



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: DIGITEK® LITIGATION

CIVIL ACTION NO. 08-C-5555

THIS DOCUMENT APPLIES TO ALL CASES

STATE AND FEDERAL COORDINATION ORDER

It appearing that the cases pending in the Circuit Court of Kanawha County, West Virginia as *In re: Digitek® Litigation*, Civil Action No. 08-C-5555 (“West Virginia State Digitek Litigation”) share common issues with and will involve common discovery with cases pending in the United States District Court for the Southern District of West Virginia as *In re: Digitek Products Liability Litigation*, MDL No. 1968 (“MDL No. 1968”), and that pretrial proceedings in all these cases should be coordinated to avoid unnecessary conflicts and expense, conserve judicial resources, and expedite the disposition of all the cases, this Court, after having been advised that a similar order will be entered in MDL No. 1968, ORDERS:

A. *Application.* All West Virginia State Digitek Litigation is subject to state-federal coordination with MDL No. 1968 under this Order.

B. *Designated Counsel.*

1. *Plaintiffs’ Liaison and Lead Counsel.* Carl N. Frankovitch, Esquire is designated as Plaintiffs’ Liaison and Lead Counsel in this Court, with the responsibilities defined in West Virginia Trial Court Rule 26.04(b) and (c). Plaintiffs’ Liaison and Lead Counsel shall endeavor to coordinate activities in the West Virginia State Digitek Litigation with the cases in MDL No. 1968.

2. *Defendants’ Liaison and Lead Counsel.* Rebecca A. Betts, Esquire is designated as Defendants’ Liaison Counsel and Matthew P. Moriarity, Esquire is

designated as Defendants' Lead Counsel in this Court with the responsibilities defined in West Virginia Trial Court Rule 26.04(b) and (c), respectively. Defendants' Liaison and Lead Counsel shall endeavor to coordinate activities in the West Virginia State Digitek Litigation with the cases in MDL No. 1968.

3. Compensation. Attorneys designated as Liaison or Lead Counsel by this Court and by the court in MDL No. 1968 shall be entitled to reasonable compensation and reimbursement of expenses for services performed in such capacities, equitably apportioned among the parties benefiting from such services in the West Virginia State Digitek Litigation and in MDL No. 1968. This Court will cooperate with the court in MDL No. 1968 in making appropriate orders for such compensation and reimbursement if agreement cannot be reached between such counsel and the parties for whom they are acting.

C. Discovery

1. Joint Document Depository. Any document depository shall be established for the joint use of parties in the West Virginia State Digitek Litigation and the cases in MDL No. 1968. Subject to agreement among the parties regarding the sharing of expenses and the confidentiality of documents, counsel in the West Virginia State Digitek Litigation shall have access to the documents in such depository to the same extent as counsel in MDL No. 1968. Parties shall not make new requests for production of documents in the West Virginia State Digitek Litigation if such documents have already been produced and are available to them in MDL No. 1968.

2. Confidential Documents. Counsel in the West Virginia State Digitek Litigation obtaining access to documents subject to a confidentiality and/or protective

order entered in MDL No. 1968 shall be subject to and abide by the terms and conditions of such order. Counsel in MDL No. 1968 obtaining access to documents subject to a confidentiality and/or protective order entered in the West Virginia State Digitek Litigation shall be subject to and abide by the terms and conditions of such order.

3. *Plaintiffs' Work Product.* Pursuant to an order entered by the court in MDL No. 1968, plaintiffs in any actions eligible for state-federal coordination, as set forth above, shall be entitled to receive the following materials from the MDL No. 1968 Plaintiffs' Steering Committee ("PSC") upon payment of the actual cost of providing copies of the materials:

- a.* CD-ROMs reflecting searchable images of the key documents selected by the PSC from the document productions of the defendants and third-parties in MDL No. 1968;
- b.* a bibliographic database providing a "coded" index of such key documents;
- c.* abstracts and subjective analyses of the depositions of each generally applicable fact witness and generic expert taken in MDL No. 1968 and the state-court actions coordinated pursuant to this Order;
- d.* to the extent developed by the PSC, timelines, "casts of characters," issues outlines, and other work product relating to the facts at issue in MDL No. 1968; and
- e.* reports of "generic experts" developed by the PSC in connection with MDL No. 1968.

Plaintiffs in the West Virginia Digitek Litigation are prohibited from using any of the work product of the PSC or plaintiffs, as described in subparagraphs *a. – e.* above, for any purpose other than the litigation of actions which qualify for state-federal coordination pursuant to the terms of this Order.

Nothing contained in this Order will limit the obligation of the PSC to provide copies of documents produced in MDL No. 1968 which do not reflect the PSC's work product to counsel in the West Virginia Digitek Litigation to the extent that all defendants consent to such disclosure, the requesting party pays the actual costs of producing copies of the documents and, if necessary, the requesting party executes an appropriate confidentiality agreement.

D. Depositions.

1. Depositions of persons whose testimony will likely be relevant both in the West Virginia State Digitek Litigation and in MDL No. 1968 shall be cross-noticed for use in all such cases. Parties in the State Digitek Litigation must show cause within 60 days of the taking of a deposition in MDL No. 1968 why the deposition taken in MDL No. 1968 should not be usable in this Court, subject to the right to conduct supplemental examination upon a showing of need.

2. Copies of transcripts of any deposition taken in the West Virginia State Digitek Litigation and/or MDL No. 1968 pursuant to the terms of this Order shall not be provided to any person except upon payment for such transcript or other record of the deposition directed to the court reporter who stenographically recorded the proceedings at the deposition or the operator who made any video or audio recording of the proceedings at the deposition and payment of such person's proper fees.

