

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

**IN RE: HILL’S PET NUTRITION, INC.
DOG FOOD PRODUCTS LIABILITY
LITIGATION**

MDL No. 2887

Case No. 2:19-md-02887-JAR-TJJ

**This Document Relates to All Cases,
Except:**

*Diana Anja Eichorn-Burkhard v. Hill’s
Pet Nutrition, Inc. et al.*, Case No. 19-CV-
02672- JAR-TJJ;

and

*Bone, et al. v. Hill’s Pet Nutrition, Inc., et
al.*, Case No. 19-CV-02284-JAR-TJJ (cat
and dry dog food-related claims only.
This Document **DOES** apply to all wet
dog food-related claims in the *Bone*
complaint).

**CO-LEAD COUNSEL’S MEMORANDUM IN OPPOSITION TO WEXLER WALLACE
LLP’S APPLICATION FOR ATTORNEYS’ FEES AND
REIMBURSEMENT OF EXPENSES**

At the very beginning of this litigation, the Court entered its Order Appointing Counsel. ECF No. 20 (July 31, 2019). In addition to appointing the attorneys who would lead this MDL, the Order required that all counsel must keep contemporaneous records of any “time and expenses devoted to this matter” and “must submit these records for the preceding month in summary form by the end of each month to Plaintiffs’ Liaison Counsel.” *Id.* at 7. The Order additionally empowered Co-Lead Counsel to provide “further direction” to counsel in the MDL regarding time and expenses. *Id.* The Court warned counsel that failure to comply with the submission of monthly time and expense submissions may render the time and expense as “non-reimbursable at the discretion of Co-Lead Counsel.” *Id.*

Consistent with the Court's Order and the Notice of Plaintiffs' Protocols for Time and Expenses, ECF No. 37 (the "Protocol"), twenty law firms, including Wexler Wallace LLP ("Wexler Wallace"), submitted time and expense records to Plaintiffs' Liaison Counsel. Wexler Wallace alone submitted \$112,090 in lodestar plus \$2,589.79 in expenses, which included time spent before the Court's July 31 leadership order.

On May 28, 2021, which was the deadline for the submission for any motion for attorneys' fees, Co-Lead Counsel filed their application for approval of a fee award of 32% of the Settlement Fund from which fees and expenses for all plaintiffs' counsel in this MDL will be allocated and paid. At approximately noon on May 28, 2021, Wexler Wallace told Co-Lead Counsel for the first time that it had tens of thousands of dollars in additional lodestar and expenses it had *never* submitted to Co-Lead Counsel. Wexler Wallace stated that unless Co-Lead Counsel would make assurances that the unsubmitted time and expenses would be compensated, Wexler Wallace would file a motion that day demanding compensation. Co-Lead Counsel assured Wexler Wallace that the time and expense records it had already submitted would be treated fairly and in the same manner as all counsel in the MDL. Co-Lead Counsel, however, could not promise Wexler Wallace that the unsubmitted time and expenses would be compensated or treated better than all other time and expenses that had been timely submitted in compliance with the Court's Order and the Protocol.

That same day, Wexler Wallace separately filed its own application for an award of attorneys' fees seeking an astonishing \$105,645 in attorneys' fees plus \$1,309.77 in expenses. ECF No. 118 at 2. On the first page of the motion, Wexler Wallace proclaims that it intentionally chose not to submit to Plaintiffs' Liaison Counsel the time and expenses sought in the motion, *id.* at 1, which means this submission is purportedly in *addition* to the \$112,090 in lodestar and

\$2,589.79 in expenses previously submitted to Co-Lead Counsel. To put this total amount in context, Wexler Wallace—who was not appointed to any leadership roles in this litigation and who was not directly assigned any common benefit work by Co-Lead Counsel—claims a combined lodestar of \$217,735 compared to Co-Lead Counsel Gary Mason’s \$337,409.75 in total lodestar for all of the significant work undertaken by his firm throughout this litigation.

