the Federal Deposit Insurance Corporation (“FDIC”); (b) is organized under the laws of the United States or any state thereof; and (c) has a total risk-based capital in excess of \$5 billion and meets the minimum risk-based ratios established under the Federal Deposit Insurance Corporation Improvement Act of 1991. The Escrow Agent may act as a paying agent, depository, custodian, or trustee with respect to the funds it holds. The Administrator shall consider, in designating the Escrow Agent, the charges that the Escrow Agent will impose for its actions and the ability of the Escrow Agent to undertake the tasked called for with efficiency and responsiveness.

4. In connection with their services, the Administrator and the Escrow Agent shall be entitled to be paid reasonable fees and to be reimbursed for reasonable expenses when and as approved by this Court. To this end, they shall periodically submit statements, under seal, to the Court, with copies to the Co-Lead Counsel. If funds are not then available in the Fund, they shall be paid by Co-Lead Counsel, the PEC, and PSC, which shall be reimbursed out of the Fund when and if it is funded.

¹ The Administrator shall consider, in procuring professional services, the charges that the provider will impose for its actions and the ability of the provider to undertake the tasked called for with efficiency and responsiveness.

5. The Fund property will be held subject to the direction of the Court. No party or attorney has any individual rights to any of these funds except to the extent of amounts directed to be disbursed to such person by order of the Court. These funds will not constitute the separate property of any party or attorney nor be subject to garnishment or attachment for the debts of any party or attorney except when directed to be disbursed as provided by order of this Court to a specific person.

6. The Fund shall not acquire or hold for longer than ninety (90) days any debt securities, certificates or investments unless such instruments are a U.S. Treasury Bill, U.S. Treasury Money Market, U.S. Government Money Market or similar type of account guaranteed by the United States or an agency thereof, including an FDIC-Insured Account. The U.S. Treasury Money Market or U.S. Government Money Market must be registered under the Investment Company Act of 1940, as amended, and have the highest rating obtained from either Moody's or S&P. In determining investments to be held by the Fund, primary regard shall be given to the Administrator to safety of principal.

7. This Order applies to all "Covered Claims," which are defined as the following Darvon, Darvocet, and Propoxyphene (collectively, "Darvon") claims, whether direct or derivative:

a. All Darvon claims now or hereafter subject to the jurisdiction of MDL 2226, whether disposed of before or after remand, including but not limited to:

i. all Darvon claims settled pursuant to an MDL-supervised Settlement Agreement between the parties or any private settlement between the parties;

- ii. all Darvon claims on tolling or suspense agreements; and
- iii. all Darvon claims in which any Co-Lead Counsel, PEC member or

PSC member has a financial interest.

b. All Darvon claims in which the attorneys have a fee interest and use any MDL work product, regardless of whether the attorneys have executed the Limited Joint Prosecution and Confidentiality Agreement, or whether those claims are subject to the jurisdiction of MDL 2226, tolled, unfiled, or filed in another jurisdiction.

8. All Covered Claims are subject to an Assessment on the Gross Monetary Recovery, where the Plaintiff or his or her attorneys either agree or have agreed — for monetary consideration — to settle, compromise, dismiss, or reduce the amount of a claim or, with or without trial, recover a judgment for monetary damages or other monetary relief, including such compensatory and punitive damages, with respect to any Darvon claim. In measuring the Gross Monetary Recovery, the Administrator shall:

- a. include all sums to be paid in settlement of the claim;
- b. exclude court costs that are to be paid by Defendants;
- c. exclude any payments made directly by Defendants on a formal intervention asserted directly against Defendants by third parties, such as to physicians, hospitals, and other healthcare providers or Court-recognized valid subrogation claims related to treatment of the Plaintiff; and
- d. include the present value of any fixed and certain payments to be made in the future.

9. All Covered Claims are subject to a total Assessment of five percent (5%) of the Gross Monetary Recovery. The five percent (5%) assessment will be divided proportionally: two percent (2%) coming from the plaintiffs' share of any recovery and three percent (3%) coming from the share of any recovery payable to plaintiffs' attorneys as attorneys' fees. For example, on a recovery of \$1,000 with an attorneys' fee of forty percent (40%), and without any consideration of case-specific out-of-pocket costs paid or advanced by the individual attorney (for purposes of this example only), two percent (2%) or \$20 would come from the plaintiffs' sixty percent (60%) share and three percent (3%) or \$30 from the attorney's forty percent (40%) share.

