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May 21, 2019

Special Master Francis McGovern - McGovern@law.duke.edu
210 Science Drive
Box 90362
Durham, NC 27708-0362

Re: Lack of Participation regarding NAS Babies in MDL 2804

Dear Special Master McGovern:

As you know, we represent NAS babies in the MDL and elsewhere.

On December 6, 2018, the JPML Panel denied our request for a separate Baby MDL and transferred our cases to the MDL. In doing so, the JPML Panel recognized that recognized that (1) we (undersigned counsel) were the only parties representing babies in the MDL (2) the babies' cases were different from the bulk of the MDL plaintiffs and that the transferee Judge was in the best position to appreciate all of the nuances presented by the exceptionally complex litigation:

> The identity of plaintiffs [the babies] and their unique damages – which plaintiffs and amici assert include the need for a medical monitoring trust that funds prolonged, multidisciplinary care – do indeed differentiate these cases from those brought by the cities, counties and states that comprise the bulk of MDL No. 2804. MDL No. 2872 Rec Doc 51 p. 2

> … the transferee judge, who is in the best position to appreciate all of the nuances
> presented by this exceptionally complex litigation. We are confident in his ability to ensure that non-leadership counsel and other litigants are treated appropriately in this litigation. MDL No. 2872 Rec Doc 51 p. 4.

Almost immediately after that ruling, Judge Polster denied our renewed motion for leave to file a separate baby track, noting the JPML's decision on this important responsibility of adequately addressing the babies' special needs within the MDL:

> In denying centralization, the Joint Panel on Multidistrict litigation stated that they "are confident in [this Court's] ability to ensure that non-leadership counsel and other litigants are treated appropriately in this litigation."

> Therefore, in lieu of granting Plaintiffs' Motion, the Court directs NAS Baby Plaintiffs' Counsel to meet with the PEC and Special Master McGovern to address how Plaintiffs' needs might be more adequately addressed. Rec. Doc. 1185 (internal citations omitted).

Since that ruling, we have undertaken on multiple occasions, commencing at our December 19, 2018 face-to-face in Houston, Texas, to comply with Judge Polster's order. Following that Houston meeting we continued to engage, and we have many (many) emails, telephone conferences, and other communications with both you and Mr. Rice (but primarily Mr. Rice) confirming these efforts. Our files are replete with letters, emails, meeting memoranda and the like confirming these many interactions, but we decided not to burden you with all this paper. We write, because despite all this outreach, we have been unable to secure a role that includes insuring that the babies' interests are included in the PEC's work as relates to discovery and damage modeling.

This is critical because the December Order by Judge Polster remains unsatisfied and our clients, who require immediate care (before age three to be meaningful) are being denied due process of law. Our clients unlike the other plaintiffs in the MDL are children. The Supreme Court has long recognized that "[c}hildren have a very special place in life which the law should reflect." *May v. Anderson*, 345 U. S. 528, 536 (1953). Courts are required to provide special protections to children. *Green v. Nevers,* 111 F. 3d 1295, 1301 (6th Cir. 1997). The Fourteenth Amendment and the Bill of Rights is not for adults alone. *Prince v. Mass.*, 321 U.S. 158, 170 (1944).

While we understand that the PEC takes the position that the babies' interests are covered by governmental entities and even hospitals, this is a position that we do not share and believe should be litigated. And since we are charged with the responsibility of representing our clients' interests, we continue to seek resolution.

The bottom line is that everything proposed to us turns out to be something different. And agreements that we seek to reach are denied by the PEC with no basis for the denial provided.

Following the Houston meeting, Mr. Rice advised:

> Scott, first, thank you for spending the time with me in Houston. I hope the meeting was beneficial. Second, I apologize for not having more time and also for not being able to discuss in more depth your issue. I have talked further with Francis McGovern in trying to figure out how to mesh this in without causing problems in other areas. As I told you, the Attorneys General feel strongly about NAS, as does the PEC constituency. However, I understand that you have a large number of attorneys throughout the country that are prepared to litigate the NAS issue and feel like it deserves special attention. We all feel for the babies.
>
> As I indicated, getting the money into the hands of an abatement program does not present any unique issues at NAS as far as I see it.

