

EXHIBIT A

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9 Plaintiffs' Co-Liaison Counsel

10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA

12 In re Incretin-Based Therapies
13 Products Liability Litigation

Case No. 3:13-md-02452 AJB-MDD

MDL 2452

14 _____
15 *This Document Relates to All Cases*

**Common Benefit Participation
Agreement**

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17 **THIS AGREEMENT** is made this ___ day of _____, 2014, by and between
18 the Plaintiffs' Leadership Group appointed by the United States District Court for
19 the Southern District of California in MDL 2452 and _____
20 _____ **[Name of the Firm Executing the Agreement]** (the
21 "Participating Counsel").

22 **WHEREAS**, the United States District Court for the Southern District of
23 California has appointed Ryan Thompson, Hunter Shkolnik, and Tor Hoerman, to
24 serve as Co-Leads of the Plaintiffs' Steering Committee or "PSC", to facilitate the
25 conduct of pretrial proceedings in the federal actions relating to the use, marketing,
26 and sales of Incretin-Based Therapies.

27
28 Common Benefit
Participation Agreement

1 **WHEREAS**, the Co-Leads, in association with other attorneys working for
2 the common benefit of plaintiffs, have developed or are in the process of
3 developing work product that will be valuable in all proceedings and benefit all
4 plaintiffs alleging injury caused by use of Incretin-Based Therapies ("Common
5 Benefit Work Product"); and

6 **WHEREAS**, the Participating Counsel are desirous of acquiring the
7 Common Benefit Work Product and establishing an amicable, working relationship
8 with the Plaintiffs' Leadership Group for the mutual benefit of their clients;

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

12 **I. SCOPE OF AGREEMENT**

13 **A. Purpose**

14 This Participation Agreement is a private cooperative agreement between
15 plaintiffs' attorneys to share Common Benefit Work Product pursuant to the Order
16 Establishing Common Benefit Fee and Expense Fund and this Participation
17 Agreement. Any plaintiffs' attorney who executes this Agreement ("Participating
18 Counsel") is entitled to receive the Common Benefit Work Product created by
19 those attorneys who have also executed, or have been deemed to have executed,
20 the Participation Agreement, regardless of the venue in which the attorney's cases
21 are pending.

22 **B. Rights and Obligations of Participating Counsel**

23 Upon execution of this Participation Agreement, the Plaintiffs' Leadership
24 Group will provide Participating Counsel access to the Common Benefit Work
25 Product, including access to the document depository. Participating Counsel agree
26 that all cases in which Participating Counsel has a fee interest, including unfiled
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1 cases, tolled cases, and/or cases filed in state and/or federal court, are subject to the
2 terms of this Participation Agreement. Participating Counsel shall produce a list
3 that correctly sets forth the name of each client represented by them and/or in
4 which they have an interest in the attorney fee, regardless of what that interest is,
5 who has filed a civil action arising from the use, marketing, and/or sale of Incretin-
6 Based Therapies. Such list shall include the court and docket number of each such
7 case. Participating counsel shall also produce a list that contains the name of each
8 client represented by them and/or in which they have an interest in the attorney fee,
9 regardless of what that interest is, who has not yet filed a civil action. Participating
10 Counsel shall supplement the lists on a quarterly basis and provide the lists to
11 Plaintiffs' Co-Liaison Counsel. The initial list shall be provided within 15 days of
12 signing this Agreement and must be supplemented every 90 days thereafter.

13 **II. AGREEMENT TO PAY AN ASSESSMENT ON GROSS**
14 **RECOVERY**

15 Subject to the terms of this Agreement, the provisions set forth below, and
16 the terms of CMO (Doc. ___), all plaintiffs and their attorneys who agree to settle,
17 compromise, dismiss, or reduce the amount of a claim, or with or without trial,
18 recover a judgment for monetary damages or other monetary relief, including
19 compensatory and punitive damages, for any Incretin-Based Therapies claims are
20 subject to an assessment of the Gross Monetary Recovery, as provided herein.

21 **A. Gross Monetary Recovery Defined**

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

5 **B. Covered Cases**

6 The assessment amount set forth above and in the related Order shall apply
7 to all cases now pending or later filed in, transferred to, or removed to this Court
8 and treated as part of the coordinated proceeding known as *In re: Incretin-Based*
9 *Therapies Products Liability Litigation*, MDL 2452, regardless of whether the
10 plaintiffs' attorney is either Participating or Non-Participating Counsel. Counsel
11 who sign this Participation Agreement further agree that the assessment shall apply
12 to all un-filed cases, tolled cases, and/or cases filed in state court in which they
13 have a fee interest, regardless of the size of that fee interest.

