IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: LIPITOR (ATORVASTATIN CALCIUM) MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	MDL No. 2:14-mn-02502-RMG
Juanita Hempstead v. Pfizer, Inc.	Case No.: 2:14-cv-1879-RMG

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
DEFENDANT PFIZER INC.'S BILLS OF COSTS

The Court has granted summary judgment in all cases pending in the MDL and plaintiffs' appeal to the United States Court of Appeals for the Fourth Circuit was denied, so Pfizer has now filed bills of costs relating to all of the cases in the MDL. Specifically, Pfizer has filed a total of three separate bills of costs: an individual bill of costs in the *Hempstead* case, an omnibus bill of costs covering the 2578 cases addressed by CMOs 99 and 100, and a bill of costs relating to the 157 cases covered by CMO 109. The Plaintiffs' Steering Committee files this Memorandum in Opposition to Pfizer's bills of costs and requests that this Court deny any award of costs.

INTRODUCTION

Defendant, a multi-billion dollar pharmaceutical giant, has asked this Court to wade into the individual finances of thousands of plaintiffs – the majority of whom are elderly women on fixed incomes – so that Defendant may recover $477,728.16 in costs. As set forth below, this Court has the discretion to flatly refuse tax these costs. Indeed, this case presents several of the equitable

factors identified by the Fourth Circuit for denying such an award of costs, including the unsuccessful party's inability to pay costs, the excessiveness of the costs, and the closeness and difficulty of the issues presented. Furthermore, the bills of costs are incurably defective as they do not provide the proper documentary support for the specifically asserted costs nor do they provide proper delineation of how much each plaintiff owes of the total costs.

If the Court chooses not to deny the bills of costs in their entirety, the cost award should be dramatically reduced because Defendant's bills inappropriately assert some costs and do not clearly delineate which costs apply to each individual plaintiff, thereby denying plaintiffs the ability to even fully and properly respond to Defendant's deficient bills of costs.

Additionally, it must be noted that the PSC has no authority to fully respond to these bills of costs as the PSC does not represent every plaintiff in this litigation. In fact, it would be impossible for the PSC to fully respond to the bills on behalf of each of the thousands of plaintiffs in this MDL because the PSC does not possess the requisite knowledge of each individual case in order to do so. If the Court is inclined to award costs, individual counsel for each plaintiff should be afforded the opportunity to demonstrate how each of the Fourth Circuit's equitable factors specifically apply in each plaintiff's individual circumstances.

LAW AND ARGUMENT

I. The Court should exercise its discretion under Rule 54(d) and decline to tax costs on any of the individual plaintiffs in this MDL.

Federal Rule of Civil Procedure 54(d) states that "costs—other than attorney's fees—should be allowed to the prevailing party." While the Rule gives a presumption in favor of an award of costs to the prevailing party, federal courts, including the Fourth Circuit and district courts within the Fourth Circuit, have long recognized that a district court has discretion to award or deny costs to the prevailing party. *See e.g.*, *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482

U.S. 437, 442 (1987) (". . .Rule 54(d) generally grants a federal court discretion to refuse to tax costs in favor of the prevailing party."); *Country Vintner of North Carolina, LLC v. E. & J. Gallo Winery, Inc.*, 718 F.3d 249, 254 (4th Cir. 2013)("Section 1920 [of Title 28 in the U.S. Code] enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d)"); *Cherry v. Champion Intern. Corp.*, 186 F.3d 442, 446 (4th Cir. 1999) ("the district court is given discretion to deny the award. . ."); *Flint v. Haynes*, 651 F.2d 970, 973 (4th Cir. 1981) (stating that Section 1920 enumerates the expenses that federal court may tax as a cost under the discretionary authority found in 54(d)); *Jeter v. Allstate Ins. Co.*, No. CV 7:15-1458-TMC, 2017 WL 5593296, at *2 (D.S.C. Mar. 28, 2017) ("Ultimately, the court has discretion to award or deny costs to the prevailing party.").