10. Within ten (10) business days of the resolution of a Covered Claim, by settlement, judgment, or otherwise, counsel for Plaintiff(s) in that Covered Claim shall provide the Administrator with written notice of the date and Gross Monetary Recovery amount applicable to that Covered Claim, including all factors taken into account in calculating the Gross Monetary Recovery amount, and payment for the total Assessment amount outlined above. Any failure of counsel for Plaintiff(s) in a Covered Claim to comply with the reporting and/or payment obligations outlined above shall be in contempt of Court, and shall be subject to monetary penalties.

11. This Assessment represents a holdback which may be altered under the following circumstances: (a) Co-Lead Counsel, the PEC, and the PSC approve the proposed change to the Assessment by a majority vote which is subsequently approved by the Court; (b) a noticed

motion (including notice to Defendants' counsel) with an opportunity to be heard is granted by the Court; or (c) the Court, for good cause shown, amends this Order.

12. This Order shall in no way be read to affect or otherwise encumber any Defendant's obligation to pay attorneys' fees and costs pursuant to consumer fraud claims or other fee-shifting statutes, if any, that may apply in this case.

13. In the event of a global settlement or settlement program in which Co-Lead Counsel, the PEC, and the PSC accept additional responsibilities beyond those described herein and Defendants agree to pay to Co-Lead Counsel, the PEC, and the PSC fees and expenses for settlement purposes, such fees are beyond the scope of those set forth in this Order.

14. Provided Assessments are paid as provided for herein, nothing in this Order is intended to impair the attorney/client relationship or any contingency fee contract deemed lawful by the attorneys' respective bar rules and/or state court orders.

15. Upon payment of the Assessment into the Fund, Defendants, Co-Lead Counsel, the PEC, and the PSC shall be released from any and all liability to any person, attorney, or claimant with respect to the Assessment placed into the Fund. Any person, attorney, or claimant allegedly aggrieved by an Assessment pursuant to this Order shall seek recourse against the Fund. Notwithstanding this provision, notice and an opportunity to be heard on any such claim shall be given to all Defendants and Co-Lead Counsel, the PEC, and the PSC.

16. Upon a proper showing and Order of the Court, payments may be made from the Fund to "Eligible Counsel" who have provided services or incurred expenses for the joint and common benefit of Plaintiffs and claimants whose claims have been treated by this Court as a

part of these proceedings, in addition to the attorneys' own client or clients. Such Eligible Counsel include:

- a. Co-Lead Counsel and members of the PEC and PSC;
- b. Court-appointed State Liaison Counsel; and
- c. Other attorneys performing similar responsibilities in this MDL-assigned

Court, or in other district or state court actions, to the extent that those attorneys have executed the Limited Joint Prosecution and Confidentiality Agreement and have performed common benefit work that was approved by Co-Lead Counsel or the PEC, and provided that all cases in which those attorney have a financial interest are subject to this Order.

17. Subject to order of the Court, Eligible Counsel may receive payment from the Fund for time and efforts expended for Approved Common Benefit Work, if said time and efforts are:

- a. for the joint and common benefit of Plaintiffs;
- b. expended by Co-Lead Counsel, the PEC, the PSC, or Eligible Counsel;
- c. appropriately authorized by Co-Lead Counsel or the PEC;
- d. timely submitted and verified; and
- e. ultimately approved by this Court.

18. Approved Common Benefit Work may include, but is not limited to:

- a. investigation and research;
- b. conducting discovery (*e.g.*, reviewing, indexing, and coding documents);
- c. drafting and filing pleadings, motions, briefs, and proposed orders;

- d. preparation and attendance at non-case specific depositions;
- e. preparation for and attendance at state and federal Court hearings;
- f. attendance at Co-Lead Counsel, PEC, or PSC-sponsored meetings

addressing lawyers on the status of the litigation;

- g. other Co-Lead Counsel, PEC, or PSC activities;
- h. work with expert witnesses
- i. trial preparation and trial; and
- j. performance of administrative matters, provided that all such work was

conducted for the joint and common benefit of Plaintiffs and approved by Co-Lead Counsel or the PEC.

19. In apportioning any fee award to Eligible Counsel, appropriate consideration will be given to the experience, talent, and contribution made by Eligible Counsel; the time and effort expended by each; and the type, necessity, and value of the particular legal services rendered.

20. Approved Common Benefit Expenses may include but are not limited to:

- a. assessments paid for the operation of the PEC and PSC;
- b. costs related to obtaining, reviewing, indexing, and paying for hard copies

of computerized images of documents for Defendants;

- c. deposition and court reporter costs for non-case specific depositions;
- d. costs for the electronic storage, retrieval, and searches of ESI;
- e. certain Court, filing, and services costs for matters involving MDL-wide

application;

- f. Co-Lead Counsel, PEC, or PSC group administration matters, such as meetings, food, and conference calls;
- g. reasonable travel expenses, including lodging, meals, and expenses incurred in connection with Co-Lead Counsel, PEC, or PSC-approved meetings, events and other common benefit issues;
- h. expert witness and consultant fees and expenses, if such experts and consultants were approved by Co-Lead Counsel or the PEC;
- i. investigator fees and expenses, if such investigators were approved by Co-Lead Counsel or the PEC;
- j. printing, copying, coding, and scanning (out-of-house or extraordinary firm cost);
- k. research by outside third-party vendors, consultants, or attorneys, if such third parties were approved by Co-Lead Counsel or the PEC;
- l. common witness expenses, including travel; and
- m. translation costs, provided that all such work was conducted for the joint and common benefit of Plaintiffs.

