

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

IN RE: ABILIFY (ARIPIPRAZOLE)
PRODUCTS LIABILITY
LITIGATION

Case No. 3:16-md-2734

Chief Judge M. Casey Rodgers
Magistrate Judge Gary Jones

This Document Relates to All Cases

COMMON BENEFIT FUND ORDER NO. 1

Currently pending before the Court is a proposed “Agreed Order Regarding Management of Timekeeping, Cost Reimbursement and Related Common Benefit Issues” submitted by Plaintiffs’ Liaison Counsel. Plaintiffs submitted this Order in anticipation of the possibility that, at some time in the future, there may be applications to the Court by attorneys for payment of common benefit fees or expenses.

The Court now issues the following preliminary procedures and guidelines at this early juncture in the case, but expresses *no opinion* regarding whether payment of common benefit fees or expenses will ever be appropriate. This Order merely provides guidance so that, should the issue become ripe, any attorneys applying for common benefit fees or expenses will have notice of the standards the parties have agreed will be employed in assessing those applications. These guidelines are not meant to be exhaustive, and the Court may issue additional procedures, limitations, and guidelines in the future, if appropriate.

I. APPOINTMENT OF COMMON BENEFIT SPECIAL MASTER AND CPA

The forms and records detailing both time and expenses will be subject to periodic review by Ellen Reisman, as Common Benefit Special Master, and Randy Sansom, CPA, who are hereby appointed based on the recommendation of the Plaintiffs' Fees and Common Benefit Fund Committee (hereinafter referred to as "PFFC") to perform such services as set forth in this Order and otherwise make such periodic and discreet reports to the Court as requested and to the PFFC. The Common Benefit Special Master and CPA will be paid from the common benefit funds and will work with the PFFC to insure the accuracy of the submissions and all accounts and records.

II. COMMON BENEFIT FUND FOR EXPENSES

As necessary to effectively prosecute the interests of the litigation, the Plaintiffs' Executive Committee, from time to time, must make assessments and may receive and hold funds. These funds must be held in such accounts at a federally insured banking institution as designated and approved by the PFFC, as well as the Common Benefit Special Master and CPA. The account will be maintained by the Special Master with primary oversight of PFFC, subject to periodic review by the CPA. Any funds to be paid out of such account may be paid only at the direction of the Special Master and the PFFC. The Special Master must apply for and receive a Federal Tax ID number for such account.

III. ADMINISTRATION

For counsel appointed by the Court or acting under the direction of the leadership of the Plaintiffs' Steering Committee ("PSC"), the recovery of common benefit time and cost reimbursements will be allowed and is essential. This will be for "participating counsel" as defined herein. Furthermore, participating counsel will only be eligible to receive common benefit attorney's fees and cost reimbursement if the time expended, costs incurred and activity in question were (a) for the common benefit, (b) appropriately authorized (as defined in this section), (c) timely submitted, and (d) approved by the Court. This Order establishes the guidelines regarding the submission and compensability of common benefit time and expenses. Plaintiffs' counsel who seek to recover Court-awarded common benefit attorney's fees and expenses in connection with this litigation must keep a daily contemporaneous record of their time and expenses, noting with specificity the amount of time and particular activity along with confirmation that authority was obtained to have undertaken that common benefit effort. For the purpose of coordinating these guidelines and tracking submissions, Co-Lead Counsel, the PFFC, and the Executive Committee, will employ the CPA approved above. The CPA will insure proper compliance by the parties with this Order and will work with the Co-Leads to manage the litigation fund and administer the payment of the expenses (not fees) from the litigation fund. All counsel working on common benefit

activities must submit a separate report of their time and expense records every two months. Report periods close on the last day of every even numbered month and must be submitted within twenty (20) days of the due date. (Such reports must be submitted directly into the TimeLocker system. In order to gain access to the system, please reach out to bwilliams@awkolaw.com and wprice@awkolaw.com).

The failure to secure authority to incur common benefit time and expenses, or maintain and timely provide such records or to provide a sufficient description of the activity will be grounds for denying the recovery of attorney's fees or expenses in whole or in part.

"Participating Counsel" are counsel who subsequently desire to be considered for common benefit compensation and as a condition thereof agree to the terms and conditions herein and acknowledge that the Court will have final, non-appealable authority regarding the award of fees, the allocation of those fees and awards for cost reimbursements in this matter. Participating Counsel have (or will have) agreed to and therefore will be bound by the Court's determination on common benefit attorney fee awards, attorney fee allocations, and expense awards, and the Participating Counsel knowingly and expressly waive any right to appeal those decisions or the ability to assert the lack of enforceability of this Agreed Order or to otherwise challenge its adequacy. Nothing in this Agreed Order should be construed

to prohibit an agreement between the PSC and state court litigants who may later seek a common benefit allocation.