A court must "justify its decision to deny costs by articulating some good reason for doing so." *Liberty Mut. Fire Ins. Co. v. J.T. Walker Indus., Inc.*, No. CIV.A. 2:08-2043-MBS, 2012 WL 4584179, at *4 (D.S.C. Sept. 28, 2012), *aff'd sub nom. Liberty Mut. Fire Ins. Co. v. JT Walker Indus., Inc.*, 554 F. App'x 176 (4th Cir. 2014) (quoting *Cherry*, 186 F.3d at 446). The decision of whether to award costs is a decision based in equity. *Id.* at *3 (recognizing that the court should consider specific equitable factors to determine if "an element of injustice would arise from an award of costs"). The Fourth Circuit has stated that "[a]mong the factors that justify denying an award of costs are: (1) misconduct of the prevailing party; (2) the unsuccessful party's inability to pay the costs; (3) the excessiveness of costs in a particular case; (4) the limited value of the prevailing party's victory; or (5) the closeness and difficulty of the issues decided." *Ellis v. Grant Thornton LLP*, 434 F. App'x 232, 235 (4th Cir. 2011).

Numerous courts within the Fourth Circuit have denied bills of costs following this analysis and finding one or more of these five factors present. *See e.g.*, *Ellis*, 434 F. App'x at 235 (4th Cir.

2011) (finding the district court was correct to utilize its discretion to deny $61,957.45 in costs because the issues in the case were close and difficult); *Teague v. Bakker*, 35 F.3d 978, 996 (4th Cir. 1994) (affirming a district court's denial of costs on the grounds that the "plaintiffs had proceeded in good faith," that the plaintiff's case "was for the most part, a relatively close and difficult case," and because the plaintiffs were of modest means); *Jeter v. Allstate Ins. Co.*, No. CV 7:15-1458-TMC, 2017 WL 5593296, at *2 (D.S.C. Mar. 28, 2017) (denying costs because the case was "relatively close and difficult, and that the party and their counsel acted in good faith in the prosecution and defense of this matter" and recognizing "that Jeter is unable to pay the costs due to his financial hardship."); *Liberty Mut. Fire Ins. Co. v. J.T. Walker Indus., Inc.*, No. CIV.A. 2:08-2043-MBS, 2012 WL 4584179, at *4 (D.S.C. Sept. 28, 2012), *aff'd sub nom. Liberty Mut. Fire Ins. Co. v. JT Walker Indus., Inc.*, 554 F. App'x 176 (4th Cir. 2014) (finding it "unfair to shift taxable costs on to either party" because of the "case's complexity"); *Couram v. S.C. Dep't of Motor Vehicles*, No. CIV.A. 3:10-00001, 2011 WL 6115509, at *2 (D.S.C. Dec. 8, 2011) (exercising discretion to not tax costs to non-prevailing party because of her financial status); *Ford v. Zalco Realty, Inc.*, 708 F.Supp.2d 558, 563 (E.D. Va. 2010) (exercising discretion to not tax $2,174.18 of copying costs because defendant failed to give adequate reasons for requesting them); and *Turner v. U.S.*, 736 F. Supp. 2d 980, 1024 (M.D. N.C. 2010) (noting that an award of costs to the prevailing party would be inequitable under the circumstances, when plaintiffs acted in good faith in bringing the action, and the case was a close and difficult one to decide). While several of these cases demonstrate that the presence of just one of these equitable factors may support a denial of costs, no fewer than three of these factors are present in this matter.

A. Many, if not all, of the individual plaintiffs will be unable to pay the costs Pfizer asserts that it is entitled to.

The first equitable factor at issue in this matter is the unsuccessful parties' inability to pay the asserted costs. While the PSC cannot speak to each and every individual plaintiff in this MDL, the members of the PSC are aware of numerous individual clients who simply do not have the means to pay the costs asserted by Pfizer. Most of these women are elderly and many are retired and living on fixed incomes.[1] Pfizer has made no effort to assign individual bills of costs to the individual plaintiffs covered by these filings (except for Mrs. Hempstead), but has lumped together widely disparate "medical records custodian fees" from 831 plaintiffs, different numbers of depositions from 9 individual trial cases, and removal fees in another 28 cases. Depending on the particular plaintiff's circumstances, the costs that Pfizer seeks *apparently* vary from amounts less than $100 to amounts as high as several thousand dollars. While the PSC is not in a position to speak for each individual plaintiff, it stands to reason that a bill for several thousand dollars could be crippling for some plaintiffs in the MDL. Furthermore, the bill of costs submitted as applicable to just Mrs. Hempstead totals $29,695.09. Again, such an enormous sum could be impossible for a retired school principal to pay.