By intentionally not submitting its time to MDL leadership, this is now the second time in this MDL that Wexler Wallace has decided that the Court’s orders generally do not apply to it and the second time it has chosen to ignore the Court’s orders requiring counsel in this litigation to work cooperatively and efficiently.¹ But what is even more egregious is that Wexler Wallace fails to disclose that the time included in this motion overlaps, at least in part or in subject matter, with time it previously did submit to Co-Lead Counsel. For example, the Wexler Wallace motion seeks compensation for its purportedly unsubmitted time related to work in Rhode Island. *See* ECF No. 118-1 at ¶ 5 (“Wexler Wallace researched, drafted, and filed an Emergency Motion for a Protective Order Governing Communications between Defendants and Putative Class Members” in the *Jubenville* case in Rhode Island). But Wexler Wallace *already* submitted time entries to Co-Lead Counsel for this exact work.² It is troubling that Wexler Wallace represents to the Court that the

¹ In denying Wexler Wallace’s Motion to Establish a Separate Litigation Track, the Court stated: “In closing, the Court must unfortunately note that it is troubled by some of the tactics that have come to light through the briefing on the foregoing matters. In its Practice and Procedure Order, the Court stated that ‘cooperation among counsel is essential to resolving this litigation in an orderly and expeditious fashion.’ . . . All of the foregoing issues indicate a lack of cooperative spirit that the Court expects to see and threaten to undermine the just and efficient conduct of these actions.” ECF No. 72 at 21.

² Wexler Wallace emailed Liaison Counsel time and expense submissions on September 30, October 31, and December 2, 2019. The Wexler Wallace time entries in February and March 2019 state in relevant part: “Finalize edits and revisions on Emergency Protective Order”; “Finalize motion for protective order”; “Correspond with co-counsel regarding emergency motion for a protective order”; “Draft Declaration for Emergency Protective Order”; “Prepare for March 18th argument for hearing on motion for protective order”; “Prepare for argument on

“time and expense involved in these efforts could not be properly submitted to Lead Counsel under the Protocol,” ECF No. 118 at 2, when in fact, Wexler Wallace could and *actually did* submit some time records specifically for that same work. Without Wexler Wallace’s detailed time entries for the lodestar and expenses sought in its motion, Co-Lead Counsel cannot compare the time and expenses requested in the motion with the previously submitted time to know the full extent of the duplication or which records were never submitted to Co-Lead Counsel.

Wexler Wallace’s failure to comply with the Court’s Order and the Protocol alone merits denial of this motion. Wexler Wallace’s lack of candor regarding its previous submission of time and expense records to Co-Lead Counsel for the same subject matter at issue in the motion is another basis for denying this motion. Moreover, as discussed below, Wexler Wallace is seeking compensation for time expressly excluded by Co-Lead Counsel, including for time spent before the Court’s Order Appointing Counsel. For these reasons and for the additional reasons discussed below, this motion should be denied.

In the alternative, Wexler Wallace should be ordered to submit to Co-Lead Counsel detailed time and expense records. Despite such records being untimely and despite the work not being assigned by Co-Lead Counsel, Co-Lead Counsel will review those records consistent with how all other time and expenses in the litigation will be reviewed and compensated.

emergency motion for protective order on communications with class members”; “Prepare for and attend argument on emergency motion to limit communications to class members, exchange emails with other counsel regarding same”; “Return travel to Chicago, Illinois from Rhode Island in connection with argument on emergency motion to limit communications to class members”; and “Review transcript of hearing on emergency motion for protective order[.]” Co-Lead Counsel can provide these billing records for the Court’s review *in camera* upon the Court’s request.

ARGUMENT AND AUTHORITIES

I. The Court Expressly Required All Counsel to Submit All Time and Expense Records to Liaison Counsel, which Wexler Wallace Apparently Did Not Do for All of Its Records.

