

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

IN RE: CHANTIX  
(VARENICLINE) PRODUCTS  
LIABILITY LITIGATION

Master File No.: 2:09-CV-2039-IPJ  
MDL No. 2092

This Order Relates To:  
  
ALL CASES

**PRETRIAL ORDER NO. 7:  
PLAINTIFFS' COMMON BENEFIT  
FEE AND EXPENSE FUND**

1.

**SCOPE OF ORDER**

**I.**

This Order is entered to provide for the fair and equitable sharing among plaintiffs of the cost of services performed and expenses incurred by attorneys acting for MDL administration and common benefit of all plaintiffs in this complex litigation. Therefore, the Court finds it appropriate to establish a Common Benefit Fund from which payments may be made to attorneys who provide authorized and approved services or incur authorized and approved expenses for the joint and common benefit of plaintiffs in addition to their own client(s).

**A. Governing Principles – The Common Benefit Doctrine.**

This Court has authority under applicable law, the common benefit doctrine, and other principles of efficiency and equity to a create a common benefit fund to

compensate Plaintiffs' Leadership Structure ("PLS") for the services they provide, and expenses they incur, for the benefit of all plaintiffs in the Coordinated Litigation.

The governing principles are derived from the United States Supreme Court's common benefit doctrine, as established in *Trustees v. Greenough*, 105 U.S. 527 (1881); refined in, *inter alia*, *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1884); *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); and approved and implemented in the MDL context, in *inter alia*, *In re MGM Grand Hotel Fire Litigation*, 660 F.Supp. 522, 525-29 (D. Nev. 1987); and *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1019-21 (5th Cir. 1977). *See also* Manual for Complex Litigation, Fourth §§ 14.121, 20.312, 22.927 (2008).

**B. Application.**

This Order applies to all cases now pending, or later filed in, transferred to, or removed to, this Court and treated as part of the coordinated proceeding known as *In re: Chantix (Varenicline) Products Liability Litigation*, MDL 2092 ("the MDL proceedings"). This Order further applies to all plaintiffs' attorneys who are counsel, co-counsel, or have any type of fee interest in cases now pending, or later

filed in, transferred to, or removed to, this Court as part of the MDL proceedings. This Order also applies to Participating State Court Counsel as outlined below.

**1. Counsel with Cases in MDL No. 2092**

All plaintiffs' attorneys who are counsel, co-counsel, or have any type of fee interest in cases now pending, or later filed in, transferred to, or removed to, this Court as part of the MDL proceedings shall be subject to the assessment established in Section II.B.2.

**2. State Court Counsel**

**a. Participating State Court Counsel**

Exhibit A, attached hereto and incorporated herein, is a voluntary agreement between plaintiffs' attorneys who have personal injury cases relating to Chantix pending in any state court but who are not counsel or co-counsel and do not have any type of fee interest in any case now pending, or later filed in, transferred to, or removed to, this Court as part of the MDL proceedings ("Participating State Court Counsel") and the PLS. The Participation Agreement for State Court Counsel ("Participation Agreement") is a private and cooperative agreement between the PLS and Participating State Court Counsel only, and not Defendants.

Participating State Court Counsel are entitled to receive the "Common Benefit Work Product" generated by the PLS, subject to the Participating State Court

Counsel's agreement to be subject to the protective order in the MDL proceedings (Pretrial Order No. 3) and the entry of a substantively similar protective order in the applicable state court litigation. "Common Benefit Work Product" does not include trial or hearing transcripts, deposition transcripts of defendants' or third-party witnesses or exhibits attached thereto, nor does it include the actual documents/images of documents produced by defendants in response to discovery requests or the discovery requests themselves.

Plaintiffs' attorneys who are not counsel or co-counsel and do not have any type of fee interest in any case now pending, or later filed in, transferred to, or removed to, this Court as part of the MDL proceedings, but have personal injury Chantix cases pending in any State Court, may, within the time-period set forth in paragraph II.

B. 2., designate whether or not they wish to be a Participating Counsel (Early Participating or Later Participating) or a Non-Participating Counsel by signing the appropriate section of the Participation Agreement for State Court Counsel.

