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16 **UNITED STATES DISTRICT COURT**

17 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

18
19 **IN RE INCRETIN-BASED**
20 **THERAPIES PRODUCTS**
21 **LIABILITY LITIGATION**

22 *As to All Member Cases*

CASE NO. 13-MD-2452-AJB-MDD

MDL No. 2452

**DEFENDANTS' MEMORANDUM
OF POINTS AND AUTHORITIES
IN RESPONSE TO PLAINTIFFS'
MOTION FOR ENTRY OF A
COMMON BENEFIT ORDER**

Date: December 11, 2014

Time: 3:00 p.m.

Courtroom: 3B

Judge: Hon. Anthony J. Battaglia

Magistrate: Hon. Mitchell D. Dembin

1 **I. INTRODUCTION**

2 There are two issues that the parties have been unable to resolve with respect
3 to the form of Common Benefit Fund Order (“CBF Order”) to be entered by the
4 Court:

5 1) Whether defendants should be required to bear the burden of assuring
6 that plaintiffs’ counsel comply with their commitments to pay a Common Benefit
7 Fund assessment (“Assessment”)?

8 2) Whether defendants should be required to notify the Plaintiffs’
9 Steering Committee (“PSC”) each time a state court action involving an incretin-
10 based pancreatic cancer claim is brought outside a California court?

11 For the reasons that follow, defendants urge the Court to reject the PSC’s
12 attempt to hold defendants responsible for administering payment of the
13 Assessments, which are owed to the PSC by its own constituent plaintiffs’ counsel
14 who sign on to the PSC’s Common Benefit Participation Agreement. Defendants
15 also urge the Court to limit defendants’ responsibility for identifying to the PSC
16 any non-California state court actions to those actions that reach a stage where
17 MDL discovery or PSC work product is being made available by defendants, rather
18 than at the inception of the action, when PSC involvement is irrelevant.

19 **II. PROCEDURAL HISTORY**

20 The PSC first presented a proposed form of CBF Order to defendants over a
21 year ago. Defendants raised several issues with the PSC’s proposal at that time,
22 and the PSC let the matter lie until it filed its motion seeking creation of a
23 Common Benefit Fund on August 1, 2014. The PSC correctly describes the series
24 of events that then led to the Court entering the form of CBF Order that was
25 submitted by the PSC, which was the form that defendants had rejected in their
26 discussions with the PSC last year.

27 When the defendants saw that the Court had entered the form of CBF Order
28 that defendants had rejected, they contacted the PSC, and parties discussed

1 defendants' concerns. The PSC advised defendants that it was agreeable to making
2 all the modifications sought by defendants, with the exception of the two at issue in
3 this motion, described above. On September 17, 2014, Jacob Plattenberger of the
4 PSC supplied defendants with a revised form of CBF Order, which addressed each
5 of the other issues raised by defendants, however, the draft did not include the
6 agreed-upon deletion of a provision requiring lien holders to pay Assessments.¹
7 (Mr. Plattenberger's email dated September 17, 2014 and the revised form of CBF
8 Order that was included are attached as Exhibit A. The differences between this
9 form of CBF Order and the one that the PSC had submitted to the Court are shown,
10 by redlining, on Exhibit B.)

11 **III. ARGUMENT**

12 Imposing on defendants the responsibility to police individual plaintiffs'
13 counsels' contractual obligations to pay Assessments owed to the PSC pursuant to
14 their agreement, to which defendants are not parties, is unnecessary and
15 unwarranted. Similarly, imposing on defendants the responsibility to notify the
16 PSC of state court filings, even when a case is at a nascent stage and no PSC work
17 product is requested or being made available, is unnecessary to protect the PSC's
18 legitimate interests. Defendants should not be placed in the untenable position of
19 having to administer the fees of their adversaries. Nor should defendants be
20 required to involve the PSC in litigation outside this Court unless and until PSC
21 work product would be made available in that litigation.

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25 ¹ Defendants believe that the PSC's failure to address defendants' concerns
26 respecting lien holders was inadvertent. Defendants also believe that the request
27 in the PSC's memorandum that the Court retain the CBF Order that it entered
28 without any modification whatsoever, *see* Plaintiffs' Memorandum of Points and
Authorities in Further Support of Plaintiffs' Motion for Entry of a Common
Benefit Fund Order at p. 3 and p.7, is inadvertent as well, given the PSC's
agreement to make modifications.

1 **A. There are adequate protections in place to assure payment of**
2 **Assessments that may be owed by plaintiffs' counsel to the PSC**
3 **without defendants being involved in their collection for the**
4 **benefit of the PSC.**

4 Under the form of CBF Order to which the PSC has agreed, an
5 Assessment is owed only by those plaintiffs' counsel who sign a Participation
6 Agreement and thereby commit to paying an Assessment in exchange for access to
7 PSC work product. A plaintiffs' counsel's obligation to pay an Assessment arises
8 from a contract, which has its own force. Also, in this instance, the payment
9 obligation is supported by an order of this Court, which brings the force of a
10 contempt of court citation, if violated. Thus, the PSC has more than adequate
11 assurance that an Assessment will be paid by plaintiffs' counsel when owed.

12 The PSC nonetheless seeks to impose on defendants the requirements that
13 defendants -- rather than plaintiffs' counsel whose cases are at issue -- 1) provide
14 notice of every settlement; 2) withhold Assessments owed in settlement of
15 plaintiffs' claims or in satisfaction of any judgments; 3) provide an accounting of
16 each such payment; and 4) pay the Assessment to the PSC. The PSC also seeks to
17 impose a provision that would block dismissal of settled cases -- despite
18 defendants' compliance with all their obligations under the settlements -- until
19 plaintiffs' and defense counsel both certify that related Assessments will be
20 withheld and paid by defense counsel. None of these requirements and limitations
21 is needed to assure that Assessment payments are made when owed, and they only
22 needlessly add to defendants' costs and will impede settlements and dismissals.²

23 The PSC suggests that that such defense obligations are standard practice,
24 and in support, it offers common benefit fund orders from various other litigations.

25 _____
26 ² It is noteworthy that the PSC has not yet sought any specified Assessment
27 amount or suggested the basis for how an Assessment would be calculated.
28 Until that is done, any ability to conclude a settlement would be frustrated,
which would not be the case if the payment obligation remained solely with the
responsible party -- settling plaintiffs' counsel.

1 However, the absence of uniform treatment of how common benefit fund
2 assessments are administered and paid is demonstrated by the very MDL to which
3 the PSC cites in its brief -- the Zyprexa MDL. In that MDL, Judge Jack Weinstein
4 of the United States District Court for the Eastern District of New York declined to
5 impose these burdens on defendant Eli Lilly and Company. (*See Common Benefit*
6 *Fund Order* (adopting the Recommendation of Proposed Order of the Special
7 Discovery Master, which at p. 6 directs plaintiffs' counsel to set aside and remit
8 the assessment to the Executive Committee of the PSC), attached as Exhibit C.)
9 Different considerations may have been at play in other cases in regard to whether
10 a burden on defendants was justified, such as whether the plaintiffs' steering
11 committees would not necessarily be aware of all plaintiffs' counsel who might
12 owe an assessment. Here, an Assessment would be owed only by plaintiffs'
13 counsel who sign the PSC's Common Benefit Participation Agreement and thus
14 could be identified readily.

15 In a further effort to justify its position, the PSC also contends that the
16 burdens on defendants are justified by the efficiencies afforded by this MDL. This
17 is a *non sequitur*. The fact that there is merit to having federal litigation
18 coordinated for pre-trial activities in this MDL is a matter wholly separate from
19 how payment of settlements or judgments should be administered. Moreover, this
20 argument by the PSC is inconsistent with the fact that numerous counsel, including
21 lead PSC members themselves, are pursuing incretin claims outside this MDL and
22 thus simultaneously, when it suits them, defeating the MDL efficiencies that they
23 claim justify added burdens on defendants.

24 The premise underlying the PSC's position is that defendants are more likely
25 to meet a payment obligation than a given plaintiffs' counsel. This is not a good
26 reason to substitute defendants as responsible parties. The PSC and the individual
27 plaintiffs' counsel who are bound by contract and order of this Court to pay the
28 Assessment to the PSC should alone be responsible for assuring payment. Any

1 settlement process should not be encumbered, and dismissals should not be
2 disrupted, through an extension of those responsibilities to defendants.

3 **B. Any notice requirement regarding state court litigation should be**
4 **limited to the protection of the PSC's only legitimate interest in**
5 **such litigation, which is to assure payment for PSC work product.**

6 The PSC also asks this Court to order defendants to notify the PSC of
7 all state court actions outside California at the time of their filing. Defendants are
8 agreeable to providing notice to the PSC if a state court action reaches a stage at
9 which MDL discovery or PSC work product, such as defendants' MDL written
10 discovery responses or an MDL deposition taken by the PSC, is sought by a state
11 court plaintiff or is made available by defendants. Defendants' rationale is that, for
12 Assessment purposes, the PSC could have a legitimate interest in such state
13 litigation when some use of PSC work product may be made.

14 The PSC does not otherwise directly confront the matter of its interest in
15 early identification of state court actions that are not related to the MDL
16 proceedings. There is no justification for the PSC to become involved in litigation
17 outside this Court when there may be no activity in that proceeding whatsoever and
18 no use of MDL-related discovery.

19 The PSC only suggests that notice of a state court action at the outset of such
20 litigation will permit counsel who initiate such state court litigation to be provided
21 with an opportunity to utilize MDL discovery or PSC work product. But counsel
22 who bring state court litigation are fully capable of reaching out to the PSC if they
23 wish access to PSC work product. Unless legitimate work product is involved,
24 there is no reason to burden the defendants with the requirement to track such
25 actions for the PSC.³

26 ³ The PSC also argues that notice of state court litigation will serve to aid
27 coordination with this MDL. However, again, this attempt at justifying the
28 placement of added burdens on defendants is wholly unrelated to the basis for
the PSC's application to this Court -- establishment of a Common Benefit Fund.

1 The PSC has not even suggested that a requirement that defendants supply
2 notice of proceedings in other courts is routinely part of orders establishing
3 common benefit funds. Indeed, the fact that this requirement would be rare is
4 revealed by its absence from all but two of the 12 orders that the PSC has
5 submitted. All told, there is no legitimate PSC interest respecting the matter of an
6 Assessment that is not addressed by defendants' proposal to provide notice of state
7 court litigation when MDL discovery or PSC work product may be used.⁴

8 **IV. CONCLUSION**

9 For the reasons explained, this Court should enter a modified form of CBF
10 Order that reflects the changes that have been agreed to by the PSC and deletes any
11 duties on the part of defendants to become involved in the payment of assessments
12 or to provide notice of state court proceedings where MDL discovery or PSC work
13 product is not used. (The form of Common Benefit Fund Order that defendants
14 propose to be entered by the Court is attached as Exhibit D. For the Court's
15 convenience a redlined version of this Order, showing the differences between it
16 and the modified form of order to which the PSC agreed is attached as Exhibit E.)

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25 ⁴ The PSC also contends that defendants' proposal to provide notice of a state
26 court action when a plaintiff or a defendant wishes to utilize MDL discovery or
27 materials prepared by the PSC is ambiguous. But there is no ambiguity as to
28 when such materials are being used. The language to which the PSC cites in
support of its contention -- that notice occur when there is an "indication of
interest" in such material -- is simply how defendants phrased the trigger for the
timing of notice, so it would be plain that notice would occur before use occurs.

1 Dated: December 9, 2014

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By: /s/ Nina M. Gussack

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SIGNATURE ATTESTATION

Pursuant to Section 2.f.4 of the Court's CM/ECF Administrative Policies, I hereby certify that authorization for the filing of this document has been obtained from each of the other signatories shown above and that all signatories have authorized placement of their electronic signature on this document.

s/ Stephen P. Swinton

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CERTIFICATE OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 12670 High Bluff Drive, San Diego, CA 92130.

On December 9, 2014, I served the following document described as:

**DEFENDANTS’ MEMORANDUM OF POINTS AND AUTHORITIES
IN RESPONSE TO PLAINTIFFS’ MOTION FOR ENTRY OF A
COMMON BENEFIT ORDER**

by serving a true copy of the above-described document in the following manner:

BY ELECTRONIC FILING

I am familiar with the United States District Court, Southern District of California’s practice for collecting and processing electronic filings. Under that practice, documents are electronically filed with the court. The court’s CM/ECF system will generate a Notice of Electronic Filing (NEF) to the filing party, the assigned judge, and any registered users in the case. The NEF will constitute service of the document. Registration as a CM/ECF user constitutes consent to electronic service through the court’s transmission facilities. Under said practice, all parties to this case have been served electronically.

I declare that I am employed in the office of a member of the Bar of California, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 9, 2014, at San Diego, California

_____/s/ Stephen P. Swinton

EXHIBIT A

Zucker, Kenneth

From: Jacob Plattenberger <jplattenberger@torhoermanlaw.com>
Sent: Wednesday, September 17, 2014 2:48 PM
To: Zucker, Ken
Cc: King, Kenneth J.
Subject: 'Plaintiffs Proposed CMO Establishing Common Benefit Fund w Def's Edits and JWP edits 9 17 2014copy'
Attachments: Plaintiffs Proposed CMO Establishing Common Benefit Fund w Def's Edits and JWP edits 9 17 2014copy.docx; ATT00001.htm

Ken:

Attached is a clean version that incorporates your proposed and agreed upon changes and the changes we discussed during our call.

This is now the version that the plaintiffs are proposing. Please call me after you have had time to review.