21. Except in extraordinary circumstances approved by Co-Lead Counsel or the PEC, all travel-related reimbursements are subject to the following limitations:

- a. Airfare: Only the price of a business or full-fare coach seat for a reasonable itinerary will be reimbursed. First-class airfare will not be reimbursed. If first-class travel is

selected, the then-applicable coach fare should be included on the expense report, and only that fare shall be eligible for consideration for reimbursement.

b. Hotel: Hotel room charges will be reimbursed for the average available room rate of a business hotel, including but not limited to the Hyatt, Westin, and Marriott hotels, in the city in which the stay occurred. Miscellaneous hotel expenses, such as dry cleaning and movie rentals, will not be reimbursed.

c. Meals: Meal expenses must be no greater than the reasonable and customary charges for the city in which the charge is incurred. Alcohol expenses will not be reimbursed.

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

e. Rental Automobiles: Standard rates for rentals of automobiles shall be reimbursed if necessary for the common benefit.

f. Mileage: Mileage claims must be documented by stating origination point, destination, total actual miles for each trip, and the rate per mile paid by the Eligible Counsel's firm. The maximum allowable rate will be the maximum rate allowed by the IRS.

22. All reimbursements unrelated to travel are subject to the following limitations:

a. Long Distance and Cellular Telephone: Long distance and cellular telephone charges must be documented. Copies of the telephone bills must be submitted with notations as to which charges relate to the Darvocet/Darvon litigation.

b. Shipping, Courier, and Delivery Charges: All claimed expenses must be documented with bills showing the sender, origin of the package, recipient, and destination of the package.

c. Postage: A contemporaneous postage log or other supporting documentation must be maintained and submitted. Postage charges are to be reported at actual cost.

d. Facsimile Charges: Contemporaneous records should be maintained and submitted showing faxes sent and received. The per-fax charge shall not exceed \$0.50 per page.

e. In-House Photocopies: A contemporaneous photocopy log or other supporting documentation must be maintained and submitted. The maximum copy charge is \$0.20 per page.

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

23. All time and expenses must be authorized and accurately and contemporaneously maintained. Eligible Counsel shall keep a daily detailed record of their time spent in connection with approved common benefit work on this litigation, indicating with specificity the hours, location (where applicable) and particular activity. All approved common benefit work time for each firm shall be maintained in a tenth-of-an-hour increment. Time entries that are not sufficiently detailed may not be considered for common benefit payments.

24. Eligible Counsel shall keep a daily detailed record of their expenses spent in connection with approved common benefit work on this litigation, as well as receipts for all expenses, except those for which receipts are not generally available, such as gratuities. Credit card receipts are an appropriate form of verification so long as accompanied by a statement from a firm partner or shareholder that work was performed and paid for the common benefit. Expense entries that are not sufficiently detailed or not accompanied by receipts (where appropriate) may not be considered for common benefit payments.

25. Eligible Counsel must make time and expense submissions every other month to Co-Lead Counsel in accordance with Time and Expense Reporting Guidelines to be provided by Co-Lead Counsel. The first time and expense submission shall be made on February 1, 2012, and shall include all time and expense entries from the inception of the case through November 30, 2011. Subsequent time and expense submissions shall be made every two months thereafter, on the 1st of the month, and shall include all time entries for the two months following the matters included in the prior report. All time and expense submissions shall be certified by a senior partner or shareholder in the firm, attesting to their accuracy.

26. The Common Benefit Committee, consisting of Co-Lead Counsel and their designee(s), will review each time and expense report submission to evaluate its compliance with these Time and Expense Reporting Guidelines, and will approve, reduce, or reject each submission in accordance with these guidelines.

27. Eligible Counsel shall waive the right to contest the reduction or rejection of any items that were or should have been included in a time and expense submission that is not made

within thirty (30) days after the submission deadline has passed. Eligible Counsel shall receive an automatic rejection, which cannot be contested, for all items that were or should have been included in a time and expense submission that is made more than sixty (60) days after the submission deadline has passed.

This 12th day of January, 2012.



Signed By:

Danny C. Reeves DCR

United States District Judge