

01871 (E.D. Pa. Oct. 19, 2012); *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Oct. 19, 2010).

II. APPLICATION

2. This Order applies to all Lipitor diabetes cases, whether direct or derivative, now pending as of the date that this Order is entered, or later filed in, transferred to, or removed to this Court and treated as part of the coordinated proceeding known as *In Re: Lipitor (Atorvastatin Calcium) Marketing, Sales Practices and Products Liability Litigation*, MDL 2502 (“the MDL Cases”), whether or not said cases are later remanded. Any plaintiffs that participate in any MDL Settlement or MDL Tolling Agreement are deemed to consent to be bound the terms of this Order. This Order further applies to each case in which Plaintiffs’ Counsel elects to sign the Participation Agreement, attached hereto as Exhibit A, regardless of whether the case is filed, unfiled, or subject to a state court settlement or tolling agreement (“the Participating Non-MDL Cases”) (together with the MDL Cases, “Covered Claims”). Plaintiffs’ Counsel for Covered Claims are collectively referred to hereinafter as “Participating Counsel.”

III. MDL 2502 ATTORNEY PARTICIPATION AGREEMENT

3. Exhibit A, attached hereto and incorporated herein, is a voluntary “*MDL 2502 Attorney Participation Agreement*” between: (1) the Plaintiffs’ Steering Committee (“PSC”), and (2) plaintiffs’ attorneys who elect to sign the Participation Agreement. The *MDL 2502 Attorney Participation Agreement* is a private and cooperative agreement between plaintiffs’ attorneys only, and not with Pfizer Inc., Greenstone LLC, or any other Defendant in any case in this litigation (collectively “Defendants”). All plaintiffs’ attorneys who currently have cases pending in any state court and who want to become a Participating Counsel shall, within 45 days of this Order, execute the Participation Agreement. Any plaintiffs’ attorney who does not yet have a

Lipitor diabetes case filed in any federal or state court and who wants to become a Participating Counsel shall execute the Participation Agreement within 45 days of the date their first case is filed in any state court, if that lawyer intends to voluntarily become a Participating Counsel at the fee and expense percentages set forth herein. Failure to execute a Participation Agreement indicating that an attorney will be a Participating Counsel within the time frame set forth in this paragraph will result in higher percentages for common benefit assessment as a result of such later participation. More specifically, and as set forth in the Participation Agreement, the higher fee percentage for failure to execute a Participation Agreement indicating that an attorney will be a Participating Counsel within the time frame set forth in this paragraph shall increase from 5% to 7% (for a total assessment increasing from 8% to 10%).

Participating Counsel shall be entitled to receive the entire common benefit work product performed by the PSC. Counsel who choose *not* to execute the Participation Agreement are not entitled to receive common benefit work product.

The Court recognizes the jurisdictional rights and obligations of the state courts to conduct their state court litigation as they so determine and that the state court litigations may include counsel who are Participating Counsel. The Participation Agreement and this Order shall not be cited by a Party to the Participation Agreement in any other court in support of a position that adversely impacts the jurisdictional rights and obligations of the state courts and state court Participating Counsel.

IV. THE “MDL 2502 FUNDS” TO BE ESTABLISHED AND DUTIES OF ADMINISTRATOR THEREOF

4. The Court hereby authorizes the establishment of an “*MDL 2502 Fund*” and an “*MDL 2502 Expense Fund*” (both collectively referred to herein as “*MDL 2502 Funds*”) for the purposes and pursuant to the limitations set forth in this Order. By subsequent Order, the Court

will appoint an Administrator of the *MDL 2502 Funds* (hereinafter the “Administrator”) and directs the Administrator to establish insured, and if possible, may be interest-bearing accounts to receive and disburse funds as provided in this Order. The Administrator shall designate a Depository for this purpose. These funds will be held as funds subject to the direction of the Court. Within the Fund, the Administrator shall account for funds, fees, and for funds used for expenses. 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 Order of the Court. These funds will not constitute the separate property of any party or attorney nor 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 Order of this Court to a specific person.