After considering various counsel’s applications for leadership in this MDL, including one from Wexler Wallace, the Court appointed Gary E. Mason, Rachel Schwartz, Michael Reese and Scott Kamber to serve as Co-Lead Counsel and Interim Class Counsel. ECF No. 20. Co-Lead Counsel were empowered with the responsibility to:

- “Coordinat[e] the work of preparing and presenting all of Plaintiffs’ claims and otherwise coordinating all proceedings, including organizing and supervising the efforts of Plaintiffs’ counsel in a manner to ensure that Plaintiffs’ pretrial preparation is conducted efficiently, expeditiously, and economically”;
- “Delegat[e] work responsibilities and monitoring the activities of all Plaintiffs’ counsel—including but not limited to those counsel serving on the Plaintiffs’ Executive Committee—in a manner to promote the orderly and efficient conduct of this litigation and to avoid unnecessary duplication and expense”; and
- “Encourag[e] and enforce[e] efficiency among all Plaintiffs’ counsel.”

Id. at 3-5.

With respect to time and expenses incurred by any plaintiff’s counsel, the Court provided the following specific guidance:

Pending further direction from Plaintiffs’ Co-Lead Counsel and/or order of the Court, the procedure for Plaintiffs’ Co-Lead Counsel to manage and approve Plaintiffs’ counsel’s time and expenses shall be as follows.

All Plaintiffs’ counsel must keep contemporaneous records of their time and expenses devoted to this matter. Those records must reflect the date the legal service was rendered or expenses incurred, the nature of the service or expense, and the number of hours (measured in one-tenths of an hour) consumed by the service or the amount of the expense. Plaintiffs’ counsel must submit these records for the preceding month in summary form by the end of each month to Plaintiffs’ Liaison Counsel. Failure to comply with this procedure may render the expenses non-reimbursable at the discretion of Co-Lead Counsel.

Id. at 7 (emphasis added).

Consistent with this Order, on August 22, 2019, Co-Lead Counsel filed the Protocol. ECF No. 37. The Protocol was intended to “ensure the efficient prosecution of this litigation.” *Id.* at 1. As the Protocol stated, Co-Lead Counsel would file “a single application seeking fees and expenses out of the overall class recovery funds” and “[t]here is no guarantee that the time submitted by any counsel or firm to Lead Counsel for consideration will be included in any fee petition to the Court and the submitted hourly rate for the work is not guaranteed.” *Id.* at 2. The Protocol set forth standards for any time or expenses submitted, including that “only time and expense incurred after the Court’s July 31, 2019 Order appointing Plaintiffs’ Leadership shall be submitted and considered as potential eligible time.” *Id.* at 12.³ The Protocol additionally stated: “Authorization to perform work on behalf of the classes must be obtained from Lead Counsel.” *Id.* at 3. “In the event that MDL Counsel are unsure if the action they are about to undertake may be compensable as defined herein, they shall ask Lead Counsel in advance as to whether such time may be compensable.” *Id.* at 2.

Wexler Wallace did not file any objection to the Protocol. In fact, many of the key provisions of the Protocol were included in Wexler Wallace’s own Proposed Order Establishing Protocols for Common Benefit Work and Expenses, which Wexler Wallace attached as Exhibit M

³ The Protocol allows Co-Lead Counsel to consider time and expenses incurred before the leadership order, but that consideration is “[i]n their discretion” and provides expressly that “[t]ime and expense incurred in client solicitation, efforts to secure a leadership appointment, pre-appointment attendance at meetings of plaintiffs’ counsel, attendance at the JPML hearing, attendance at the initial court hearing and similar tasks shall not be approved.” ECF No. 37 at 12-13 n.2. As explained herein and in their Petition for Award of Attorneys’ Fees, Co-Lead Counsel have excluded this time from all counsel, whether counsel is part of the appointed leadership or not. ECF No. 122 at 16 n.11.

