

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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IN RE MEDTRONIC, INC.  
IMPLANTABLE DEFIBRILLATORS  
PRODUCTS LIABILITY LITIGATION

MDL NO. 05-1726 (JMR/AJB)

This documents relates to:  
All Cases

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**ORDER REGARDING MOTION FOR PRELIMINARY APPROVAL  
OF COMMON BENEFIT ATTORNEYS' FEES**

Upon consideration of Plaintiffs' Motion for Preliminary Approval and Notice of the Common Benefit Attorneys' Fees, and based on the files, records and pleadings herein, IT IS HEREBY ORDERED that:

1. The PSC's request for preliminary approval of the common benefit attorneys' fees in the amount of \$18,250,000 has been received.
2. An approval hearing is set for **August 20, 2008 at 9:00 a.m.**
3. The Court is considering:
  - a. whether an assessment of private contingency fee contracts is appropriate in this case to serve as the source of funding the common benefits attorneys' fees;
  - b. whether such an assessment would be appropriate to service common benefit litigation and settlement administrative costs;
  - c. whether common benefit settlement administrative costs should be charged to the settlement fund rather than to the common benefit attorneys' fees fund;

- d. whether to establish a maximum hourly rate in connection with calculating the instant lodestar; and
  - e. whether to modify private contingency fee contracts between the individual plaintiffs' counsel and their clients.
4. The following schedule is set for the responses:
- a. Any counsel shall have until **July 17, 2008** to respond to the motion for preliminary approval of common benefit attorneys' fees. These responses shall be filed with the Court and shall be served on Co-Lead Counsel by email to [kgluek@gustafsongluek.com](mailto:kgluek@gustafsongluek.com).
  - b. Co-Lead Counsel shall have until **July 24, 2008** to reply to any response on the motion for preliminary approval of common benefit attorneys' fees, the assessment of common benefit fees and costs, whether common benefit settlement administrative costs should be charged to the settlement fund or whether the Court should limit private contracts or hourly rates. This reply shall be filed with the Court and served via ECF.

5. The Common Benefit Attorneys' Fee Committee (the "Committee") was appointed pursuant to the Court's May 13, 2008 Order. The Committee submitted a proposed protocol for evaluating and recommending an attorneys' fee allocation. The Court has reviewed the protocol and hereby adopts that protocol, as amended (attached hereto as Exhibit A) and sets the following schedule:

- a. The Committee shall meet and audit all time submissions and shall make recommended cuts by **June 13, 2008** using the guidelines set forth in the March 6, 2007 Memo from Co-Lead Counsel relating to Time and Expense Reports and the Protocol (attached hereto as Exhibit B). These recommendations will be sent to the individual counsel by email on **June 13, 2008**.

- b. Any counsel shall have until **June 20, 2008** to send the Committee a statement explaining their respective role in the litigation and why the time they submitted should be allowed. These submissions shall be made in writing and shall not exceed five (5) pages. They shall be sent to [kgluek@gustafsongluek.com](mailto:kgluek@gustafsongluek.com) by no later than **June 20, 2008**.
- c. Any counsel may also appear by telephone or in person before the Committee to further explain their respective role in the litigation and any relevant factors associated with the fee allocation process. These presentations will take place in Minneapolis, Minnesota no later than **July 11, 2008** as further directed by the Committee.
- d. The Committee shall make its final fee allocation recommendations. These recommendations must be filed with the Court and serve upon the individual counsel by email no later than **July 18, 2008**.
- e. Individual counsel may respond to the final recommendations of the Committee. These responses must be in writing and filed with the Court and served on Co-Lead Counsel by email to [kgluek@gustafsongluek.com](mailto:kgluek@gustafsongluek.com) by **July 25, 2008**. The responses shall not exceed five (5) pages.
- f. The Committee shall file a reply to any Individual Responses by **August 1, 2008**. The replies shall be filed with the Court and shall not exceed five (5) pages.

6. The Court shall hold an approval hearing on the Common Benefit

Attorneys' Fees **August 20, 2008 at 9:00 a.m.**

Dated: June 10, 2008

BY THE COURT:

\_\_\_s/ Arthur J. Boylan \_\_\_\_\_  
Arthur J. Boylan  
United States Magistrate Judge  
District of Minnesota

**UNITED STATES DISTRICT COURT**  
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**PROPOSED ATTORNEY FEE ALLOCATION PROCESS**

On May 13, 2008, the Court appointed the Common Benefit Attorneys' Fees Committee (the "Committee") to review and recommend how common benefit attorneys' fees should be allocated among the various firms making claims for common benefit attorneys' fees. The committee now proposes the following protocol to guide that process.

The Manual for Complex Litigation ("Manual") correctly observes that the calculation of fee awards is complex, burdensome, bitterly contested and often a precursor to satellite litigation. *See* Manual at § 14.11. Establishing guidelines and ground rules early in the litigation, according to the Manual, helps ease the Court's burden and prevent later disputes. *Id.*; *see also* Court's Order dated March 5, 2007 [Document No. 398].

The Committee believes that establishing an appropriate methodology is critical to the attorney fee allocation process. Before a court exercises its judicial oversight obligation in determining an allocation of attorneys' fees, there should be a fair process in place which recognizes the delicate balance between providing due process, objectivity and transparency while, at the same time, ensuring that the allocation is resolved consistent with the mandate of the Federal Rules of Civil Procedure – *i.e.*, resolved not only fairly, but without undue cost or

delay.<sup>1</sup> Obviously, this process should not become so complex that it consumes more judicial resources than was required for the underlying litigation.