5. In connection with his or her duties, the Administrator of the *MDL 2502 Funds* shall:
 - a. Have all such power and authority over such funds as necessary or convenient to exercise the authority granted herein;
 - b. Keep and report periodically to this Court *in camera* an accounting of the funds received, maintained and disbursed;
 - c. Have the authority to instruct the Depository with respect to permitted investments of said funds;
 - d. Make decisions and take action with respect to treatment of such funds for purposes of compliance with the Internal Revenue Code and any applicable local or state tax codes, including creating, maintaining and reporting such funds and the income, if any, derived therefrom as in a

Qualified Settlement Fund (QSF) or such other entity as he deems appropriate;

- e. Out of the assets of the *MDL 2502 Funds*, in his or her discretion, purchase and maintain reasonable amounts and types of insurance for errors and omissions or fidelity bonds, if reasonably available;
- f. To procure, upon consultation with the PSC, professional accounting, legal and other services for the purposes of carrying out the tasks described in this Order, and to be reimbursed for the expenses of such services; and
- g. To adopt and implement reasonable procedures consistent with this Order and in consultation with the PSC.

6. The Depository shall be a commercial bank that: (1) has deposits insured by the Federal Deposit Insurance Corporation; (2) is organized under the laws of the United States or any state thereof; and (3) has a total risk-based capital in excess of \$5 billion and meets the minimum risk-based ratios established under the Federal Deposit Insurance Corporation Improvement Act of 1991. The Depository may act as paying agent, depository, custodian or trustee with respect to funds it holds.

7. The Administrator of the *MDL 2502 Funds* shall consider, in designating the Depository and in procuring professional services, the charges that the Depository or provider of professional services will impose for its actions and the ability of the Depository or provider of professional services to undertake the tasks called for with efficiency and responsiveness.

8. The Funds shall not acquire or hold for longer than 90 days, any debt securities, certificates or investments unless such instruments are a U.S. Treasury Bill, U.S. Treasury

Money Market, U.S. Government Money Market or similar type of account guaranteed by the United States or an agency thereof, including an FDIC-Insured Account. The U.S. Treasury Money Market or U.S. Government Money Market must be registered under the Investment Company Act of 1940, as amended, that have the highest rating obtained from either Moody's or S&P. In determining investments to be held by the Funds, primary regard shall be given by the Administrator to safety of principal.

9. In connection with their services, the Administrator and his or her staff, and the Depository shall be entitled to be paid reasonable fees and to be reimbursed for reasonable expenses when, and as approved by this Court, and they shall periodically submit statements to the Court, with copies to Plaintiffs' Liaison Counsel and Defendant's Liaison Counsel. If funds are not then available in the *MDL 2502 Fund*, they shall be paid by the PSC, which shall be reimbursed out of the *MDL 2502 Funds* when and if ever funded.

V. **ASSESSMENTS AND PAYMENTS INTO THE MDL 2502 FUND FOR ALL COVERED CLAIMS**

10. A total assessment for payment of attorneys' fees and approved common benefit and MDL expenses of eight percent (8%) of the Gross Monetary Recovery shall apply to all Covered Claims (the "Assessment"). This eight percent (8%) Assessment shall be divided as follows: five percent (5%) from the attorney's legal fees, and three percent (3%) from the plaintiffs' recovery. Any balance remaining in the *MDL 2502 Expense Fund* after all assessments and common-benefit expenses have been fully reimbursed shall be transferred to the *MDL 2505 Fund* on application of Plaintiffs' Liaison Counsel for distribution accordingly to the common-benefit fee guidelines below.

11. In measuring the Gross Monetary Recovery:

- a. Include all sums to be paid in settlement of the claim;

- b. Exclude court costs that are to be paid by any Defendant; and
- c. Include the present value of any fixed and certain payments to be made in the future.

12. Defendants are directed to withhold the Assessment from amounts paid on any Covered Claim and to pay the Assessment directly into the *MDL 2502 Funds* as a credit against the Settlement or Judgment. If a Defendant desires to settle with any plaintiff whose counsel disputes that the claim is a Covered Claim, that Defendant may make a confidential, *ex parte* application to the Court or any officer appointed by the Court to resolve such disputes for a threshold determination of whether the claim is a Covered Claim and the amount, if any, to be paid into the *MDL 2502 Funds*. The Defendant will notify the settling plaintiff of its application, to provide the settling plaintiff with an opportunity to participate in such proceedings. The Court or its appointed officer may request any information from the PSC that it feels it needs to resolve the dispute, including written submissions and if necessary or helpful, a hearing on the issue where evidence and testimony may be presented. If the Court or its appointed officer determines that the claim is not a Covered Claim, Defendant shall have no responsibility to pay any part of such settlement into the *MDL 2502 Funds*. If the Court or its appointed officer determines that the claim is a Covered Claim, Defendant will withhold such funds from any settlement payment until the dispute can be resolved with the settling plaintiff or by the Court with jurisdiction over the claim, and within such determination becomes final and unappealable.

