

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION**

In re: Guidant Corp. Implantable  
Defibrillators Products Liability  
Litigation

MDL No. 05-1708  
(DWF/AJB)

**Report of the Common Benefit**

This Document Relates to All Actions

**Attorneys Fee and Cost Committee**

**Introduction**

The Common Benefit Attorneys Fee and Cost Committee, heretofore the CBAFCC, was created pursuant to Court Order dated February 15, 2008 (Docket # 2603). The CBAFCC was ordered to recommend to this Court, a Plan of Allocation of the common benefit attorney fees ordered and set aside by this Court in the total amount of \$34,500,000.00 [Common Benefit Attorney Fee Fund] and costs advanced for the common benefit of approximately \$3,500,000.00 of a \$10,000,000.00 set aside fund [Common Cost Fund].

This Court selected a combination of MDL and non-MDL Plaintiffs' counsel for this task. The Court appointed Charles S. Zimmerman as Chair of this Committee and appointed Elizabeth Cabraser, Christopher A. Seeger, Nicholas J. Drakulich, Michael K. Johnson and Gale D. Pearson as members of the Committee. The CBAFCC was instructed by this Court to give each common benefit attorney fee and cost application "careful scrutiny" and provide each applicant with a "fair and equitable" allocation.

The allocation of each applicant was conducted pursuant to the guidelines set for in the CBAFCC Policies, Procedures, Protocols and Guidelines for Allocation of Common Benefit Attorneys Fee Fund and Common Cost Fund submitted to this Court on February 28, 2008 and approved by Order of this Court on March 3, 2008 (Docket # 2628; attached as Exhibit A).

The review of each application was conducted pursuant to and accordance with these Court Approved CBAFCC Policies, Procedures, Protocols and Guidelines and the CBAFCC makes its recommendations based on these Protocol and Guidelines in our determination of each fee and cost allocation. The CBAFCC relied upon its combined years of experience, extensive knowledge of both the state and MDL litigations, the detailed submissions and oral presentations and an intense and cooperative deliberation process in the determination of each firm's allocation.

This report is a culmination of the work of the CBAFCC which was commenced over two months ago in February of 2008. In the main, the Report is an accounting of the CBAFCC's discharge of its duties as directed by the Court and its made pursuant to the Court's February 15, 2008 Order. The Reports provides the Court with findings and recommendations regarding the payment and allocation of attorneys' fees and reimbursement costs.

The Report reiterates the CBAFCC Policies, Procedures, Protocols and Guidelines along with the protocols it followed in reaching its recommendations. It also discusses the rationale it followed in reaching its recommendations.

## **I. Responsibilities of the CBAFCC**

On February 15, 2008, this Court issued its order “Regarding Determination of The Common Benefit Attorney Fee Amount”. In that order, Your Honor set aside \$10 million in a Common Benefit Cost Fund and \$34.5 million in common benefit attorneys’ fees to be set aside in a Common Benefit Attorney Fee Fund. The Court discussed its basis for these awards as the *Johnson* factors and a lodestar cross-check. It also relied on its equitable authority.

The CBAFCC’s first order of business was to submit to the Court for approval its proposed policies, procedures, guidelines and protocol for performing its assigned tasks. These policies, et al., were prepared and submitted to the Court on February 28, 2008 and approved by the court in its aforementioned order. Similarly, the Court ordered the CBAFCC to file and serve a proposed allocation plan within 60 days of the date of its order. This Report fulfils that requirement.

## **II. Process, Guidelines and Procedures**

### **A. The Process**

Each counsel making common benefit submissions were asked to follow the protocols set forth in the Court Approved CBAFCC Policies, Procedures, Protocols and Guidelines (Exhibit A) which was duly filed by this Court on ECF, posted on the Court's Guidant MDL website and emailed to every attorney who might be eligible for common benefit application.