Thank you,
Jake

This message is intended solely for the use of the individual to whom it is addressed and may contain information that is privileged, confidential or otherwise exempt from disclosure under applicable law. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately reply to this message or notify us by telephone at 618-656-4400 and delete the message.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

IN RE INCRETIN-BASED THERAPIES
PRODUCTS LIABILITY LITIGATION,

CV NO. 3:13-md-02452-AJB-MDD
MDL 2452

This Document Relates to All Cases

Judge: Hon. Anthony J. Battaglia
Magistrate: Hon. Mitchell D. Dembin

CASE MANAGEMENT ORDER
ESTABLISHING COMMON BENEFIT FEE AND EXPENSE FUND

I. SCOPE OF ORDER

This Order is entered to provide for the fair and equitable sharing among plaintiffs, and their counsel, of the burden of services performed and expenses incurred by attorneys acting for the common benefit of all plaintiffs in the *Incretin-Based Therapies Product Liability Litigation*.

A. Governing Principles and the Common Benefit Plan

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-Ute 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 Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1019-21 (5th Cir. 1977); and *In re MGM Grand Hotel Fire Litigation*, 660 F.Supp. 522, 525-29

1 (D. Nev. 1987). Common benefit work product includes all work performed for the benefit of all
2 plaintiffs, including pre-trial matters, discovery, trial preparation, a potential settlement process,
3 and all other work that advances this litigation to conclusion.

4 **B. Application of this Order**

5 This Order applies to all cases now pending, as well as to any case later filed in,
6 transferred to, or removed to this Court and treated as part of the coordinated proceeding known
7 as *Incretin-Based Therapies Product Liability Litigation*, MDL 2452. This Order further applies
8 to each attorney who represents a plaintiff with a case now pending in or later filed in, transferred
9 to, or removed to this Court, regardless of whether the plaintiffs attorney signs the "Participation
10 Agreement" attached hereto as Exhibit A.

11 This Order shall also apply to any private lien holder who obtains reimbursement from
12 any plaintiff whose case is subject to this Order, because that lien holder is benefiting from the
13 common benefit work performed by Participating Counsel. Such entities shall be subject to this
14 Order regardless of execution of the Participation Agreement, as they are seeking to obtain part of
15 the recovery obtained by a plaintiff who is subject to this Order and the jurisdiction of this Court.
16 Counsel for private lien holder shall pay amounts consistent with the terms of Paragraph
17 IV.(B)(3) of this Order into the Incretins Fee Fund and the Incretins Expense Fund (as those terms
18 are defined herein). Private lien holders' counsel shall not be eligible to make a claim to receive
19 any distribution from the Common Benefit Fee Fund or the Common Benefit Cost Fund.

20 **C. Participation Agreement (Exhibit A)**

21 Exhibit A, attached hereto and incorporated herein, is a voluntary Participation Agreement
22 between plaintiffs' attorneys who have cases pending in the MDL and/or in state court. The
23 Participation Agreement is a private and cooperative agreement between plaintiffs' attorneys only
24 ("Participating Counsel"); and not Defendants or Defendants' counsel. Participating Counsel
25 shall automatically include all members of the Plaintiffs' Leadership Group by virtue of their
26 appointment by the Court to the Plaintiffs' Steering Committee, any State-Federal Liaisons that
27 this Court may appoint, and any other plaintiffs attorneys who execute the Participation
28 Agreement (Exhibit A hereto). All plaintiffs' attorneys wishing to participate in the Common

1 Benefit Participation Agreement and who currently have cases pending shall, within 45 days of
2 this Order, execute the Common Benefit Participation Agreement Any plaintiffs' attorney who
3 does not yet have an Incretins case filed in any federal or state court shall designate whether or
4 not they are a Participating Counselor a Non-Participating Counsel by signing the appropriate
5 section of the Participation Agreement: (a) within 45 days of the date their first case is filed in or
6 otherwise docketed in this Court via direct filing, transfer or removal; or (b) within 45 days of the
7 date their first case is filed in any state court, if that lawyer intends to voluntarily become a
8 Participating Counsel at the fee and expense percentages to be determined. Failure to execute a
9 Participation Agreement indicating that an attorney will be a Participating Counsel within the
10 time frame set forth in this paragraph may result in higher percentages for common benefit
11 assessment as a result of such later participation.

12 Participating Counsel shall be entitled to receive all the common benefit work product of
13 those counsel who have also signed the Participation Agreement. Counsel who choose not to
14 execute the Participation Agreement, are not entitled to receive common benefit work product
15 and may be subject to an increased assessment on all Incretins cases in which they have a fee
16 interest if they receive common benefit work product or otherwise benefit by the work performed
17 by Participating Counsel.

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

24 **II. COMMON BENEFIT EXPENSES**

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

26 In order to be eligible for reimbursement of common benefit expenses, said expenses must
27 meet the requirements of this section and the limitations set forth in the Participation Agreement.
28 Specifically, said expenses must be: (a) for the common benefit; (b) appropriately authorized (as

1 defined in the Participation Agreement); (c) timely submitted within the defined limitations set
2 forth in this Order; and (d) verified by a partner or shareholder in the submitting firm. Time and
3 expense submissions are to be made on the 15th of each month, beginning on January 15, 2014.
4 Each submission should contain all time and expenses incurred during the calendar month prior to
5 the submission date (i.e., the January 15, 2014 submission should include all time and expenses
6 incurred during the month of December, 2013), though the first submission should include all
7 time and expenses incurred through December 31, 2013. All time and expense submissions
8 should be accompanied by contemporaneous records and verified by a partner or shareholder in
9 the submitting firm. Submissions of time and expense made after the 15th day of the month
10 following the month in which the time or expense were incurred may be rejected. Only time and
11 expense incurred after the entry of the Order by the Court appointing Plaintiffs' Leadership on
12 October 21, 2013 (plus any time and expense incurred by those appointed to leadership) shall be
13 submitted and considered for common benefit consideration. Moreover, only that time and those
14 expenses incurred for the common benefit of all cases, consistent with the terms of this Order
15 shall be considered for common benefit reimbursement at the end of the litigation.

16 **B. Shared an Held Common Benefit Expenses**

17 **1. Shared Costs**

18 Shared Costs are costs incurred for the common benefit of all plaintiffs. Shared Costs are
19 costs that will be paid out of a separate Incretins Operating Expense Fund established and
20 administered by Plaintiffs' Liaison Counsel and funded by all members of the PSC and others as
21 determined by Plaintiffs' Co- Lead Counsel. All Shared Costs must be approved by Plaintiffs'
22 Co-Lead Counsel prior to payment. Shared Costs include: (a) certain filing and service costs;
23 (b) deposition, court reporter, and video technician costs for non-case specific depositions;
24 (c) costs necessary for creation of a document depository, the operation and administration of the
25 depository, and any equipment required for the depository; (d) Plaintiffs' Co-Lead and Liaison
26 Counsel administrative matters (*e.g.*, expenses for equipment, technology, courier services,
27 telecopier, electronic service, photocopy and printing, secretarial/temporary staff, etc.); (e) PSC
28 group administration matters such as meetings and conference calls; (f) accountant fees;

1 (g) generic expert witness and consultant fees and expenses; (h) printing, copying, coding,
2 scanning (out of house or extraordinary firm cost); (i) research by outside third party
3 vendors/consultants/attorneys; (j) translation costs; (k) bank or financial institution charges;
4 (l) certain investigative services, and (m) special master and/or mediator charges.

5 **2. Held Costs**

6 Held Costs are those that will be carried by each Participating Counsel in MDL 2452.
7 Held Costs are those that do not fall into any of the above categories of shared costs, but are
8 incurred for the benefit of all plaintiffs. Held costs can also include unreimbursed, but
9 authorized, shared costs. No specific client related costs shall be considered as Held Costs, unless
10 the case is determined by Plaintiffs' Co-Lead Counsel to be a "common benefit case," *e.g.*,
11 certain bellwether cases as determined by Plaintiffs' Co-Lead Counsel.

12 **C. Authorization and Submission**

13 The Participation Agreement sets forth the guidelines for authorizing and submitting
14 expenses for the common benefit which shall be followed.

15 **D. Expenses Limitations**

16 **1. Travel Limitations**

17 Except in extraordinary circumstances approved in advance by Plaintiffs Co-Lead
18 Counsel, all travel reimbursements are subject to the following Limitations:

19 i. Airfare: Only the price of a coach seat for a reasonable itinerary will be
20 reimbursed. Business/First Class Airfare will *not* be fully reimbursed, except for
21 international flights, which requires prior approval by Plaintiffs Co-Lead Counsel
22 in order to be considered for reimbursement. Use of a private aircraft will not be
reimbursed. If Business/First Class Airfare is used on domestic flights then the
difference between the Business/First Class Airfare must be shown on the travel
reimbursement form, and only the coach fare will be will be reimbursed.

23 ii. Hotel: Hotel room charges for the average available room rate of a
24 business hotel, including the Hyatt, Westin, and Marriott hotels, in the city in
25 which the stay occurred will be reimbursed. Luxury hotels will not be fully
reimbursed but will be reimbursed at the average available rate of a business hotel.

26 iii. Meals: Meal expenses must be reasonable.

27 iv. Cash Expenses: Miscellaneous cash expenses for which receipts generally
28 are not available (tips, luggage handling, pay telephone, etc.) will be reimbursed
up to \$50.00 per trip, as long as the expenses are properly itemized.

1 v. Rental Automobiles: Luxury automobile rentals will not be fully
2 reimbursed, unless only luxury automobiles were available. If luxury automobiles
3 are selected when non-luxury vehicles are available, then the difference between
4 the luxury and non-luxury vehicle rates must be shown on the travel
5 reimbursement form, and only the non-luxury rate may be claimed, unless such
6 larger Sized vehicle is needed to accommodate several counsel

7 vi. Mileage: Mileage claims must be documented by stating origination point,
8 destination, total actual miles for each trip, and the rate per mile paid by the
9 member's firm. The maximum allowable rate will be the maximum rate allowed
10 by the IRS (currently 50.5 cents per mile).

11 **2. Non-Travel Limitations**

12 i. Shipping, Courier, and Delivery Charges: All claimed expenses must be
13 documented with bills showing the sender, origin of the package, recipient, and
14 destination of the package.

15 ii. Postage Charges: A contemporaneous postage log or other supporting
16 documentation must be maintained and submitted. Postage charges are to be
17 reported at actual cost.

18 iii. Telefax Charges: Contemporaneous records should be maintained and
19 submitted showing faxes sent and received. The per-fax charge shall not exceed
20 \$1.00 per page.

21 iv. In-House Photocopy: A contemporaneous photocopy log or other
22 supporting documentation must be maintained and submitted. The maximum copy
23 charge is 150 per page.

24 v. Computerized Research Lexis/Westlaw: Claims for Lexis or Westlaw, and
25 other computerized legal research expenses should be in the exact amount charged
26 to or allocated by the firm for these research services.

27 **E. Verification**

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

29 **III. COMMON BENEFIT WORK**

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

31 Only Participating Counsel are eligible for reimbursement for time and efforts expended
32 for the common benefit. Participating Counsel shall be eligible for reimbursement for time and
33 efforts expended for common benefit work if said time and efforts are: (a) for the common
34 benefit; (b) appropriately authorized (as described in footnote I of the Participation Agreement);

1 (c) timely submitted; and (d) verified by a partner or shareholder in the submitting firm.

2 **B. Compensable Common Benefit Work**

3 As the litigation progresses and common benefit work product continues to be generated,
4 the Co-Lead Counsel may assign Participating Counsel with common benefit work; common
5 benefit work shall include only work specifically assigned. Examples of common benefit work
6 include, but are not limited to, maintenance and working in the depository; review and document
7 coding; expert retention and development authorized by Co-Lead Counsel; preparing for and
8 conducting authorized depositions of Defendants, third-party witnesses, and experts; and
9 activities associated with preparation for trial and the trial of any cases designated as “common
10 benefit trials” by Plaintiffs’ Co-Lead Counsel.

11 **C. Authorization and Time Keeping**

12 All time must be authorized and accurately and contemporaneously maintained. Time
13 shall be kept according to these guidelines as set forth in the Participation Agreement and
14 approved by Plaintiffs’ Co-Lead Counsel.

15 **IV. PLAINTIFFS’ LITIGATION FEE AND EXPENSE FUNDS**

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

17 At an appropriate time, Plaintiffs’ Liaison Counsel will be directed to establish two
18 interest-bearing accounts to receive and disburse funds as provided in this Order (the “Funds”).
19 The first fund shall be designated the “Incretins Fee Fund” and the second fund shall be
20 designated the “Incretins Expense Fund.” These funds will be held subject to the direction of this
21 Court.

22 By subsequent Order of this Court, the Court will appoint a qualified certified public
23 accountant (the “CPA”) to serve as Escrow Agent over the Funds and to keep detailed records of
24 all deposits and withdrawals and to prepare tax returns and other tax filings in connection with the
25 Funds. Such subsequent Order shall specify the hourly rates to be charged by the CPA and for
26 the CPA’s assistants, who shall be utilized where appropriate to control costs, The CPA shall
27 submit quarterly detailed bills to the Court and to Plaintiffs’ Liaison Counsel. Detail shall not
28 include any information concerning the numbers of claimants subject to settlements or settlement

1 amounts, individually or in the aggregate, nor shall it include information from which numbers of
2 claimants subject to settlements or settlement amounts may be derived. Upon approval by the
3 Court, the CPA's bills shall be paid from the Incretins Expense Fund and shall be considered a
4 shared cost. The Plaintiffs' Liaison Counsel shall provide a copy of this Order to the CPA.

5 **B. Payments into the Fee and Expense Funds**

6 **1. General Standards**

7 All plaintiffs and their attorneys who sign the Common Benefit Participation Agreement
8 (Doc. No. 531-1) and who are thereby subject to this Order and who agree to settle, compromise,
9 dismiss, or reduce the amount of a claim or, with or without trial, recover a judgment for
10 monetary damages or other monetary relief, including such compensatory and punitive damages,
11 with respect to Incretins claims are subject to an assessment of the gross monetary recovery, as
12 provided herein.