13. Every thirty (30) days, the PSC shall provide a list of all then-known Covered Claims, including the name of each plaintiff and his or her attorney, if any, to the Administrator of the *MDL 2502 Funds*, Defendants' Liaison Counsel, plaintiffs' counsel, and the Court or its

designee. In connection therewith, Defendants' Liaison Counsel shall, upon request from the PSC, supply to the PSC any corrections or additions to such list.

14. A Defendant and its counsel shall not distribute any potential common benefit portion of any settlement proceeds with respect to any Covered Claims until: (1) Defendant's counsel notifies the PSC in writing of the existence of a settlement and the name of the individual plaintiff's attorney holding such Covered Claims and (2) Plaintiffs' Liaison Counsel has confirmed to Defendant's counsel in writing that the individual plaintiff attorney's cases or claims are subject to an Assessment pursuant to this Order.

15. Information regarding the amount of an Assessment paid or to be paid into the *MDL 2502 Funds* will be provided only to the individual plaintiff's attorney holding the Covered Claim and to the Administrator, the Escrow Agent, and the Court, and shall otherwise remain confidential and shall not be disclosed to the PSC or any of its members or to any other person unless ordered by the Court.

16. The Assessment represents a hold-back (*In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 266 (2d Cir. 2006)) and shall not be altered in any way unless each of the following occurs: (1) the entire PSC is consulted and provided an opportunity to be heard at a formally announced PSC meeting prior to the filing of any motion to change the Assessment amount; (2) the PSC approves the proposed change to the Assessment by a majority vote; and (3) this Court, upon motion, notice, and good cause shown, amends this Order.

17. Nothing in this Order is intended to impair the attorney/client relationship or any contingency fee contract deemed lawful by the attorneys' respective state bar rules and/or state court orders.

18. Upon payment of the Assessment into the *MDL 2502 Funds*, Defendant shall be released from any and all responsibility to any person, attorney, or claimant with respect to the Assessment placed into the *MDL 2502 Funds*. Any person, attorney, or claimant allegedly aggrieved by an Assessment pursuant to this Order shall seek recourse as against the *MDL 2502 Funds*.

VI. ADDITIONAL GUIDELINES COMPENSABILITY OF COMMON BENEFIT TIME AND EXPENSES

19. The following guidelines regarding the submission of common-benefit time and expenses are adopted for the management of timekeeping, cost reimbursement, and related common-benefit issues. These guidelines will be strongly considered by this Court in approving the award of common-benefit attorney fees and costs.

20. The recovery of common-benefit attorneys' fees and cost reimbursements will be limited to Participating Counsel. Participating Counsel shall only be eligible to receive common-benefit attorneys' fees and cost reimbursement, (should such funds be available) if the time expended, costs incurred, and activity in question were:

- a. for the common-benefit;
- b. appropriately authorized by the Court, Plaintiffs' Lead Counsel or a Committee Chair appointed by the PEC;
- c. timely submitted;
- d. verified; and
- e. approved by this Court.

A. COMMON-BENEFIT TIME

1.) Common-Benefit Work

21. Common-benefit work may include, but is not limited to:

- a. investigation and research;
- b. conducting discovery (*e.g.* reviewing, indexing, and coding documents);
- c. preparation and attendance at non-case-specific depositions;
- d. preparation for and attendance at hearings;
- e. attendance at PSC-sponsored meetings;
- f. other PSC activities, including work on the Discovery, Case-Specific, Science, Experts, Law and Briefing, Document Review and similar Committees;
- g. work with expert witnesses (not case-specific experts, unless such experts are for bellwether trials);
- h. trial preparation and trial;
- i. performance of administrative matters, provided that all such work was conducted for the joint and common-benefit of plaintiffs; and
- j. work done in connection with an Discovery Pool and/or Trial Pool case.

