

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division



In re:
ZETIA (EZETIMIBE) ANTITRUST
LITIGATION

MDL NO. 2:18md2836

THIS DOCUMENT RELATES TO:

ALL CASES.

PRETRIAL ORDER NO. 3

This Order considers and resolves the parties' various motions for appointment of lead counsel and interim class counsel: Merck Defendants (ECF No. 42), Glenmark Defendants (ECF No. 40), Par Pharmaceuticals (ECF No. 61), Retailer Plaintiffs (ECF No. 22), Direct Purchaser Plaintiffs ("DPPs") (ECF No. 16), and End-Payor Plaintiffs ("EPPs") (ECF Nos. 41, 50, 51, 52, 58).

Appointment of lead counsel is one of the most effective tools for streamlining the litigation of pre-trial matters in cases transferred by the Judicial Panel on Multidistrict Litigation. See Manual for Complex Litigation § 10.22 (2004) (hereinafter referred to as "Manual"). A court must therefore appoint lead counsel with great care, bearing in mind the factors listed in § 10.224 of the Manual, and, when appointing interim class counsel for a proposed class, the standard for

class counsel prescribed by Federal Rule of Civil Procedure 23(g). See, e.g., Hodges v. Bon Secours Health Sys., Inc., No. CV RDB-16-1079, 2016 WL 4447047, at *1 (D. Md. Aug. 24, 2016) (applying Rule 23(g) factors to appoint interim class counsel).

I.

With these standards in mind, the court has considered the parties' agreed nominations and conferred with representatives of each designated firm at the initial scheduling conference on August 9, 2018. The court finds the attorneys they have proposed as lead and local counsel have the necessary expertise, resources, and experience to represent their respective party group. Accordingly, the court makes the following appointments of counsel for the noted parties or groups of parties as set forth below.

A.

For the Merck Defendants, the court **APPOINTS** as lead counsel, Samuel G. Liversidge and the law firm Gibson, Dunn, and Crutcher LLP, 333 South Grand Avenue, Los Angeles, California 90071, and as local counsel Stephen E. Noona and the law firm Kaufman and Canoles, PC, 150 West Main Street, Suite 2100, Norfolk, Virginia 23510. See Merck Defs.' Mem. (ECF No. 42). Other firms representing the Merck Defendants are coordinating representation through Liversidge and his firm, namely Tarek

Ismail and Jennifer Greenblatt and the law firm of Goldman Ismail Tomaselli Brennan and Baum LLP, 564 West Randolph Street, Suite 400, Chicago, Illinois 60661.

B.

For the Glenmark Defendants, the court **APPOINTS** as lead counsel, Steven A. Reed and the law firm Morgan Lewis and Bockius LLP, 1701 Market Street, Philadelphia, Pennsylvania 19103, and as local counsel James Kevin Fee and the law firm Morgan Lewis and Bockius LLP, 1111 Pennsylvania Avenue, Northwest, Washington, D.C. 20005. See Glenmark Defs.' Mem. (ECF No. 40).

The court notes that Defendant Par Pharmaceuticals has retained its own counsel in the case and so will not be represented in either defendant group. Par Response (ECF No. 61). Par's Lead Counsel is Eric Grannon and the law firm White and Case LLP, 701 Thirteenth Street, Northwest, Washington, D.C. 20005. Its local counsel is Kathryn J. Mims of the same firm.

C.

For the Retailer Plaintiffs, the court **APPOINTS** as lead counsel, Scott E. Perwin and the law firm Kenny Nachwalter PA, 1441 Brickell Avenue Suite 1100, Miami, Florida 33131, and as local counsel Craig C. Reilly and the law firm Law Office of

Craig C. Reilly, 111 Oronoco Street, Alexandria, Virginia 22314.
See Walgreens Pls.' Mem. (ECF No. 22).