13 **2. Gross Monetary Recovery**

14 Gross monetary recovery includes any and all amounts paid to plaintiffs' counsel by
15 Defendants through a settlement or pursuant to a judgment. In measuring the "gross monetary
16 recovery," the parties are to (a) exclude court costs that are to be paid by the defendant;
17 (b) include any payments to be made by the defendant on an intervention asserted by third-
18 parties, such as to physicians, hospitals, or other healthcare providers in subrogation related to
19 treatment of a plaintiff, and any governmental liens or obligations (e.g., Medicare/Medicaid); and
20 (c) include the present value of any fixed and certain payments to be made in the future. The
21 assessment shall apply to all of the cases of the plaintiffs' attorneys who have signed the
22 Common Benefit Participation Agreement (Doc. No. 531-1) and who are thereby subject to this
23 Order, whether as sole counsel or co-counsel, including cases pending in the MDL, pending in
24 state court, unfiled, or tolled.

25 **3. Defendant Obligations**

26 Upon learning of a case being filed in any state court Defendants' Liaison Counsel shall
27 notify Plaintiffs' Liaison Counsel of such filing within 30 days of service of the complaint upon
28 Defendant(s). Such notice shall include the name, firm name, and firm address of the Plaintiffs

1 attorney(s) and the date of such filing, so that Plaintiffs' Liaison Counsel can offer them the
2 opportunity to become Participating Counsel. Defendants' Liaison Counsel is not required to
3 notify Plaintiffs' Liaison Counsel of any cases filed in California state court JCCP Number 4574.
4 The Plaintiffs' Liaison Counsel shall provide the Defendants' Liaison Counsel, the CPA, and the
5 Court or its designee with a list of cases and/or counsel who have entered into written agreements
6 with the PSC by executing the Participation Agreement. This same list shall be made available to
7 all plaintiffs' counsel with cases in this MDL, as well as any other plaintiffs' counsel who signs
8 the Participation Agreement, upon request. In the event there is a dispute as to whether a case
9 should be on the list, Plaintiffs' Co-Lead Counsel shall seek to resolve the matter with the
10 particular plaintiffs' counsel informally, and if that is unsuccessful, upon motion to the Court.

11 Settling defendants and their counsel shall not distribute any settlement proceeds to any
12 plaintiffs counsel (or directly to a plaintiff) until after they notify the Court and Plaintiffs'
13 Liaison Counsel in writing of the existence of the settlement (without disclosing the amount of
14 the settlement) if the settlement was entered with an individual plaintiffs counsel who has been
15 identified by Plaintiffs' Liaison Counsel to such defendant's counsel in writing as having
16 executed the Participation Agreement. Plaintiffs' Liaison Counsel shall share this information
17 with Plaintiffs' Co-Lead Counsel, who shall otherwise keep this information confidential. For
18 cases subject to an assessment, Defendants are directed to withhold an assessment from any and
19 all amounts paid to plaintiffs and their counsel and to pay the assessment directly into the Funds
20 as a credit against the settlement or judgment. No orders of dismissal of any plaintiffs claim,
21 subject to this Order, shall be entered unless accompanied by a certificate of plaintiffs and
22 defendants' counsel that the assessment, if applicable, will be withheld and will be deposited into
23 the Funds at the same time the settlement proceeds are paid to settling counsel. If, for any reason,
24 the assessment is not or has not been so withheld, the plaintiff and his counsel are jointly
25 responsible for paying the assessment into the Fund promptly. The CPA retained by the PSC or
26 Plaintiffs' Liaison Counsel shall provide at least quarterly to the Court or its designee notice of
27 the names and docket numbers of the cases for which an assessment has been paid since the last
28 such report. A report is not due if there are no payments made into the Funds during that quarter.

1 Details of any individual settlement agreement, individual settlement amount and individual
2 amounts deposited into escrow shall be confidential and shall not be disclosed by the CPA to
3 Plaintiffs' Co-Lead Counsel, the PSC, the Court, or the Court's designee, unless the Court
4 requests that it receive that information. Quarterly statements from the CPA or Plaintiffs' Liaison
5 Counsel shall, however, be provided to Plaintiffs' Co-Lead and Plaintiffs' Liaison Counsel,
6 Defendants' Liaison Counsel, and the Court showing only the aggregate of the quarterly deposits,
7 disbursements, interest earned, financial institution charges, if any, and current balance, provided
8 that numbers of claimants subject to settlements or settlement amounts, individually or in the
9 aggregate, may not be derived from such quarterly statements.

10 **V. DISTRIBUTIONS**

11 **A. Court Approval**

12 The amounts deposited into the Incretins Fee Fund and the Incretins Expense Fund shall
13 be available for distribution to Participating Counsel who have performed professional services or
14 incurred expenses for the common benefit. No amounts will be disbursed without review and
15 approval by the Court, or such other mechanism as the Court may order. Specifically, such sums
16 shall be distributed only upon Order of this Court. This Court retains jurisdiction over any
17 common benefit award or distribution.

18 **B. Application for Distribution**

19 Each Participating Counsel who does common benefit work has the right to present their
20 claim(s) for compensation and/or reimbursement prior to any distribution approved by this Court.
21 Any Counsel who does not sign the Participation Agreement shall not be eligible to receive
22 common benefit payments for any work performed or expenses incurred. At the appropriate time,
23 this Court shall request that Plaintiffs' Co-Lead Counsel make recommendations to this Court for
24 distributions to Participating Counsel who have performed common benefit work. In the event
25 that there is not agreement among Plaintiffs' Co-Lead Counsel, each Co-Lead Counsel shall only
26 have one vote and each vote shall bear the same weight. A decision of Plaintiffs' Co-Lead
27 Counsel need only be made by a majority of votes. Plaintiffs' Co-Lead Counsel shall determine
28 on its own the most fair and efficient manner by which to evaluate all of the time and expense

1 submissions in making its recommendation to this Court. This Court will give due consideration
2 to the recommendation of the Plaintiffs' Co-Lead Counsel.

3 It is so ORDERED.
4 Dated: December _____, 2013

5 _____
6 The Honorable Anthony J. Battaglia

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EXHIBIT B

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

~~UNITED STATES DISTRICT COURT~~

~~SOUTHERN DISTRICT OF CALIFORNIA~~

~~In re Incretin-Based Therapies-
Products Liability Litigation~~
IN RE
INCRETIN-BASED THERAPIES
PRODUCTS LIABILITY
LITIGATION,

This Document Relates to All Cases

~~Case~~CV No NO. 3:13-md-02452-AJB-MDD

MDL 2452

~~Case Management Order Establishing
Common Benefit Fee and Expense Fund~~

No hearing per request of Chambers:

Courtroom:- 3B

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Judge: - Hon. Anthony J. Battaglia

Magistrate:- Hon. Mitchell D. Dembin

- 2 -

CASE MANAGEMENT ORDER: ESTABLISHING COMMON BENEFIT FEE AND EXPENSE FUND
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Proposed
Case Management Order

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3 **CASE MANAGEMENT ORDER**
4 **ESTABLISHING COMMON BENEFIT FEE AND EXPENSE FUND**

5 **I. SCOPE OF ORDER**

6 This Order is entered to provide for the fair and equitable sharing among plaintiffs, and
7 their counsel, of the burden of services performed and expenses incurred by attorneys acting for
8 the common benefit of all plaintiffs in the *Incretin-Based Therapies Product Liability Litigation*.

9 **A. Governing Principles and the Common Benefit Plan**

10 The governing principles are derived from the United States Supreme Court's common
11 benefit doctrine, as established in *Trustees v. Greenough*, 105 U.S. 527 (1881); refined in *inter*
12 *alia*, *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1884); *Sprague v. Ticonic*
13 *National Bank*, 307 U.S. 161 (1939); *Mills v. Electric Auto-Ute Co.*, 396 U.S. 375 (1970); *Boeing*
14 *Co. v. Van Gemert*, 444 U.S. 472 (1980); and approved and implemented in the MDL context, in
15 *inter alia*, *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006,
16 1019-21 (5th Cir. 1977); and *In re MGM Grand Hotel Fire Litigation*, 660 F.Supp. 522, 525-29
17 (D. Nev. 1987). Common benefit work product includes all work performed for the benefit of all
18 plaintiffs, including pre-trial matters, discovery, trial preparation, a potential settlement process,
19 and all other work that advances this litigation to conclusion.

20 **B. Application of this Order**

21 This Order applies to all cases now pending, as well as to any case later filed in,
22 transferred to, or removed to this Court and treated as part of the coordinated proceeding known
23 as *Incretin-Based Therapies Product Liability Litigation*, MDL 2452. This Order further applies
24 to each attorney who represents a plaintiff with a case now pending in or later filed in, transferred
25 to, or removed to this Court, regardless of whether the plaintiffs' attorney signs the "Participation
26 Agreement" attached hereto as Exhibit A.

27 This Order shall also apply to any private lien holder who obtains reimbursement from any
28 plaintiff whose case is subject to this Order, because that lien holder is benefiting from the
29 common benefit work performed by Participating Counsel. Such entities shall be subject to this
30 **CASE MANAGEMENT ORDER: ESTABLISHING COMMON BENEFIT FEE AND EXPENSE FUND**
31 Order regardless of execution of the Participation Agreement, as they are seeking to obtain part of

32 Proposed
33 Case Management Order

1 the recovery obtained by a plaintiff who is subject to this Order and the jurisdiction of this Court.
2 Counsel for private lien holder shall pay amounts consistent with the terms of Paragraph IV.(B)(3)
3 of this Order into the Incretins Fee Fund and the Incretins Expense Fund (as those terms are
4 defined herein). Private lien holders' counsel shall not be eligible to make a claim to receive any
5 distribution from the Common Benefit Fee Fund or the Common Benefit Cost Fund.
6

7 **C. Participation Agreement (Exhibit A)**

8 Exhibit A, attached hereto and incorporated herein, is a voluntary Participation Agreement
9 between plaintiffs' attorneys who have cases pending in the MDL and/or in state court. The
10 Participation Agreement is a private and cooperative agreement between plaintiffs' attorneys only
11 ("Participating Counsel"); and not Defendants or Defendants' counsel. Participating Counsel
12 shall automatically include all members of the Plaintiffs' Leadership Group by virtue of their
13 appointment by the Court to the Plaintiffs' Steering Committee, any State-Federal Liaisons that
14 this Court may appoint, and any other plaintiffs attorneys who execute the Participation
15 Agreement (Exhibit A hereto). All plaintiffs' attorneys wishing to participate in the Common
16 Benefit Participation Agreement and who currently have cases pending ~~in this Court or in~~
17 ~~any state court~~ shall, within 45 days of this Order, ~~designate whether or not they are a~~
18 ~~Participating Counselor a Non-Participating Counsel by signing the appropriate~~
19 ~~section of the~~ execute the Common Benefit Participation Agreement. ~~Any plaintiffs'~~
20 attorney who does not yet have an Incretins case filed in any federal or state court shall designate
21 whether or not they are a Participating Counselor a Non-Participating Counsel by signing the
22 appropriate section of the Participation Agreement: (a) within 45 days of the date their first case is
23 filed in or otherwise docketed in this Court via direct filing, transfer or removal; or (b) within 45
24 days of the date their first case is filed in any state court, if that lawyer intends to voluntarily
25 become a Participating Counsel at the fee and expense percentages to be determined. Failure to
26 execute a Participation Agreement indicating that an attorney will be a Participating Counsel
27 within the time frame set forth in this paragraph may result in higher percentages for common

28 ~~benefits shared by all participants in the common benefit fund.~~
CASE MANAGEMENT ORDER ESTABLISHING COMMON BENEFIT FEE AND EXPENSE FUND
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Participating Counsel shall be entitled to receive all the common benefit work product of
~~Proposed~~
Case Management Order

1 those counsel who have also signed the Participation Agreement. Counsel who choose not to
2 execute the Participation Agreement, are not entitled to receive common benefit work product and
3 may be subject to an increased assessment on all Incretins cases in which they have a fee interest
4 if they receive common benefit work product or otherwise benefit by the work performed by
5 Participating Counsel.
6

7 The Court recognizes the jurisdictional rights and obligations of the state courts to conduct
8 their state court litigation as they so determine and that the state court litigations may include
9 counsel who are Participating Counsel. The Participation Agreement and this Order shall not be
10 cited by a Party to the Participation Agreement in any other court in support of a position that
11 adversely impacts the jurisdictional rights and obligations of the state courts and state court
12 Participating Counsel.
13

14 **II. COMMON BENEFIT EXPENSES**

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

16 In order to be eligible for reimbursement of common benefit expenses, said expenses must
17 meet the requirements of this section and the limitations set forth in the Participation Agreement.
18 Specifically, said expenses must be: (a) for the common benefit; (b) appropriately authorized (as
19 defined in the Participation Agreement); (c) timely submitted within the defined limitations set
20 forth in this Order; and (d) verified by a partner or shareholder in the submitting firm. Time and
21 expense submissions are to be made on the 15th of each month, beginning on
22 ~~September~~January 15, 2014. Each submission should contain all time and expenses incurred
23 during the calendar month prior to the submission date (i.e., the ~~September~~January 15, 2014
24 submission should include all time and expenses incurred during the month of ~~August,~~
25 ~~2014~~December, 2013), though the first submission should include all time and expenses
26 incurred through ~~August~~December 31, ~~2014~~2013. All time and expense submissions should
27 be accompanied by contemporaneous records and verified by a partner or shareholder in the
28 submitting firm. Submissions of time and expense made after the 15th day of the month