### **THE PROPOSED PROCESS**

1. During the course of the litigation, firms submitted time and expense records in accord with the Court's Order and the Memorandum from Co-lead Counsel. *See* Memorandum from Charles S. Zimmerman and Dan Gustafson, dated March 6, 2007, attached as Exhibit 1.
2. All common benefit fee applicants have been provided with an opportunity to examine and, if necessary, amend their common benefit submission to make certain it complies with the Court's March 5, 2007 Order and applicable common benefit standards.
3. Although attorney fee requests will be viewed through the *Johnson*<sup>2</sup> prism, the analysis first requires identifying "compensable" time through an illustrative list of germane questions such as those that follow:
  - Was the activity authorized?
  - Was the time properly described?
  - Was it necessary?
  - Was it reasonable?
  - Was it excessive?
  - Was it duplicative?

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<sup>1</sup> The Federal Rules of Civil Procedure "shall be construed and administered to ensure the just, speedy and inexpensive determination of every action." Fed.R.Civ.P(1).

<sup>2</sup> *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). The *Johnson* factors for determining the amount of an attorney fees award are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the political undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

- Did the activity actually advance the common benefit effort?

Essentially, the only common benefit time that is compensable is time which (1) is properly and timely documented; (2) authorized; and (3) actually advanced the common benefit effort. In recognition of these and the *Johnson* principles, the Committee shall undertake a detailed analysis and examination of all individual common benefit submissions and identify specific time entries and/or submissions which fail to satisfy the criteria set forth above. Consistent with these factors, the Committee has identified several objective categories of common benefit time submissions in which the Committee believes there likely is a high percentage of non-common-benefit time:

- a. Pre-MDL time;
- b. Read and review time;
- c. Administrative time (compiling time sheets, cost bills, etc.);
- d. Efforts on behalf of individual clients (assembling medical records, preparing fact sheets, etc.);
- e. Non-specific and/or undocumented time entries;
- f. Clerical time;
- g. Duplicative entries and/or work; and
- h. Attendance at hearings or meetings by non-essential persons.

The Committee shall consider these categories of time and identify the specific entries which fall into these objective categories. All time entries which fall within these categories may be subject to preliminary cuts. Common benefit fee applicants will be provided with notice of the proposed cuts and a reasonable opportunity to respond and explain why, under their particular circumstances, any cuts are inappropriate.

4. Following the examination and recommendation of the objective categories of time subject to preliminary cuts, the Committee shall then determine the appropriate hourly rates for the various categories of attorneys and staff that have submitted compensable common benefit time.
5. Once the Committee determines the amount of “compensable” time, and the appropriate hourly rates, the Committee shall consider the *Johnson* factors as to each applicant and apply an appropriate positive or negative multiplier. In addition to the *Johnson* factors, the Committee may consider the following non-exclusive list of factors in determining the appropriate multiplier range, if any:
  - In what aspects of the litigation was the applicant involved?
  - Did the applicant’s work directly and meaningfully contribute to the common benefit effort and ultimate resolution of the case?
  - Did the applicant’s effort yield positive results?
  - What was the nature of the contribution of time, energy and talent? (unconditional, modes, sporadic, etc.)

- What was the applicant's key contribution to the litigation?
- Did the applicant directly participate in substantive meetings and conferences?
- Did the applicant develop and/or otherwise contribute to litigation and settlement strategies?
- Did the applicant assist in coordinating the litigation?

Essentially, in determining the multiplier, the Committee will consider the nature and extent of the role and responsibility each counsel had for the overall conduct of the litigation through its various phases.

6. The process set forth herein recognizes that that there are a finite amount of fees to be distributed.
7. All common benefit applicants were previously instructed to submit a three-page memorandum summarizing the common benefit work for which they seek payment. Presumably, applicants addressed each *Johnson* factor with particularity and identified with specificity the services performed that advanced the common benefit. The submission should have included a discussion of the following:

- a. Details of counsel's experience and qualifications pertinent to this specific litigation;

- b. A description of any direct and meaningful participation in the litigation, including but not necessarily limited to:

- PSC meetings and teleconferences;
- status conferences, hearings and litigation related meetings;
- discovery efforts including but not limited to depositions, document review, written discovery;
- retaining and working with experts;
- preparing pleadings, motion practice, brief writing and legal research;
- committee leadership positions;
- committee infrastructure and organizational issues;
- developing the discovery, litigation, and settlement strategy and coordinating those efforts;
- developing claims that needed to be asserted and associated damages;
- negotiating, evaluating, structuring, consummating, and memorializing the settlement from the initial Memorandum of Understanding to the final judicial approval;
- hearing presentations;
- focus groups; and
- trial preparation.

8. Applicants shall be notified of the Committee's preliminary recommendation regarding objective evaluations and hourly rates. Common benefit applicants will have an opportunity to respond to the Committee's recommendation via a brief written submission and/or oral presentation to the Committee. To the extent not previously addressed in their prior submission, Applicants should address the factors set forth above in their response to the Committee's preliminary recommendation regarding the Applicant's time and expenses.
9. Following the examination of all common benefit time and expense submissions, and the written submissions and responses of applicants, including any oral presentations made by such applicants, the Committee shall evaluate the totality of information and submissions provided by each applicant and submit the final recommendations to the Court.