

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS**

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IN RE YASMIN AND YAZ (DROSPIRENONE) MARKETING, SALES PRACTICES AND RELEVANT PRODUCTS LIABILITY LITIGATION	:	3:09-md-02100-DRH-PMF
	:	
	:	MDL No. 2100
	:	
	:	Hon. David R. Herndon
This Document Applies To All Actions	:	
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**EXHIBIT A TO CMO 14
(Common Benefit Participation Agreement)**

THIS AGREEMENT is made this ____ day of _____, 20__, by and between the Plaintiffs’ Steering Committee (“PSC”) appointed by the United States District Court for the Southern District of Illinois in MDL 2100 and _____ [Name of the Firm Executing the Agreement] (the “Participating Counsel”).

WHEREAS, the United States District Court for the Southern District of Illinois has appointed Michael S. Burg, Michael London, Mark Niemeyer, Roger Denton, Andy Alonso, Christopher Seeger, Paul Pennock, Tim O’Brien, Mark Robinson, Trent Miracle, Tom Girardi, Arnold Levin, Jeff Lowe, A.J. DeBartolomeo, Steven Maher, Daniel Becnel, and Roopal Luhana to serve as members of the PSC to facilitate the conduct of pretrial proceedings in the federal actions relating to the use, marketing, and sales of Yasmin and Yaz Drospirenone containing hormonal birth control pills (“Yasmin/Yaz”).¹

WHEREAS, the PSC in association with other attorneys working for the common benefit of plaintiffs have developed or are in the process of developing work product that will be

¹ The United States District Court for the Southern District of Illinois has appointed Michael Burg, Michael London and Mark Niemeyer to serve as Co-Lead Counsel and has appointed Roger Denton to serve as Liaison Counsel.

valuable in all proceedings involving Yasmin/Yaz/Ocella personal injuries (“PSC Common Benefit Work Product”) and

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

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

I. SCOPE OF AGREEMENT

A. Purpose.

This Participation Agreement is a private cooperative agreement between plaintiffs’ attorneys to share “Common Benefit Work Product” with regard to personal injury claims resulting from the use of Yaz/Yasmin/Ocella by Participating Counsel pursuant to the Order Establishing Common Benefit Fee and Expense Fund and this Participation Agreement. Plaintiffs’ attorneys who execute this Agreement (“Participating Counsel”) are entitled to receive the “Common Benefit Work Product” created by those attorneys who have also executed or have been deemed to have executed the Participation Agreement.

Participating Counsel further recognize the separate and independent rights of each jurisdiction, and the litigants in each jurisdiction — including non-participating counsel — to fully represent the interests of their clients, including the right to conduct discovery, set cases for trial, conduct jury trials, and/or resolve cases.

B. Early Participation vs. Late Participation. For any counsel who enters into this Participation Agreement within 45 days of the entry of this Order or 45 days of their first case being docketed in the MDL or any other jurisdiction working cooperatively with the MDL PSC (e.g., California, New Jersey, Pennsylvania) (whichever is later), the assessment shall be 6% as computed and determined below (“Early Participation”). For any counsel who enters into this Participation Agreement after 45 days of the entry of this Order or 45 days of their first case

being docketed in the MDL or any other jurisdiction working cooperatively with the MDL PSC (e.g., California, New Jersey, Pennsylvania) (whichever is later), the assessment shall be 10% as computed and determined below (“Late Participation”).

C. Rights and Obligations of Participating Counsel.

Upon execution of this Participation Agreement, the PSC will provide access to Participating Counsel, the common benefit work product defined in the Court’s Case Management Order to which this Exhibit “A” is attached, including access to the PSC’s depository. Participating Counsel agree that all cases in which Participating Counsel has a fee interest, including unfiled cases, tolled cases, and/or cases filed in state and/or federal court, are subject to the terms of this Participation Agreement. Participating Counsel shall produce a list that correctly sets forth the name of each client represented by them and/or in which they have an interest in the attorneys’ fee regardless of what that interest is, who has filed a civil action arising from the use, marketing, and/or sale of YASMIN/YAZ/OCELLA together with the Court and docket number of each such case and shall produce a list that contains the name of each client represented by them and/or in which they have an interest in the attorneys’ fee regardless of what that interest is, who has not yet filed a civil action arising from the use, marketing, and sale of YASMIN/YAZ/OCELLA. Participating Counsel shall supplement the lists on a quarterly basis and provide this list to Liaison Counsel, Roger Denton at rdenton@uselaws.com. The initial list shall be provided within 15 days of signing this Agreement and must be supplemented every 90 days thereafter.

II. AGREEMENT TO PAY AN ASSESSMENT ON GROSS RECOVERY

Subject to the terms of this Agreement and the provisions set forth below and the terms of the corresponding Case Management Order, all Plaintiffs and their attorneys who, either agree or have agreed — for a monetary consideration — to settle, compromise, dismiss, or reduce the amount of a claim or, with or without trial, recover a judgment for monetary damages or other monetary relief, including such compensatory and punitive damages, with respect to

YASMIN/YAZ/OCELLA claims are subject to an assessment of the gross settlement amount, “gross monetary recovery,” as provided herein.