29 ~~following the month in which the time or expense were incurred. Expenses may be rejected if they are~~
30 ~~not submitted within the time frame set forth in this Order.~~
31 ~~EAST66952157.1~~

32 expense incurred after the entry of the Order by the Court appointing Plaintiffs' Leadership on
33 Proposed
34 Case Management Order

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2 1 October 21, 2013 (plus any time and expense incurred by those appointed to leadership) shall be
3 2 submitted and considered for common benefit consideration. Moreover, only that time and those
4 3 expenses incurred for the common benefit of all cases, consistent with the terms of this Order
5 4 shall be considered for common benefit reimbursement at the end of the litigation.
6 5

7 6 **B. Shared and Held Common Benefit Expenses**

8 7 **1. Shared Costs**

9 8 Shared Costs are costs incurred for the common benefit of all plaintiffs. Shared Costs are
10 9 costs that will be paid out of a separate Incretins Operating Expense Fund established and
11 10 administered by Plaintiffs' Liaison Counsel and funded by all members of the PSC and others as
12 11 determined by Plaintiffs' Co- Lead Counsel. All Shared Costs must be approved by Plaintiffs'
13 12 Co-Lead Counsel prior to payment. Shared Costs include: (a) certain filing and service costs; (b)
14 13 deposition, court reporter, and video technician costs for non-case specific depositions; (c) costs
15 14 necessary for creation of a document depository, the operation and administration of the
16 15 depository, and any equipment required for the depository; (d) Plaintiffs' Co-Lead and Liaison
17 16 Counsel administrative matters (e.g., expenses for equipment, technology, courier services,
18 17 telecopier, electronic service, photocopy and printing, secretarial/temporary staff, etc.); (e) PSC
19 18 group administration matters such as meetings and conference calls; (f) accountant fees; (g)
20 19 generic expert witness and consultant fees and expenses; (h) printing, copying, coding, scanning
21 20 (out of house or extraordinary firm cost); (i) research by outside third party
22 21 vendors/consultants/attorneys; (j) translation costs; (k) bank or financial institution charges; (l)
23 22 certain investigative services, and (m) special master and/or mediator charges.

24 23 **2. Held Costs**

25 24 Held Costs are those that will be carried by each Participating Counsel in MDL 2452.
26 25 Held Costs are those that do not fall into any of the above categories of shared costs, but are
27 26 incurred for the benefit of all plaintiffs. Held costs can also include unreimbursed, but authorized,
28 27 shared costs. No specific client related costs shall be considered as Held Costs, unless the case is
28 28 determined by Plaintiffs' Co-Lead Counsel to be a bellwether case, e.g., certain
bellwether cases as determined by Plaintiffs' Co-Lead Counsel.

~~Proposed~~
~~Case Management Order~~

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C. Authorization and Submission

The Participation Agreement sets forth the guidelines for authorizing and submitting expenses for the common benefit which shall be followed.

D. Expenses Limitations

1. Travel Limitations

Except in extraordinary circumstances approved in advance by Plaintiffs Co-Lead Counsel, all travel reimbursements are subject to the following Limitations:

i. Airfare: Only the price of a coach seat for a reasonable itinerary will be reimbursed. Business/First Class Airfare will *not* be fully reimbursed, except for international flights, which requires prior approval by Plaintiffs Co-Lead Counsel in order to be considered for reimbursement. Use of a private aircraft will not be reimbursed. If Business/First Class Airfare is used on domestic flights then the difference between the Business/First Class Airfare must be shown on the travel reimbursement form, and only the coach fare will be will be reimbursed.

ii. Hotel: Hotel room charges for the average available room rate of a business hotel, including the Hyatt, Westin, and Marriott hotels, in the city in which the stay occurred will be reimbursed. Luxury hotels will not be fully reimbursed but will be reimbursed at the average available rate of a business hotel.

iii. Meals: Meal expenses must be reasonable.

iv. Cash Expenses: Miscellaneous cash expenses for which receipts generally are not available (tips, luggage handling, pay telephone, etc.) will be reimbursed up to \$50.00 per trip, as long as the expenses are properly itemized.

v. Rental Automobiles: Luxury automobile rentals will not be fully reimbursed, unless only luxury automobiles were available. If luxury automobiles are selected when non-luxury vehicles are available, then the difference between the luxury and non-luxury vehicle rates must be shown on the travel reimbursement form, and only the non-luxury rate may be claimed, unless such larger Sized vehicle is needed to accommodate several counsel:

vi. Mileage: Mileage claims must be documented by stating origination point, destination, total actual miles for each trip, and the rate per mile paid by the member's firm. The maximum allowable rate will be the maximum rate allowed by the IRS (currently 50.5 cents per mile).

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2 1 documented with bills showing the sender, origin of the package, recipient, and
3 2 destination of the package.

4 3 ii. Postage Charges: A contemporaneous postage log or other supporting
5 4 documentation must be maintained and submitted. Postage charges are to be
6 5 reported at actual cost.

7 6 iii. Telefax Charges: Contemporaneous records should be maintained and
8 7 submitted showing faxes sent and received. The per-fax charge shall not exceed
9 8 \$1.00 per page.

10 9 iv. In-House Photocopy: A contemporaneous photocopy log or other
11 10 supporting documentation must be maintained and submitted. The maximum copy
12 11 charge is 150 per page.

13 12 v. Computerized Research Lexis/Westlaw: Claims for Lexis or Westlaw, and
14 13 other computerized legal research expenses should be in the exact amount charged
15 14 to or allocated by the firm for these research services.

16 15 **E. Verification**

17 16 The forms detailing expenses shall be certified by a senior partner in each firm attesting to
18 17 the accuracy of the submissions. Attorneys shall keep receipts for all expenses. Credit card
19 18 receipts are an appropriate form of verification if accompanied by a declaration from counsel that
20 19 work was performed and paid for the common benefit.

21 20 **III. COMMON BENEFIT WORK**

22 21 **A. Qualified Common Benefit Work Eligible for Reimbursement**

23 22 Only Participating Counsel are eligible for reimbursement for time and efforts expended
24 23 for the common benefit. Participating Counsel shall be eligible for reimbursement for time and
25 24 efforts expended for common benefit work if said time and efforts are: (a) for the common
26 25 benefit; (b) appropriately authorized (as described in footnote I of the Participation Agreement);
27 26 (c) timely submitted; and (d) verified by a partner or shareholder in the submitting firm.

28 27 **B. Compensable Common Benefit Work**

29 28 As the litigation progresses and common benefit work product continues to be generated,
the Co-Lead Counsel may assign Participating Counsel with common benefit work; common
CASE MANAGEMENT ORDER: ESTABLISHING COMMON BENEFIT FEE AND EXPENSE FUND
benefit work shall include only work specifically assigned. Examples of common benefit work

Proposed
Case Management Order

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2 1 include, but are not limited to, maintenance and working in the depository; review and document
3 2 coding; expert retention and development authorized by Co-Lead Counsel; preparing for and
4 3 conducting authorized depositions of Defendants, third-party witnesses, and experts; and
5 4 activities associated with preparation for trial and the trial of any cases designated as “common
6 5 benefit trials” by Plaintiffs’ Co-Lead Counsel.
7 6

7 7 **C. Authorization and Time Keeping**

8 8 All time must be authorized and accurately and contemporaneously maintained. Time
9 9 shall be kept according to these guidelines as set forth in the Participation Agreement and
10 10 approved by Plaintiffs’ Co-Lead Counsel.
11 11

11 11 **IV. PLAINTIFFS’ LITIGATION FEE AND EXPENSE FUNDS**

12 12 **A. Establishing the Fee and Expense Funds**

13 13 At an appropriate time, Plaintiffs’ Liaison Counsel will be directed to establish two
14 14 interest-bearing accounts to receive and disburse funds as provided in this Order (the “Funds”).
15 15 The first fund shall be designated the “Incretins Fee Fund” and the second fund shall be
16 16 designated the “Incretins Expense Fund.” These funds will be held subject to the direction of this
17 17 Court.

18 18 By subsequent Order of this Court, the Court will appoint a qualified certified public
19 19 accountant (the “CPA”) to serve as Escrow Agent over the Funds and to keep detailed records of
20 20 all deposits and withdrawals and to prepare tax returns and other tax filings in connection with the
21 21 Funds. Such subsequent Order shall specify the hourly rates to be charged by the CPA and for the
22 22 CPA’s assistants, who shall be utilized where appropriate to control costs, The CPA shall submit
23 23 quarterly detailed bills to the Court and to Plaintiffs’ Liaison Counsel. Detail shall not include
24 24 any information concerning the numbers of claimants subject to settlements or settlement
25 25 amounts, individually or in the aggregate, nor shall it include information from which
26 26 numbers of claimants subject to settlements or settlement amounts may be derived. Upon

27 27 approval by the Court, the CPA’s bills shall be paid from the Incretins Expense Fund and shall be

28 28 ~~considered a shared cost of the Plaintiffs’ Liaison Counsel and a copy of this Order to be~~

28 28 CPA.

Proposed

Case Management Order

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2 **B. Payments into the Fee and Expense Funds**

3 **1. General Standards**

4 All plaintiffs and their attorneys who ~~are~~ sign the Common Benefit Participation
5 Agreement (Doc. No. 531-1) and who are thereby subject to this Order and who agree to settle,
6 compromise, dismiss, or reduce the amount of a claim or, with or without trial, recover a
7 judgment for monetary damages or other monetary relief, including such compensatory and
8 punitive damages, with respect to Incretins claims are subject to an assessment of the gross
9 monetary recovery, as provided herein.
10

11 **2. Gross Monetary Recovery**

12 Gross monetary recovery includes any and all amounts paid to plaintiffs' counsel by
13 Defendants through a settlement or pursuant to a judgment. In measuring the "gross monetary
14 recovery," the parties are to (a) exclude court costs that are to be paid by the defendant; (b)
15 include any payments to be made by the defendant on an intervention asserted by third-parties,
16 such as to physicians, hospitals, or other healthcare providers in subrogation related to treatment
17 of a plaintiff, and any governmental liens or obligations (e.g., Medicare/Medicaid); and (c)
18 include the present value of any fixed and certain payments to be made in the future. The
19 assessment shall apply to all of the cases of the plaintiffs' attorneys who ~~are~~ have signed the
20 Common Benefit Participation Agreement (Doc. No. 531-1) and who are thereby subject to
21 this Order, whether as sole counsel or co-counsel, including cases pending in the MDL, pending
22 in state court, unfiled, or tolled.
23

24 **3. Defendant Obligations**

25 Upon learning of a case being filed in any state court, Defendants' Liaison Counsel shall
26 notify Plaintiffs' Liaison Counsel of such filing within 30 days of service of the complaint upon
27 Defendant(s). Such notice shall include the name, firm name, and firm address of the Plaintiffs
28 attorney(s) and the date of such filing, so that Plaintiffs' Liaison Counsel can ~~notify that~~
~~attorney of this Order and~~ offer them the opportunity to become Participating Counsel.

29 ~~Defendants' Liaison Counsel is not required to notify Plaintiffs' Liaison Counsel of any~~
30 ~~cases filed in California state court JCCP Number 4574.~~ The Plaintiffs' Liaison Counsel shall
31 ~~Proposed~~
32 ~~Case Management Order~~

33 cases filed in California state court JCCP Number 4574. The Plaintiffs' Liaison Counsel shall
34 Proposed
35 Case Management Order

1 provide the Defendants' Liaison Counsel, the CPA, and the Court or its designee with a list of
2 cases and/or counsel who have entered into written agreements with the PSC by executing the
3 Participation Agreement. This same list shall be made available to all plaintiffs' counsel with
4 cases in this MDL, as well as any other plaintiffs' counsel who signs the Participation Agreement,
5 upon request. In the event there is a dispute as to whether a case should be on the list, Plaintiffs'
6 Co-Lead Counsel shall seek to resolve the matter with the particular plaintiffs' counsel
7 informally, and if that is unsuccessful, upon motion to the Court.
8

9 ~~Defendants~~Settling defendants and their counsel shall not distribute any settlement
10 proceeds to any plaintiffs' counsel (or directly to a plaintiff) until after ~~(1) Defendants'~~
11 ~~counsel notifies~~they notify the Court and Plaintiffs' Liaison Counsel in writing of the
12 existence of ~~a~~the settlement and the name of the individual plaintiffs attorney (without
13 disclosing the amount of the settlement); and ~~(2) if the settlement was entered with an~~
14 individual plaintiffs counsel who has been identified by Plaintiffs' Liaison Counsel ~~has~~
15 ~~advised Defendants' to such defendant's~~ counsel in writing whether or not the individual
16 plaintiffs attorney's cases are subject to an assessment and the amount (stated as a
17 percentage of the recovery) of the assessment pursuant to this Order as having
18 executed the Participation Agreement. Plaintiffs' Liaison Counsel shall share this information
19 with Plaintiffs' Co-Lead Counsel, who shall otherwise keep this information confidential. For
20 cases subject to an assessment, Defendants are directed to withhold an assessment from any and
21 all amounts paid to plaintiffs and their counsel and to pay the assessment directly into the Funds
22 as a credit against the settlement or judgment. No orders of dismissal of any plaintiffs claim,
23 subject to this Order, shall be entered unless accompanied by a certificate of plaintiffs and
24 defendants' counsel that the assessment, if applicable, will be withheld and will be deposited into
25 the Funds at the same time the settlement proceeds are paid to settling counsel. If, for any reason,
26 the assessment is not or has not been so withheld, the plaintiff and his counsel are jointly
27 responsible for paying the assessment into the Fund promptly. The CPA retained by the PSC

28 ~~or Plaintiffs' Liaison Counsel for each defendant shall provide at least quarterly to the Court~~
EAST 66952157.1

Proposed
Case Management Order

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2 1 or its designee notice of the names and docket numbers of the cases for which it has paid an
3 2 assessment into the Funds has been paid since the last such report. A report is not due if there
4 3 are no payments made into the Funds by that Defendant during that quarter. Details of any
5 4 individual settlement agreement, individual settlement amount and individual amounts deposited
6 5 into escrow shall be confidential and shall not be disclosed by the CPA to Plaintiffs' Co-Lead
7 6 Counsel, the PSC, the Court, or the Court's designee, unless the Court requests that it receive that
8 7 information. ~~Monthly~~Quarterly statements from the CPA or Plaintiffs' Liaison Counsel
9 8 shall, however, be provided to Plaintiffs' Co-Lead ~~and Lead~~ and Plaintiffs' Liaison Counsel,
10 9 Defendants' Liaison Counsel, and the Court showing only the aggregate of the
11 10 ~~monthly~~quarterly deposits, disbursements, interest earned, financial institution charges, if any,
12 11 and current balance, provided that numbers of claimants subject to settlements or settlement
13 12 amounts, individually or in the aggregate, may not be derived from such quarterly
14 13 statements.