**b. Non-Participating State Court Counsel**

State Court Counsel who are not counsel or co-counsel and do not have any type of fee interest in any case now pending, or later filed in, transferred to, or removed to, this Court as part of the MDL proceedings, but have personal injury Chantix cases pending in any State Court, and who choose not to execute the

Participation Agreement (“Non-Participating State Court Counsel”) are not entitled to receive Common Benefit Work Product. Additionally, Non-Participating Counsel shall not be eligible to receive Common Benefit payments for any work performed or expenses incurred.

Nothing in this Order shall limit the PLS’s right or ability to seek an equitable contribution from any gross monetary recovery by a Non-Participating State Court Counsel settling a non-MDL personal injury case in which such counsel obtained access to, or the benefit of, MDL work product.

## **II. PLAINTIFFS’ LITIGATION FEE AND EXPENSE FUNDS**

### **A. Establishing the Fee and Expense Funds.**

By subsequent Order of this Court, the Court will appoint a qualified certified public accountant (the “CPA”) who is directed to establish two interest-bearing accounts to receive and disburse funds as provided in this Order (the “Funds”). The first fund shall be designated the “MDL 2092 Fee Fund” and the second fund shall be designated the “MDL 2092 Expense Fund.” These funds will be held subject to the direction of this Court.

The CPA shall serve as Escrow Agent over the Funds and keep detailed records of all deposits and withdrawals and to prepare tax returns and other tax filings in connection with the Funds. Such subsequent Order appointing the CPA shall

specify the hourly rates to be charged by the CPA and for the CPA's assistants, who shall be utilized where appropriate to control costs. The CPA shall submit quarterly detailed bills to the Court and to Plaintiffs' Lead Counsel. Upon approval by the Court, the CPA's bills shall be paid from the MDL 2092 Expense Fund and shall be considered a shared cost in accordance with § III. B.1., below.

**B. Payments into the Fee and Expense Funds: The Assessment.**

All Plaintiffs and their attorneys who are subject to this Order (either by virtue of being counsel, co-counsel, or having a fee interest in any case now pending, or later filed in, transferred to, or removed to, this Court as part of the MDL proceedings or by virtue of signing the Participation Agreement for State Court Counsel) and who either agree or have agreed — for a monetary consideration — 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 such compensatory and punitive damages, with respect to Chantix claims are subject to an assessment of the “gross monetary recovery,” as provided herein.

**1. Gross monetary recovery.**

Gross monetary recovery includes any and all amounts paid to plaintiffs' counsel by Defendants 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, and other healthcare providers in subrogation related to treatment of 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. The assessment shall apply to all of an attorney's Chantix personal injury clients, including any filed cases and/or unfiled claims.

**2. Assessment Amount.**

**a. Counsel with Cases in MDL No. 2092**

All plaintiffs' attorneys who are counsel, co-counsel, or have any type of fee interest in cases now pending, or later filed in, transferred to, or removed to, this Court as part of the MDL proceedings shall be subject to an assessment of six (6) percent (four (4) percent for common benefit attorneys' fees and two (2) percent for costs).

**b. Early Participating State Court Counsel**

For any Participating State Court Counsel who enters into the Participation Agreement within 45 days of the entry of this Order or within 45 days of their first case being docketed in state court (whichever date is later), the assessment shall be

six (6) percent (four (4) percent for common benefit attorneys' fees and two (2) percent for costs).

**c. Later Participating State Court Counsel**

For any Participating State Court Counsel who enters into the Participation Agreement after 45 days of the entry of this Order or more than 45 days after their first case is docketed in state court (whichever date is later), the assessment shall be eight (8) percent (six (6) percent for common benefit attorneys' fees and two (2) percent for costs).

**3. Modification of Assessment Amount by PLS.**

The assessment represents a hold back (*In re Zyprexa Prods. Liab. Litig.*, 267 F.Supp.2d 256 (E.D.N.Y. 2006)) and shall not be altered by the PLS in any way unless each of the following occurs: (1) the members of the PLS are consulted and provided an opportunity to be heard prior to the filing of any motion to change the assessment amount; (2) the members of the PLS approve the proposed change to the assessment by a majority vote; (3) noticed motion with an opportunity to be heard is granted by the Court; and (4) the increase is approved by the Court.