B. The costs asserted by Pfizer are excessive.

Before one can determine if costs are excessive, it must first be determined if the costs are properly included in a bill of costs. In performing this evaluation, district courts look to whether the expense was "reasonably necessary" at the time the expense was incurred. *See, e.g. LaVay Corp. v. Dominion Fed. Sav. & Loan Ass'n*, 830 F.2d 522, 528 (4th Cir. 1987) (stating that courts, in order to evaluate whether to tax a deposition's costs, should determine if "the taking of the

[1] Some undetermined but likely significant number of plaintiffs have died since the commencement of this litigation, and, undoubtedly in many instances, have left no estate capable of paying the asserted costs.

deposition is reasonably necessary at the time of its taking"). The costs asserted in Defendant's bills of costs are excessive precisely because they include costs that are not reasonably necessary. While courts are loathe to strike bills of costs simply because they exceed some threshold dollar value, courts do look to the reasonableness of the underlying costs in order to determine whether the asserted costs are excessive. *See e.g., In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449, 468 (3d Cir. 2000) (stating that a prevailing party's unreasonableness "may be responsible for excessive costs, not that the sheer size of a costs award is a relevant factor in and of itself"). In this case, as will be more fully discussed below, numerous categories of costs were included in the bills, despite their not being reasonably necessary at the time they were incurred, including but not limited to rough drafts of every deposition and medical records in non-trial pool cases. Just these two categories alone added a total of $182,471.27 in costs to the bills ($25,848.35 in rough draft expenses and $156,622.92 in medical records acquisition costs for non-trial pool cases).

Additionally, as specifically relates to Ms. Hempstead's case, $29,695.09 in costs is excessive for a case that served as a bellwether for the benefit of the entire MDL. Mrs. Hempstead should not bear such significant costs when she agreed to waive her *Lexecon* rights and serve as a bellwether plaintiff in this litigation. Taxing a voluntary bellwether plaintiff could have a chilling effect on the bellwether process, hampering the potential resolution of future MDL proceedings.

C. The case was both close and difficult.

As mentioned above, both the Fourth Circuit and the District of South Carolina have chosen to deny costs based either in part or solely upon the fact that the case was "close and difficult." In *Ellis v. Grant Thornton LLP*, 434 F. App'x 232, 235 (4th Cir. 2011), the Fourth Circuit upheld the district court's decision to exercise its discretion in denying $61,957.45 in costs because the issues in the case were "close and difficult." The Fourth Circuit supported the finding of closeness and

difficulty by noting that "[t]he case was hotly contested at trial and in the previous appeal." *Id.* Furthermore, in *Liberty Mut. Fire Ins. Co. v. J.T. Walker Indus., Inc.*, No. CIV.A. 2:08-2043-MBS, 2012 WL 4584179, at *4 (D.S.C. Sept. 28, 2012), Judge Margaret Seymour denied costs to the prevailing party based solely upon the "closeness and difficulty of the issues decided in this case." Judge Seymour noted that "[a] case's closeness 'is judged not by whether one party clearly prevails over another, but by the refinement of perception required to recognize, sift through and organize relevant evidence, and by the difficulty in discerning the law of the case.'" *Id.* at *4 (quoting *White & White, Inc. v. Am. Hosp. Supply Corp.*, 786 F.2d 728 (6th Cir. 1986)). Judge Seymour concluded her analysis by stating: "In light of the case's complexity…the court finds that it would be unfair to shift taxable costs on to either party." *Id.*

This MDL (and its underlying individual cases) was undoubtedly complex, and its closeness and difficulty strongly support the wholesale denial of costs. The first case alleging that Lipitor caused the plaintiff's diabetes was filed in this Court by Evalina Smalls on March 25, 2013, and this MDL was ultimately created on February 19, 2014. In the ensuing years, the parties have been engaged in litigation that cannot be called anything but "hotly contested." Just to name a few of the complexities of this MDL: it involved hundreds of millions of pages of discovery, dozens of depositions, an enormous amount of memoranda and briefs, numerous expert reports, many complex scientific and medical publications and their underlying issues, complicated statistical analyses, travel across the country and the coordination of numerous law firms and their teams of attorneys and paralegals. The "refinement of perception" necessary to evaluate and organize all of these components required the work and cooperation of dozens of attorneys and countless paralegals. This Court on numerous occasions remarked from the bench about the complexity and difficulty of this litigation. For example, this Court remarked "And what I've learned further

through this case is just how complex that determination of causation is."[2] The Court has noted the enormous amount of effort put in by both sides and by the Court: "Listen, I think the work the plaintiffs did, both sides did, in discovery is just remarkable;"[3] and "we have done a lot of work in this case."[4]

Not only was this litigation complex and difficult in the district court, but that complexity reached the Fourth Circuit in an equally hotly contested appeal. In its opinion affirming this Court's granting of summary judgment, the Fourth Circuit noted that "[t]he questions presented in this case are complex and manifold (if the ink spilled in litigation thus far were not evidence enough)." *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig.*, 892 F.3d 624, 647 (4th Cir. 2018). The Fourth Circuit further noted in its conclusion that "[t]hese cases involve difficult questions of mathematics and science, wrapped in a complex form of mass litigation." *Id.* at 649. It is precisely this complexity that warrants the denial of Defendant's bills of costs in their entirety.