15 14
16 15 **V. DISTRIBUTIONS**

17 16 **A. Court Approval**

18 17 The amounts deposited into the Incretins Fee Fund and the Incretins Expense Fund shall
19 18 be available for distribution to Participating Counsel who have performed professional services or
20 19 incurred expenses for the common benefit. No amounts will be disbursed without review and
21 20 approval by the Court, or such other mechanism as the Court may order. Specifically, such sums
22 21 shall be distributed only upon Order of this Court. This Court retains jurisdiction over any
23 22 common benefit award or distribution.

24 23 **B. Application for Distribution**

25 24 Each Participating Counsel who does common benefit work has the right to present their
26 25 claim(s) for compensation and/or reimbursement prior to any distribution approved by this Court.
27 26 Any Counsel who does not sign the Participation Agreement shall not be eligible to receive
28 27 common benefit payments for any work performed or expenses incurred. At the appropriate time,
28 28 this Court may require that Participating Counsel file a written recommendation to the Court for
distributions to Participating Counsel who have performed common benefit work. In the event
Proposed
Case Management Order

-12-
CASE MANAGEMENT ORDER: ESTABLISHING COMMON BENEFIT FEE AND EXPENSE FUNDS
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that there is not agreement among Plaintiffs' Co-Lead Counsel, each Co-Lead Counsel shall only have one vote and each vote shall bear the same weight. A decision of Plaintiffs' Co-Lead Counsel need only be made by a majority of votes. Plaintiffs' Co-Lead Counsel 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. This Court will give due consideration to the recommendation of the Plaintiffs' Co-Lead Counsel.

It is so ORDERED.

Dated: ~~August-December~~ _____,
~~2014~~2013

The Honorable Anthony J. Battaglia

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CASE MANAGEMENT ORDER: ESTABLISHING COMMON BENEFIT FEE AND EXPENSE FUND
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Proposed
Case Management Order

EXHIBIT C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re: ZYPREXA
PRODUCTS LIABILITY LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ AUG 17 2007 ★

MDL No. 1596 (JBW) (RLM)

P.M. _____
TIME A.M. _____

ORDER
COMMON BENEFIT FUND

Following a hearing upon notice to all parties, Special Discovery Master Peter H. Woodin issued a Recommendation and Proposed Order (Common Benefit Fund Set-Aside) dated July 31, 2007. Objections to the Special Discovery Master's Recommendation and Proposed Order were filed. A full evidentiary hearing on the issues raised in the objections was held on August 14, 2007. A member of the Executive Committee of the PSC II offered testimony concerning the work carried out by the PSC II on behalf of all plaintiffs with cases pending in the MDL. His testimony is fully credited.

Having considered the Special Discovery Master's Recommendation and Proposed Order, the issues raised by objections, and the arguments and evidence received at the August 14, 2007 hearing, the Recommendation and Proposed Order of the Special Discovery Master is adopted as an order of the court.

- 1) Every personal injury plaintiff whose case is or will be included in MDL No. 1596 and is now, or will be, before this court (even if a motion to remand is pending), and whose claims were not settled as part of the November 2005 settlement, shall be assessed a common benefit fund set-aside in the amount of 3% of the plaintiff's gross recovery, whether received by way of settlement or judgment. This assessment shall apply to all cases in the MDL, including those that may be subject to remand to state courts or transfer to other federal courts.
- 2) The common benefit fund set-aside shall be paid at the time each individual plaintiff's settlement or judgment becomes final and funds are paid or released to the individual plaintiff. As between attorney and client, the 3% assessment shall be paid ½ (1.5%) from the plaintiff's share of the gross recovery and ½ (1.5%) from the attorney fee portion of the gross recovery. The attorney fee limitations set out in *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488 (E.D.N.Y. 2006) ("March 28, 2006 Fee Order") that applied to all cases included in the November 2005 settlement shall apply to all cases within the scope of this order.

- 3) All common benefit fund assessments shall be remitted promptly to the Executive Committee of PSC II, which shall establish an escrow account at a national bank in which the set-aside assessments shall be deposited. The Executive Committee of PSC II shall submit periodic reports to magistrate judge Mann concerning the status of the escrow account, and will not authorize the release of any funds from the escrow fund except pursuant to orders of magistrate judge Mann or this court.
- 4) All applications seeking compensation from the common benefit fund for work done and expenses incurred for the common benefit of Zyprexa plaintiffs shall be submitted to magistrate judge Mann for review and final determination, with notice, and opportunity to be heard, to all plaintiffs and counsel whose recoveries have been subject to the assessment.
- 5) Given the contingent nature of some of the settlements entered into between Lilly and settling law firms on behalf of their clients, and the fact that work done by the PSC II and others in the continued prosecution of Zyprexa claims in this litigation inures to the benefit of all plaintiffs whose counsel may have already agreed to contingent settlements, the court declines to set any specific cut-off date after which work for the common benefit will not be compensated. That date can best be determined at a later time as settlements become final and settlement monies begin to be distributed.
- 6) The parties may apply for modification of this order at any time on notice.

Dated: August 17, 2007
Brooklyn, New York

SO ORDERED.



Jack B. Weinstein
Senior United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
In re: ZYPREXA
PRODUCTS LIABILITY LITIGATION

MDL No. 1596 (JBW) (RLM)

-----X
THIS DOCUMENT RELATES TO:
ALL ACTIONS

-----X
of Special Master
RECOMMENDATION AND PROPOSED ORDER
(Common Benefit Fund Set-Aside) ✓

By order of December 5, 2006 (the "Order"), the Court imposed a common benefit fund set-aside assessment on all cases in the MDL that were not included in the November 2005 settlement. See Order at 11-12. The purpose of the assessment was to create a fund from which attorneys who worked for the common benefit of all Zyprexa plaintiffs could be compensated for their services and incurred expenses. The set-aside assessment was ordered for cases then pending in the MDL and cases that would become part of the MDL, "regardless of whether any of those cases are eventually remanded to state court or transferred to a federal court." See Order at 26. The Court subsequently reaffirmed its order concerning the imposition of a common benefit fund set-aside at the hearing of June 22, 2007. See Hearing Transcript of June 22, 2007, at 27, 95.

In the Order, the Court deferred two issues for later resolution: (1) the percentage amount of the set-aside assessment; and (2) the manner in which the common benefit fund was to be administered. See Order at 13. The Court subsequently referred these two issues to the Special Discovery Master for consideration and recommendation.

The PSC II has now requested entry of an order (1) imposing a three percent (3%) assessment on the gross recoveries paid, by settlement or judgment, to all Zyprexa personal injury cases in the MDL that were not included in the November 2005 settlement, and (2) directing all plaintiff counsel to pay these set-aside amounts into a common benefit fund account to be established and administered by the Executive Committee of the PSC II. Several firms that represent plaintiffs with cases in the MDL have objected, on various grounds, both to the establishment of a common benefit fund and to the requested three percent set-aside amount.

Pursuant to the Scheduling Order of May 31, 2007, notice of a telephonic hearing to consider the PSC II's request was distributed to all plaintiff counsel by the PSC II at the direction of the Special Discovery Master. The telephonic hearing was subsequently held on June 7, 2007, at which members of the PSC II and various objectors participated. Based on the submissions of the PSC II and the objecting law firms, and oral argument at the hearing of June 7, 2007, I make the following findings and recommendations:

DISCUSSION AND FINDINGS:

The work of PSC II: As previously recognized by the Court, the attorneys of the PSC II and others working under their direction have provided significant benefits to all Zyprexa plaintiffs in this litigation. See Order at 10-12. As set forth in submissions accompanying their motion, the activities and responsibilities undertaken by the PSC II for the benefit of all Zyprexa plaintiffs include: the relocation to South Carolina and continued maintenance of the document depository, consisting of millions of pages of documents produced by Lilly in discovery, and ensuring continued access to the depository by all plaintiff counsel; the continued oversight and coordination of all discovery in the MDL, which required weekly "meet and confers" with counsel for Lilly, weekly discovery conferences with the Special Discovery Master, and the

bringing of numerous motions in connection with discovery disputes and related matters; identifying, interviewing and preparing expert witnesses, and coordinating and finalizing the expert reports for filing in this litigation; reviewing the many volumes of privilege logs produced by Lilly, and preparing and prosecuting numerous challenges to privilege designations; ongoing coordination with the activities of counsel for state court plaintiffs, to ensure that the national Zyprexa litigation was prosecuted efficiently and without duplicative effort; coordinating the effort to identify and prepare cases designated for the trial pool in the MDL, including serving and conducting case specific discovery in all 35 of the selected trial pool plaintiffs; and reviewing the many millions of pages of documents previously produced by Lilly, as well as reviewing the additional documents produced by Lilly after August 2006, numbering over a million document pages.

In my capacity as Special Discovery Master, I have worked closely with members of the PSC II over the last year, and I have been extremely impressed with their diligence, expertise and professionalism. I have seen the continuing results of their efforts week after week during the course of the litigation, and there can be no doubt that their work has been essential to the prosecution and final resolution of all the currently settling Zyprexa cases.

The three percent set-aside: The three percent set-aside requested by the PSC II is consistent with set-aside assessments imposed in other complex multidistrict litigations. In fact, as noted in the submission of PSC II, the requested three percent assessment is less than that imposed in many other comparable mass tort litigations. *See, e.g., In re Bextra and Celebrex Marketing Sales Practices Liability Litigation*, MDL 1699 (4%); *In re Fen-Phen Litigation*, MDL No. 1203 (6% to 9%); *In re Vioxx Marketing, Sales Practices and Products Litigation*, MDL 1657 (3% to 6%); *In re Prempro Products Liability Litigation*, MDL 1507 (5%); *In re Ortho Evra Products Liability Litigation*, MDL 1742 (3% to 5%). Moreover, this Court

previously approved a four percent assessment in connection with the November 2005 personal injury settlements for the work undertaken by the PSC I on behalf of those plaintiffs.

Allocation: A question raised at the hearing of June 22, 2007 was the appropriate allocation between attorney and client of the three percent set-aside. As reported at that hearing, this issue has not been discussed in prior proceedings and is not addressed in the PSC II's submissions. I expressed the view at the hearing that an appropriate allocation might be one half (1.5%) paid from the attorney fee portion of the gross recovery, and one half (1.5%) paid from the client's portion of the gross recovery. Subject to hearing further from counsel on this issue, that will remain my recommendation.

Common benefit fund administration: PSC II has proposed to hold the set-aside funds in a separate, interest-bearing, escrow account in a "national" bank in the name of the PSC II. Periodic reports will be provided to PSC members and the Court. Any distribution from the account will require the consent of all three members of the PSC II Executive Committee. This proposal is consistent with the manner in which similar funds have been administered, and seems appropriate to ensure the continued security of the set-aside funds during the settlement and distribution process.

Objections: A number of objections to the PSC II's application challenge the authority and jurisdiction of the Court to order a set-aside assessment. Those matters are beyond the scope of the present inquiry, and in any event they have been addressed by the Court in the Order and again subsequently at the hearing of June 22, 2007. Other objections assert that the set-aside amount is excessive, and that the work of the PSC II conferred no benefit.

As noted above, a set-aside amount of three percent of gross recovery is well within the range of set-asides ordered by courts in other multidistrict mass tort litigations. Objectors assert, however, that the current settlements to which the set-aside assessments might apply are reported

to total some \$497 million, which would mean a set-aside amount of approximately \$15 million. They question the appropriateness of a set-aside in this amount.

First, although the total amount of current settlements may be \$497 million, presumably some portion of that amount is attributable to cases that will not be contributing a set-aside assessment, such as cases not part of the MDL and cases that do not qualify under relevant settlement protocols. Therefore, at three percent, the final amount of the common benefit fund will certainly be less than \$15 million, and perhaps substantially less. Second, the PSC II has reported a preliminary figure of lodestar billings and expenses totaling some \$10.1 million for work done through December 31, 2006, and the final amounts that are applied for may be higher. Given the likely difficulty of collecting additional assessments after distribution of settlement proceeds has been completed, it is not unreasonable to provide some margin in the set-aside assessment, especially as any amount remaining in the common benefit fund after all distributions have been made will be returned to plaintiffs and counsel. And finally, the amount awarded to the PSC I attorneys, from the common benefit fund that was created from the proceeds of the first settlements, was approved under a percentage of the fund approach. Four percent of those settlement funds (for a total award to PSC I of approximately \$31 million in fees and expenses) was found by the Court to be reasonable compensation for the work that PSC I performed. See Order of December 29, 2006 (Magistrate Judge Mann). Here the PSC II's request of three percent represents a significantly lesser amount, both as to percentage (3% rather than 4%) and ultimate dollar amount (a maximum of \$15 million rather than \$31 million).