A. Gross Monetary Recovery Defined.

Gross monetary recovery includes any and all amounts paid to plaintiffs’ counsel by Defendants through a settlement or pursuant to a judgment. In measuring the “gross monetary recovery,” the parties are to (a) exclude court costs that are to be paid by the defendant; (b) include any payments to be made by the defendant on an intervention asserted by third-parties, such as to physicians, hospitals, and other healthcare providers in subrogation related to treatment of plaintiff and any governmental liens or obligations (*e.g.*, Medicare/Medicaid); and (c) include the present value of any fixed and certain payments to be made in the future. The assessment shall apply to all of the cases of the Plaintiff’s attorneys who are subject to this Order that are pending in the MDL or state court as well as any unfiled or tolled cases of such attorneys in which they are counsel or co-counsel.

B. Assessment Amount.

(a) Early Participation – The assessment amount shall be six (6) percent (four (4) percent for common benefit attorneys’ fees and two (2) percent for costs) for Early Participation Counsel;

(b) Late Participation – The assessment amount shall be ten (10) percent (eight (8) percent for common benefit attorneys’ fees and two (2) percent for costs) for Late Participation Counsel.

(c) The assessment represents a hold back (*In re Zyprexa Prods. Liab. Litig.*, 267 F.Supp.2d 256 (E.D.N.Y. 2006)) and shall not be altered in any way unless each of the following occurs: (1) the entire PSC is consulted and provided an opportunity to be heard prior

to the filing of any motion to change the assessment amount; (2) the PSC approves the proposed change to the assessment by a majority vote; (3) noticed motion with an opportunity to be heard is granted by the Court; and (4) the increase is approved by the Court.

C. Covered Cases.

The assessment amount set forth above and in the related Order shall apply to all cases now pending, or later filed in, transferred to, or removed to, this Court and treated as part of the coordinated proceeding known as *In re: Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Relevant Products Liability Litigation*, MDL 2100 regardless of whether or not the plaintiff's attorney is either Participating or Non-Participating Counsel. Counsel who sign the Participation Agreement further agree that the assessment shall apply to all un-filed cases, tolled cases, and/or cases filed in state court in which they have a fee interest, regardless of the size of that fee interest.

Non-Participating Counsel are not required to pay an assessment on state court cases or on un-filed cases. However, counsel who do not sign the Participation Agreement, are not entitled to receive Common Benefit Work Product" and may be subject to an increased assessment on all YASMIN/YAZ/OCELLA cases in which they have a fee interest if they receive any Common Benefit Work Product or otherwise benefit from the work product created pursuant to the Order Creating Common Benefit Fee and Expense Fund by the MDL and other Participating Counsel working with the MDL. Non-Participating Counsel shall not be eligible to receive Common Benefit payments for any work performed or expenses incurred.

D. Attorney Fee Lien

With respect to each client who they represent in connection with YASMIN/YAZ/OCELLA related claims that are filed or pending in any Federal court, un-filed or subject to a tolling agreement, consistent with ¶ II.B.3 of the associated Case Management Order Establishing Common Benefit Fee and Expense Fund (Order # 14), each Participating Counsel shall agree to have Defendants deposit or cause to be deposited in the YASMIN/YAZ

Fee and Expense Fund established by the District Court in the MDL, a percentage proportion of the gross amount recovered by each such client that is equal to the assessment amount. In the event Defendants do not deposit such funds into the Fund, Plaintiff and Plaintiff's Participating Counsel shall deposit or cause to be deposited in the YASMIN/YAZ Fee and Expense Fund established by the District Court in the MDL, a percentage proportion of the gross amount recovered by each such client that is equal to the assessment amount. Participating Counsel, on behalf of themselves, their affiliated counsel, and their clients, hereby grant and convey to the PSC a lien upon and/or a security interest in any fee generated as a result of any recovery by any client who they represent in connection with any YASMIN/YAZ/OCELLA induced injury and marketing and sales practices, to the full extent permitted by law, in order to secure payment in accordance with the provisions of this Agreement. Participating Counsel will undertake all actions and execute all documents that are reasonably necessary to effectuate and/or perfect this lien and/or security interest.

E. Attorney-Client Contracts.

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

III. COMMON BENEFIT EXPENSES.

A. Qualified Expenses Eligible for Reimbursement.

In order to be eligible for reimbursement of common benefit expenses, said expenses must meet the requirements of this section. Specifically, said expenses must be (a) for the

common benefit, (b) appropriately authorized² and timely submitted, (c) within the defined limitations set forth in this Participation Agreement and associated Order, and (d) verified.

B. Authorization and Submission of Expenses.

Participating Counsel must submit expenses consistent with the Order of this Court. Expenses spent on matters common to all claimants in MDL 2100 that has been assigned by the Co-Lead or Liaison Counsel or has been authorized by the co-Chairs of the MDL Science, Law and Briefing, or Discovery Committees may be submitted for reimbursement.