D. The bills of costs are incurably defective as they provide no evidentiary support for the asserted costs, nor do they even attempt to appropriately allocate the costs applicable to each of the plaintiffs as required by Supreme Court precedent.

In addition to the equitable reasons for this Court to deny Defendant's bills of costs, the defective nature of the bills themselves provides another reason for this Court to decline to award costs to Pfizer. The Fourth Circuit has long held that an appropriate bill of costs must be accompanied by adequate documentary support for the asserted costs. *See Trimper v. City of Norfolk*, 58 F.3d 68, 77 (4th Cir. 1995) (stating "No litigation costs should be awarded in the

[2] September 7, 2016 Hearing Transcript at 25:13-14.

[3] October, 21, 2106 Hearing Transcript at 58:8-9.

[4] March 8, 2016 Hearing Transcript at 25:13-14.

absence of adequate documentation"). While Defendant seeks to immunize itself from this obligation by noting in footnotes to each of its bill's supporting declarations that it is presenting its costs in summary form without the supporting invoices, such an omission of supporting documentation has been fatal to other bills of costs within the Fourth Circuit. For example, both the District of Maryland and the Eastern District of Virginia have denied costs due to lack of support without giving the prevailing party the opportunity to amend their defective bills. *See e.g. Denton v. PennyMac Loan Servs., LLC*, 252 F. Supp. 3d 504, 531 (E.D. Va. 2017) (noting in its denial of prevailing party's requests for certain costs "[a]s to Plaintiff's remaining requests for costs, because Plaintiff has not provided invoices or receipts for these expenses, the Court is unable to determine if the expenses are taxable as costs"); and *Hylind v. Xerox Corp.*, No. PJM 03-116, 2011 WL 806419, at *7 (D. Md. Feb. 28, 2011) (refusing to grant leave to amend and ordering the subtraction of certain undocumented costs). This Court should do as its sister district courts have done and deny Defendant's bills of costs due to their lack of documentation.

Another fatal defect in Defendant's bills of costs is their failure to clearly allocate costs on a plaintiff-by-plaintiff basis as required by U.S. Supreme Court precedent. As is well-settled, "the concept of taxable costs under Rule 54(d) is more limited and represents those expenses, including, for example, court fees, that a court will assess *against a litigant*." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2006 (2012) (emphasis added, quoting 10 Fed. Prac. & Proc. Civ. § 2666 (3d ed.)); *see also* 10 Fed. Prac. & Proc. Civ. § 2666 (3d ed.) ("'Costs' refers to those charges that one party has incurred and is permitted to have reimbursed *by the opposing party* as part of the judgment in the action" and "costs are allowed in favor of the winning party *against the losing party*…") (emphasis added). In this case, apart from the bill of costs filed solely against Mrs. Hempstead, Defendant did not file a bill of costs "against a litigant," as required by Rule 54(d) and

by the Supreme Court. Rather, Defendant filed a generic bill of costs in the MDL docket without identifying "the opposing party" against whom costs were sought. Apparently, Defendant believes that it can either obtain a joint judgment against every single plaintiff in this MDL or that the Court must somehow allocate costs to each and every plaintiff despite having no documentary evidence to facilitate such a gargantuan task.

A bill of costs is supposed to be "merely a clerical matter that can be done by the court clerk." *Taniguchi*, 132 S. Ct. at 2006 (quotation omitted). The bills filed by Pfizer are a far cry from being a simple clerical matter. While individual medical records costs are broken down in summary form per plaintiff (albeit without documentary support), no attempt was made to allocate certain general case costs presumably to be shared by some number of plaintiffs. Defendant's decision to burden the Court with identifying which opposing parties should bear which costs renders the bills of costs incurably defective, and it is too late to correct theses defects by re-filing in individual cases.

Therefore, both equitable and legal reasons support denial of Defendant's bills of costs in their entirety.