14 Non-Participating Counsel are not required to pay an assessment on state
15 court cases or on un-filed cases. However, counsel who do not sign the
16 Participation Agreement are not entitled to receive Common Benefit Work
17 Product, and may be subject to an increased assessment on all Incretin-Based
18 Therapies cases in which they have a fee interest if they receive any Common
19 Benefit Work Product or otherwise benefit from the work product created by
20 Plaintiffs' Leadership Group and other Participating Counsel working with the
21 MDL. Non-Participating Counsel shall not be eligible to receive Common Benefit
22 payments for any work performed or expenses incurred.

23 **C. Attorney Fee Lien**

24 With respect to each client represented in connection with Incretin-Based
25 Therapies related claims that are filed or pending in any Federal court, are un-filed,
26 or are subject to a tolling agreement, consistent with paragraphs I.B. and I.C. of the
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1 associated Case Management Order Establishing Common Benefit Fee and
2 Expense Fund (Case Management Order Doc # ____), each Participating Counsel
3 shall agree to have Defendants deposit or cause to be deposited in the Incretin-
4 Based Therapies Fee and Expense Funds established by the District Court in the
5 MDL a percentage of the gross amount recovered by each such client that is equal
6 to the assessment amount. In the event Defendants do not deposit the assessed
7 percentage into the Funds, Plaintiff and Plaintiffs Participating Counsel shall
8 deposit or cause to be deposited in the Incretin-Based Therapies Fee and Expense
9 Funds established by the District Court in the MDL a percentage of the gross
10 amount recovered by each such client that is equal to the assessment amount.
11 Participating Counsel, on behalf of themselves, their affiliated counsel, and their
12 clients, hereby grant and convey to Plaintiffs' Leadership Group a lien upon and/or
13 a security interest in any fee generated as a result of any recovery by any client
14 who they represent in connection with any Incretins-Based Therapies-induced
15 injury and Incretin-Based Therapies marketing and sales practices, to the full
16 extent permitted by law, in order to secure payment in accordance with the
17 provisions of this Agreement. Participating Counsel will undertake all actions and
18 execute all documents that are reasonably necessary to effectuate and/or perfect
19 this lien and/or security interest.

20 **D. Attorney-Client Contracts**

21 Both the Plaintiffs' Leadership Group and Participating Counsel recognize
22 the importance of individual cases and the relationship between case-specific
23 clients and their attorneys. Regardless of the type of settlement or conclusion
24 eventually made in either state or federal cases, Plaintiffs' Leadership Group will
25 recommend to this Court that appropriate consideration will be given to individual
26 case contracts between attorneys and their clients.
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2 **III. COMMON BENEFIT EXPENSES**

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

4 In order to be eligible for reimbursement of common benefit expenses, said
5 expenses must be: (a) for the common benefit; (b) appropriately authorized¹ and
6 timely submitted; (c) within the defined limitations set forth in this Participation
7 Agreement and associated Order; and (d) verified by a partner or shareholder in the
8 submitting law firm.

9 **B. Authorization and Submission of Expenses**

10 Participating Counsel must submit expenses consistent with the Order of this
11 Court. Expenses incurred on matters common to all claimants in MDL 2452 and
12 assigned by Co-Lead Counsel of the MDL may be submitted for reimbursement.

13 **C. Verification**

14 The forms detailing expenses shall be certified by a senior partner in each
15 firm and such certification should attest to the accuracy of the submissions.
16 Attorneys shall keep receipts for all expenses. Credit card receipts are an
17 appropriate form of verification if accompanied by a declaration from counsel that
18 work was performed and paid for the common benefit.

19 Cost records shall be electronically submitted to CPA and Co-Liaison
20 Counsel on a monthly basis. Untimely submission of Cost records will result in a
21 waiver of said costs. Unsubstantiated costs may be disallowed, as recommended by
22 the CPA and/or Co-Lead Counsel.

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¹ For the purposes of this Participation Agreement, “authorized” or
26 “approved” in terms of common benefit expenses and common benefit work
27 shall mean authorized and approved by Co-Lead Counsel.

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2 **IV. COMMON BENEFIT WORK**

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

4 In order to be eligible for reimbursement, time expended must be: (a) for the
5 common benefit; (b) appropriately authorized (*see* Footnote 1 *supra*); (c) timely
6 submitted; and (d) verified by a partner or shareholder in the submitting law firm.
7 Moreover, if counsel fails to timely submit capital contributions as may be
8 requested by Co-Lead Counsel throughout this litigation, such counsel and
9 members of his/her firm shall not be allowed to submit common benefit time or
10 expenses for reimbursement. Unsubstantiated costs may be disallowed, as
11 recommended by the CPA and/or Co-Lead Counsel.

12 **B. Counsel Involved**

13 Participating Counsel are prohibited from sharing Common Benefit Work
14 Product with Non-Participating Counsel, as defined herein. Counsel eligible to
15 perform common benefit work includes Plaintiffs' Co-Liaison Counsel, Co-Lead
16 Counsel, members of the PSC, Co-Chairs of MDL Committees, and other
17 Participating Counsel.