The objection concerning the benefits provided by the work of PSC II to pending Zyprexa cases generally was thoroughly aired at the hearing of June 22, 2007. At that time the Court also found that whether or not a particular firm utilized any of the specific discovery obtained and made available by PSC I and II, nonetheless the overall national litigation effort

conducted by both PSCs, and the information that became available as a result, had a direct impact on the ultimately successful resolution of the cases. See Hearing Transcript of June 22, 2007, at 27.

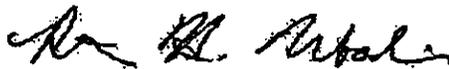
RECOMMENDATIONS:

In my capacity as Special Discovery Master, I respectfully make the following recommendations to the Court:

- (i) that the Executive Committee of the PSC II be ordered to establish and maintain a separate interest-bearing escrow account at a national bank, the purpose of which will be to receive and hold set-aside assessment funds, as provided below, to compensate and reimburse attorneys for services rendered and for expenses incurred for the common benefit of Zyprexa plaintiffs; and
- (ii) that each attorney with personal injury cases pending in the MDL (including cases that were transferred or removed to the MDL) be ordered to set-aside three percent (3%) of each gross recovery received by way of judgment or settlement, and promptly remit the set-aside funds to the Executive Committee of PSC II for deposit in the common benefit fund account; the three percent set-aside shall be allocated one half (1.5%) from the attorney fee portion of the gross recovery, and one half (1.5%) from the client's portion of the gross recovery.

SO RECOMMENDED:

Dated: July 31, 2007
New York, New York



Peter H. Woodin
Special Discovery Master

EXHIBIT D

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

IN RE INCRETIN-BASED THERAPIES
PRODUCTS LIABILITY LITIGATION,

CV NO. 3:13-md-02452-AJB-MDD
MDL 2452

This Document Relates to All Cases

Judge: Hon. Anthony J. Battaglia
Magistrate: Hon. Mitchell D. Dembin

CASE MANAGEMENT ORDER
ESTABLISHING COMMON BENEFIT FEE AND EXPENSE FUND

I. SCOPE OF ORDER

This Order is entered to provide for the fair and equitable sharing among plaintiffs, and their counsel, of the burden of services performed and expenses incurred by attorneys acting for the common benefit of all plaintiffs in the *Incretin-Based Therapies Product Liability Litigation*.

A. Governing Principles and the Common Benefit Plan

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-Ute 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 Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1019-21 (5th Cir. 1977); and *In re MGM Grand Hotel Fire Litigation*, 660 F.Supp. 522, 525-29

1 (D. Nev. 1987). Common benefit work product includes all work performed for the benefit of all
2 plaintiffs, including pre-trial matters, discovery, trial preparation, a potential settlement process,
3 and all other work that advances this litigation to conclusion.

4 **B. Application of this Order**

5 This Order applies to all cases now pending in, as well as to any case later filed in,
6 transferred to, or removed to this Court and treated as part of, the coordinated proceeding known
7 as *Incretin-Based Therapies Product Liability Litigation*, MDL 2452 (“MDL”). This Order
8 further applies to each attorney who represents a plaintiff with a case now pending in, or later
9 filed in, transferred to, or removed to, this Court, regardless of whether the plaintiffs’ attorney
10 signs the “Participation Agreement” attached hereto as Exhibit A.

11 **C. Participation Agreement (Exhibit A)**

12 Exhibit A, attached hereto and incorporated herein, is a voluntary Participation Agreement
13 between plaintiffs’ attorneys who have cases pending in the MDL and/or in state court. The
14 Participation Agreement is a private and cooperative agreement between plaintiffs’ attorneys only
15 (“Participating Counsel”); and not defendants or defendants’ counsel. Participating Counsel shall
16 automatically include all members of the Plaintiffs’ Leadership Group by virtue of their
17 appointment by the Court to the Plaintiffs’ Steering Committee (“PSC”), any State-Federal
18 Liaisons that this Court may appoint, and any other plaintiffs’ attorneys who execute the
19 Participation Agreement (Exhibit A hereto). All plaintiffs’ attorneys with a case now pending in
20 this Court who wish to participate in the Common Benefit Participation Agreement shall, within
21 45 days of this Order, execute the Common Benefit Participation Agreement. Any plaintiffs’
22 attorney who represents a plaintiff with a case that is later filed in, transferred to, or removed to
23 this Court shall designate whether or not they wish to participate in the Common Benefit
24 Participation Agreement and, if so, sign the appropriate section of the Participation Agreement:
25 within 45 days of the date their first case is filed in or otherwise docketed in this Court via direct
26 filing, transfer or removal. Failure to execute a Participation Agreement indicating that an
27 attorney will be a Participating Counsel within the time frame set forth in this paragraph may
28 result in higher percentages for common benefit assessment as a result of such later participation.

1 Participating Counsel shall be entitled to receive all the common benefit work product of
2 those counsel who have also signed the Participation Agreement. Counsel who choose not to
3 execute the Participation Agreement, are not entitled to receive common benefit work product
4 and may be subject to an increased assessment on all Incretins cases in which they have a fee
5 interest if they receive common benefit work product or otherwise benefit by the work performed
6 by Participating Counsel.

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

13 **II. COMMON BENEFIT EXPENSES**

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

15 In order to be eligible for reimbursement of common benefit expenses, said expenses must
16 meet the requirements of this section and the limitations set forth in the Participation Agreement.
17 Specifically, said expenses must be: (a) for the common benefit; (b) appropriately authorized (as
18 defined in the Participation Agreement); (c) timely submitted within the defined limitations set
19 forth in this Order; and (d) verified by a partner or shareholder in the submitting firm. Time and
20 expense submissions are to be made on the 15th of each month, beginning on _____, 2014.
21 Each submission should contain all time and expenses incurred during the calendar month prior to
22 the submission date (i.e., the _____, 2014 submission should include all time and expenses
23 incurred during the month of _____, 2014), though the first submission should include all
24 time and expenses incurred through _____, 2014. All time and expense submissions should
25 be accompanied by contemporaneous records and verified by a partner or shareholder in the
26 submitting firm. Submissions of time and expense made after the 15th day of the month
27 following the month in which the time or expense were incurred may be rejected. Only time and
28 expense incurred after the entry of the Order by the Court appointing Plaintiffs' Leadership on

1 October 21, 2013 (plus any time and expense incurred by those appointed to leadership) shall be
2 submitted and considered for common benefit consideration. Moreover, only that time and those
3 expenses incurred for the common benefit of all cases, consistent with the terms of this Order,
4 shall be considered for common benefit reimbursement at the end of the litigation.

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

6 **1. Shared Costs**

7 Shared Costs are costs incurred for the common benefit of all plaintiffs. Shared Costs are
8 costs that will be paid out of a separate Incretins Operating Expense Fund established and
9 administered by Plaintiffs' Liaison Counsel and funded by all members of the PSC and others as
10 determined by Plaintiffs' Co-Lead Counsel. All Shared Costs must be approved by Plaintiffs'
11 Co-Lead Counsel prior to payment. Shared Costs include: (a) certain filing and service costs;
12 (b) deposition, court reporter, and video technician costs for non-case specific depositions;
13 (c) costs necessary for creation of a document depository, the operation and administration of the
14 depository, and any equipment required for the depository; (d) Plaintiffs' Co-Lead and Liaison
15 Counsel administrative matters (*e.g.*, expenses for equipment, technology, courier services,
16 telecopier, electronic service, photocopy and printing, secretarial/temporary staff, etc.); (e) PSC
17 group administration matters such as meetings and conference calls; (f) accountant fees;
18 (g) generic expert witness and consultant fees and expenses; (h) printing, copying, coding,
19 scanning (out of house or extraordinary firm cost); (i) research by outside third party
20 vendors/consultants/attorneys; (j) translation costs; (k) bank or financial institution charges;
21 (l) certain investigative services, and (m) special master and/or mediator charges.

22 **2. Held Costs**

23 Held Costs are those that will be carried by each Participating Counsel in MDL 2452.
24 Held Costs are those that do not fall into any of the above categories of shared costs, but are
25 incurred for the benefit of all plaintiffs. Held costs can also include unreimbursed, but
26 authorized, shared costs. No specific client related costs shall be considered as Held Costs, unless
27 the case is determined by Plaintiffs' Co-Lead Counsel to be a "common benefit case," *e.g.*,
28 certain bellwether cases as determined by Plaintiffs' Co-Lead Counsel.

1 **C. Authorization and Submission**

2 The Participation Agreement sets forth the guidelines for authorizing and submitting
3 expenses for the common benefit, which shall be followed.

4 **D. Expenses Limitations**

5 **1. Travel Limitations**

6 Except in extraordinary circumstances approved in advance by Plaintiffs' Co-Lead
7 Counsel, all travel reimbursements are subject to the following Limitations:

8 i. Airfare: Only the price of a coach seat for a reasonable itinerary will be
9 reimbursed. Business/First Class Airfare will *not* be fully reimbursed, except for
10 international flights, which requires prior approval by Plaintiffs' Co-Lead Counsel
11 in order to be considered for reimbursement. Use of a private aircraft will not be
reimbursed. If Business/First Class Airfare is used on domestic flights, then the
difference between the Business/First Class Airfare must be shown on the travel
reimbursement form, and only the coach fare will be will be reimbursed.

12 ii. Hotel: Hotel room charges for the average available room rate of a
13 business hotel, including the Hyatt, Westin, and Marriott hotels, in the city in
14 which the stay occurred will be reimbursed. Luxury hotels will not be fully
reimbursed but will be reimbursed at the average available rate of a business hotel.

15 iii. Meals: Meal expenses must be reasonable.

16 iv. Cash Expenses: Miscellaneous cash expenses for which receipts generally
17 are not available (tips, luggage handling, pay telephone, etc.) will be reimbursed
up to \$50.00 per trip, as long as the expenses are properly itemized.

18 v. Rental Automobiles: Luxury automobile rentals will not be fully
19 reimbursed, unless only luxury automobiles were available. If luxury automobiles
20 are selected when non-luxury vehicles are available, then the difference between
the luxury and non-luxury vehicle rates must be shown on the travel
reimbursement form, and only the non-luxury rate may be claimed, unless such
larger Sized vehicle is needed to accommodate several counsel

21 vi. Mileage: Mileage claims must be documented by stating origination point,
22 destination, total actual miles for each trip, and the rate per mile paid by the
member's firm. The maximum allowable rate will be the maximum rate allowed
23 by the IRS (currently 50.5 cents per mile).

24 **2. Non-Travel Limitations**

25 i. Shipping, Courier, and Delivery Charges: All claimed expenses must be
26 documented with bills showing the sender, origin of the package, recipient, and
destination of the package.

27 ii. Postage Charges: A contemporaneous postage log or other supporting
28 documentation must be maintained and submitted. Postage charges are to be
reported at actual cost.

1 iii. Telefax Charges: Contemporaneous records should be maintained and
2 submitted showing faxes sent and received. The per-fax charge shall not exceed
3 \$1.00 per page.

4 iv. In-House Photocopy: A contemporaneous photocopy log or other
5 supporting documentation must be maintained and submitted. The maximum copy
6 charge is 150 per page.

7 v. Computerized Research Lexis/Westlaw: Claims for Lexis or Westlaw, and
8 other computerized legal research expenses should be in the exact amount charged
9 to or allocated by the firm for these research services.

10 **E. Verification**

11 The forms detailing expenses shall be certified by a senior partner in each firm attesting to
12 the accuracy of the submissions. Attorneys shall keep receipts for all expenses. Credit card
13 receipts are an appropriate form of verification if accompanied by a declaration from counsel that
14 work was performed and paid for the common benefit.

15 **III. COMMON BENEFIT WORK**

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

17 Only Participating Counsel are eligible for reimbursement for time and efforts expended
18 for the common benefit. Participating Counsel shall be eligible for reimbursement for time and
19 efforts expended for common benefit work if said time and efforts are: (a) for the common
20 benefit; (b) appropriately authorized (as described in footnote 1 of the Participation Agreement);
21 (c) timely submitted; and (d) verified by a partner or shareholder in the submitting firm.

22 **B. Compensable Common Benefit Work**

23 As the litigation progresses and common benefit work product continues to be generated,
24 the Co-Lead Counsel may assign Participating Counsel with common benefit work; common
25 benefit work shall include only work specifically assigned. Examples of common benefit work
26 include, but are not limited to, maintenance and working in the depository; review and document
27 coding; expert retention and development authorized by Co-Lead Counsel; preparing for and
28 conducting authorized depositions of defendants, third-party witnesses, and experts; and activities
29 associated with preparation for trial and the trial of any cases designated as "common benefit
30 trials" by Plaintiffs' Co-Lead Counsel.

1 **C. Authorization and Time Keeping**

2 All time must be authorized and accurately and contemporaneously maintained. Time
3 shall be kept according to these guidelines as set forth in the Participation Agreement and
4 approved by Plaintiffs' Co-Lead Counsel.

5 **IV. PLAINTIFFS' LITIGATION FEE AND EXPENSE FUNDS**

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

7 At an appropriate time, Plaintiffs' Liaison Counsel will be directed to establish two
8 interest-bearing accounts to receive and disburse funds as provided in this Order (the "Funds").
9 The first fund shall be designated the "Incretins Fee Fund" and the second fund shall be
10 designated the "Incretins Expense Fund." These funds will be held subject to the direction of this
11 Court.