The CBAFCC Process followed by the Committee and approved by the Court was as follows:

- 1) Counsel making a common benefit application must submit time and costs as described below. PSC and other attorneys who have already submitted time and costs throughout this litigation under PTO 6 should NOT do so again. Counsel was asked to update time and costs through January 31, 2008 pursuant to the Guidelines;
- 2) Each firm was asked to prepare and submit a summary no longer than 3 pages, double spaced to the committee describing, with specificity and particularity the common benefit work performed by that firm, with particular emphasis on bona fide efforts made to produce results for the common benefit and as a contribution toward the discovery, trial and/or resolution of the Guidant litigation;

- 3) Each firm could also choose to present a 15 minute presentation to the CBAFCC on the firm's common benefit time and costs;
- 4) The CBAFCC reviewed for each firm making a common benefit application: the submissions of time and costs, the summary and the live presentations;
- 5) The CBAFCC deliberated on the information provided in the time and cost submissions, the summary submission and the 15 minute live presentation;
- 6) The CBAFCC submits this recommendation for allocations for each firm/attorney making a Common Benefit Attorney Fee and Cost application to the Court;
- 7) Objections to the CBAFCC proposed allocations must be submitted within 7 days of the submission of the proposal. The CBAFCC shall have 4 days to respond to any objections.

## **B. Guidelines**

### **1. Guidelines and Criteria for Each Submission**

In the CBAFCC Policies, Procedures, Protocols and Guidelines, published as described above and approved by this Court, ten [10] specific requirements for each submission were provided to each applicant. These Guidelines and Criteria are found starting on page 4 in Exhibit A attached.

## **2. Time Record Submissions**

Eight [8] specific Time Submission requirements were published in the CBAFCC Policies, Procedures, Protocols and Guidelines and approved by this Court. The Time Submission requirements are found starting on page 7 of Exhibit A attached.

## **3. Cost Submissions**

Sixteen [16] specific Cost Submissions requirements were published in the CBAFCC Policies, Procedures, Protocols and Guidelines and approved by this Court. The Cost Submission requirements are found starting on page 9 of Exhibit A attached.

## **4. PTO 6**

The Guidelines and Protocol all were in supplementation and amendment of this Court's PTO 6 entered early in this litigation. PTO 6 is attached hereto and marked Exhibit B.

## **C. Additional Procedures**

### **1. 3 page summaries**

Each firm that applied for common benefit attorney's fees and/or costs was required to submit to the CBAFCC a three page summary describing, with specificity and

particularity, the common benefit work performed by that firm, with particular emphasis on bona fide efforts made to produce results for the common benefit and as a contribution toward the discovery, trial and/or resolution of the Guidant litigation.

## **2. CBAFCC Presentations**

In order to provide substantial due process and afford applicants with an opportunity to be heard in this matter, a process and procedure was published and approved by the Court for non-mandatory attorney presentations to provide additional information to the CBAFCC in the form of live presentation and to include a time for questions by members of the committee. Each firm was given the opportunity to make a 15 minute live, confidential presentation to the CBAFCC relating to the firm's common benefit time and costs. The presentations were to be specific to the firm's efforts and contributions to the common benefit of Plaintiffs and the discovery, trial and/or resolution of the Guidant litigation. Five [5] separate CBAFCC sessions were set up in advance throughout the country for the convenience of the applicants.

## **III. The Work and Procedure of the CBAFCC**

### **A. Meetings to Draft Guidelines**

The CBAFCC met in person on three occasions at various locations for the convenience of the members to discuss the process and propose guidelines for the allocation process

consistent with this Court's orders. The CBAFCC meet in Minneapolis, MN; San Francisco, CA and Phoenix, AZ. This work culminated in the publication of the CBAFCC Policies, Procedures, Protocols and Guidelines for Allocation of the Common Benefit Attorney Fee Fund and the Common Cost Fund. This document was submitted to the Court, as instructed, on February 28, 2008 and approved by this Court on March 3, 2008 (Docket # 2628).