22. **Common-benefit work does not include:**

- a. time not authorized by the Plaintiffs' Executive Committee;
- b. excessive time for a particular task;
- c. duplicative time (*i.e.* time billed by two or more people in the same firm unless both are required or requested to attend an event or work on a project together);
- d. class action work, including pleadings and briefs will not be considered common-benefit work in this case;
- e. time related to prosecution of claims for individual clients, such as preparing fact sheets, preparing for depositions, case-specific depositions and all other such time on an individual case. However, once listed for trial or identified as a case that

should be prepared for a bellwether trial, time will be allowed, from the date of such listing;

- f. time related to negotiating individual client settlements;
- g. read and review time for persons not overseeing or directly participating in a project;
- h. all conference time such as Mealey's, American Association for Justice, Mass Torts Made Perfect, except for any time actually preparing and presenting Lipitor materials at such conference;
- i. clerical time, such as faxing, copying, booking travel and preparing binders;
- j. time for which descriptions are incomplete;
- k. internal firm time for firm management; and
- l. time related to fee issues; time spent preparing or reviewing PSC time reporting, unless the fee review or time reporting review is being done by assignment or appointment on behalf of the PSC.

2.) Disbursements from the MDL 2502 Funds for Common-Benefit Work

23. Upon a proper showing and Order of the Court, payments may be made from the *MDL 2502 Common Benefit Funds* to Participating counsel who have provided services or incurred expenses for the joint and common-benefit 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.

B. COMMON-BENEFIT EXPENSES

24. The submission and compensability of common-benefit time shall be governed by CMO No. 4, including all attachments thereto.

C. EVALUATION OF COMMON-BENEFIT TIME

25. In apportioning any fee award to Participating Counsel, appropriate consideration will be given to the experience, talent, and contribution made by Participating Counsel, and to the time and effort expended by each as well as to the type, necessity, and value of the particular legal services rendered.

VII. INCORPORATION BY REFERENCE

25. The *MDL 2502 Attorney Participation Agreement* is attached hereto as Exhibit A and is incorporated by reference and has the same effect as if fully set forth in the body of this order.

AND IT IS SO ORDERED.


Richard Mark Gergel
United States District Court Judge

January 22, 2015
Charleston, South Carolina

work product that will be valuable in all proceedings and benefit all plaintiffs alleging injury caused by use of Lipitor (“Common Benefit Work Product”); and

WHEREAS, Participating Counsel is desirous of acquiring the Common Benefit Work Product;

NOW THEREFORE, in consideration of the covenants and promises contained herein, and intending to be legally bound hereby, the parties agree as follows:

I. SCOPE OF AGREEMENT

A. Purpose

This Participation Agreement is a private cooperative agreement between plaintiffs’ attorneys to share Common Benefit Work Product pursuant to MDL Case Management Number (“CMO”) No. 27. Any plaintiffs’ attorney who executes this Agreement or who is otherwise bound to this Participation Agreement by CMO 27 (“Participating Counsel”) is entitled to receive the Common Benefit Work Product created by those attorneys who have also executed, or have been deemed to have executed, the Participation Agreement, regardless of the venue in which the attorney’s cases are pending.

B. Rights and Obligations of Participating Counsel

Participating Counsel shall be provided access to the Common Benefit Work Product. Participating Counsel acknowledges that non-Participating Plaintiffs’ Counsel are not entitled to receive Common Benefit Work Product. Participating Counsel agree that all Lipitor cases and/or claims in which Participating Counsel has a fee interest, including unfiled cases, tolled cases, and/or cases filed in state and/or federal court, are subject to the terms of this Participation Agreement. Participating Counsel shall produce a list that correctly sets forth the name of each client represented by them and/or in which they have an interest in the attorney fee, regardless of

what that interest is, who has filed a civil action arising from the use, marketing, and/or sale of Lipitor. Such list shall include the court and docket number of each such case. Participating Counsel shall also produce a list that contains the name of each client represented by them and/or in which they have an interest in the attorney fee, regardless of what that interest is, who has not yet filed a civil action. Participating Counsel shall supplement the lists on a quarterly basis and provide the lists to Plaintiffs' Co-Liaison Counsel. The initial list shall be provided within 30 days of signing this Agreement and must be supplemented every 90 days thereafter.

II. AGREEMENT TO PAY AN ASSESSMENT ON GROSS RECOVERY

Subject to the terms of this Agreement and the terms of CMO No. 27, all plaintiffs and their attorneys who agree to settle, compromise, dismiss, or reduce the amount of a claim, or with or without trial, recover a judgment for monetary damages or other monetary relief, including compensatory and punitive damages, for any Lipitor claims are subject to an assessment of the Gross Monetary Recovery, as provided herein.