12 By subsequent Order of this Court, the Court will appoint a qualified certified public
13 accountant (the "CPA") to serve as Escrow Agent over the Funds and to keep detailed records of
14 all deposits and withdrawals and to prepare tax returns and other tax filings in connection with the
15 Funds. Such subsequent Order shall specify the hourly rates to be charged by the CPA and for
16 the CPA's assistants, who shall be utilized where appropriate to control costs. The CPA shall
17 submit quarterly detailed bills to the Court and to Plaintiffs' Liaison Counsel. Detail shall not
18 include any information concerning the numbers of claimants subject to settlements or settlement
19 amounts, individually or in the aggregate, nor shall it include information from which numbers of
20 claimants subject to settlements or settlement amounts may be derived. Upon approval by the
21 Court, the CPA's bills shall be paid from the Incretins Expense Fund and shall be considered a
22 shared cost. The Plaintiffs' Liaison Counsel shall provide a copy of this Order to the CPA.

23 **B. Payments into the Fee and Expense Funds**

24 **1. General Standards**

25 All plaintiffs and their attorneys who sign the Common Benefit Participation Agreement
26 (Doc. No. 531-1) and who are thereby subject to this Order and who agree to settle, compromise,
27 dismiss, or reduce the amount of a claim or, with or without trial, recover a judgment for
28 monetary damages or other monetary relief, including such compensatory and punitive damages,

1 with respect to Incretins claims are subject to an assessment of the gross monetary recovery, as
2 provided herein. The plaintiff and his or her counsel are jointly responsible for paying the
3 assessment into the Fund promptly upon receipt of a recovery subject to assessment.

4 **2. Gross Monetary Recovery**

5 Gross monetary recovery includes any and all amounts paid to plaintiffs' counsel by
6 defendants through a settlement or pursuant to a judgment. In measuring the "gross monetary
7 recovery," the parties are to (a) exclude court costs that are to be paid by the defendant;
8 (b) include any payments to be made by the defendant on an intervention asserted by third-
9 parties, such as to physicians, hospitals, or other healthcare providers in subrogation related to
10 treatment of a plaintiff, and any governmental liens or obligations (*e.g.*, Medicare/Medicaid); and
11 (c) include the present value of any fixed and certain payments to be made in the future. The
12 assessment shall apply to all of the cases of the plaintiffs' attorneys who have signed the
13 Common Benefit Participation Agreement (Doc. No. 531-1) and who are thereby subject to this
14 Order, whether as sole counsel or co-counsel, including cases pending in the MDL, pending in
15 state court, unfiled, or tolled.

16 **3. Defendant Obligations**

17 If a plaintiff and/or a defendant in a state case that includes claims within the scope of this
18 MDL wish to utilize the written or oral discovery from the MDL, or materials prepared by the
19 PSC for motion practice or trials, then Defendants' Liaison Counsel shall notify Plaintiffs'
20 Liaison Counsel of such state case within 30 days after notification of interest in such discovery
21 or materials. Such notice shall include the name, firm name, and firm address of the plaintiff's
22 attorney(s) and the date of such filing, so that Plaintiffs' Liaison Counsel can offer them the
23 opportunity to become Participating Counsel. Defendants' Liaison Counsel is not required to
24 notify Plaintiffs' Liaison Counsel of any case (a) filed in or transferred to or to be transferred to
25 California state court JCCP Number 4574; (b) being removed to federal court for inclusion in this
26 MDL; or (c) filed by (i) a member of Plaintiffs' Leadership Group or the PSC; (ii) or any State-
27 Federal Liaison that this Court may appoint; or (iii) any other plaintiffs' attorneys who execute
28 the Participation Agreement. The Plaintiffs' Liaison Counsel shall provide the Defendants'

1 Liaison Counsel, the CPA, and the Court or its designee with a list of cases and/or counsel who
2 have entered into written agreements with the PSC by executing the Participation Agreement.
3 This same list shall be made available to all plaintiffs' counsel with cases in this MDL, as well as
4 any other plaintiffs' counsel who signs the Participation Agreement, upon request. In the event
5 there is a dispute as to whether a case should be on the list, Plaintiffs' Co-Lead Counsel shall seek
6 to resolve the matter with the particular plaintiffs' counsel informally, and if that is unsuccessful,
7 upon motion to the Court.

8 **4. Reporting**

9 The CPA shall provide at least quarterly to the Court or its designee notice of the names
10 and docket numbers of the cases for which an assessment has been paid since the last such report.
11 A report is not due if there are no payments made into the Funds during that quarter. Details of
12 any individual settlement agreement, individual settlement amount and individual amounts
13 deposited into escrow shall be confidential and shall not be disclosed, unless the Court requests
14 that it receive that information. Quarterly statements from the CPA or Plaintiffs' Liaison Counsel
15 shall, however, be provided to Plaintiffs' Co-Lead and Plaintiffs' Liaison Counsel, Defendants'
16 Liaison Counsel, and the Court showing only the aggregate of the quarterly deposits,
17 disbursements, interest earned, financial institution charges, if any, and current balance, provided
18 that numbers of claimants subject to settlements or settlement amounts, individually or in the
19 aggregate, may not be derived from such quarterly statements.

20 **V. DISTRIBUTIONS**

21 **A. Court Approval**

22 The amounts deposited into the Incretins Fee Fund and the Incretins Expense Fund shall
23 be available for distribution to Participating Counsel who have performed professional services or
24 incurred expenses for the common benefit. No amounts will be disbursed without review and
25 approval by the Court, or such other mechanism as the Court may order. Specifically, such sums
26 shall be distributed only upon Order of this Court. This Court retains jurisdiction over any
27 common benefit award or distribution.

28

EXHIBIT E

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

IN RE INCRETIN-BASED THERAPIES
PRODUCTS LIABILITY LITIGATION,

CV NO. 3:13-md-02452-AJB-MDD
MDL 2452

This Document Relates to All Cases

Judge: Hon. Anthony J. Battaglia
Magistrate: Hon. Mitchell D. Dembin

**CASE MANAGEMENT ORDER
ESTABLISHING COMMON BENEFIT FEE AND EXPENSE FUND**

I. SCOPE OF ORDER

This Order is entered to provide for the fair and equitable sharing among plaintiffs, and their counsel, of the burden of services performed and expenses incurred by attorneys acting for the common benefit of all plaintiffs in the *Incretin-Based Therapies Product Liability Litigation*.

A. Governing Principles and the Common Benefit Plan

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-Ute 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 Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1019-21 (5th Cir. 1977); and *In re MGM Grand Hotel Fire Litigation*, 660 F.Supp. 522, 525-29 (D. Nev. 1987). Common benefit work product includes all work performed for the benefit of all

1 plaintiffs, including pre-trial matters, discovery, trial preparation, a potential settlement process,
2 and all other work that advances this litigation to conclusion.

3
4 **B. Application of this Order**

5 This Order applies to all cases now pending in, as well as to any case later filed in,
6 transferred to, or removed to this Court and treated as part of, the coordinated proceeding known
7 as *Incretin-Based Therapies Product Liability Litigation*, MDL ~~2452-2452~~ (“MDL”). This Order
8 further applies to each attorney who represents a plaintiff with a case now pending in, or later
9 filed in, transferred to, or removed to, this Court, regardless of whether the plaintiffs’ attorney
10 signs the “Participation Agreement” attached hereto as Exhibit A. ~~This Order shall also apply to~~
11 ~~any private lien holder who obtains reimbursement from any plaintiff whose case is subject to this~~
12 ~~Order, because that lien holder is benefiting from the common benefit work performed by~~
13 ~~Participating Counsel. Such entities shall be subject to this Order regardless of execution of the~~
14 ~~Participation Agreement, as they are seeking to obtain part of the recovery obtained by a plaintiff~~
15 ~~who is subject to this Order and the jurisdiction of this Court. Counsel for private lien holder~~
16 ~~shall pay amounts consistent with the terms of Paragraph IV.(B)(3) of this Order into the Incretins~~
17 ~~Fee Fund and the Incretins Expense Fund (as those terms are defined herein). Private lien~~
18 ~~holders’ counsel shall not be eligible to make a claim to receive any distribution from the~~
19 ~~Common Benefit Fee Fund or the Common Benefit Cost Fund.~~

20 **C. Participation Agreement (Exhibit A)**

21 Exhibit A, attached hereto and incorporated herein, is a voluntary Participation Agreement
22 between plaintiffs’ attorneys who have cases pending in the MDL and/or in state court. The
23 Participation Agreement is a private and cooperative agreement between plaintiffs’ attorneys only
24 (“Participating Counsel”); and not ~~Defendants~~defendants or ~~Defendants~~defendants’ counsel.
25 Participating Counsel shall automatically include all members of the Plaintiffs’ Leadership Group
26 by virtue of their appointment by the Court to the Plaintiffs’ Steering Committee (“PSC”), any
27 State-Federal Liaisons that this Court may appoint, and any other plaintiffs’ attorneys who
28 execute the Participation Agreement (Exhibit A hereto). All plaintiffs’ attorneys ~~wishing~~with a
case now pending in this Court who wish to participate in the Common Benefit Participation

1 Agreement and who currently have cases pending shall, within 45 days of this Order, execute the
2 Common Benefit Participation Agreement—~~Any plaintiffs’ attorney who does not yet have an~~
3 ~~Incretins case filed in any federal or state court~~ **represents a plaintiff with a case that is later**
4 **filed in, transferred to, or removed to this Court** shall designate whether or not they are a
5 ~~Participating Counselor a Non-Participating Counsel by signing~~ **wish to participate in the**
6 **Common Benefit Participation Agreement and, if so, sign** the appropriate section of the
7 Participation Agreement: (a) within 45 days of the date their first case is filed in or otherwise
8 docketed in this Court via direct filing, transfer or removal; or (b) ~~within 45 days of the date their~~
9 ~~first case is filed in any state court, if that lawyer intends to voluntarily become a Participating~~
10 ~~Counsel at the fee and expense percentages to be determined.~~ Failure to execute a Participation
11 Agreement indicating that an attorney will be a Participating Counsel within the time frame set
12 forth in this paragraph may result in higher percentages for common benefit assessment as a result
13 of such later participation.

14 Participating Counsel shall be entitled to receive all the common benefit work product of
15 those counsel who have also signed the Participation Agreement. Counsel who choose not to
16 execute the Participation Agreement, are not entitled to receive common benefit work product and
17 may be subject to an increased assessment on all Incretins cases in which they have a fee interest
18 if they receive common benefit work product or otherwise benefit by the work performed by
19 Participating Counsel.

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

26
27 **II. COMMON BENEFIT EXPENSES**

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

In order to be eligible for reimbursement of common benefit expenses, said expenses must

1 meet the requirements of this section and the limitations set forth in the Participation Agreement.
2 Specifically, said expenses must be: (a) for the common benefit; (b) appropriately authorized (as
3 defined in the Participation Agreement); (c) timely submitted within the defined limitations set
4 forth in this Order; and (d) verified by a partner or shareholder in the submitting firm. Time and
5 expense submissions are to be made on the 15th of each month, beginning on ~~January~~
6 ~~15, _____~~ 2014. Each submission should contain all time and expenses incurred during the
7 calendar month prior to the submission date (i.e., the ~~January 15, _____~~ 2014 submission
8 should include all time and expenses incurred during the month of ~~December, 2013 _____~~
9 2014), though the first submission should include all time and expenses incurred through
10 ~~December 31, 2013 _____~~ 2014. All time and expense submissions should be accompanied
11 by contemporaneous records and verified by a partner or shareholder in the submitting firm.
12 Submissions of time and expense made after the 15th day of the month following the month in
13 which the time or expense were incurred may be rejected. Only time and expense incurred after
14 the entry of the Order by the Court appointing Plaintiffs' Leadership on October 21, 2013 (plus
15 any time and expense incurred by those appointed to leadership) shall be submitted and
16 considered for common benefit consideration. Moreover, only that time and those expenses
17 incurred for the common benefit of all cases, consistent with the terms of this Order, shall be
18 considered for common benefit reimbursement at the end of the litigation.

19
20 **B. Shared and Held Common Benefit Expenses**

21 **1. Shared Costs**

22 Shared Costs are costs incurred for the common benefit of all plaintiffs. Shared Costs are
23 costs that will be paid out of a separate Incretins Operating Expense Fund established and
24 administered by Plaintiffs' Liaison Counsel and funded by all members of the PSC and others as
25 determined by Plaintiffs' Co- Lead Counsel. All Shared Costs must be approved by Plaintiffs'
26 Co-Lead Counsel prior to payment. Shared Costs include: (a) certain filing and service costs; (b)
27 deposition, court reporter, and video technician costs for non-case specific depositions; (c) costs
28 necessary for creation of a document depository, the operation and administration of the
depository, and any equipment required for the depository; (d) Plaintiffs' Co-Lead and Liaison

1 Counsel administrative matters (*e.g.*, expenses for equipment, technology, courier services,
2 telecopier, electronic service, photocopy and printing, secretarial/temporary staff, etc.); (e) PSC
3 group administration matters such as meetings and conference calls; (f) accountant fees; (g)
4 generic expert witness and consultant fees and expenses; (h) printing, copying, coding, scanning
5 (out of house or extraordinary firm cost); (i) research by outside third party
6 vendors/consultants/attorneys; (j) translation costs; (k) bank or financial institution charges; (l)
7 certain investigative services, and (m) special master and/or mediator charges.
8

9 **2. Held Costs**

Held Costs are those that will be carried by each Participating Counsel in MDL 2452.

