

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

IN RE: PHILIPS RECALLED CPAP, BI-LEVEL PAP, AND MECHANICAL VENTILATOR PRODUCTS LITIGATION)	Master Docket: Misc. No. 21-1230
)	
)	MDL No. 3014
)	
<i>This Document Relates to: All Actions</i>)	

PRETRIAL ORDER #24

**ORDER ESTABLISHING A COMMON BENEFIT ASSESSMENT
PERCENTAGE FOR COMMON BENEFIT FEES AND EXPENSES**

Following the appointment of Plaintiffs' leadership counsel on February 15, 2022 (Doc. 395), the Court entered a Common Benefit Order setting forth standards and procedures for the fair and equitable sharing among Plaintiffs, and their counsel, of the burden of services performed and expenses incurred by attorneys acting for the common benefit of all Plaintiffs in this complex litigation (Doc. 491).¹ The Common Benefit Order applies to all Participating Counsel, which includes: (1) all attorneys who voluntarily sign the Participation Agreement attached as Exhibit A to the Common Benefit Order (Doc. 491 at 16-19); (2) all attorneys with a fee interest in any cases pending in, later filed in, transferred to, or removed to this Court as part of MDL 3014, regardless of whether or not the attorney signs the Participation Agreement, and regardless of whether or not the attorney also has cases outside the MDL (filed or unfiled); and (3) any attorneys who are subject to the jurisdiction of the Court and who are not otherwise Participating Counsel but who obtain access to and use the common benefit work product of MDL 3014, thereby becoming Participating Counsel. The Court indicated in its Common Benefit Order that at the

¹ The Common Benefit Order was entered on March 29, 2022 (Doc. 491), and later revised to add Settlement Mediator charges to the categories of Shared Expenses (Doc. 586).

appropriate time, the Court would establish a mechanism for creating funds for reimbursing counsel for common benefit costs and awarding common benefit fees. In consideration of the motion of Plaintiffs' Co-Lead Counsel, on behalf of the Plaintiffs' Steering Committee, Settlement Committee, Time and Expense Subcommittee, Leadership Development Committee, Co-Liaison Counsel, and other counsel performing common benefit services at their direction, for entry of an Order establishing a common benefit assessment percentage for common benefit fees and expenses, the Court hereby enters the following Order:

1. Scope of Assessment Order

This Order applies to (1) all Plaintiffs with cases pending in, later filed in, transferred to, or removed to this Court as part of MDL 3014 and (2) all Participating Counsel, as defined in the Common Benefit Order. Plaintiffs and Participating Counsel who agree to settle, compromise, or dismiss, or who, with or without trial, recover a judgment, for monetary damages or other monetary relief, including compensatory and punitive damages, from Defendants are subject to an assessment of the gross monetary recovery, as provided herein. The assessment set by the Court does not set the amounts of or award any common benefit fees or expenses, but rather simply establishes a means to create a fund from which common benefit fees and reimbursement of expenses, if any, might later be awarded and disbursed pursuant to procedures to be determined by future Order of the Court.

2. Gross Monetary Recovery

Gross monetary recovery includes any and all monetary amounts paid to Plaintiffs (either directly or through Plaintiffs' counsel) by Defendants through a settlement or pursuant to a judgment or other order. In measuring the "gross monetary recovery," the parties are to (a) exclude court costs that are to be paid by Defendants; (b) include any payments to be made by Defendants

on an intervention asserted by third parties, such as to physicians, hospitals, or other healthcare providers in subrogation related to treatment of a Plaintiff, and any governmental liens or obligations (*e.g.*, Medicare/Medicaid); and (c) include the present value of any fixed and certain payments to be made in the future. The assessment shall apply to all cases of the Plaintiffs' attorneys who are subject to this Order, whether as sole counsel or co-counsel, including cases pending in the MDL, pending in state court, unfiled, or tolled.

3. Assessment Percentage

The assessment shall be ten percent (10%), with eight percent (8%) allocated for common benefit fees and two percent (2%) allocated for common benefit expenses. The Court reserves the right to adjust the assessment percentage and/or the allocation of the assessment percentage as between common benefit fees and expenses, if warranted. The common benefit fees portion of the assessment will be deducted from the Plaintiff's attorney's individually-retained fee and will not decrease the Plaintiff's recovery. The common benefit expense portion of the assessment may be deducted from the Plaintiff's recovery. Depending on the results achieved in the litigation, it is possible that in connection with the determination of an award of common benefit fees and reimbursement of common benefit expenses, the Court may order a partial refund of assessments to Plaintiffs and Participating Counsel whose recoveries or fees were subject to the assessments. In such event, refunds will be made proportionately to the amount that was assessed pursuant to this Order or any amendments thereto.