#### **B. Confidential Memorandum and Records**

In addition, members of the CBAFCC drafted a confidential memorandum to the members on the followings subjects:

- 1) Requirements set out by this Court in its Memorandum Opinion and Amended Order Regarding Determination of the Common Benefit Attorney Fee Amount and Reasonable Assessment of Attorney Fees and Requirements of PTO 6;
- 2) Activities Constituting Compensable Common Benefit Time and
- 3) Lessons from *Sulzer* Common Benefit Determination of Judge O'Malley.

Each CBAFCC member was provided a compact disk [CD] compiled by the PSC accountant and Seth Lesser, an LCC member, of all time records and cost submissions provided by MDL members throughout the litigation. This CD was made available for all members to use and review at their discretion. A summary of all time records and cost

submissions was also provided to each CBAFCC member in the form of an interactive Excel spreadsheet.

### **C. Presentation Hearings**

The CBAFCC then met on four additional occasions in person to hear live presentations from common benefit attorney fee applicants who requested to be heard. The CBAFCC met in the following cities on the following dates for the convenience of the applicants:

March 11: Minneapolis, MN  
March 20: New York City, NY  
April 3: Dallas, TX  
April 10: Miami, FL

The CBAFCC heard presentations from the following firms who chose to exercise the opportunity to present further information to the CBAFCC.

Zelle, Hofmann, Voelbel, Mason & Gette, LLP	Jim Reese
Lockridge Grindal Nauen PLLP	Rob Shelquist
Rheingold, Valet, Rheingold Shkolnik & McCartney LLP	Hunter Shkolnik
Cuneo Gilbert & LaDuca, LLP	Jon Cuneo
Todd & Weld LLP	Chris Weld
Klafter & Olsen LLP	Jeff Klafter

Parker Waichman Alonso, LLP	Melissa Malstock
Douglas & London, P.C.	Michael London
Kershaw, Cutter & Ratinoff, LLP	Brooks Cutter
Schneider & Wallace	Todd Schneider
Grady, Schneider & Newman, LLP	Pete Schneider
Lopez, Hodes, Restaino, Milman & Skikos	Tom Schultz
Neblett Beard & Arsenault, LLP	Richard Arsenault
Levin Papantonio Thomas Mitchell Echsner & Proctor, PA	Kim Lambert
Aylstock, Wikin, Kreis & Overholtz, PLLC	Neil D. Overholtz
Cohen & Malad, LLP	Irwin Levine
Charfoos & Christensen, P.C.	Larry Charfoos
Harke & Clasby, LLP	Howard Bushman
Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLP	Silvija Strikis
Hersh & Hersh	Mark Burton
Preti Flaherty Beliveau & Pachios LLP	Gregory P. Hansel
Locks Law Firm	Seth Lesser
Pearson, Randall & Schumacher, PA	Gale Pearson
Goldenberg & Johnson, PLLC	Michael Johnson

#### **D. Applicants Reports**

Additionally, the CBACC considered a 3 page summary from the following firms that were submitted on a timely basis:

Aylstock, Wikin, Kreis & Overholtz, PLLC

Barrios, Kingsdorf & Casteix, LLP

Cuneo Gilbert & LaDuca, L.L.P

Harke & Clasby, LLP

Heins, Mills & Olson, PLC

Jennings & Drakulich, LLP

Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC

Kershaw, Cutter & Ratinoff, LLP

Klafter & Olsen, LLP

Lieff, Cabraser, Heimann & Bernstein LLP

Lockridge Grindal Nauen PLLP

Locks Law Firm

Lopez, Hodes, Restaino, Milman & Skikos

Neblett, Beard & Arsenault, LLP

Preti Flaherty Beliveau & Pachios LLP

Price Waicukauski & Riley, LLC

Rheingold, Valet, Rheingold Shkolnik & McCartney LLP

Todd & Weld LLP

Weitz & Luxenberg PC

Wexler Toriseva Wallace, LLP

Zelle, Hofmann, Voelbel, Mason & Gette, LLP

Zimmerman Reed, PLLP

Pearson, Randall & Schumacher, PA

Goldenberg & Johnson, PLLC

Joe Crosby

The Schmidt Firm, LLP

Wallace & Graham, PA.