II. If the Court decides that an award of some costs is appropriate, the cost award should be dramatically reduced because Defendant's bills inappropriately assert numerous costs both generally and individually.

In evaluating whether a specific expense can be properly taxed in a bill of costs, district courts look to whether the expense was "reasonably necessary" at the time the expense was incurred. *See, e.g. LaVay Corp. v. Dominion Fed. Sav. & Loan Ass'n*, 830 F.2d 522, 528 (4th Cir. 1987) (stating that courts, in order to evaluate whether to tax a deposition's costs, should determine if "the taking of the deposition is reasonably necessary at the time of its taking"); *Jop v. City of Hampton, VA*, 163 F.R.D. 486, 488 (E.D. Va. 1995) (utilizing the *LaVay* reasonable necessity test

to determine if the cost of certain depositions may be taxed); *see also* 10 C. Wright & A. Miller, Federal Practice and Procedure § 2677 (3d ed. 2018) (stating that the basic standard applied by courts is whether the transcript or copy was "necessarily obtained for use in the case").

A. Defendant's bills of costs seek to tax costs which were not reasonably necessary at the time Defendant chose to incur them.

Among other items, Defendant's bills of costs include at least three categories of costs which cannot be considered reasonably necessary: rough drafts of deposition transcripts for every deposition taken, medical records acquisition costs for cases not in the trial pool, and specific records acquisition costs in select individual cases represented by the undersigned.

1. Rough Drafts

Defendant seeks to recover costs for rough drafts ordered for *every* deposition included in its bills of costs. The acquisition of rough drafts was not reasonably necessary and, therefore, should not be taxable. All told, Defendant seeks to recover $25,848.35 in rough draft expenses. This includes $16,410.35 in general deposition rough draft expenses (experts and Pfizer employees) and $9,438.00 in case-specific deposition rough draft expenses. A review of the timing of the depositions taken both generally and within specific bellwether cases demonstrates that Defendant's reflexive decision to always order rough drafts was not reasonably necessary. For example, in the Waltina Gadsden case, Defendant ordered a $618 rough draft of Mrs. Gadsden's deposition despite the fact that the next deposition in her case was of one of her healthcare providers 35 days later. Defendant then ordered a rough draft of that doctor's deposition at a cost of $345.50, despite the next deposition in Mrs. Gadsden's case not occurring for another 27 days. Defendant then ordered the rough draft of that second healthcare provider at a cost of $273, despite the fact that no further depositions were planned in Mrs. Gadsden's case *at all* and no briefing that was even arguably dependent on these three depositions occurred for months. The same relative

pattern of ordering rough drafts despite large time gaps between depositions occurred in the individual cases of Kimberly Hines, Patricia Dicenzi, Jean Martin, Heather Soule, Elizabeth Rawdon, Joyce Jennings, Juanita Durocher, and Vickie Bowens – all trial pool plaintiffs with expenses included in Defendant's bills of costs. Furthermore, all of this rough draft ordering occurred despite the fact that Defendant's chosen court reporting company, Veritext, makes it a standard procedure to complete transcripts in eight business days or less. It also occurred despite the fact that counsel for Defendant was (obviously) present at each deposition and clearly knew exactly what was asked and answered in each instance thereby lessening any alleged need for rough drafts.

This pattern persisted with respect to general witness and expert depositions. For example, the deposition of Rajesh Aggarwal, a Pfizer employee, occurred on September 25, 2014, and Defendant ordered a rough draft of his deposition at a cost of $240.35. The next general witness deposition was not until November 6, 2014 – 42 days later, and Mr. Aggarwal's second deposition, as a 30(b)(6) witness, did not occur until December 10, 2014 – 76 days later. It simply was not reasonably necessary to acquire a rough draft of Mr. Aggarwal's initial deposition, especially in light of the fact that the transcript was finalized on October 9, 2014 – nearly two months before the continuation thereof.

In light of these large gaps of time between many of the related depositions, the only argument for the procurement of the rough drafts is that they provided counsel some level of convenience. Setting aside any discussion of the true usefulness of rough drafts that are often error-riddled and only precede the final draft by a few days, convenience to counsel is not recognized as satisfying the reasonable necessity test. As the Tenth Circuit has stated, the reasonably necessary "standard does not allow a prevailing party to recover costs for materials that

merely 'added to the convenience of counsel' or the district court." *In re Williams Sec. Litig.-WCG Subclass*, 558 F.3d 1144, 1147–48 (10th Cir. 2009) (quoting *U.S. Industries, Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1245 (10th Cir. 1988)); *see also McDowell v. Safeway Stores, Inc.*, 758 F.2d 1293 (8th Cir. 1985). Therefore, if the Court does decide that some costs are recoverable in this litigation, the costs related to Defendant's decision to order rough drafts of deposition transcripts should not be a part of those costs.