18 **C. Authorization**

19 Time spent on matters common to all claimants in the MDL must be
20 assigned by Plaintiffs' Co-Lead Counsel to be eligible for consideration as common
21 benefit time. No time spent on developing or processing individual issues in any
22 case for an individual client (claimant) will be considered or should be submitted;
23 nor should time spent on unauthorized work be submitted for consideration.

24 **D. Examples of Authorized and Unauthorized Work**

- 25 i. Depositions of corporate witnesses: Any attorney not designated as
26 one of the authorized questioners or otherwise authorized to attend a
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1 deposition on behalf of the PSC shall not submit time or expenses for
2 preparing for or attending such deposition, as such attendance is
3 deemed to be on behalf of that attorney's individual clients;

4 ii. Periodic PSC, MDL or Full-Committee Conference Calls and
5 Meetings: Such calls and meetings are held so that individual
6 attorneys are kept up-to-date on the status of the litigation, therefore
7 participation by listening to such calls is not common benefit work.
8 Each attorney has an obligation to stay informed about the litigation
9 so that they can best represent their clients, and that is a reason to
10 participate in such calls and meetings. The attorneys designated by
11 Plaintiffs' Co-Lead Counsel to run those calls are working for the
12 common benefit by keeping other lawyers informed and educated
13 about the case, and their time will be considered common benefit
14 time. Nothing in this paragraph shall be construed to prevent members
15 of the PSC from submitting common benefit time for participation in
16 PSC communications that are germane to all members of the PSC and
17 are necessary to fulfill their PSC obligations;

18 iii. Periodic Status Conferences: Periodic status conferences are held so
19 that the litigation continues to move forward and legal issues are
20 resolved with the Court. Individual attorneys are free to attend any
21 status conference held in open court in order to keep up-to-date on the
22 status of the litigation, but participation by attending and listening to
23 such conferences is not common benefit work. Each attorney has an
24 obligation to stay informed about the litigation so that they can best
25 represent their clients. Mere attendance at a status conference will not
26 be considered a common benefit expense or common benefit time, nor
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1 shall participation in such status conferences via telephone be
2 considered common benefit time. The attorneys designated by Co-
3 Lead Counsel to address issues that will be raised at a given status
4 conference or requested by Co-Lead Counsel to be present at a status
5 conference are working for the common benefit and their time will be
6 considered common benefit time;

- 7 iv. Identification and Work Up of Experts: Participating Attorneys are
8 encouraged to identify experts in consultation with the Co-Chairs of
9 the Science and/or Expert Committees. If a Participating Attorney
10 travels to and retains an expert without the knowledge and approval of
11 the Co-Lead Counsel, the MDL may not need or use that expert, and
12 the associated time and expense may not be considered common
13 benefit expenses/ work, and therefore may not be compensable;
- 14 v. Attendance at Various Seminars: Attendance at a seminar that has an
15 agenda item about the Incretin-Based Therapies litigation is not
16 common benefit work or a common benefit expense;
- 17 vi. Document Review: In the MDL, only document review specifically
18 assigned to an attorney and authorized by Plaintiffs' Co-Lead Counsel
19 or one of the co-chairs of the Discovery or Science Committees will
20 be considered common benefit work. If an attorney elects to review
21 documents that have not been assigned to that attorney by Plaintiffs'
22 Co-Lead Counsel or one of the Co-Chairs of the Discovery or Science
23 Committees, that review is not considered common benefit work;
- 24 vii. Review of Pleadings and Orders: Each attorney has an obligation to
25 stay informed about the litigation so that they can best represent their
26 clients, and review of pleadings and orders is part of that obligation.
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1 Only those attorneys designated by Plaintiffs' Co-Lead Counsel to
2 review and summarize those pleadings or orders for the MDL are
3 working for the common benefit, and their time will be considered
4 common benefit time. All other counsel are reviewing those pleadings
5 and orders for their own benefit and the benefit of their own clients,
6 and the review is not considered common benefit work. Nothing in
7 this paragraph shall be construed to prevent members of the PSC from
8 submitting common benefit time for reviewing orders that are
9 germane to all members of the PSC and review of which is necessary
10 to fulfill their PSC obligations;

11 viii. Review of Discovery Responses: Each attorney has an obligation to
12 stay informed about the litigation so that they can best represent their
13 clients, and that is a reason to review discovery responses served in
14 this litigation. Only those attorneys designated by Plaintiffs' Co-Lead
15 Counsel to review and summarize discovery responses for the MDL
16 are working for the common benefit, and their time will be considered
17 common benefit time. All other counsel are reviewing those discovery
18 responses for their own benefit and the benefit of their own clients,
19 and the review is not considered common benefit work;

20 ix. Bellwether Trials: While the work-up of individual cases is not
21 considered common benefit work, in the event that a case is selected
22 as part of an approved bellwether trial process in the MDL, California,
23 or Illinois, the time and expenses in trying the case (including work
24 performed as part of the approved bellwether process) may be
25 considered common benefit work at the discretion of Co-Lead
26 Counsel to the extent it complies with the other provisions of this
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1 Order and Participation Agreement.