Sheller, Ludwig & Badey, PC

Levin Simes Kaiser and Gornick, LLP

Bourland Heflin Alvarez Minor & Matthews, PLC

Martin & Jones

The following firms submitted a 3 page summary late, but were nevertheless considered by the CBAFCC:

Whatley Drake & Kallas, LLC

Parker Waichman Alonso, LLP

Cohen & Malad, LLP

Seeger Weiss LLP

Milberg Weiss LLP

Martha Wivell

Charfoos & Christensen, P.C.

Levin Papantonio Thomas Mitchell Echsner & Proctor, PA

Schneider & Wallace

Grady Schneider & Newman, LLP

Douglas & London, P.C.

Hersh & Hersh

The following firms did not submit a 3 page summary:

Anapol Schwartz Weiss Cohan Feldman & Smalley PC

Barnow & Associates, P.C.

Becnel Law Firm, LLC

Hagen Berman Sobol, LLP

John F. Nevares

Kirtland & Packard, LLP

Lawrence E. Feldman

Lopez McHugh LLP

Mason Law Firm

Pritzker Ruohonen & Associates PA

Robinson, Calcagnie & Robinson Inc.

Schiffirin, Barroway, Topaz & Kessler, LLP

Ellis, Carstarphen, Dougherty & Goldenthal, PC

Russell Abney

Watts Law Firm

Hilliard & Munoz, LLP

Beasley Allen

After several weeks of discussion, review and deliberation, both collectively and individually, the CBAFCC then met on April 10 and 11, 2008, to review and discuss all submissions and make final recommendations for a Plan of Allocation. The Plan of Allocation was thoroughly discussed and debated, and ultimately finalized by the Committee, which voted unanimously to approve, and hereby respectfully submits, the proposed Plan of Allocation attached as Exhibit C.

#### **IV. Recommendations**

In its Order, the Court directed that the CBAFCC's plan of allocation "should be fair and equitable, and should be the result of careful scrutiny of all applications for common benefit fees and costs". (Docket # 2603). To that end, the CBAFCC engaged in a procedure that offered ample due process by offering, in its Court approved guidelines, two opportunities to be heard: 1) A written submission discussing why an applicant is eligible and deserving of a common benefit fee; and, 2) An optional oral presentation of an applicants bona fides as a basis for receiving a common benefit payment.

In the course of its work and evaluation of common benefit fee applications, the CBAFCC took into consideration the Court's order to apply the *Johnson* Factors and indeed, did so. The Committee also considered as a significant measure "how and to what extent did an applicant firm actually effect the overall result of the litigation or contribute to a seminal benchmark in the litigation."

Having been engaged in all of the above referenced process, the CBAFCC was particularly mindful of the Court's direction in its footnote 4 of its February 15, 2008 order where the Court stated in part, ". . . in several instances the number of hours claimed as common benefit by attorneys appears high. . . . [W]here the specific common benefit attorney fee awards will be calculated, the Court anticipates that after close scrutiny of the number of hours applied for, a substantial portion of the purported common benefit hours will be rejected as not being performed for common benefit purposes." The Court's perception is shared by the CBAFCC. We believe it is an informed perception because as in the prosecution of most MDL's, a small number of people and firms do the "lion's share" of the work and thereby, contribute most to the common benefit. In this regard, about ten law firms comprise that "lion's share". This is not to demean the hard work of other law firms who contributed to the prosecution of the case. Rather, it is a significant distinction of value and an earmark of the contribution toward the common benefit made by some law firms when compared to others. The CBAFCC assigned multipliers, positive or negative, to properly reflect this important reality, taking into consideration the Court's instruction.

#### **A. Rationale**

The Court's February 15, 2007 Order Regarding Determination of the Common Benefit Attorneys Fee Amount instructed the CBAFCC to recommend the specific allocation for attorney's fees and costs among all counsel entitled to share in the Common Benefit Attorney Fee Fund and to utilize the relevant *Johnson* factors in discharging its duties for

making its recommendations. (*Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)). In addition, the Court instructed the all applicants and the CBAFCC to employ the reasoning, findings and comments of the Court as contained in the Court's Memorandum for the Order of February 15, 2008.