2. Medical Records for Non-Trial Pool cases

Defendant's omnibus bill of costs includes $234,081.94 for medical record retrieval in individual cases. This amount includes $77,459.02 in cases that were in the trial pool for consideration as possible bellwethers; it also includes $156,622.92 in cases that were filed after the May 31, 2014, cutoff date for inclusion in the trial pool. Simply stated, it was not "reasonably necessary" for Defendant to incur $156,622.92 in medical record acquisition costs in cases that were not even part of the trial pool. The non-trial pool cases did not stand a chance of going to trial for years – if they ever went to trial at all. Not only did Defendant already have completed plaintiff fact sheets in each non-trial pool case, it also had the benefit of medical and pharmacy records provided by plaintiffs during the discovery process. Furthermore, Defendant could have sent preservation letters to plaintiffs' healthcare providers to ensure the preservation of this documentation in case it ever became necessary. As it turns out, those records were never even needed. It would be inequitable to force individual plaintiffs to bear the costs of Defendant's unreasonable decision to order these records in their cases, especially considering that many of the records ordered by Defendant were duplicative of records already produced by plaintiff with their fact sheet submissions.

3. Specific Medical Records Acquisition in Select Cases

The PSC is not in a position to be able to evaluate specific medical records acquisition costs in every individual case. Not only does the PSC not represent every plaintiff in this litigation, but Defendant's bills of costs lack adequate documentation to allow each plaintiffs' attorney to evaluate the asserted costs. That being said, even a cursory review of the known costs incurred in some of the PSC firms' cases disclose the presence of costs that cannot be properly taxed.[5] Just as one example, in the case of Waltraud Kane, Defendant ordered numerous records of little to no value in her case about diabetes, including Ear, Nose and Throat records, gastroenterology records, dermopathology records and plastic surgery records. The ordering of these records was not reasonably necessary and is, therefore, not taxable. Similarly, in the case of Lois Jean Stefano, Defendant unreasonably ordered orthopedic, gastroenterology and chiropractic records. Again, while counsel cannot evaluate how much these records account for in the bills of costs due to the lack of proper documentation, these costs were not reasonably necessary and should not be taxed. One final example truly lays bare the issue presented by Defendant's failure to provide any documentary support with its bills of costs. In the case of Bonnie Knight, while the omnibus bill claims that she is responsible for $1,253.69 in costs, Marker Group's website does not demonstrate that *any* records were ordered as relates to her case. Thus, Ms. Knight cannot even evaluate what records were allegedly ordered in her case, much less determine if their acquisition was reasonably necessary.

[5] Defendant used the Marker Group for all of its medical records acquisition. While Plaintiffs' counsel can review the actual records ordered by Defendant for each plaintiff, counsel cannot determine which costs were included in Defendant's bills of costs – or even if the costs were included at all – due to the lack of specificity in the bills of costs and the complete absence of documentary support.

B. The PSC is not in a position to determine whether certain medical record and other expenses asserted by Defendant were reasonably necessary in any individual case.

As subpart II.A.3 makes clear above, in order to properly evaluate the asserted costs, each individual plaintiff's attorney must be afforded the opportunity to review and address the costs that Pfizer has asserted. The PSC does not have the power or ability to do so. Moreover, an award of costs should not be entered without counsel for each plaintiff knowing what actual costs are being asserted (as opposed to simply knowing the dollar amount without having documentation showing the actual records that totaled that dollar amount). Furthermore, each plaintiff should have the opportunity to evaluate and thereafter present to this Court any costs that she feels were not reasonably necessary in her individual case. To do otherwise would contradict Fourth Circuit precedent.

III. If the Court decides that an award of some costs is appropriate, individual counsel for each plaintiff should be afforded the opportunity to demonstrate how the Fourth Circuit's equitable factors weigh against an award of costs in each of his or her clients' cases.

