

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

**IN RE: EpiPen (Epinephrine
Injection, USP) Marketing,
Sales Practices and Antitrust
Litigation**

MDL No: 2785

Case No. 17-md-2785-DDC-TJJ

(This Document Applies to All Cases),

ORDER APPOINTING COUNSEL

The court's Preliminary Practice and Procedure Order directed counsel who wished to seek a leadership role in the organizational structure of this case to submit a proposal describing counsel's qualifications for selection. Doc. 2 ¶ 5. The court also ordered counsel seeking a leadership role to appear at the initial scheduling conference on September 7, 2017. *Id.* The court received several thoughtful and thorough submissions from counsel. The court also heard argument about counsel's applications during the September 7 hearing. After considering these submissions and arguments as well as the guidance provided by Section 10.224 of the Manual for Complex Litigation Fourth ("MCL 4th"), the court issues this Order Appointing Counsel to designated leadership roles in this Multi-District Litigation. The court finds that appointing counsel to the roles described in this Order will help the court resolve the collected cases effectively, efficiently, and fairly.

The court also acknowledges, however, that many well-qualified candidates submitted applications for leadership positions in the case. The court does not intend its decisions to exclude some candidates from leadership positions to comment negatively about their qualifications. The court is confident that these counsel could have performed the same duties

effectively and diligently had the court selected them. But, the court reaches its decision here for the reasons explained, below.

Also, the court will consider modifying this organizational structure as the case progresses, including the appointment of additional committees, if such additions or changes will advance the interests recognized in Fed. R. Civ. P. 1. But, for now, the court believes the case is in a position to move to the next phase—the scheduling conference set for September 27, 2017.

Co-Lead Counsel. The court selects Warren T. Burns, Paul J. Geller, Lynn Lincoln Sarko, and Rex Sharp as Co-Lead Counsel for plaintiffs. This is the Co-Lead Counsel structure proposed by the so-called “consensus plaintiffs’ counsel.” This group refers to themselves by this name because all but two of 58 plaintiffs in this proceeding support this group’s organizational proposal. The court also recognizes that Judge Lungstrum previously appointed three of these lawyers as Co-Lead Counsel in one of the cases in this MDL, before the Judicial Panel on Multidistrict Litigation transferred the Kansas case to the MDL. *See In Re: EpiPen Auto-Injector Litig.*, No. 16-cv-2711 (D. Kan. Apr. 25, 2017), ECF 109 (Lungstrum, J.). In so doing, Judge Lungstrum concluded the following about Mr. Burns, Mr. Sarko, and Mr. Sharp:

These lawyers satisfy the criteria for selection set out in the Manual for Complex Litigation (4th), the Duke Center for Judicial Studies Standards and Best Practices, and Federal Rule of Civil Procedure 23(g). They have completed extensive work identifying and investigating claims against the defendants; are experienced in handling complex litigation including consumer and antitrust class actions; are knowledgeable in the law; have demonstrated themselves as able and willing to work with diverse interests among plaintiffs as well as with the court and opposing counsel; and they bring the resources necessary to sustain this litigation. They each have been chosen as lead or co-lead class counsel previously by state and federal courts throughout the country.

Id. ¶ 4. The court agrees with Judge Lungstrum’s conclusions about these three lawyers, and also concludes that Mr. Geller meets these criteria.

Judge Lungstrum recognized that the Co-Lead Counsel group included representatives of varying interests asserted by plaintiffs and their different claims. *Id.* ¶ 5. He noted that: “[s]ome of the plaintiffs in this case originally filed consumer class actions, and now class actions raising claims for antitrust indirect purchaser violations and RICO violations [, and] [t]he co-lead counsel group included representatives of each of these interests in its leadership team, including its proposed Executive Committee.” *Id.* Judge Lungstrum not only agreed “that this is the best way to proceed,” but he also concluded “that it bodes well for the expeditious handling of this litigation that the co-lead counsel group anticipated this diversity and proposed an organization.” *Id.*

Mr. Burns explained the rationale for this group’s structure at the September 7 hearing. He explained that the Co-Lead Counsel had divided itself into three teams in Judge Lungstrum’s case, before the case was transferred to the MDL: (1) Mr. Burns led a team devoted to the antitrust claims; (2) Mr. Sharp led a team responsible for the RICO claim; and (3) Mr. Sarko led a team assigned to the consumer protection claims. Mr. Burns explained that Co-Lead Counsel planned to use this same representative model in the MDL. Mr. Geller’s addition provides a representative for third party payor claims brought by Mr. Geller’s clients. The court agrees that this organizational structure will provide an efficient and fair means for representing a diverse group of plaintiffs and their interests in this MDL. And, when appointing counsel, the MCL 4th directs courts to consider “whether designated counsel fairly represent the various interests [presented] in the litigation—where diverse interests exist among the parties, the court may designate a committee of counsel representing different interests.” MCL 4th § 10.224. For these reasons, the court adopts the “consensus plaintiffs’ counsel’s” proposed Co-Lead Counsel organizational structure.