10 Held Costs are those that do not fall into any of the above categories of shared costs, but are
11 incurred for the benefit of all plaintiffs. Held costs can also include unreimbursed, but authorized,
12 shared costs. No specific client related costs shall be considered as Held Costs, unless the case is
13 determined by Plaintiffs' Co-Lead Counsel to be a "common benefit case," *e.g.*, certain
14 bellwether cases as determined by Plaintiffs' Co-Lead Counsel.
15

16 **C. Authorization and Submission**

The Participation Agreement sets forth the guidelines for authorizing and submitting
17 expenses for the common benefit, which shall be followed.
18

19 **D. Expenses Limitations**

20 **1. Travel Limitations**

21 Except in extraordinary circumstances approved in advance by Plaintiffs' Co-Lead
22 Counsel, all travel reimbursements are subject to the following Limitations:

23 i. Airfare: Only the price of a coach seat for a reasonable itinerary will be
24 reimbursed. Business/First Class Airfare will *not* be fully reimbursed, except for
25 international flights, which requires prior approval by Plaintiffs' Co-Lead Counsel
26 in order to be considered for reimbursement. Use of a private aircraft will not be
reimbursed. If Business/First Class Airfare is used on domestic flights, then the
difference between the Business/First Class Airfare must be shown on the travel
reimbursement form, and only the coach fare will be will be reimbursed.

27 ii. Hotel: Hotel room charges for the average available room rate of a
28 business hotel, including the Hyatt, Westin, and Marriott hotels, in the city in
which the stay occurred will be reimbursed. Luxury hotels will not be fully

1 reimbursed but will be reimbursed at the average available rate of a business hotel.

2
3 iii. Meals: Meal expenses must be reasonable.

4
5 iv. Cash Expenses: Miscellaneous cash expenses for which receipts generally
6 are not available (tips, luggage handling, pay telephone, etc.) will be reimbursed up
7 to \$50.00 per trip, as long as the expenses are properly itemized.

8
9 v. Rental Automobiles: Luxury automobile rentals will not be fully
10 reimbursed, unless only luxury automobiles were available. If luxury automobiles
11 are selected when non-luxury vehicles are available, then the difference between
12 the luxury and non-luxury vehicle rates must be shown on the travel
13 reimbursement form, and only the non-luxury rate may be claimed, unless such
14 larger Sized vehicle is needed to accommodate several counsel

15
16 vi. Mileage: Mileage claims must be documented by stating origination point,
17 destination, total actual miles for each trip, and the rate per mile paid by the
18 member's firm. The maximum allowable rate will be the maximum rate allowed
19 by the IRS (currently 50.5 cents per mile).

2. Non-Travel Limitations

20
21 i. Shipping, Courier, and Delivery Charges: All claimed expenses must be
22 documented with bills showing the sender, origin of the package, recipient, and
23 destination of the package.

24
25 ii. Postage Charges: A contemporaneous postage log or other supporting
26 documentation must be maintained and submitted. Postage charges are to be
27 reported at actual cost.

28
29 iii. Telefax Charges: Contemporaneous records should be maintained and
30 submitted showing faxes sent and received. The per-fax charge shall not exceed
31 \$1.00 per page.

32
33 iv. In-House Photocopy: A contemporaneous photocopy log or other
34 supporting documentation must be maintained and submitted. The maximum copy
35 charge is 150 per page.

36
37 v. Computerized Research Lexis/Westlaw: Claims for Lexis or Westlaw, and
38 other computerized legal research expenses should be in the exact amount charged
39 to or allocated by the firm for these research services.

E. Verification

The forms detailing expenses shall be certified by a senior partner in each firm attesting to

1 the accuracy of the submissions. Attorneys shall keep receipts for all expenses. Credit card
2 receipts are an appropriate form of verification if accompanied by a declaration from counsel that
3 work was performed and paid for the common benefit.
4

5 **III. COMMON BENEFIT WORK**

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

7 Only Participating Counsel are eligible for reimbursement for time and efforts expended
8 for the common benefit. Participating Counsel shall be eligible for reimbursement for time and
9 efforts expended for common benefit work if said time and efforts are: (a) for the common
10 benefit; (b) appropriately authorized (as described in footnote I1 of the Participation Agreement);
11 (c) timely submitted; and (d) verified by a partner or shareholder in the submitting firm.

12 **B. Compensable Common Benefit Work**

13 As the litigation progresses and common benefit work product continues to be generated,
14 the Co-Lead Counsel may assign Participating Counsel with common benefit work; common
15 benefit work shall include only work specifically assigned. Examples of common benefit work
16 include, but are not limited to, maintenance and working in the depository; review and document
17 coding; expert retention and development authorized by Co-Lead Counsel; preparing for and
18 conducting authorized depositions of ~~Defendants~~defendants, third-party witnesses, and experts;
19 and activities associated with preparation for trial and the trial of any cases designated as
20 “common benefit trials” by Plaintiffs’ Co-Lead Counsel.

21 **C. Authorization and Time Keeping**

22 All time must be authorized and accurately and contemporaneously maintained. Time
23 shall be kept according to these guidelines as set forth in the Participation Agreement and
24 approved by Plaintiffs’ Co-Lead Counsel.

25 **IV. PLAINTIFFS’ LITIGATION FEE AND EXPENSE FUNDS**

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

27 At an appropriate time, Plaintiffs’ Liaison Counsel will be directed to establish two
28 interest-bearing accounts to receive and disburse funds as provided in this Order (the “Funds”).
The first fund shall be designated the “Incretins Fee Fund” and the second fund shall be

1 designated the "Incretins Expense Fund." These funds will be held subject to the direction of this
2 Court.

3 By subsequent Order of this Court, the Court will appoint a qualified certified public
4 accountant (the "CPA") to serve as Escrow Agent over the Funds and to keep detailed records of
5 all deposits and withdrawals and to prepare tax returns and other tax filings in connection with the
6 Funds. Such subsequent Order shall specify the hourly rates to be charged by the CPA and for the
7 CPA's assistants, who shall be utilized where appropriate to control costs. The CPA shall
8 submit quarterly detailed bills to the Court and to Plaintiffs' Liaison Counsel. Detail shall not
9 include any information concerning the numbers of claimants subject to settlements or settlement
10 amounts, individually or in the aggregate, nor shall it include information from which numbers of
11 claimants subject to settlements or settlement amounts may be derived. Upon approval by the
12 Court, the CPA's bills shall be paid from the Incretins Expense Fund and shall be considered a
13 shared cost. The Plaintiffs' Liaison Counsel shall provide a copy of this Order to the CPA.
14

15 **B. Payments into the Fee and Expense Funds**

16 **1. General Standards**

17 All plaintiffs and their attorneys who sign the Common Benefit Participation Agreement
18 (Doc. No. 531-1) and who are thereby subject to this Order and who agree to settle, compromise,
19 dismiss, or reduce the amount of a claim or, with or without trial, recover a judgment for
20 monetary damages or other monetary relief, including such compensatory and punitive damages,
21 with respect to Incretins claims are subject to an assessment of the gross monetary recovery, as
22 provided herein. The plaintiff and his or her counsel are jointly responsible for paying the
23 assessment into the Fund promptly upon receipt of a recovery subject to assessment.

24 **2. Gross Monetary Recovery**

25 Gross monetary recovery includes any and all amounts paid to plaintiffs' counsel by
26 ~~Defendants~~ defendants through a settlement or pursuant to a judgment. In measuring the "gross
27 monetary recovery," the parties are to (a) exclude court costs that are to be paid by the defendant;
28 (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

1 of a plaintiff, and any governmental liens or obligations (e.g., Medicare/Medicaid); and (c)
2 include the present value of any fixed and certain payments to be made in the future. The
3 assessment shall apply to all of the cases of the plaintiffs' attorneys who have signed the
4 Common Benefit Participation Agreement (Doc. No. 531-1) and who are thereby subject to this
5 Order, whether as sole counsel or co-counsel, including cases pending in the MDL, pending in
6 state court, unfiled, or tolled.

8 3. Defendant Obligations

9 ~~Upon learning of a case being filed in any state court~~ **If a plaintiff and/or a defendant in**
10 **a state case that includes claims within the scope of this MDL wish to utilize the written or**
11 **oral discovery from the MDL, or materials prepared by the PSC for motion practice or**
12 **trials, then** Defendants' Liaison Counsel shall notify Plaintiffs' Liaison Counsel of such
13 ~~filing~~ **state case** within 30 days of service of the complaint upon Defendant(s) **after notification of**
14 **interest in such discovery or materials.** Such notice shall include the name, firm name, and
15 firm address of the Plaintiffs' ~~plaintiff's~~ attorney(s) and the date of such filing, so that Plaintiffs'
16 Liaison Counsel can offer them the opportunity to become Participating Counsel. Defendants'
17 Liaison Counsel is not required to notify Plaintiffs' Liaison Counsel of any cases ~~case (a)~~ filed in
18 **or transferred to or to be transferred to** California state court JCCP Number 4574-~~4574~~; **(b)**
19 **being removed to federal court for inclusion in this MDL; or (c) filed by (i) a member of**
20 **Plaintiffs' Leadership Group or the PSC; (ii) or any State-Federal Liaison that this Court**
21 **may appoint; or (iii) any other plaintiffs' attorneys who execute the Participation**
22 **Agreement.** The Plaintiffs' Liaison Counsel shall provide the Defendants' Liaison Counsel, the
23 CPA, and the Court or its designee with a list of cases and/or counsel who have entered into
24 written agreements with the PSC by executing the Participation Agreement. This same list shall
25 be made available to all plaintiffs' counsel with cases in this MDL, as well as any other plaintiffs'
26 counsel who signs the Participation Agreement, upon request. In the event there is a dispute as to
27 whether a case should be on the list, Plaintiffs' Co-Lead Counsel shall seek to resolve the matter
28 with the particular plaintiffs' counsel informally, and if that is unsuccessful, upon motion to the
Court.

1
2 **4. Reporting**

3 ~~Settling defendants and their counsel shall not distribute any settlement proceeds to any~~
4 ~~plaintiffs counsel (or directly to a plaintiff) until after they notify the Court and Plaintiffs' Liaison~~
5 ~~Counsel in writing of the existence of the settlement (without disclosing the amount of the~~
6 ~~settlement) if the settlement was entered with an individual plaintiffs counsel who has been~~
7 ~~identified by Plaintiffs' Liaison Counsel to such defendant's counsel in writing as having~~
8 ~~executed the Participation Agreement. Plaintiffs' Liaison Counsel shall share this information~~
9 ~~with Plaintiffs' Co-Lead Counsel, who shall otherwise keep this information confidential. For~~
10 ~~cases subject to an assessment, Defendants are directed to withhold an assessment from any and~~
11 ~~all amounts paid to plaintiffs and their counsel and to pay the assessment directly into the Funds~~
12 ~~as a credit against the settlement or judgment. No orders of dismissal of any plaintiffs claim,~~
13 ~~subject to this Order, shall be entered unless accompanied by a certificate of plaintiffs and~~
14 ~~defendants' counsel that the assessment, if applicable, will be withheld and will be deposited into~~
15 ~~the Funds at the same time the settlement proceeds are paid to settling counsel. If, for any reason,~~
16 ~~the assessment is not or has not been so withheld, the plaintiff and his counsel are jointly~~
17 ~~responsible for paying the assessment into the Fund promptly. The CPA retained by the PSC or~~
18 ~~Plaintiffs' Liaison Counsel~~**The CPA** shall provide at least quarterly to the Court or its designee
19 notice of the names and docket numbers of the cases for which an assessment has been paid since
20 the last such report. A report is not due if there are no payments made into the Funds during that
21 quarter. Details of any individual settlement agreement, individual settlement amount and
22 individual amounts deposited into escrow shall be confidential and shall not be disclosed by the
23 ~~CPA to Plaintiffs' Co-Lead Counsel, the PSC, the Court, or the Court's designee, unless the Court~~
24 requests that it receive that information. Quarterly statements from the CPA or Plaintiffs' Liaison
25 Counsel shall, however, be provided to Plaintiffs' Co-Lead and **Lead and** Plaintiffs' Liaison
26 Counsel, Defendants' Liaison Counsel, and the Court showing only the aggregate of the quarterly
27 deposits, disbursements, interest earned, financial institution charges, if any, and current balance,
28 provided that numbers of claimants subject to settlements or settlement amounts, individually or
in the aggregate, may not be derived from such quarterly statements.

1
2 **V. DISTRIBUTIONS**

3 **A. Court Approval**

4 The amounts deposited into the Incretins Fee Fund and the Incretins Expense Fund shall
5 be available for distribution to Participating Counsel who have performed professional services or
6 incurred expenses for the common benefit. No amounts will be disbursed without review and
7 approval by the Court, or such other mechanism as the Court may order. Specifically, such sums
8 shall be distributed only upon Order of this Court. This Court retains jurisdiction over any
9 common benefit award or distribution.

10 **B. Application for Distribution**

11 Each Participating Counsel who does common benefit work has the right to present their
12 claim(s) for compensation and/or reimbursement prior to any distribution approved by this Court.
13 Any Counsel who does not sign the Participation Agreement shall not be eligible to receive
14 common benefit payments for any work performed or expenses incurred. At the appropriate time,
15 this Court shall request that Plaintiffs' Co-Lead Counsel make recommendations to this Court for
16 distributions to Participating Counsel who have performed common benefit work. In the event
17 that there is not agreement among Plaintiffs' Co-Lead Counsel, each Co-Lead Counsel shall only
18 have one vote and each vote shall bear the same weight. A decision of Plaintiffs' Co-Lead
19 Counsel need only be made by a majority of votes. Plaintiffs' Co-Lead Counsel shall determine
20 on its own the most fair and efficient manner by which to evaluate all of the time and expense
21 submissions in making its recommendation to this Court. This Court will give due consideration
22 to the recommendation of the Plaintiffs' Co-Lead Counsel.

23 It is so ORDERED.

24 Dated: ~~December~~ September _____,
~~2013~~ 2014

25 The Honorable Anthony J. Battaglia
26 _____
27
28