As has been previously discussed, Pfizer has made no effort to assign individual bills of costs to the individual plaintiffs (apart from Mrs. Hempstead) covered by these filings, but has lumped together widely disparate "medical records custodian fees" from 831 plaintiffs, different numbers of depositions from 9 individual trial cases, and removal fees in another 28 cases. Depending on the particular plaintiff's circumstances, the costs that Pfizer seeks apparently vary from amounts less than $100 to amounts as high as several thousand dollars. While the Court granted summary judgment in the vast majority of these cases in omnibus orders, that does not change the fact that these cases are individual filings consolidated only for certain pre-trial proceedings in accordance with the MDL process. If Pfizer wishes to seek costs against thousands of individual plaintiffs, then it should have done so appropriately, assigning to each plaintiff

individually those costs that are clearly ascribable to that case - e.g., medical records custodian fees, deposition costs, and filing or docketing fees - and fairly apportioning those costs that should be borne by all plaintiffs - e.g., deposition or transcript costs related to general discovery matters. Neither plaintiffs nor the Court should have to undertake this task.

Pfizer's failure here highlights the PSC's inability to fully respond to these bills of costs in a substantive manner. While the PSC believes that the bills of costs should be denied in their entirety because of the financial hardship their award would impose, the excessiveness of those costs, the complexity of this case and the defective nature of the bills themselves, should the Court believe *some* award of costs is warranted, then the Court will need to hear from each individual plaintiff's attorney on how the Fourth Circuit's equitable factors come to bear in her individual case.

As noted above, while there were over two thousand cases pending in this MDL, they were individual cases consolidated for certain pre-trial proceedings. They remain cases filed by individual plaintiffs represented by different attorneys. The PSC was appointed by the Court with limited authority defined by that order of appointment, i.e., to "initiate, coordinate and conduct all pretrial discovery on behalf of plaintiffs," "to call meetings of counsel for plaintiffs," "to examine witnesses and introduce evidence at hearings," to "act as spokesperson for all plaintiffs…*subject of course to the right of any plaintiff's counsel to present non-repetitive individual or different position* **[**emphasis added]," to argue motions "on behalf of the PSC," to "negotiate and enter stipulations with defendants," and "maintain adequate files" and "provide periodic reports to non-PSC plaintiffs' counsel." *See* Case Management Order No. 3 at ¶ 11. CMO 3 does not does not extend this authority to, for example, settling an individual plaintiff's case. Nor does it or can it extend to objecting to an individual plaintiff's bill of costs. Only an individual plaintiff's attorney

can know the extent to which a bill of costs may inflict an undue financial hardship, one of the legal objections to a bill of costs discussed above. *See Cherry v. Champion Int'l Corp.*, 186 F.3d 442, 446 (4th Cir. 1999) (*citing Teague v. Bakker*, 35 F.3d 978, 996 (4th Cir. 1994)). While a bill of costs totaling less than $100 may not present a financial hardship to some plaintiffs, one totaling several thousand dollars or more certainly could. Additionally, only an individual plaintiff's attorney will be in a position to object to particular medical records custodian fees, or a particular case-specific deposition, as not reasonably necessary in the case (reasonable necessity of the particular cost being a pre-requisite for its taxation). *Id.*[6]

These practical issues demonstrate the problems faced by the PSC in attempting to respond to Pfizer's omnibus bills of costs on a case-by-case basis. More importantly, however, tasking the

[6] Other MDL courts recognize the inherent limitations on what a PSC may do or even be required to do. For example, earlier this month, the U.S. District Court for the Southern District of Illinois was asked in the Yaz MDL to consider whether Plaintiffs' Lead and Liaison Counsel owed duties to *all* MDL plaintiffs to such an extent that lead counsel should be held "responsible for responding to case-specific case management orders or filing responses to defendants' motions pertinent only to individual cases." Casey v. Denton, No. 3:17-CV-00521, 2018 WL 4205153, at *5 (S.D. Ill. Sept. 4, 2018). The Court declined to hold MDL leadership to such a standard and instead held that the extent of the PSC's duties were created by the CMO establishing the PSC (which closely mirrors CMO 3 in this case). The Court stated that

> the fiduciary duties that may be created and owed by leadership counsel in an MDL context include obligations to act fairly, efficiently, and economically in the interests of all parties and parties' counsel. *See* Manual for Complex Litigation, § 10.22. Put differently, lead and liaison counsel do not owe a fiduciary duty to each and every MDL plaintiff in the traditional sense. Rather, lead and liaison counsel should put the common and collective interests of all plaintiffs first while they carry out their enumerated functions. This is a far cry from making leadership counsel liable to respond to every individual motion and request filed in each singular case.