The Committee believes unanimously that the plan of allocation is fair and equitable. The Plan is the result of careful scrutiny of all applications for common benefit fees and costs. We believe due process was provided to all; and, each applicant was given adequate time and opportunity to be heard. Important questions were addressed by CBAFCC members to all applicants and were answered.

The CBAFCC adjusted each and every loadstar application to reflect a maximum hourly rate of \$400.00 per hour for attorneys and \$150.00 per hour for paralegals. The first column of the Proposed Plan of Allocation (Exhibit C) is the applied for loadstar from each application while the second column of the Proposed Plan of Allocation shows the adjusted said loadstar and reflects this Court's findings of maximum allowable hourly rates.

## **B. Discussion**

### **1. Multiplier as a Qualitative and Quantitative Analysis**

In each instance, the Committee attempted to determine, and remove when possible, time

that was not authorized; not considered to be for the common benefit; unreasonable and/or, not appropriate under the circumstances. This was a difficult, if not impossible, task on a quantitative basis. However on a qualitative basis the task was possible. The multiplier applied in the fifth column of the Proposed Plan of Allocation (Exhibit C), is the CBAFCC's reasonable and unanimous "qualitative analysis" of each applicant's work, taking into consideration all of the above factors enunciated in the Court's various orders.

Additionally, as Chairman of the CBAFCC, Charles S. Zimmerman, met with Kahn, Hoffman & Hochman, LLP (Certified Public Accountants) and Seth Lesser, an LCC member who was the custodian of the Time and Cost submissions required throughout the litigation. Mr. Zimmerman made inquiries of both the CPA and Mr. Lesser regarding their review of the records and further asked that they point out to the committee any inappropriate time records as defined in PTO 6. (Exhibit B). For PSC members, this was done on a monthly basis pursuant to PTO 6 reporting. For others the task was done when the records were submitted. All records as provided and adjusted in the second column of the Proposed Plan of Allocation (Exhibit C) subject to individual law firm record keeping policies and individual lawyer record keeping practice which do vary, appeared to our CPA, Mr. Lesser and the CBAFCC to be within reason.

In any evaluation of professional services, and in the evaluation of common benefit work in complex litigation especially, the key is identifying the work that made a difference in the litigation: the critical question is "What work mattered?" These criteria, while simple

to define, are difficult to apply unless, as here, those evaluating the common benefit applicants' time and presentations have observed, from various vantage points, the work performed and the course of events throughout the litigation.

To this end, the Court selected a diverse CBAFCC, comprised of members from the MDL leadership (LCC and PSC), from leadership positions in Minnesota state court and elsewhere, and prominent counsel with recent experience in complex litigation prosecution and settlement. Collectively, the members brought to this fee allocation task: 1) a comprehensive knowledge of the particulars of every phase and facet of the Guidant litigation, and of those counsel responsible for its successes; 2) extensive experience in the prosecution, trial and settlement of complex state and federal litigation; and 3) previous service on court-appointed common benefit fee committees. Determining "what work mattered" was our ultimate task.

Determining what mattered, who did what, who did it right and who did not, became more apparent to the CBAFCC than we anticipated at the beginning. Quality of work not quantity was apparent to us; leadership was easy to determine; earnestness, follow through, thoroughness, completeness, commitment to the cause and case, and professionalism became benchmarks for evaluation. Answering the questions: "what" moved the litigation? . . . "what" broke open issues? . . . "what" caused the litigation to succeed? . . . who achieved measurable results? . . . who took actual significant risk? . . . were upper most in the minds of the CBAFCC members. Importantly, these criteria formulate a qualitative measure of "what mattered" in light of the CBAFCC Policies,

Procedures, Protocols and Guidelines supported by the jurisprudence of the *Johnson* factors. Ultimately these were the criteria used by the CBAFCC to evaluate each applicants submission and guided the Committee in setting a multiplier for each applicant.