E. Consistency of Rulings. To avoid unnecessary conflicts and inconsistencies in the rulings of this Court and the court in MDL No. 1968, this Court is prepared to conduct consolidated hearings and status conferences with Judges Joseph R. Goodwin and Mary E. Stanley, and to enter joint rulings, except to the extent that differences may be mandated by different laws or rules governing this Court or justified by particular circumstances of the cases before this Court.

Judge Mary E. Stanley has been appointed in MDL No. 1968 to: (1) assist in preparing and monitoring schedules and plans for the coordinated conduct of discovery; (2) to recommend appropriate resolution of discovery disputes, including controversies regarding limitations on the scope or form of discovery and questions regarding claims of privilege and confidentiality; and (3) to facilitate proper cooperation and coordination among counsel. If a ruling is made regarding any of these issues by the court in MDL No. 1968, this Court will adopt such ruling, unless a different ruling is shown to be mandated by the laws and rules governing this Court or justified by particular circumstances of the cases before this Court.

F. Claim Payments. Before making any claim payment to any plaintiff, all defendants in the West Virginia State Digitek Litigation shall deduct from any payment an amount equal to six percent (6%) of the aggregate of the amount being paid and any amounts to be paid in the future and shall pay such sum for deposit into the MDL No. 1968 Plaintiff's Litigation Expense Fund for distribution in accordance with the provisions of MDL No. 1968 Pretrial Order #9, a copy of which is attached to this Order. In measuring the gross amount due or to become due to any plaintiff as claim payments,

the defendant shall include the present value of any fixed and certain payments to be made in the future.

G. *Other Litigation.* Upon application, these provisions may be ordered applicable to cases involving the same common issues subsequently filed in other courts.

ENTER: January 23, 2009

/s/ Alan D. Moats
Lead Presiding Judge



**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

IN RE: DIGITEK
PRODUCTS LIABILITY LITIGATION

MDL No. 1968

THIS DOCUMENT APPLIES TO ALL CASES

**PRETRIAL ORDER #9
(Establishment of Plaintiffs' Litigation Expense Fund)**

This order is entered to provide for the fair and equitable sharing among plaintiffs of the cost of special services performed and expenses incurred by attorneys acting for MDL administration and common benefit of all plaintiffs in this complex litigation.

1. Plaintiffs' Litigation Expense Fund to be Established

Plaintiffs' Co-Lead and Liaison Counsel, Fred Thompson, III, Carl N. Frankovitch and Harry F. Bell, Jr. are directed to establish an interest-bearing account to receive and disburse funds as provided in this order. Plaintiffs' Co-Lead Counsel shall agree on and designate an appropriate bank for this purpose. These funds will be held as funds subject to the direction of the court. No party or attorney has any individual right to any of these funds except to the extent of amounts directed to be disbursed to such person by the Co-Lead Counsel of the Plaintiffs' Steering Committee (PSC) acting under authority of the court. These funds will not constitute the separate property of any party or attorney or be subject to garnishment or attachment for the debts of any party or attorney except when and as directed to be disbursed as provided by court order to a specific person. These limitations do not preclude a party or attorney from transferring, assigning, or

creating a security interest in potential disbursements from the fund if permitted by applicable state laws and if subject to the conditions and contingencies of this order.

2. Disbursements

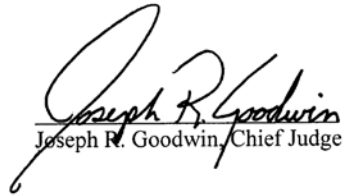
- a. Upon approval of the Co-Lead Counsel, payments shall be made from the fund to attorneys who incur expenses for the joint and common benefit (as defined by *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 110 11 (3rd Cir. 1976)) of plaintiffs and claimants whose claims have been treated by this Court as a part of these proceedings in addition to their own client or clients. Eligible attorneys are limited to Plaintiffs' Liaison Counsel, Lead Counsel and members of the PSC and other attorneys called upon by them to assist in performing their responsibilities.
- b. Payments will be allowed only to entities for special expenses incurred for the joint and common benefit of all plaintiffs as designated by the PSC and approved by the Co-Lead Counsel.
- c. Payment may, for example, be made for services and expenses related to the obtaining, reviewing, indexing, and payment for hard copies of computerized images of documents for the defendants; for conducting "national" or "state" depositions; and for activities connected with the coordination of federal and state litigation.
- d. Payments will not exceed the fair value of the services performed or the reasonable amount of the expenses incurred considering the complexity of the work and the results obtained.

- e. No amounts will be disbursed without approval by Co-Lead Counsel or such other mechanism as the court may order. However, accurate reports and statements shall be maintained and available to be examined by the PSC and the court in camera in it's discretion, showing the aggregate of the monthly deposits, disbursements, interest earned, financial institution charges, if any, and current balance.
 - f. At the close of all relevant claims, if the fund exceeds the amount needed to make payments as provided in this order, the Court may order a refund to those who have contributed to the fund. Any such refund will be made in proportion to the amount of the contributions.
3. Oversight
- a. The PSC shall retain a CPA for the purposes of assisting in oversight and completing any and all necessary reports as reflected in this order.

The court **DIRECTS** the Clerk to file a copy of this order in 2-08-md-1968 which shall apply to each member Digitek-related case previously transferred to, removed to, or filed in the is district, which includes counsel in all member cases up to and including civil action number 2-08 -cv-1432. In cases subsequently filed in this district, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action at the time of filing of the complaint. In cases subsequently removed or transferred to this court, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action upon removal or transfer. It shall be the responsibility of the parties to review and abide by all pretrial orders previously entered by the

court. The orders may be accessed through the CM/ECF system or the court's website at www.wvsd.uscourts.gov.

Entered: December 30, 2008



Joseph R. Goodwin, Chief Judge