to its leadership application. *See* Motion for Appointment to Leadership Structure, emailed to the Court on July 16, 2019. These similar provisions included that:

- “Time and expense submissions shall be made to Liaison Counsel on a monthly basis”;
- “Counsel shall be eligible to receive Common Benefit attorneys’ fees and reimbursement of expenses only if the time expended, expenses incurred, and activity in question were: . . . (b) timely submitted;”
- “There is no guaranty that any or all of the time submitted by any counsel or firm will be compensated and the submitted hourly rate for the work that is compensated is not guaranteed”;
- “recovery of Common Benefit attorneys’ fees and expenses shall be limited to ‘MDL Counsel,’” which is defined as the Court-appointed leadership, “any other counsel authorized by Co-Lead Counsel to perform Common Benefit Work, and/or counsel who have been specifically approved by this Court as MDL Counsel prior to incurring any such cost or expense”; and
- “no time spent on any unauthorized work[] will be considered or should be submitted.”

Id. at Ex. M.

Wexler Wallace could have, but chose not to, discuss with Co-Lead Counsel any of the time it believed should be compensable prior to the May 28 deadline. Alternatively, Wexler Wallace could have submitted all time and expenses to Co-Lead Counsel as required by the Order and by the Protocol. Wexler Wallace claims that it could not submit any such time because “to do so would have violated the reporting Protocol” because the time was not authorized by Co-Lead Counsel. ECF No. 118 at 2.

But Wexler Wallace *already* submitted time and expenses not authorized by Co-Lead Counsel. For example, in its September 30, 2019 email submitting time to Liaison Counsel, Wexler Wallace stated in part: “Attached please find our firm’s time and expense report, through August 31, 2019, which Kenneth A. Wexler certifies as accurate. You will see that we have

included pre-appointment time/expenses to the extent they relate to our complaint and our motion for a protective order governing communications between Defendants and putative class members.” Of Wexler Wallace’s \$112,090 in lodestar previously submitted to Co-Lead Counsel, Wexler Wallace claims that only \$930 of that lodestar was purportedly authorized by Co-Lead Counsel. In the Excel column requiring each submitting law firm to identify the “Co-Lead Who Assigned or Approved Work,” Wexler Wallace merely wrote “Pre-Appointment Time” for lodestar totaling \$111,160.

Because of its failure to comply with the Court’s Order and with the Protocol, Wexler Wallace’s motion seeking \$106,954.77 in combined time and expenses should be denied.

II. Wexler Wallace’s Time and Expenses Should be Treated the Same and Subject to the Same Scrutiny as All Other Time and Expenses in the MDL.

The Protocol expressly stated Co-Lead Counsel would move for an award of attorneys’ fees *for all counsel in all cases* on or before May 28, 2021. *See* ECF No. 37 at 2 (Co-Lead Counsel would file “a single application seeking fees and expenses out of the overall class recovery funds.”); ECF No. 105 (Feb. 3, 2021) (setting a May 28, 2021 deadline for filing the motion for attorneys’ fees and litigation costs and expenses). Separate filings by lawyers other than Co-Lead Counsel were not anticipated.

Indeed, with the singular exception of Wexler Wallace, none of the other nineteen firms that submitted time and expenses in this litigation filed a separate application for fees. This is not surprising. Plaintiffs’ counsel were all well-aware that in this case, as is typical in MDL class actions, Co-Lead Counsel would review the time and expenses submitted by all counsel for compliance with the Protocol and determine how the fees should be allocated. That extensive process is on-going. *See* ECF No. 122 at 17 (Memorandum in Support of Plaintiffs’ Petition for an Award of Attorneys’ Fees, Reimbursement of Expenses and Service Awards to Class

Representatives) (May 28, 2021) (“Plaintiffs’ Petition”) (“Co-Lead Counsel is additionally in the process of conducting the same review of time submitted by the Executive Committee and other plaintiffs’ counsel in the litigation [who] performed common benefit work.”).