Another retailer, Rite Aid Corp., along with Rite Aid Headquarters Corp., has also filed a Complaint related to the antitrust allegations in this MDL case. Compl., Rite Aid Corp. v. Merck and Co., Inc., No. 2:18cv423 (E.D. Va. Aug. 6, 2018) (ECF No. 1). At the hearing conducted on August 9, 2018, counsel for Rite Aid expressed its willingness to work closely with lead counsel for the other Retailer Plaintiffs, but stated its intent to proceed with its own counsel, rather than fall under the umbrella of the other Retailer Plaintiffs' lead counsel. Due to the small number of Retailer Plaintiffs currently in the case, the court accepts this arrangement and permits Eric L. Bloom and the law firm Hangle, Aronchick, Segal, Pudlin, and Schiller, to represent the two Rite Aid plaintiffs with Craig C. Reilly as local counsel.¹

D.

For the Direct Purchaser Plaintiffs, the court **APPOINTS** as lead counsel and interim class counsel, Thomas M. Sobol and Kristen A. Johnson, and the law firm Hagens Berman Sobol Shapiro

¹ Another retailer, CVS Pharmacy, Inc., filed a Complaint yesterday, likewise related to the antitrust allegations alleged in this MDL case, with Craig C. Reilly as local counsel. Compl., CVS Pharmacy, Inc. v. Merck and Co., Inc., No. 2:18cv439 (E.D. Va. Aug. 13, 2018) (ECF No. 1.). At the hearing conducted on August 9, 2018, Eric L. Bloom indicated that he also represents CVS Pharmacy, Inc.

LLP, 55 Cambridge Parkway, Suite 301, Cambridge, Massachusetts 02142, and as local counsel William H. Monroe, Jr., and the law firm Glasser and Glasser PLC, 580 East Main Street, Suite 600, Norfolk, Virginia 23510. See DPPs' Mem. (ECF No. 48). The DPPs have also agreed to the appointment of an executive committee whose role will be limited in scope to "from time to time, provid[ing] advice and input to lead counsel" regarding a number of different topics likely to come up in the course of the litigation. Id. at 7. Because of the limited role of the executive committee, the court accepts the DPPs' agreement to it and **APPOINTS** the attorneys and firms to the committee and **PRESCRIBES** for that committee the rules suggested, with a minor change to Rule 6, in the DPPs' proposed order (ECF No. 16-1). See Exhibit 1, attached hereto and made a part hereof.

II.

The only dispute in the proceedings related to the appointment of counsel has been among the EPPs, related to the appointment of lead counsel, who will also serve as interim class counsel. Four factors prescribed in Federal Rule of Civil Procedure 23 must inform a court's selection of interim class counsel:

- (i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1). Additionally, a court "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). Given the multiplicity of parties in this case, the Manual's admonition in § 10.224 to consider the ability of an attorney or law firm to work effectively with other attorneys in the case is also particularly relevant here.

Although all proposed appointees were qualified, one proposed arrangement will best balance the needs of the EPPs for efficient and effective representation. Having reviewed all four proposed lead counsel arrangements against the standards described above, the court **APPOINTS** Michael M. Buchman and the law firm Motley Rice LLC, 600 Third Avenue, Suite 2101, New York, New York 10016, and Marvin A. Miller and the law firm Miller Law LLC, 115 South LaSalle Street, Suite 2910, Chicago, Illinois 60603, as co-lead counsel and interim co-class counsel for the EPPs, with Alan B. Rashkind and James A. Cales III of Furniss, Davis, Rashkind, and Saunders PC, 6160 Kempsville Circle, Suite 341B, Norfolk, Virginia 23502, to serve as local

counsel. Several elements of the Motley Rice/Miller Law proposal made it the most persuasive to the court. See Buchman-Miller Mem. (ECF No. 50).

