

**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

**EXHIBIT A TO PTO NO. 7:
COMMON BENEFIT
PARTICIPATION AGREEMENT
FOR STATE COURT COUNSEL**

THIS AGREEMENT is made this ____ day of _____, 20__, by and between the Plaintiffs’ Leadership Structure (“PLS”) appointed by the United States District Court for the Northern District of Alabama in MDL 2092 and _____
[Name of the Firm Executing the Agreement] (the “Participating State Court Counsel”).

WHEREAS, the United States District Court for the Northern District of Alabama has instructed the PLS in MDL 2092 to facilitate the conduct of pretrial proceedings in the federal actions relating to the use of the smoking cessation drug, CHANTIX.

WHEREAS, the PLS in association with other attorneys working for the common benefit of plaintiffs have developed or are in the process of developing work product that will be valuable in all proceedings involving CHANTIX personal injuries (“Common Benefit Work Product”) and

WHEREAS, the Participating State Court Counsel are desirous of acquiring the Common Benefit Work Product and establishing an amicable, working relationship with the PLS for the mutual benefit of their clients;

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" with regard to personal injury claims resulting from the use of CHANTIX by Participating State Court Counsel pursuant to the Order Establishing Common Benefit Fee and Expense Fund and this Participation Agreement. Plaintiffs' attorneys who execute this Agreement ("Participating State Court Counsel") are entitled to receive the "Common Benefit Work Product" created by the PLS.

B. Assessment Amount and Early Participation vs. Late Participation.

For any State Court Counsel who enters into the Participation Agreement within 45 days of the entry of this Order or 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).

For any State Court Counsel who enters into the Participation Agreement after 45 days of the entry of this Order or 45 days of their first case being 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).

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 entire PLS is consulted and provided an opportunity to be heard prior to the filing of any motion to change the assessment amount; (2) the PLS approves 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.

C. Rights and Obligations of Participating State Court Counsel.

Upon execution of this Participation Agreement, and subject to the protective order in MDL No. 2092 (Pretrial Order No. 3), the PLS will provide access to Participating State Court Counsel, the common benefit work product defined in PTO No. 6 to which this Exhibit “A” is attached, including access to the PLS’s depository. Participating State Court Counsel agree that they are subject to Pretrial Order No. 3, and further agree that all cases in which they have 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 State Court 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 attorneys’ fee regardless of what that interest is, who has filed a civil action arising from the use of CHANTIX together with the Court and docket number of each such case and shall produce a list that contains the name of each client represented by them and/or in which they have an interest in the attorneys’ fee regardless of what that interest is, who has not yet filed a civil action arising from the use, marketing, and sale of CHANTIX. Participating State Court Counsel shall supplement the lists on a quarterly basis and provide this list to Plaintiffs’ Lead Counsel, at chantixlead@cwcd.com. The initial list shall be provided within 15 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 provisions set forth below and the terms of the corresponding PTO No. 6, all Plaintiffs and their attorneys 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 settlement amount, “gross monetary recovery,” as provided herein.

A. Gross Monetary Recovery Defined.

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 the cases of the Plaintiff’s attorneys who are subject to this Order that are pending in the MDL or state court as well as any unfiled or tolled cases of such attorneys in which they are counsel or co-counsel.

C. Covered Cases.

The assessment amount set forth above and in the related Order shall apply 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 regardless of whether or not the plaintiff’s attorney is either Participating or Non-Participating State Court Counsel. State Court Counsel who sign the Participation Agreement further agree that the assessment shall apply to all un-filed cases, tolled cases, and/or cases filed in state court in which they have a fee interest, regardless of the size of that fee interest.

Non-Participating State Court Counsel are not required to pay an assessment on their state court cases or on un-filed cases. However, State Court Counsel who do not sign the Participation Agreement, are not entitled to receive “Common Benefit Work Product.” Additionally, the cases of Non-Participating State Court Counsel shall not be eligible to receive Common Benefit payments for any work performed or expenses incurred.

D. Attorney Fee Lien

With respect to each client who they represent in connection with CHANTIX related claims that are filed or pending in any Federal court, un-filed or subject to a tolling agreement, each Participating State Court Counsel shall agree to have Defendants deposit or cause to be deposited in the MDL 2092 Fee and Expense Fund established by the District Court in the MDL, a percentage proportion of the gross amount recovered by each such client that is equal to the assessment amount. In the event Defendants do not deposit such funds into the Fund, Plaintiff and Plaintiff’s Participating State Court Counsel shall deposit or cause to be deposited in the MDL 2092 Fee and Expense Fund established by the District Court in the MDL, a percentage proportion of the gross amount recovered by each such client that is equal to the assessment amount.

Participating State Court Counsel, on behalf of themselves, their affiliated counsel, and their clients, hereby grant and convey to the PLS a lien upon and/or a security interest in any fee generated as a result of any recovery by any client who they represent in connection with any CHANTIX induced injury and marketing and sales practices, 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.

E. Attorney-Client Contracts.

Both the PLS and Participating State Court Counsel recognize the importance of individual cases and the relationship between case-specific clients and their attorneys. It is expressly understood that the PLS will never undertake any actions to interfere with the attorney-client contracts in place between Participating State Court Counsel and their clients. Regardless of the type of settlement or conclusion eventually made in either state or federal cases, the PLS will recommend to this Court that appropriate consideration should be given to individual case contracts between attorneys and their clients.

___ **EARLY PARTICIPATION ELECTION**

I elect to be an **Early Participating Counsel** and hereby certify that I am signing this Participation Agreement within 45 days of (a) the entry of PTO No. 7 in MDL 2092, or (b) the date my first case was docketed in any state court. I also certify that have the authority and power to bind my law firm into this Participation Agreement.

___ **LATE PARTICIPATION ELECTION**

I elect to be a **Late Participating Counsel** and hereby certify that I am signing this Participation Agreement after the passage of 45 days since (a) the entry of the PTO No. 7 in MDL 2092, or (b) the date my first case was docketed in any state court. I also certify that have the authority and power to bind my law firm into this Participation Agreement.

___ **NON-PARTICIPATION ELECTION**

I elect to be a **Non-Participating Counsel** and I understand that I will not be entitled to MDL common benefit work product. I also certify that have the authority and power to bind my law firm into this Participation Agreement.

Dated: _____, 20__

Firm Name:

Attorney's Name:

AND

PLAINTIFFS' LEADERSHIP STRUCTURE

Dated: _____, 20__

Ernest Cory
Plaintiffs' Lead Counsel