If a fee and expense award is approved by the Court, Co-Lead Counsel will evaluate all submitted common benefit time and expenses from twenty law firms—including those from Wexler Wallace—and pay from the fee award reasonable time and expenses that conform to the substance of the Protocol. Rather than wait for that process to conclude and rather than subject its billing records to this scrutiny, Wexler Wallace rushed out and filed its own fee application seeking reimbursement for time and expenses, including for the types of work previously submitted to Co-Lead Counsel, and for the type of time that will not be reimbursed to any other law firm.

Although the process of reviewing time is on-going, Co-Lead Counsel make the following initial observations concerning time submitted by counsel in this MDL generally, including the time records Co-Lead Counsel have reviewed from Wexler Wallace. A significant amount of time was incurred by plaintiffs’ counsel prior to the formation of the MDL. Across all time submission, plaintiffs’ counsel submitted more than \$1.6 million in time incurred prior to the Court’s July 31, 2019 leadership order, including hundreds of thousands in lodestar from appointed leadership in this MDL. All counsel in this MDL could argue about the benefits to the Settlement Class related to this pre-appointment work. For example, Co-Lead Counsel would cite to their work filing the very first complaint against Defendants and their extensive work done on behalf of class representatives, many of whom are now the proposed Settlement Class Representatives.

The Protocol put all counsel on notice that time incurred prior to the appointment of leadership on July 31, 2019, would not be approved. *See* ECF No. 37 at 12 (“Generally, only time and expenses incurred after the Court’s July 31, 2019 Order appointing Plaintiffs’ Leadership shall

be submitted and considered as potential eligible time.”). Again, no one objected when the Protocol was filed. Consistent with the Protocol and after review of the submitted detailed time entries, Co-Lead Counsel have cut all pre-appointment time, including pre-appointment time from Co-Lead Counsel and members of the Executive Committee, because this time did not benefit the proposed Settlement Class in a “material and direct way.” Protocol, ECF No. 37 at 12 n.2; *see also In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 190 (3d Cir. 2005) (discussing *Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994), and stating that “even under [*Gottlieb*], mere diligent and competent work is not sufficient to earn compensation: the work must actually benefit the class in order to be rewarded out of the common fund.”). No pre-appointment time was included in Plaintiffs’ Petition for Award of Attorneys’ Fees, Reimbursement of Expenses, and Service Awards to Class Representatives. ECF No. 122 at 16 n.11.

The time incurred by Wexler Wallace is no exception. While the injunctive relief obtained by Wexler Wallace in the District of Rhode Island may have benefitted some individual class members, i.e., those who received a Recall Letter from Hill’s, it did not materially benefit the Settlement Class as a whole. Moreover, at best, Wexler Wallace’s work was only minimally successful, resulting in what that court characterized as merely “a limited clarification of the meaning of the Hill’s deadline for consumers to submit documentation to support a claim for non-litigation reimbursement.” ECF No. 118-2 at 6.

Indeed, despite Wexler Wallace’s request for sweeping relief, the *Jubenville* Court declined to grant any of the four corrective actions the motion actually sought. Specifically, the *Jubenville* court declined to grant Wexler Wallace’s attempt to: 1) “bar Hill’s from communicating at all with customers”; 2) “void any releases consumers already signed”; 3) “cancel authority any consumers had given to allow Hill’s to communicate with a veterinarian”; and 4) “chide Hill’s for what

Plaintiffs claim is unethical conduct.” *Id.* at 5 (summarizing the motion). Rather, the *Jubenville* court found “that, overall, Hill’s communications strategy appears to be well calibrated to avoid misleading or improperly coercing consumers to sign releases.” *Id.* at 6. Further, with regard to the purportedly unethical communications by Hill’s, the court found: “none were unethical or violative of any Rhode Island Rule of Professional Responsibility. Rather, they . . . not only were appropriate, but also were empathetically responsive to Ms. Jubinville’s understandable anguish over the death of her dog.” *Id.* The Court went on in dicta to state that the relief Wexler Wallace sought “treads perilously close a serious interdiction on protected First Amendment speech.” *Id.*