A. Assessment Amount

The assessment amount shall be eight percent (8%) of the Gross Monetary Recovery in each case, five percent (5%) for common benefit attorneys' fees and three percent (3%) for common benefit expenses, and represents a holdback (*See In re Zyprexa Prods. Liab. Litig.*, 267 F.Supp.2d 256 (E.D.N.Y. 2006)). Failure of any counsel who is not automatically bound to pay the common benefit assessment by virtue of having a fee interest in a case that is part of the MDL to execute a Participation Agreement indicating that an attorney will be a Participating Counsel within the time frame set forth herein paragraph will result in higher percentages for common benefit assessment as a result of such later participation. More specifically, and as set forth in this Participation Agreement, the higher fee percentage for failure

to execute a Participation Agreement indicating that an attorney will be a Participating Counsel within the time frame set forth in this paragraph shall increase from 8% to 10% (for a total assessment increasing from 5% to 7%).

The Participation Agreement is a private and cooperative agreement between plaintiffs' attorneys only; and not defendants or defendants' counsel. All plaintiffs' attorneys who currently have cases pending in any state court and who want to become a Participating Counsel shall, within 45 days of this Order, execute the Participation Agreement. Any plaintiffs' attorney who does not yet have a Lipitor case filed in any federal or state court and who wants to become a Participating Counsel shall execute the Participation Agreement within 45 days of the date their first case is filed in any state court, if that lawyer intends to voluntarily become a Participating Counsel at the fee and expense percentages set forth herein.

B. Gross Monetary Recovery Defined

Gross Monetary Recovery includes any and all amounts paid to plaintiffs' and/or their counsel by defendant(s) through a settlement or pursuant to a judgment. In measuring the Gross Monetary Recovery, the parties are to (a) exclude court costs that are to be paid by the defendant; (b) include any payments to be made by the defendant on an intervention asserted by third-parties, such as to physicians, hospitals, or other healthcare providers in subrogation related to treatment of a plaintiff, and any governmental liens or obligations (*e.g.*, Medicare/Medicaid); and (c) include the present value of any fixed and certain payments to be made in the future.

C. Attorneys' Fee Lien

With respect to each Lipitor diabetes claim subject to Case Management Order No. 27 or this Agreement, each Participating Counsel shall agree to have defendants deposit or cause to be deposited in the *MDL 2502 Funds* established by the District Court in the MDL a percentage of

the gross amount recovered by each such client that is equal to the assessment amount. In the event defendants do not deposit the assessed percentage into the Funds, Plaintiff and Plaintiff's Participating Counsel shall deposit or cause to be deposited in the *MDL 2502 Funds* established by the District Court in the MDL a percentage of the gross amount recovered by each such client that is equal to the assessment amount. Participating Counsel, on behalf of themselves, their affiliated counsel, and their clients, hereby grant and convey to Plaintiffs' Steering Committee a lien upon and/or a security interest in any fee (a) generated as a result of any recovery by any client who they represent in connection with any Lipitor diabetes claims and (b) they have any interest in, to the full extent permitted by law, in order to secure payment in accordance with the provisions of this Agreement. Participating Counsel will undertake all actions and execute all documents that are reasonably necessary to effectuate and/or perfect this lien and/or security interest.

D. Attorney-Client Contracts

Both the Plaintiffs' Steering Committee and Participating Counsel recognize the importance of individual cases and the relationship between case-specific clients and their attorneys. Regardless of the type of settlement or conclusion eventually made in either state or federal cases, Plaintiffs' Steering Committee will recommend to the MDL Court that appropriate consideration will be given to individual case contracts between attorneys and their clients.

I _____ [name of lawyer executing the Agreement] hereby represent to the Plaintiffs' Steering Committee that I have the authority to execute this Agreement on behalf of my law firm and have the authority to bind my law firm to the terms of this Agreement.

CHOOSE ONE:

I _____ [name of lawyer executing the Agreement] hereby certify that my law firm is a MDL Plaintiffs' Counsel as defined in CMO No. 27 and is subject to an assessment of 8% (5% for fees and 3% for costs)

I _____ [name of lawyer executing the Agreement] hereby certify that my law firm is a participating non-MDL Plaintiffs' Counsel as defined in CMO No. 27, and is an early participant and is subject to an assessment of 8% (5% for fees and 3% for costs)

I _____ [name of lawyer executing the Agreement] hereby certify that my law firm is a participating non-MDL Plaintiffs' Counsel as defined in CMO No. 27, and is a late participant and is subject to an assessment of 10% (7% for fees and 3% for costs)

Dated: _____

Attorney's Name:

Law Firm's Name:

Dated: _____

Mark C. Tanenbaum
Plaintiffs' Liaison Counsel
FOR PLAINTIFFS' STEERING COMMITTEE