**4. Defendant's Obligations.**

Plaintiffs' Liaison Counsel shall provide the Defendants' Liaison Counsel, the CPA, and the Court or its designee with a list of State Court Counsel who have



entered into written agreements with the PLS by executing the Participation Agreement for State Court Counsel. Such list shall indicate whether the Participating State Court Counsel are Early Participating or Later Participating.

If Defendants settle a case subject to an assessment, defendants are directed to withhold the assessment from any and all amounts paid to plaintiffs and their counsel and to pay the assessment directly into the Funds as a credit against the settlement or judgment. If for any reason the assessment is not or has not been so withheld, the plaintiff and his counsel are jointly responsible for paying the assessment into the Fund promptly.

Within thirty days after the end of the first quarter in which the Defendant has paid any assessment into the Fund, the Defendant shall meet and confer with Plaintiffs' Lead Counsel regarding whether the Defendant shall make any report to the Court regarding the cases for which it has paid an assessment into the Funds and, if so, the content of such a report. To aid the Court and litigants in coordinating this litigation with any state court litigation, and to enable the PLS to offer state court counsel the opportunity to participate under the terms of this order, within thirty days of the end of each quarter, the Defendant shall inform Plaintiffs' Lead Counsel of any cases during that quarter that were: (1) filed in state court (other than in New York), (2) served on Defendant, (3) not removed by

Defendant, and (4) filed by counsel not part of the PLS. Such report shall include the case caption, case number, and the court in which the action is pending.

Whether any cases have been settled and the specifics of any settlement, including but not limited to the amount of any such settlement, shall be confidential and shall not be disclosed by the CPA to members of the PLS, any other plaintiffs' lawyer, the Court, the Court's designee, or to anyone else.

Monthly statements from the CPA shall, however, be provided to Plaintiffs' Lead and Liaison Counsel and the Court showing only the aggregate of the monthly deposits, disbursements, interest earned, financial institution charges, if any, and current balance.

### **III. COMMON BENEFIT EXPENSES**

#### **A. Qualified Expenses Eligible for Reimbursement.**

In order to be eligible for reimbursement of common benefit expenses, said expenses must meet the requirements and limitations set forth in the letter dated February 4, 2010, from Plaintiffs' Lead Counsel to all participating firms in the PLS and attached hereto as Exhibit B.

#### **B. Shared and Held Common Benefit Expenses.**

##### **1. Shared Costs.**

Shared Costs are costs incurred for the common benefit of the MDL as a whole.

Shared Costs are costs that will be paid out of a separate MDL 2092 Fund account that has already been established by Plaintiffs' Lead Counsel and to be funded by all members of the MDL PLS and others as determined by the PEC and its designated subcommittees. All Shared Costs must be approved by Plaintiffs' Lead Counsel prior to payment.

Shared Costs include: (a) Certain Court, filing and service costs; (b) Deposition and court reporter costs for non-case specific depositions; (c) Document Depository: creation, operation, equipment and administration; (d) Plaintiffs' Co-Lead and Liaison Counsel administrative matters (*e.g.*, expenses for equipment, technology, courier services, long distance, telecopier, electronic service, photocopy and printing, secretarial/temporary staff, etc.); (e) Group administration matters such as meetings and conference calls; (f) Legal and accountant fees; (g) Generic expert witness and consultant fees and expenses; (h) Printing, copying, coding, scanning (out of house or extraordinary firm cost) (i) Research by outside third party vendors/consultants/attorneys; (j) Common witness expenses including travel; (k) Translation costs; (l) Bank or financial institution charges; and (m) Investigative services.

## **2. Held Costs.**

Held Costs are those that will be carried by each PLS member in MDL 2092 or state court and reimbursed as and when determined by the PEC and/or the Fee Committee, and then approved by this Court. Held costs can also include unreimbursed and authorized shared costs. Held Costs are costs incurred for the global benefit of the litigation, which can include costs incurred in the state court litigations that are authorized and approved by the State-court leadership and have global benefit for all plaintiffs in general. Held Costs are those that do not fall into the above Shared Costs categories but are incurred for the benefit of all plaintiffs in general. No specific client-related costs shall be considered as Held Costs, except that costs incurred for the common benefit as part of a bellwether trial process in the MDL may be considered for treatment as a Held Cost by the Fee Committee. All costs of a substantial nature that meet these requirements and fall under the following categories shall be considered Held Costs and qualify to be submitted for consideration by the PEC and the Court for future reimbursement from the MDL 2092 Expense Fund.