A. Expense Limitations

1. *Travel Limitations*

Only reasonable expenses will be reimbursed. Except in extraordinary circumstances approved by the Co-Lead Counsel, Fees and Funds Committee and Special Master, all travel reimbursements are subject to the following limitations:

- a. Airfare. Reasonable and appropriate airfare will be reimbursed and is subject to audit and review. Airfare deemed to be excessive or which is not related to an assigned task or judicial requirement will not be reimbursed. Only the lowest-price available coach airfare at time of booking (at rates which allow the reservation to be rebooked without surcharge and other agency fees) for a reasonable itinerary will be reimbursed. Notwithstanding the foregoing, first class airfare is allowed for cross-country flights that are in excess of four hours total flight time or international flights. Airfare expense submissions must be supported by invoice or receipt for airfare that shows class of airfare purchased, name of traveler, and destination. If first class is flown and only coach fare is reimbursable, proof of applicable coach fare must be provided.
- b. Hotel. Reasonable and appropriate hotel accommodations will be reimbursed, such as prevailing room rates available for Marriott, Hilton, Westin and similar hotel brands. Hotel accommodations deemed to be excessive or which are not related to an assigned task or judicial requirement will not be reimbursed. Hotel expense submissions must be supported by a hotel issued receipt.

- c. Meals. Meal expenses must be reasonable. Meal expense submissions must be supported by receipts or credit card statements that reflect the date and those partaking in the meal.
- d. Cash Expenses. Miscellaneous cash expenses for which receipts generally are not available (tips, luggage handling, pay telephone, etc.) will be reimbursed up to \$30.00 per trip, as long as the expenses are properly itemized.
- e. Rental Automobiles. Luxury automobile rentals will not be fully reimbursed, unless only luxury automobiles were available. If luxury automobiles are selected when non-luxury vehicles are available, then the difference between the luxury and non-luxury vehicle rates must be shown on the travel reimbursement form, and only the non-luxury rate may be claimed, unless such larger sized vehicle is needed to accommodate several counsel or materials necessary to be transported to a deposition or trial. Rental automobile expense submissions must be supported by receipts or credit card statements. Such rentals are limited to travel pursuant to an assigned or required task related to this litigation.
- 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 member's firm. The maximum allowable rate will be the maximum rate allowed by the IRS.

2. *Non-Travel Limitations*

- a. Long Distance, Conference Call and Cellular Telephone Charges. Common benefit long distance, conference call and cellular telephone charges must be documented as individual call expenses in order to be compensable. Copies of the telephone bills must be submitted with notations as to which charges relate to the MDL litigation. Such charges are to be reported at actual cost.
- b. Shipping, Overnight, Courier, and Delivery Charges. All claimed common benefit shipping, overnight, courier or delivery expenses must be documented with bills showing the

sender, origin of the package, recipient, and destination of the package. Such charges are to be reported at actual cost.

- c. Postage Charges. A contemporaneous postage log or other supporting documentation must be maintained and submitted for common benefit postage charges. Such charges are to be reported at actual cost.
- d. Telefax Charges. Contemporaneous records should be maintained and submitted showing faxes sent and received for common benefit matters. The per-fax charge must not exceed \$1.00 per page.
- e. In-House Photocopy. A contemporaneous photocopy log or other supporting documentation must be maintained and submitted. The maximum copy charge is .20¢ per page for black and white copies and .35¢ per page for color copies
- f. Computerized Research – Lexis/Westlaw. Claims for Lexis or Westlaw, and other computerized legal research expenses should be in the exact amount charged the firm and appropriately allocated for these research services.

B. Verification

The forms detailing expenses must be certified by a member of the PSC in each firm attesting to the accuracy of the submissions. For those attorneys submitting time who are not members of the PSC, the forms must be signed by a senior partner in their firm. Attorneys must keep receipts for all expenses. Credit card receipts are an appropriate form of verification so long as accompanied by a declaration from counsel that work was performed and paid for the common benefit.