On the other hand, Co-Lead Counsel believe that Wexler Wallace could have been eligible to receive reasonable compensation for the work it did related to the change in the claim form. If Wexler Wallace had timely submitted billing records for this work, Co-Lead Counsel would have considered a fee allocation to compensate Wexler Wallace for the reasonable time spent on that effort. But Wexler Wallace did not submit time entries for this work to Co-Lead Counsel.

Ultimately, if the Court believes that Wexler Wallace’s unsubmitted time and expense records should be considered despite being untimely, Wexler Wallace should be ordered to submit detailed time records to Co-Lead Counsel. In sum, Wexler Wallace needs to comply with the procedures in place for all counsel and all of its billing records should be subject to the same scrutiny and standards that are applied to all other counsel in this MDL. Co-Lead Counsel will review all of the records, including any untimely and unsubmitted records included in its motion. Co-Lead Counsel will advise all counsel of their fee allocation after this review is completed.⁴

⁴ If Wexler Wallace has an objection to its allocation at that point, it can raise the objection then, not before. *See, e.g., In re Motor Fuel Temperature Sales Pracs. Litig.*, No. 07-MD-1840-KHV, 2016 WL 10732583, at *17 (D. Kan. Feb. 17, 2016), *report and recommendation adopted as modified sub nom.* (“Unlike the situation in *High Sulfur*, there is no indication that any Plaintiffs’ counsel is dissatisfied with the agreement among them in allocating an award of fees.

CONCLUSION

Co-Lead Plaintiffs respectfully request that Wexler Wallace's motion be denied. To the extent the Court believes that Wexler Wallace should be permitted to submit time and expenses not previously submitted to Co-Lead Counsel, Wexler Wallace should be required to submit detailed time and expense records to Co-Lead Counsel for review and consideration, consistent with the Court's Order and the Protocol.

The Court sees no reason to involve itself in how Plaintiffs' counsel allocate the fee award among themselves"); *id.*, 2016 WL 4445438, at *6 n.16 (D. Kan. Aug. 24, 2016) ("The Court agrees with Judge James that absent an indication that plaintiffs' counsel are dissatisfied with their agreement regarding fee allocation, the Court need not involve itself in how counsel allocate the fee award among themselves.").

Date: June 11, 2021

Respectfully submitted,

STUEVE SIEGEL HANSON LLP

By: Rachel E. Schwartz
Rachel E. Schwartz, KS Bar # 21782
schwartz@stuevesiegel.com
460 Nichols Road, Suite 200
Kansas City, Missouri 64112
Telephone: (816) 714-7125
Facsimile: (816) 714-7101

Plaintiffs' Co-Lead, Liaison, and Interim Class Counsel

MASON LIETZ & KLINGER LLP
Gary E. Mason
gmason@masonllp.com
5101 Wisconsin Avenue, NW, Suite 305
Washington, District of Columbia 20016
Telephone: (202) 429-2290
Facsimile: (202) 429-2294

Plaintiffs' Co-Lead and Interim Class Counsel

REESE LLP
Michael Robert Reese
mreese@reesellp.com
100 West 93rd Street, 16th floor
New York, New York 10025
Telephone: (212) 643-0500
Facsimile: (212) 253-4272

Plaintiffs' Co-Lead and Interim Class Counsel

KAMBERLAW LLC
Scott A. Kamber
skamber@kamberlaw.com
201 Milwaukee Street, Suite 200
Denver, Colorado 80206
Telephone: (303) 222-9008
Facsimile: (212) 202-6364

Plaintiffs' Co-Lead and Interim Class Counsel