4. Obligations of the Parties

Plaintiffs' Co-Lead Counsel shall provide Defendants' counsel and the Court or its designee with a list of counsel who have entered into the Participation Agreement, as well as the name of each client represented by them and/or in which they have an interest in attorneys' fees,

regardless of whether the claim, case or action is currently filed in state or federal court, or is unfiled, or is on a tolling agreement. In the event there is a dispute as to whether a particular Plaintiff, Plaintiff's Counsel or case should be on the list and therefore subject to an assessment, Plaintiffs' Co-Lead Counsel shall seek to resolve the matter with the particular Plaintiff (if unrepresented) or Plaintiff's counsel informally, and if that is unsuccessful, upon motion to the Court. Defendants shall play no role in any such disputes.

Defendants and their counsel shall not distribute any settlement or judgment proceeds to any Plaintiff (or anyone on behalf of a Plaintiff, including Plaintiff's counsel) without first verifying whether the particular Plaintiff's counsel is on the list of Participating Counsel. Plaintiffs' Co-Lead Counsel shall provide Defendants with an updated list of Participating Counsel at least once per quarter. However, under no circumstances will Defendants be liable because they withheld an assessment amount from a Plaintiff or Plaintiff's Counsel for a matter identified on the list provided to Defendants by Co-Lead Counsel, or because they inadvertently failed to withhold an assessment amount from a Plaintiff or Plaintiff's Counsel for a matter identified on the list provided to Defendants by Co-Lead Counsel. All disputes related to the withholding of an assessment or the failure to withhold an assessment shall be addressed by Plaintiffs' Co-Lead Counsel and the particular Plaintiff (if unrepresented) or Plaintiff's counsel, with no participation required, or responsibility, of Defendants. If, for any reason, an assessment required to be withheld under this Order is not or has not been withheld, Plaintiff and his/her counsel are jointly responsible for paying the assessment into the Fund promptly. Defendants shall play no role in any disputes that might arise from a particular Plaintiff's (if unrepresented) or Plaintiff's counsel's responsibility for paying the assessment.

Plaintiffs' Co-Lead Counsel shall share information regarding the withholding of

assessments only among themselves and members of the Plaintiffs' Settlement Committee and they shall otherwise keep this information confidential. For cases or claims subject to an assessment, Defendants are directed to withhold an assessment from any and all amounts paid to Plaintiffs and their counsel and to pay the assessment directly into the fund to be established by future order of the Court as a credit against the settlement or judgment. All deposits to this fund shall be accompanied by information ("Assessment Deposit Information") identifying the party and attorney making the deposit; the Defendant(s) on whose behalf the payment is being made; the gross amount of the settlement, judgment or other payment; the Plaintiff, claimant or putative class member to whom the settlement, judgment or other payment was made; and the docket number of the case, if filed. The depositing party shall notify Plaintiffs' Co-Lead Counsel of the Assessment Deposit Information within ten (10) days of each deposit. Such information shall be kept confidential, and access to such information shall be limited as set forth herein to track such information and prepare periodic reports to the Court. Any further disclosure of such information shall require an order from this Court.

Plaintiffs' Co-Lead Counsel shall keep track of settlements and judgments and corresponding deposits into the fund. Plaintiffs' Co-Lead Counsel shall notify the Court of withheld assessments, whenever and however required by the Court.

The parties shall work cooperatively to develop a mechanism and process by which to ensure that the assessments that are to be withheld by Defendants pursuant to this Order, for each individual case, has been deposited into the fund before dismissal of any case can be effectuated.

5. Disbursements

Upon an award of common benefit fees and expenses, the assessment amounts deposited into the fund to be established by the Court shall be available for distribution to eligible

Participating Counsel who have performed professional services or incurred expenses for the common benefit in accordance with the Common Benefit Order and the Participation Agreement. No party or attorney will have any individual right to any of the assessment funds except to the extent of amounts directed to be disbursed by further order of the Court. The funds will not constitute the separate property of any party or attorney or be subject to garnishment or attachment for the debts of any party or attorney except when and as directed to be disbursed by Court order to a specific person or law firm. These limitations do not preclude a party or attorney from transferring, assigning, or creating a security interest in potential disbursements from the common benefit fund if permitted by applicable state laws and if subject to the conditions and contingencies of this Order.

At an appropriate time, the Court shall establish procedures and guidelines for an award of common benefit fees and reimbursement of expenses and disbursement of the assessment funds, based on governing common benefit fee jurisprudence. Nothing contained in this Order precludes Co-Lead Counsel on behalf of Plaintiffs' leadership and other common benefit attorneys working under their direction from seeking common benefit fees and expenses in an amount that is different from or greater than the assessment amount. Nor shall anything herein prohibit Defendants from objecting to any particular fee or expense request, provided they have standing to do so.

This Court retains jurisdiction over any common benefit award or distribution.

**HAVING HEARD NO OBJECTION TO THE MOTION OR PROPOSED ORDER,
DONE and ORDERED** this 29th day of August, 2022.

/s/ JOY FLOWERS CONTI
Joy Flowers Conti
Senior United States District Judge