IV. AUTHORIZATION FOR COMPENSABLE COMMON BENEFIT WORK

Authorized Common Benefit Work includes assignments made by Co-lead and Liaison Counsel. With the exception of the initial trial pool (and Bellwether trial pool, if one is implemented at a later date), no time spent on developing or processing purely individual issues in any case for an individual client (claimant) will be considered or should be submitted, nor will time spent on any unauthorized work be compensated.

V. COMMON BENEFIT WORK

Examples of authorized and unauthorized common benefit work include but are not limited to:

- a. Depositions: Participating Counsel may attend any deposition, space permitting; however, if such counsel has not been designated as one of the authorized questioners or otherwise authorized to attend the deposition by Co-Lead Counsel, the time and expenses will not be considered common benefit work, but rather considered as attending on behalf of such counsel's individual clients.
- b. Periodic MDL Conference Calls: These calls are held so that individual attorneys are kept up-to-date on the status of the litigation, and participation by listening to such calls is not common benefit work. All attorneys have an obligation to keep themselves informed about the litigation so that they can best represent their clients, and that is a reason to listen in on those calls. The attorneys designated by the Co-Lead Counsel to run those calls are working for the common benefit by keeping other lawyers informed and educated about the case, and their time will be considered for common benefit. Nothing in this paragraph should be construed to prevent members of the PSC from submitting common benefit time for

participation in PSC communications that are germane to all members of the PSC and are necessary to fulfill their PSC obligations.

- c. Periodic Status Conferences. Regular status conferences are held so that the litigation continues to move forward and legal issues are resolved with the Court. Individual attorneys are free to attend any status conference held in open court in order to keep up-to-date on the status of the litigation and participation, but attending and listening to such conferences is not common benefit work. All attorneys have an obligation to keep themselves informed about the litigation so that they can best represent their clients. Mere attendance at a status conference will not be considered a common benefit expense or common benefit time. The attorneys designated by the Co-Lead Counsel to address issues that will be raised at a given status conference or requested by the Co-Lead Counsel to be present at a status conference are working for the common benefit and their time will be considered for common benefit. Similarly, Co-Lead Counsel, as well as any other attorney whose attendance at a status conference is specifically requested by the Judge in that case may submit their time for evaluation as common benefit time.
- d. Committee Meetings or Calls: For purposes of committee phone calls or other meetings a presumption exists that only one participant per firm will qualify for common benefit time, unless otherwise authorized by the Co-Lead Counsel.
- e. Identification and Work Up of Experts: Participating Counsel are expected to identify experts in consultation with the Co-Lead Counsel and the Joint Science and Expert Committee, which is co-chaired by Lexi J. Hazam and Jennifer Liakos, who are responsible to coordinate with the Co-Lead Counsel. If a Participating Counsel travels to and retains an expert without the knowledge and approval of the Co-Lead Counsel, that attorney understands that the MDL may not need or use that expert and the attorney's time and expenses may not be eligible for common benefit expenses/work.

- f. Attendance at Seminars: Mere attendance at a seminar does not qualify as common benefit work or a common benefit expense unless the individual is attending at the direction of Co-Lead Counsel and for the benefit of the MDL.

- g. Document Review: Only document review specifically authorized by the Co-Lead Counsel for the MDL and assigned to an attorney will be considered common benefit work. The review done in a designated attorney's office will be performed by appropriately trained individuals selected by the attorney. If a reviewer elects to review documents that have not been assigned to that attorney by the Co-Lead Counsel for the MDL, that review is not considered common benefit. Counsel will receive periodic reports from the vendor(s) retained to manage the electronic production of computer billing time for depository review. Such Vendor should have the capability to track actual time spent by each attorney reviewing documents. Participating Counsel should bring any discrepancy to the attention of the Co-Lead Counsel or its designee within thirty (30) days of receipt of the Vendor's report. Failure to timely bring any claimed discrepancy to the attention of the Co-Lead Counsel will result in the compensable document review time being presumptively deemed that which was electronically logged by Vendor. A Fee Committee at the appropriate time will review all fee submissions related to document review, and document review that is duplicative of what has been assigned in the MDL may not be compensated.

- h. Review of Pleadings and Orders: All attorneys have an obligation to keep themselves informed about the litigation so that they can best represent their clients, and review of pleadings and orders is part of that obligation. Only those attorneys designated by the Co-Lead Counsel to review or summarize those pleadings or orders for the MDL are working for the common benefit and their time will be considered for common benefit. All other counsel reviewing those pleadings and orders are doing so for their own benefit and the benefit of their own clients, and the review is not considered common benefit. Nothing in this paragraph should

be construed to prevent the Executive Committee, Co-lead, Co-Liaison Counsel and the PSC from submitting common benefit time for reviewing orders of the Court that are germane to all members of the PSC and are necessary for review to fulfill their committee or court appointed obligations.