Plaintiff's Co-Lead Counsel must assume responsibility for the following duties during all phases of this litigation:

- to organize and supervise the efforts of plaintiffs' counsel in a manner to ensure that plaintiffs' pretrial preparation is conducted effectively, efficiently, expeditiously, and economically;
- to delegate work responsibilities and monitor the activities of plaintiffs' counsel to assure that schedules are met and unnecessary expenditures of time and expense are avoided;
- to speak for plaintiffs at all court conferences and hearings;
- to initiate and conduct discussions and negotiations with counsel for defendants on all matters, including settlement;
- to determine (after consultation with other co-counsel as may be appropriate) and present (in briefs, oral argument, or such other fashion as they or their designee deems appropriate) to the court and opposing parties the position of the plaintiffs on all matters arising during the proceedings;
- to enter into stipulations with opposing counsel as necessary for the conduct of the litigation;
- to select, consult with, and employ experts, as necessary, for plaintiffs;
- to initiate and conduct discovery on plaintiffs' behalf, and coordinate its efficiency;
- to initiate communication with the court and the clerk of court (including receiving orders, notices, correspondence and telephone calls), and to dispense the content of such communications among plaintiffs' counsel;

- to serve as the primary contact for all communications between plaintiffs and defendants;
- to coordinate the work of preparing and presenting all of plaintiffs' claims and otherwise coordinate all proceedings;
- to encourage and enforce efficiency among all plaintiffs' counsel;
- to assess plaintiffs' counsel for the costs of the litigation;
- to consult with Plaintiffs' Steering Committee to fulfill their obligations as Co-Lead Counsel shall direct; and
- to perform such other duties in connection with prosecuting the claims in this litigation.

Counsel for plaintiffs who disagree with lead counsel (or those acting on behalf of lead counsel) or who otherwise have individual or divergent positions may present written and oral arguments, conduct examinations of deponents, and otherwise act separately on behalf of their clients as appropriate, so long as they do not repeat arguments, questions, or actions presented by lead counsel.

Liaison Counsel. The court appoints Ryan Hudson of Sharp Law as liaison counsel for all plaintiffs. Plaintiffs' liaison counsel is responsible for performing the duties and responsibilities described in the MCL 4th § 10.221, including facilitating and expediting communications with and among plaintiffs' counsel and fulfilling such other duties as requested by the court or Co-Lead Counsel. The court also orders the following:

- Plaintiffs' liaison counsel is designated as the counsel for all plaintiffs in all cases upon whom others must serve all notices, orders, pleadings, motions, discovery, and memoranda.

- Plaintiffs' liaison counsel is authorized to: (a) receive orders, notices, correspondence, and telephone calls from the court and the clerk of the court on plaintiffs' behalf; (b) prepare and transmit copies of such orders and notices on plaintiffs' behalf; and (c) receive orders and notices from the Judicial Panel on Multidistrict Litigation.
- Plaintiffs' liaison counsel must maintain complete files with copies of all documents served and make such files available to all defendants' counsel on request.
- Plaintiffs' liaison counsel must maintain and make available to all counsel and the court an up-to-date service list.

Steering Committee. The court appoints the following attorneys to plaintiffs' Steering Committee: Sharon Almonrode, Eric Hochstadt, Mark Lanier,¹ Damien Marshall, Elizabeth Pritzker (Chair), Rosemary Rivas, and Steven Williams. The court finds that this group of attorneys brings additional experience and skill to the organizational structure that justifies their inclusion on the Steering Committee. The court also recognizes that certain counsel in this group represent plaintiffs who are uniquely situated and have differing positions from other sets of plaintiffs. This combination of skills and experience warrants these attorneys' inclusion in decision-making roles for the litigation.

Special Trial Counsel. The court declines to appoint Special Trial Counsel at this time.

Defendants' Liaison Counsel. At the request of Mitchell Zamoff, national counsel for the Mylan Defendants, and with the consent of the Pfizer defendants, the court appoints Brian C.

¹ Mr. Lanier did not appear at the September 7 hearing, but he did explain his absence satisfactorily. The court realizes that able attorneys must work on more than one task at a time and the court scheduled the September 7 hearing without consultation or warning. Still, the court emphasizes that all attorneys appointed to leadership roles must make this MDL a priority. The court will not hesitate to reconsider and revise these appointments if circumstances warrant.

Fries of Lathrop Gape LLP as liaison counsel for all defendants. The court also orders the following:

- Defendants' liaison counsel is designated as the counsel for all defendants in all cases upon whom others must serve all notices, orders, pleadings, motions, discovery, and memoranda.
- Defendants' liaison counsel is authorized to: (a) receive orders, notices, correspondence, and telephone calls from the court and the clerk of the court on defendants' behalf; (b) prepare and transmit copies of such orders and notices on defendants' behalf; and (c) receive orders and notices from the Judicial Panel on Multidistrict Litigation.
- Defendants' liaison counsel shall maintain complete files with copies of all documents served and make such files available to all defendants' counsel on request.

Plaintiffs' Counsel Time and Expense Records. The court understands that all of plaintiffs' counsel have been engaged on a contingent fee basis and will be advancing all expenses necessary to secure appropriate relief for the class. Co-Lead Counsel must manage and approve any time and expenses for which plaintiffs may at any time seek to receive compensation or reimbursement.

To that end, all plaintiffs' counsel must keep contemporaneous records of their time and expenses devoted to this matter. Those records must reflect the date the legal service was rendered or expenses incurred, the nature of the service or expense, and number of hours consumed by the service or the amount of the expense. Plaintiffs' counsel must submit these records for the preceding month in summary form by the end of each month to plaintiffs' liaison

counsel. Failure to comply with this rule may render the expenses non-reimbursable, at the discretion of Co-Lead Counsel.

Application of this Order. This Order applies to all actions included in MDL No. 2785, subsequently transferred “tag-along” actions, and all actions directly filed in this MDL proceeding.

Plaintiffs’ liaison counsel must serve a copy of this order promptly by overnight delivery service, facsimile, or other electronic expeditious means on counsel for plaintiffs in each related action not yet consolidated in this proceeding to the extent that plaintiffs’ liaison counsel is aware of any such action(s) and on all attorneys for plaintiffs whose cases have been so consolidated but who have not yet registered for ECF.

IT IS SO ORDERED.

Dated this 12th day of September, 2017, at Topeka, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge