

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE DIET DRUGS (Phentermine/  
Fenfluramine/Dexfenfluramine) : MDL Docket No. 1203  
PRODUCTS LIABILITY LITIGATION :  
:

THIS DOCUMENT RELATES TO: :  
ALL ACTIONS :  
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**PRETRIAL ORDER NO. 5400**  
**(Procedure for Award of Counsel Fees**  
**and Reimbursement of Litigation Expenses)**

In order to provide for the orderly and efficient presentation and determination of requests for a final award of attorneys' fees and reimbursement of litigation expenses from: (1) the MDL 1203 Fee and Cost Account established and maintained pursuant to Pretrial Order Nos. 467 and 517; and (2) the funds available for an award of counsel fees and reimbursement of litigation expenses pursuant to the Nationwide Class Action Settlement Agreement with American Home Products Corporation as amended (collectively the "Diet Drug Common Benefit Fee Sources"), it is on this 1st day of July, 2005, hereby

ORDERED, ADJUDGED AND DECREED that:

1. No later than August 31, 2005, each attorney and/or law firm that performed professional services between July 1, 2001 and July 31, 2005, which are claimed to be eligible for compensation from one or more of the Diet Drug Common Benefit Fee Sources, shall submit their time and expense records for such services, in the format required by Pretrial Order No. 16, to the Court-appointed Auditor, Alan B. Winikur, C.P.A. (the "Auditor")

and shall serve a copy of such submission on Plaintiffs' Liaison Counsel. Until further order of the court, no later than the fifteenth day of each month thereafter, each such attorney and/or law firm shall supplement their submission with previously unsubmitted time and expense records for the period ending on the last day of the preceding month.

2. No later than January 31, 2006, the Auditor shall complete an audit of the professional time and expenses reported by counsel as a basis for payment or reimbursement from the Diet Drug Common Benefit Fee Sources for the period from July 1, 2001 through December 30, 2005, in accordance with the applicable orders of this court, including Pretrial Order Nos. 16, 467, 517, 1164, 1415, and 1434.

3. Thereafter, until further order of court, the Auditor shall continue to audit professional time and expense records submitted by counsel for the period of January 1, 2006 and thereafter. The Court will set a timetable for further audits after consultation with the parties and the Auditor.

4. No later than February 28, 2006, the Auditor shall file with the court a report setting forth the results of the audit described in paragraph 2 of this Order. For each law firm, attorney or other person who submitted time and expense records pursuant to paragraph 1 of this Order (each an "Applicant"), the Auditor's report shall set forth the professional time which the Auditor believes to be eligible for compensation and/or reimbursement and the amount of any submitted time or expense

which the Auditor believes should be disallowed, along with the reasons for the proposed disallowance. The report shall not be delayed while any disputes concerning disallowances are being resolved.

5. In conducting his audits, the Auditor shall disallow each of the following:

- A. Any submission or report of professional time and expense in which the hours of service were not properly coded in accordance with Pretrial Order No. 16;
- B. Any item of expense for which proper receipts or other proof of payment has not been submitted;
- C. Any item of time or expense which was incurred in connection with the litigation of any individual case or group of individual cases involving a person or persons who used the diet drugs Pondimin or Redux (each a "Diet Drug Recipient"), unless counsel was authorized by either the Co-Chairs of the Plaintiffs' Management Committee ("PMC") or the Co-Chairs of the Discovery Committee in MDL 1203 to perform such work primarily for the common benefit of the litigants in MDL 1203 and the state litigation with which it was coordinated pursuant to the terms of Pretrial Order Nos. 467 and 517;
- D. Any submission or report of professional time which does not provide a cumulative loadstar figure for the Applicant on a quarterly basis;
- E. Any submission or report of professional time which does not provide hourly rates and/or descriptions of the professional status (*i.e.*, partner, associate, paralegal, law clerk) of each person whose professional time is the subject of the submission or report;
- F. Any submission or report of professional time which does not provide cumulative totals for

the reimbursable expenses claimed by the Applicant on a quarterly basis;

- G. Any submission which is not based on time which was contemporaneously recorded in the books and records of the Applicant at the time the professional services were rendered;
- H. Any item of expense which does not meet the requirements of Pretrial Order No. 16, ¶ B; and
- I. Any item of time or expense which is not described in sufficient detail to determine the nature and purpose of the service or expense involved (entries such as "research," "telephone call to PMC," or "conference with JB," without further description, are to be disallowed).

6. In conducting his audits, the Auditor shall determine if there is reason to believe that all or part of any submission of time and expense by an Applicant should be disallowed for the following reasons:

- A. It consists of items of professional time that were expended to "review" pleadings, correspondence and similar items, where such "review" time was not directly related to and reasonably necessary for the performance of other compensable services;
- B. It is a submission in which the amount of "review" time is excessive as a whole when judged in reference to the role which the Applicant had in the Class Action certified by this court in Pretrial Order No. 1415 or in performing common benefit functions on behalf of the Diet Drug Recipients who were subject to consolidated pretrial proceedings in MDL 1203 and the state court litigation with which it was coordinated pursuant to Pretrial Order Nos. 467 and 517;
- C. It is a submission in which the amount of professional time is grossly excessive on its face, when considered as a whole in light of

the role which the Applicant had in the Class Action certified by this court in Pretrial Order No. 1415 or in performing common benefit functions on behalf of the Diet Drug Recipients who were subject to consolidated pretrial proceedings in MDL 1203 and the state court litigation with which it was coordinated pursuant to Pretrial Order Nos. 467 and 517; and

- D. It is a submission that includes items of professional time or expense which were not reasonable, necessary, or part of a bona fide effort that actually "advanced" and/or "conferred a benefit on" the interests of the class certified in Pretrial Order No. 1415, or the common interests of the Diet Drug Recipients who were plaintiffs in the actions subject to consolidated pretrial proceedings in MDL 1203 and any state court proceedings with which it was coordinated pursuant to Pretrial Order Nos. 467 and 517. See In re: Cendant Corp. Sec. Litig., 404 F.3d 173, 191, 197 (3d Cir. 2005).

As the Auditor determines during his audit that all or part of any submission of time or expense should be disallowed, and in the event that any matter relating to the proposed disallowance of time or expense is not resolved under paragraph 6 of this Order, the Auditor shall refer the matter to Gregory P. Miller, as Special Master (the "Special Master"). The Special Master shall conduct such proceedings as are appropriate to determine if the professional services or expenses at issue properly form a basis for payment of compensation or reimbursement from the Diet Drug Common Benefit Fee Sources or should be disallowed for the reasons set forth in sub-paragraphs 5(A)-(D) of this Order. Such proceedings shall be stenographically recorded. At the conclusion of those proceedings, the Special Master shall issue a

Report and Recommendation as to whether the professional services or expenses at issue properly form a basis for payment of compensation from the Diet Drug Common Benefit. Fee Sources or should be disallowed for the reasons set forth in sub-paragraphs 5(A)-(D) of this Order. Any person aggrieved by the Special Master's Report and Recommendation may file an appeal to the district court within ten (10) days of the date of the Report and Recommendation. If no such appeal is timely taken, the Report and Recommendation shall be final.

7. Prior to disallowing any item or submission of time and expense and/or referral of any matter to the Special Master under paragraph 5 of this Order, the Auditor shall afford the affected Applicant at least ten days' notice of the proposed disallowance and/or referral and an opportunity to cure the alleged deficiency.

8. The Auditor may use standard accounting procedures, including sampling, to examine the time and expense which is subject to his review. In the event that the Auditor determines after review of a sufficient sample of the time and expense records of an Applicant that there are a material number of items which should be disallowed pursuant to the terms of this Order or any other relevant Fee Order, and if such deficiencies remain uncured after affording the Applicant an opportunity to cure pursuant to the terms of paragraph 6 of this Order, then the entire submission of the Applicant shall be disallowed by the Auditor.

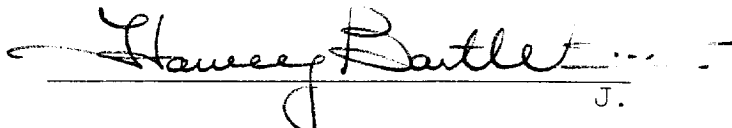
9. Within 30 days after receipt of the Auditor's report, any interested party or counsel may file and serve a submission concerning what steps and procedures the Court should implement in determining any final or other awards of attorneys' fees and reimbursement of litigation expenses. The Court will schedule a status conference thereafter.

10. No deadline provided in this Order shall be extended except for good cause shown.

11. Any attorney, law firm or other person who does not timely submit professional time and expenses for audit pursuant to this Order shall not be eligible to receive an award of attorneys' fees and reimbursement of litigation expenses for professional services performed after June 30, 2001, from any of the Diet Drug Common Benefit Fee Sources, except by leave of court upon a showing of good cause.

12. Any intentional violation of the terms of this Order is grounds for the court to deny a request for payment of counsel fees or reimbursement of litigation expenses in whole or in part, as well as for such other sanctions and penalties as may be appropriate under the law.

BY THE COURT:

  
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J.