One attractive element of the proposal was the efficiencies the proposed organizational structure will yield. The streamlined co-lead counsel arrangement Buchman and Miller propose will produce significant efficiencies over a larger, committee-based structure. In addition, any advantages of the extra resources available through a committee are already present and available to the Plaintiffs in the DPPs' agreed leadership structure. All applicants for EPP counsel acknowledged the lead role the DPPs took in preparing the claims against the Defendants, which included the commitment of significant resources to investigating and researching the claims prior to filing their first Complaints.

Turning to the Rule 23(g) factors, Buchman and Miller and their firms meet each criteria for appointment as interim class counsel. First, they have conducted their own investigation of the factual basis of the antitrust claims asserted against the Defendants. See Buchman-Miller Mem. at 6-7 (ECF No. 50). This investigation appears similar to the work all four proposed appointees have conducted for their respective clients in these early stages of the litigation. All of the EPP Complaints followed the Complaints initially filed by the DPPs.

Regarding the second and third factors, Buchman and Miller each have years of experience litigating similar cases across the country and extensive knowledge of the applicable law from that experience. Buchman and his firm have a decades-long history of involvement in complex litigation, including generic drug antitrust cases as well as asbestos and tobacco litigation. Id. at 7. Buchman recently tried a patent antitrust MDL case to a jury as co-lead counsel for a class of EPPs in the In re Solodyn (Minocycline Hydrochloride) Antitrust Litigation, No. 1:14-md-02503 (D. Mass. 2018). Id. at 8-9. Miller has decades of experience in a diverse range of complex litigation, including service as lead counsel and class counsel. Id. at 12-13. In pharmaceutical antitrust MDL cases, he has been appointed co-lead counsel on several occasions. See, e.g., In re Loestrin 24 Fe Antitrust Litig., No. 13md2472 (D.R.I.); In re Niaspan Antitrust Litig., No. 13md2460 (E.D. Pa.).

The Buchman-Miller proposal also satisfies the fourth factor under Rule 23(g): the extent of resources the proposed interim class counsel will be able to commit to the litigation. Buchman and Miller proffer that neither of their firms relies on outside funding to support their cases. Buchman-Miller Mem. at 17-18. (ECF No. 50). They also have, between them, more than sufficient manpower to handle the workload that this case will

generate, especially in combination with the resources brought to bear by the DPP and Retailer Parties. Id. at 6-9.

Additionally, Buchman and Miller also chose well in their selection of local counsel, as did the other proposed EPP lead counsel. Local counsel serve a critical function for any party seeking to have their primary counsel admitted pro hac vice. This function is demonstrated pointedly by this court's local rule requiring the presence of local counsel, deemed accountable by the court, during all proceedings. E.D. Va. L. Civ. R. 83.1(D)(1)(b); 83.1(D)(3); 83.1(F). Alan Rashkind and James Arthur Cales III of the law firm Furniss, Davis, Rashkind, and Saunders are capable litigators with a long history in the Norfolk Division of this court. They have demonstrated longstanding collegial relationships with the other attorneys the court has appointed as local counsel.

Finally, at the hearing conducted on August 9, 2018, Buchman and Miller demonstrated their ability to work with the other attorneys who have appeared in this multi-district litigation. Although this is not a factor explicitly referenced in Rule 23(g), the court does find that these two lawyers' experience working with counsel representing other parties on either side of this case will be a significant advantage to the group of EPPs present in the case now, as well as the members of the proposed class. See Fed. R. Civ. P. 23(g)(1)(B) (permitting

a court to "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class").

III.

In conclusion, and for the above stated reasons, the court has **APPOINTED** the above named counsel as co-lead counsel, interim class counsel, or local counsel for the parties described. It has therefore **GRANTED** the following motions: Merck Defendants (ECF No. 42); Glenmark Defendants (ECF No. 40); Walgreens Plaintiffs (ECF No. 22); DPPs (ECF No. 16); the City of Providence, Rhode Island and Painters District Council No. 30 Health & Welfare Funds (ECF Nos. 50); the Uniformed Firefighters Association of Greater New York Security Benefit Fund and the Retired Firefighters Security Benefit Fund of the Uniformed Firefighters Association (ECF No. 51). It **DENIES** the following motions: "Majority EPPs" (ECF No. 58); Self Insured Schools of California (ECF No. 52); UFCW Local 1500 Welfare Fund (ECF No. 41).