Id. The Court went on to state: "Leadership counsel of a MDL could not fathomably be held responsible for the minute details of hundreds or in this case, thousands, of individual cases. The proposition is unworkable." *Id.* at *6. Finally, the court recognized that "[c]harging leadership counsel with this nearly endless amount of responsibility would alter the nature and substance of the position, so much so, that the MDL format would cease to allow for the efficient handling of large, coordinated litigation." Id. at *7. This same rationale supports the need for this Court (if it decides some costs are warranted) to hear from individual plaintiffs' counsel regarding the reasonableness of case-specific costs as well as whether the asserted costs are unduly burdensome to each individual plaintiff.

PSC with responding to Pfizer's bills of costs for individual plaintiffs presents inherent ethical problems. In the same way that the PSC could not settle the cases of individual plaintiffs, because it would place the PSC in the position of arguing that Plaintiff A deserved more than Plaintiff B, Pfizer's omnibus bills of costs force the PSC to take conflicted positions with respect to payment of costs. As but one example, neither the bill of costs for Ms. Hempstead nor the bill of costs for the 157 plaintiffs subject to CMO 109 contain any share of the costs for general discovery or expert depositions. Arguably, both Ms. Hempstead and the plaintiffs covered by CMO 109 should bear their fair share of those costs, but the PSC cannot be put in the position of arguing that Plaintiff A should pay more so that Plaintiff B can pay less, regardless of the size of the resulting increase or reduction.[7] Only the attorney individually representing Plaintiff A or Plaintiff B can argue for, object, or consent to reducing or increasing that plaintiff's individual costs. Only the individual attorney may argue whether the costs present a financial hardship to his or her client. Similarly, as noted above, Pfizer has lumped together deposition costs from certain individual cases, removal fees from certain other cases, and vastly differing medical record custodian fees from 831 cases. The PSC cannot be put in the position of determining who should pay how much of these costs at the expense of or the benefit to others.[8] Rather, individual plaintiffs, through their own attorneys, must be afforded the opportunity to make these arguments, unless the Court chooses to deny the bills of costs in their entirety based upon the aforementioned reasons.

[7] Similarly, Mrs. Hempstead could argue that she should not solely bear the cost of case-specific experts as she agreed to be a bellwether for the benefit of the entire MDL.

[8] Moreover, as noted above, that is not the job of the Court to do either. Rather, a non-defective bill of costs clearly delineates which plaintiff should be responsible for which costs, thereby rendering the handling of a bill of costs "merely a clerical matter."

CONCLUSION

Pfizer's bills of costs should be denied in their entirety. A balancing of the equities as mandated by the Fourth Circuit demonstrates that the bills should be wholly denied because they would inflict financial hardship upon the plaintiffs, the costs are excessive and the case was especially close and difficult. Furthermore, the bills of costs are incurably defective as they provide inadequate evidentiary support for the asserted costs, nor do they even attempt to allocate the costs applicable to each of the plaintiffs. These defects also warrant the wholesale denial of the bills.

If the Court believes some costs are warranted, it should eliminate those costs which are not reasonably necessary, such as the costs of rough drafts of depositions and medical records in non-trial pool cases. Furthermore, if the Court believes some costs should be awarded, the lawyers for those plaintiffs against whom the Court is considering taxing costs should be given opportunities to make showings of financial hardship and other equitable arguments in their individual cases and be given the chance to address the reasonable necessity of any specific costs in each plaintiff's individual case.

September 12, 2018

Respectfully submitted,

/s/ H. Blair Hahn
H. Blair Hahn (Fed. I.D. # 5717)
RICHARDSON PATRICK
WESTBROOK & BRICKMAN, LLC
1037 Chuck Dawley Blvd., Bldg. A
Mount Pleasant, SC 29464
bhahn@rpwb.com
Telephone: (843) 727-6500
Facsimile: (843) 727-6642

Plaintiffs' Lead Counsel

Jayne Conroy (NY 8611)
SIMMONS HANLY CONROY
One Court Street
Alton, IL 62002
Telephone: (618) 259-2222
Facsimile: (618) 259-2251
jconroy@simmonsfirm.com

Plaintiffs' Executive Committee on behalf of the Plaintiffs' Steering Committee

CERTIFICATE OF SERVICE

I hereby certify that, this 12th day of September, 2018, I have electronically filed a copy of the above and foregoing with the Clerk of the Court using the ECF system, which sent notification of such filing to counsel of record.

/s/ H. Blair Hahn