- i. Emails: Time recorded for reviewing emails, and providing non substantive responses, generally is not compensable unless germane to a specific task being performed by the receiving or sending attorney or party that is directly related to that email. Thus, for example, review of an email sent to dozens of attorneys to keep them informed on a matter on which they are not specifically working would not be compensable. All attorneys have an obligation to keep themselves informed about the litigation so that they can best represent their clients and that is a reason to review emails to a larger group which involves a matter on which the recipient is not directly and immediately working. If time submissions are heavy on email review and usage with little related substantive work, that time may be heavily discounted or not compensated at all.
- j. Review of Discovery Responses: All attorneys have an obligation to keep themselves informed about the litigation so that they can best represent their clients and that is a reason to review discovery responses served in this litigation. Only those attorneys designated by the Co-Lead Counsel to review and summarize those discovery responses for the MDL are working for the common benefit and their time will be considered for common benefit. All other counsel reviewing those discovery responses for their own benefit and the benefit of their own clients, and the review is not considered common benefit.
- k. Bellwether Trials. While the work-up of individual cases is *not* considered common benefit, in the event that a case is selected as part of an approved early preference or bellwether trial process in the MDL (including work performed as part of the approved bellwether process) may be considered for

common benefit to the extent it complies with other provisions of this Agreed Order or Participation Agreement.

- l. Pre-Litigation Hours Materially Advanced. The Court will have the authority and discretion to permit the accounting of pre-litigation hours materially advanced for common benefit.
- m. Paralegal Work. Work performed by paralegals will be subject to all the same procedures and requirements set forth in this Order as that performed by attorneys.

In the event Plaintiffs' Counsel are unsure if the action they are about to undertake is considered a common benefit action, counsel must ask the Co-Lead Counsel or PFFC in advance as to whether such time may be compensable or it may not be compensable.

VI. TIME KEEPING AND SUBMISSION OF TIME RECORDS

All time must be authorized and accurately and contemporaneously maintained. Time must be kept according to these guidelines as noted herein and submitted via TimeLocker. Participating Counsel must keep a daily record of their time spent in connection with common benefit work on this litigation, indicating with specificity the hours, location and particular activity (such as "conducted deposition of John Doe"). Time entries that are not sufficiently detailed may not be considered for common benefit payments. All common benefit work time for each firm must be maintained in tenth-of-an-hour increments.

The following must be noted:

1. All time submissions must be incurred only for work authorized under this Agreed Order.

2. All time submissions must be made directly into the TimeLocker program.
3. Individual entries should have a specific task code in accordance with the Litigation Task Definitions associated with the time.
4. All time and expenses are subject to proper and timely submission every other month (reports must be submitted within 20 days of the close of the due date) of contemporaneous records certified to have been timely received within the preceding period. Beginning April 1, 2017, submissions must be made for all time incurred prior to the entry of this Agreed Order.
5. All expense submissions must include receipts for all expenses, or if a receipt is not available, an affidavit outlining the details of the expense.
6. Plaintiffs' Fee and Common Benefit Fund Committee will cooperatively share and maintain the data submitted in TimeLocker with the Executive Committee. It is therefore essential that every other month, each firm timely submit its records for the preceding period.
7. Failure to provide time and expense records on a bi-monthly basis as set forth herein will result in a waiver of same unless a specific extension is granted in writing prior to the due date by the Common Benefit Special Master.

Plaintiffs' indicated that the Litigation Task Definitions would be submitted as a supplement to this Order. The PFFC should submit these proposed definitions by March 24, 2017.

The Court **DIRECTS** the Clerk to file a copy of this Order in 3:16-md-2734 and the Order will apply to each member related case previously transferred to, removed to, or filed in this district. In cases subsequently filed in this district, a

copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action at the time of filing of the complaint. In cases subsequently removed or transferred to this Court, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action on removal or transfer. It is the responsibility of the parties to review and abide by all pretrial orders previously entered by the Court. The orders may be accessed through PACER, as well as on the Abilify website at <http://www.flnd.uscourts.gov/mdl2734>.

DONE and **ORDERED** on this 21st day of February, 2017.

M. Casey Rodgers

M. CASEY RODGERS
CHIEF UNITED STATES DISTRICT JUDGE