The CBAFCC is confident we conducted each evaluation with careful scrutiny, as the Court directed, and, we are confident that we identified the attorneys who's work truly mattered and that as a committee, we were able to separate and evaluate that work for the true value it provided to the litigation within a limited common benefit fund.

## **2. Costs**

Costs were evaluated by accountants and the CBAFCC for compliance with the guidelines of PTO 6 and were reviewed with some degree of specificity. At the time of its submission to the Court, the total amount advanced by the PSC for MDL common benefit expenses was approximately \$3,500,000.00 (which sum did not include the common benefit expenses incurred in the Minnesota state court proceedings approximating \$200,000.00). Since that time, the total amount advanced, as of the date of this filing, has increased to approximately \$4,132,000.00. This amount does include the approximately \$200,000 submitted by the Minnesota state court counsel. As a Committee, we approved only those costs we were confident were appropriate and removed or did not allow others. The fourth column of the Proposed Plan of Allocation (Exhibit C) is the CBAFCC unanimously approved Costs. The CBAFCC believes that

before reimbursement to each common benefit firm their allocated costs, a final review of those costs should take place.

#### **V. Post Award Procedure and Appeals**

The CBAFCC takes the position that any decision of this Court regarding the CBAFCC recommendations of common benefit fees and cost awards is non-appealable under the terms of the MSA. Any Counsel who filed an “attorney declaration” declaring that his or her client is filing a claim, pursuant to the procedure outlined in the MSA, submits him or herself to the jurisdiction of this Court and has thereby assented to all the terms of the MSA, including accepting the “non-appealability” term of the MSA. (See Section VI(G) of the MSA).

The CBAFCC respectfully suggests to the Court that any attorney who attempts to file an appeal should be required by order of this Court, to post a bond on behalf of all other attorneys who have been awarded fees.

#### **VI. Settlement Administration and Time and Expense Going Forward**

The CBAFCC is concerned that PSC members and others are properly motivated and remain committed throughout the duration of the settlement process. To ensure this is the case, the CBAFCC feels that all authorized persons are compensated in the settlement finalization process and during the settlement administration. Accordingly, the CBAFCC

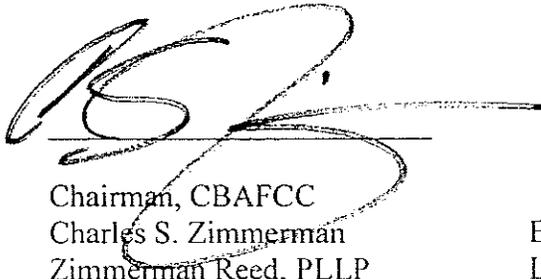
believes and requests that this Court should allow for the submission of future fee applications as approved and recommended by the CBAFCC for the following tasks and assignments:

1. A reasonable amount for fees and costs of the PSC to finalize the settlement, recognizing that issues continue to occur, particularly in the face of a sometimes recalcitrant defendant who seems to raise “belts and suspenders” issues to the point of being superfluous. Elizabeth Peterson, attorney at Zimmerman Reed, has been working full time with the guidance of the LCC and others in this process. The CBAFCC feels this time must be reviewed and compensated from the Settlement Administration hold back; and
2. The Settlement Administration time and costs, including the work of the settlement allocation committee going forward, must be, upon approval of the CBAFCC, paid going forward. It is anticipated that a fair amount of time and professional expense including that of the LCC will be required to meet the ongoing settlement requirements and settlement administration; and
3. The CBAFCC work was extensive, lasting over two months, with costs incurred. The CBAFCC respectfully requests that the time and expense incurred be paid from the settlement administration holdback as submitted and approved by the Court.

**Conclusion**

Based upon the foregoing, the CBAFCC recommends that the Court accept and approve this report in its entirety.

Respectfully submitted,



Chairman, CBAFCC  
Charles S. Zimmerman  
Zimmerman Reed, PLLP

Elizabeth Cabraser  
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