2 **E. Time Keeping and Submission of Time Records**

3 All time must be accurately and contemporaneously maintained.

4 Participating Counsel shall keep a daily record of time spent in connection with
5 common benefit work on this litigation, indicating with specificity the hours,
6 location and particular activity (such as "conducted deposition of John Doe"). Time
7 entries that are not sufficiently detailed may not be considered for common benefit
8 payments. All common benefit work time for each firm shall be maintained in
9 tenth-of-an-hour increments. Time submissions will be audited by the CPA.

10 These guidelines are intended for all activities performed and expenses
11 incurred by Participating Counsel in MDL 2452:

- 12 1. All time submissions must be incurred only for work authorized under
13 this Participation Agreement;
- 14 2. All time submissions must be made on the forms provided by the
15 PSC;
- 16 3. Time and expense submissions are to be made on the 15th of each
17 month, beginning on September 15, 2014. Each submission should contain all time
18 and expenses incurred during the calendar month prior to the submission date (i.e.,
19 the September 15, 2014 submission should include all time and expenses incurred
20 during the month of August 2014), though the first submission should include all
21 time and expenses incurred through August 31, 2014. All time and expense
22 submissions should be accompanied by contemporaneous records and verified by a
23 partner or shareholder in the submitting firm. Submissions of time and expense
24 made after the 15th day of the month following the month in which the time or
25 expense were incurred may be rejected. Only time and expense incurred after the
26 entry of CMO (Doc.#157) by this Court appointing Plaintiffs' Leadership on
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1 October 21, 2013 (plus any time and expense incurred by those appointed to
2 leadership in complying with the terms of prior court orders) shall be submitted
3 and considered for common benefit consideration. Moreover, only that time and
4 those expenses incurred for the common benefit of all cases, consistent with the
5 terms of the Common Benefit Order and this Participation Agreement, shall be
6 considered.

7 4. All time submissions must be electronically sent in the designated
8 form to the attention of CPA and Co-Liaison Counsel so they can be reviewed,
9 compiled, and submitted to the Court at the appropriate time.

10 5. Failure to provide submissions in a timely manner shall result in a
11 waiver of attorney fees and expenses claimed for the time period that is the subject
12 of the submission. Failure to submit time and expense records **in electronic**
13 **(searchable) format** on the Excel forms approved by Plaintiffs' Co-Lead Counsel,
14 or any other method approved by Plaintiffs' Co-Lead Counsel, will result in a
15 notice of deficiency, after which the submitting firm shall have 15 days to cure the
16 deficient submission. Absent prior approval from Plaintiffs' Co-Lead Counsel or
17 special circumstances, failure to cure the deficiency within the fifteen-day period
18 shall result in (a) that month's submission being rejected; and (b) the submitting
19 firm waiving compensation for the time and expenses submitted that month. Upon
20 a determination by Plaintiffs' Co-Lead Counsel that a Participating Law Firm
21 repeatedly fails to comply with the requirement to timely submit time and expense
22 records in the required format, that Participating Law Firm may be barred from
23 performing future common benefit work.

24 6. Time spent compiling the data for the time and expense submissions
25 is not considered common benefit time.

26 **F. Distribution of Fees**

1 1. No Individual Right to the Funds: No party or attorney has any
2 individual right to any common benefit funds except to the extent directed by
3 Order of this Court. Common benefit funds will not constitute the property of any
4 party or attorney or be subject to garnishment or attachment for the debts of any
5 party or attorney except when as directed by court order. These limitations do not
6 preclude a party or attorney from transferring, assigning, or creating a security
7 interest in potential disbursements from the fund if permitted by applicable state
8 laws and if subject to the conditions and contingencies of this Agreement.

9 2. Court Approval: The amounts deposited in the Incretin-Based
10 Therapies Fee Fund shall be available for distribution to attorneys who have
11 performed professional services or incurred expenses for the common benefit. The
12 MDL Court retains jurisdiction over any common benefit award. Each
13 Participating Counsel who does common benefit work has the right to present their
14 claim(s) for compensation and reimbursement prior to any recommendation to the
15 Court. It is expected that due consideration of payment of common benefit fees and
16 expenses will be given to the recommendation of Plaintiffs' Co-Lead Counsel by
17 the MDL Court.

18 Dated: August 1, 2014

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20 Respectfully submitted,

21 /s/ Tor A. Hoerman
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Participating Counsel's signature