**C. Verification.**

The forms detailing expenses shall be certified by a senior partner in each firm attesting to the accuracy of the submissions. Attorneys shall keep receipts for all expenses. Credit card receipts are an appropriate form of verification so long as

accompanied by a declaration from counsel that work was performed and paid for the common benefit.

**D. Costs and/or Expenses in Excess of Amounts Available in the Expenses Fund.**

Any compensable costs and/or expenses that exceed the amounts available in the MDL 2092 Expense Fund may be compensable by the MDL 2092 Fee Fund upon Order of the Court.

**IV. COMMON BENEFIT WORK.**

**A. Qualified Common Benefit Work Eligible for Reimbursement.**

The criteria for qualified common benefit work and the rules and standards for keeping and submitting time in this litigation were explained in detail in the letter attached hereto as Exhibit B.

Only members of the PLS and other firms approved to perform common benefit work by the PEC are eligible for reimbursement for time and efforts expended for the common benefit. These firms shall be eligible for reimbursement for time and efforts expended for common benefit work, if said time and efforts are (a) for the common benefit, (b) within the limitations and guidelines found in Exhibit B, (c) timely submitted and (d) approved by this Court.

**B. Distributions.**

**1. Procedures and Forms.**

Plaintiffs' Lead Counsel has established forms and procedures to implement and carry out any time and expense submissions required by the Court and for reimbursement from the MDL 2092 Funds. These forms have been distributed to members of the PLS and are available by contacting Plaintiffs' Lead Counsel. The forms are to be certified by a senior partner in each firm attesting to the accuracy of the submissions. Questions regarding the guidelines or procedures or the completion of any form should be directed to Plaintiffs' Lead Counsel.

**2. Court Approval.**

The amounts deposited in the MDL 2092 Fee and Expense Funds shall be available for distribution to Counsel who have performed professional services or incurred expenses for the common benefit. No amounts will be disbursed without review and approval by the Court or such other mechanism as the Court may order. Specifically, such sums shall be distributed only upon Order of the Court in MDL 2092. This Court retains jurisdiction over any common benefit award; and in furtherance of state and federal cooperation, the Court may seek input from any state court judges if the Court deems it appropriate.

Any Counsel who does common benefit work has the right to present their claim(s) for compensation prior to any recommendation to the Court. Upon order of the Court, payments may be made from the Fund to law firms or attorneys who provide services or incur expenses for the joint and common benefit of plaintiffs in addition to their own client or clients. Attorneys eligible are limited to Plaintiffs' Lead and Liaison Counsel, members of the Plaintiffs' Executive and Steering Committees, appointed members of the Discovery, Science and Law and Briefing Committees, and other counsel called on to assist in performing their responsibilities, Court-appointed Federal-State Liaison Counsel, and other counsel performing similar responsibilities in state court actions.

Any State Court Counsel who does not sign the Participation Agreement shall not be eligible to receive Common Benefit payments for any work performed or expenses incurred.

### **3. Fee Committee.**

At the appropriate time, this Court shall appoint a Fee Committee to make recommendations to this Court on the issues of how any money in the MDL 2092 Fee and Expense Funds shall be distributed (the "Fee Committee"). The Fee Committee shall have five members appointed by Plaintiffs' Lead Counsel with unanimous approval by the PEC.

Each member of the Fee Committee shall only have one vote and each vote shall bear the same weight. A decision of the Fee Committee need only be made by a majority of votes. The Fee Committee shall determine on its own the most fair and efficient manner by which to evaluate all of the time and expense submissions in making its recommendation to this Court.

**V. NOTICE**

Pursuant to PTO No. 1 § IV. 8. c. ii., any Counsel with a case currently pending in MDL No. 2092 who is not in agreement with any of the provisions outlined in this Order, has five (5) days to submit a written objection to the Court.

**DONE and ORDERED this 2<sup>nd</sup> day of June, 2010.**



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INGE PRYTZ JOHNSON  
U.S. DISTRICT JUDGE