Where the issue comes in is how the money gets used. In that context, I think it would be helpful if we do two things.

1. Create a consulting group to the PSC that focuses on NAS. I believe the issues are uniquely presented by the Hospitals and by the Long-Term Care issues. Therefore, it would be my intent to create a five-person consulting group (two from your group and two from the hospital group, and one other) to focus on NAS issues.

2. In the meantime, I know your group has put a lot of thought into questions they would like to ask the Manufacturers – particularly in the marketing side – about NAS. As you know, these depositions are taking place rapidly now. If your group could put together a series of questions or areas as quickly as possible, I will get it out to the deposition teams so everyone understands the importance of asking those questions.

Please let me know if this would be an acceptable process for you as we move forward. If so, I need to get an agreement with my co-leads.

The purpose of the committee, as we understood it, was to assist in baby-related discovery in the CT2 litigation and the baby life-care planning needs as relates to settlement for the baby claims. The committee was to consist of hospitals and the baby attorneys (us). But when it met, it included an attorney for governmental entities.

In February, the committee met, and we were told by the attorney representing the governmental entities, that the life-care planning needs were not necessary, and that work was being done by others. We have never received such instructions from the PEC confirming its change of scope for the committee. Our efforts to confirm the scope of the committee were rebuffed. We were asked to provide search terms for baby related discovery. We provided the search terms are were told that our contribution was very helpful. To date, we do not know the results of the search terms.

We asked for prior discovery to assist in the work assignment by providing discovery requests not previously covered. To gain access to discovery, we were asked to execute a participation agreement that, in essence, asked us to give an interest in every opioid case we ourselves have an interest in (irrespective of the nature of the claim, whether we were merely associated counsel and thus could not ethically agree to bind the client in this way, or where the cases were pending).

We recognize that all litigants who benefit from the PEC work must pay for it and we are willing to do so. We simply cannot assign interests in other litigation under the circumstances presented. We are part of a Joint Prosecution Agreement and have interests in other cases but do not have leadership or necessarily a direct contractual relationship with these plaintiffs and cannot assign interests we do not own or control. The Participation Agreement presented to us is extremely

overbroad and vague, we do not want to sign a document that requires us to make commitments we cannot keep.

We proposed an addendum limiting our interest sharing to our own baby cases. This was rejected. As a sign of good faith, we sent our baby related search terms (our own work product) on to the committee. We also offered to erect a Chinese Wall to protect the discovery and strictly limit its use to our baby cases but that too was rejected without a reason.

Judge Polster ordered that plaintiffs had to amend to name new defendants; ARCOS data is used by the plaintiffs for this information. We have still been denied access to ARCOS data despite it being released to Hospital plaintiffs and were thus handicapped in amending our complaints and drafting new ones.

We are still being kept in the dark concerning the scope of discovery underway which may (or may not) concern NAS baby issues. We are extremely concerned that NAS babies could be asked to meet evidentiary burdens in a master settlement not required for plaintiffs such as hospitals whose interests are represented by the PEC. In the meantime, due to the total vacuum of information from the PEC, we have been spent hundreds of thousands of dollars on the expert work up the NAS baby cases.

Our plan for the babies has always been a Special Needs Trust with an epidemiology aspect. We do not believe the governmental entities and hospitals can represent the babies' in this aspect of settlement. In fact, in the *Whitley* matter, in the MDL, Tennessee is a defendant and thus represents a true conflict of interest. We anticipate that many more suits will be filed for more babies and many will include states and governmental entities who failed to comply with their statutory duties. We also believe that state approval via legislative actions is not necessary for the babies. Courts are authorized to approve minor's settlements. To require the babies, wait while 50 legislatures act seems unnecessary and violative of the babies' due process rights.

Scott and I met with Joe Rice on March 29, 2018 at his office in South Carolina in order to streamline our April 10, 2019 meeting. Unfortunately, that meeting was not on your calendar, so it did not go forward and at your request I have sent a calendar invite for tomorrow morning as you and Mr. Rice will both be in Cleveland. The purpose of our call is to select a date for an expedited face-to-face meeting with you and those with authority within the PEC.

Yours truly,

Celeste Brustowicz

CB/lr
cc: Joe Rice (jrice@motleyrice.com)