The Clerk is **DIRECTED** to forward copies of this Pretrial Order No. 3 to all counsel of record in all member cases of this action.

EXHIBIT 1

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

**In re:
ZETIA (EZETIMIBE) ANTITRUST
LITIGATION**

MDL NO. 2:18md2836

THIS DOCUMENT RELATES TO:

ALL DPP CASES.

DPP EXECUTIVE COMMITTEE MEMBERSHIP AND RULES

As agreed by the named DPP parties, the court appoints the following as the plaintiffs' executive committee for the proposed direct purchaser class:

Steve Shadowen
HILLIARD & SHADOWEN LLP
2407 S. Congress Avenue, Suite E122
Austin, TX 78704
(855) 344-3298

Joseph H. Meltzer
KESSLER TOPAZ MELTZER & CHECK LLP
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706

Joseph M. Vanek
VANEK, VICKERS & MASINI P.C.
55 W. Monroe, Suite 3500
Chicago, IL 60603
(312) 224-1502

David F. Sorensen
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-5705

Peter Kohn
FARUQI & FARUQI, LLP
101 Greenwood Ave. # 600
Jenkintown, PA 19046
(215) 277-5770

Linda P. Nussbaum
NUSSBAUM LAW GROUP, P.C.
1211 Avenue of the Americas, 40th Fl.
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(646) 245-8502

Barry S. Taus
TAUS, CEBULASH & LANDAU, LLP
80 Maiden Lane, Suite 1204
New York, NY 10038
(212) 931-0704

William H. Monroe, Jr.
GLASSER & GLASSER PLC
580 E. Main Street, Suite 600
Norfolk, VA 23510
(757) 625-6787

The court also prescribes the following rules, agreed to by the DPPs, for the administration and operation of the Executive Committee:

1. The plaintiffs' executive committee shall, from time to time, provide advice and input to lead counsel regarding: (a) initiation, response, scheduling, briefing, and argument of all motions; (b) the scope, order, and conduct of all discovery proceedings; (c) work assignments to other counsel as they may deem appropriate; (d) the retention of experts; (e) designation of which attorneys may appear at hearings and conferences with the Court; (f) the timing and substance of any settlement negotiations with the defendant (or potential defendants); (g) all financial expenditures; and (h) other matters concerning the prosecution or resolution of their respective cases.

2. Only the plaintiffs' executive committee, local counsel, and lead class counsel may initiate or file any motions in the consolidated direct purchaser class actions.

3. Only the plaintiffs' executive committee, local counsel, and lead class counsel have the authority to communicate with the defendant's counsel on behalf of plaintiffs in the direct purchaser class actions. Defendant's counsel may rely on all agreements made by local and lead counsel or the entire plaintiffs' executive committee. All such agreements shall be binding on all counsel in the direct purchaser class actions.

4. The plaintiffs' executive committee shall reasonably coordinate activities in the direct purchaser class action to the extent appropriate and practicable. That coordination shall include avoiding duplication and inefficiency in the filing, serving, and/or implementation of pleadings, other court papers, discovery papers, and discovery.

5. The plaintiffs' executive committee shall coordinate when scheduling depositions so as to avoid, to the extent practicable, subjecting the same witness to more than one deposition.

6. All plaintiffs' counsel in the direct purchaser class actions must keep contemporaneous time records and submit monthly records of itemized time and expenses to the plaintiffs' executive committee via the Hagens Berman Sobol Shapiro Time and Expense Collection Portal, with time for the previous month due on the 15th of each month. If the 15th day of the month falls on a Saturday, Sunday, or holiday, then the time for the submission is the next business day.