

# COOPER LAW FIRM

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## VIA E-MAIL

Special Master Francis McGovern - [McGovern@law.duke.edu](mailto:McGovern@law.duke.edu)  
401 W. Alabama St.  
Houston, TX 77006

Re: Lack of Participation regarding NAS Babies in MDL 2804

Dear Special Master McGovern:

We represent NAS babies in the MDL and since our entry there we have sought a means to participate so that their rights can be adjudicated. The JPML, which denied our request for a separate Baby MDL, recognized that we are the only parties representing the NAS babies:

The NAS plaintiffs now before us are represented by their own counsel, and no other counsel is purporting to settle the NAS plaintiffs' interests on their behalf while also representing another class with conflicting interests. Rec. Doc. 51 MDL 2872

Judge Polster has twice denied our request for leave seeking a separate track within the MDL, most recently stating that the JPML Panel was confident that non-leadership and other litigants would be fairly treated and that efforts by the PEC and Special Master McGovern would resolve the issues:

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." *Id.* at 4.

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 1:17-md-02804.

Joe Rice agreed to the appointment of a committee including two of our attorneys, two hospital attorneys and a third selected by Mr. Rice. The committee was appointed by him but includes one hospital member, a public entity member, and another attorney representing individual babies. This attorney is Booth Goodwin who supported our position at the JPML. 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 met and we were told that the life-care planning needs were not necessary and being done by others. We were asked to provide search terms for baby related discovery. We asked for ARCOS and prior discovery to assist in the work assignment. 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 have an interest in, no matter who was lead counsel or where the cases were pending.

We proposed an addendum limiting our interest sharing to our baby cases. This was rejected. As a show of good faith, we have sent our baby related search terms (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.

It is obvious from our meeting and various telephone and email communications with Mr. Rice, other PEC members, and the committee members that they feel that the babies 'are covered' by the entities and the hospital plaintiffs. We disagree.

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 are mindful of your comments to us in Houston. We want what we have always wanted and believe our clients are entitled to certainty and clarity about our role. We continue to believe a NAS Baby sub-committee is the best route (see Judge Polster's Order about support settlement committees. Rec. Doc. 118 1:17-md-02804).

It seems patently unfair that the Native Americans have a separate track and our babies have no vehicle to advance their claims. Although, in fairness, our review of the docket does not reveal that any appointments to the Native American track have been made or confirmed.

We think a meeting with you, Mr. Rice, and perhaps other PEC members is in order. We wish to assure you that we are devoted to our clients, we have spent substantial sums of both money and time on experts, working up damage models, and evidence on their behalf. We want to work this out with the PEC.

Respectfully Yours,

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