Expenses spent on matters common to all claimants in the Pennsylvania, California or New Jersey Coordinated Proceedings that have been authorized by co-lead or liaison counsel in that state court jurisdiction may be compensible for reimbursement and may be submitted for reimbursement and shall be evaluated by the Fee Committee to determine if they were incurred for the common good of the litigaiton. No costs spent on developing or processing individual issues in any case for an individual client (claimant) will be considered or should be submitted, unless that case is an authorized trial case as set forth in ¶ IV.B. of the Order Establishing Common Benefit Fee and Expense Fund.

The Fee Committee shall review all expenses submitted for reimbursement and evaluate whether they were expended in furtherance of the common good in making recommendations as to whether they should be reimbursed.

² For the purposes of this Participation Agreement “authorized” or “approved” in terms of common benefit expenses and common benefit work shall mean either (a) authorized and approved by Liaison Counsel, Co-Lead Counsel or co-Chairs of the MDL Science, or Discovery Committees (“MDL leadership”) *or* (b) authorized and approved by Co-Lead or Liaison counsel in the state court consolidated Yaz/Yasmin/Ocella litigation in California, Pennsylvania and New Jersey (“State-court leadership”). Nothing in this Participation Agreement shall be construed to require pre-authorization from the MDL leadership to perform work or to incur expenses as the State-court leadership deems appropriate for the litigation of cases in each state court litigation . The work peformed and the exenses incurred, as approved by the State-court leadership are eligible to be submitted to the Fee Committee as defined herein for consideration by the Fee Committee for reimbursement as common benefit work and expenses from the Yasmin/Yaz Fee and ExpenseFund based on whether those fees and expenses benefited the litigation as a whole. Work that is duplicative may not be approved for compensation by the Fee Committee.

C. Verification.

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

Cost records shall be electronically submitted to Roger C. Denton, of Schlichter, Bogard & Denton at rdenton@uselaws.com on a monthly basis. Untimely submission of Cost records will result in a waiver of said costs

IV. COMMON BENEFIT WORK.

A. Qualified Common Benefit Work Eligible for Reimbursement.

In order to be eligible for reimbursement for time and efforts expended for common benefit work, said time and efforts must be (a) for the common benefit, (b) appropriately authorized as defined in footnote 2 above, (c) timely submitted and (d) approved by this Court. For the purposes of this Participation Agreement “common benefit work product” does not include trial or hearing transcripts, deposition transcripts of defendants’ or third-party witnesses or exhibits attached thereto, nor does it include the actual documents/images of documents produced by defendants in response to discovery requests or the discovery requests themselves.

B. Eligibility.

Participating Counsel are prohibited from sharing Common Benefit Work Product with Non-Participating Counsel, as defined herein. Participating Counsel eligible to perform common benefit work includes Plaintiffs’ Liaison Counsel, Co-Lead Counsel, members of the PSC, Co-Chairs of MDL Committees, other Participating Counsel called upon by them to assist in performing their responsibilities, court-appointed state litigation co-lead or liaison counsel, and other Participating Counsel performing similar responsibilities in state court actions, as authorized by court-appointed state litigation co-lead or liaison counsel.

C. Authorization.

Time spent on matters common to all claimants in MDL 2100 must be assigned by the Co-Lead or Liaison Counsel or authorized by the co-Chairs of Science, Law and Briefing or Discovery Committees to be eligible for consideration for common benefit. Also time spent on matters common to all claimants in the Pennsylvania, California or New Jersey Coordinated Proceedings that has been authorized by co-lead or liaison counsel in that state court jurisdiction shall be eligible for consideration as common benefit work. The Fee Committee shall consider eligible common benefit work whether performed in federal court or in any of the state court jurisdictions in making its recommendations. No time spent on developing or processing individual issues in any case for an individual client (claimant) will be considered or should be submitted, nor will time spent on unauthorized work.

(1) Examples of Authorized and Unauthorized work include:

- a. Depositions of corporate witnesses: Any Participating Attorney may attend any deposition, however, if you have not been designated as one of the authorized questioners or otherwise authorized to attend the deposition on behalf of the PSC (or you are not one of the examiners designated and/or authorized by court-appointed state litigation co-lead or liaison counsel) your time and expenses shall not be considered common benefit work, rather you are attending on behalf of your individual clients;
- b. Periodic PSC, MDL or Full-Committee Conference Calls: These calls are held so that individual attorneys are kept up-to-date on the status of the litigation and participation by listening to such calls is not common benefit work. Each attorney has an obligation to keep themselves informed about the litigation so that they can best represent their

clients and that is a reason to listen in on those calls. The attorneys designated by Co-Lead and Liaison Counsel to run those calls are working for the common benefit by keeping other lawyers informed and educated about the case, and their time will be considered for common benefit. Nothing in this paragraph shall be construed to prevent members of the PSC from submitting common benefit time for participation in PSC communications that are germane to all members of the PSC and are necessary to fulfill their PSC obligations;

- c. Periodic Status Conferences: Regular status conferences are held so that the litigation continues to move forward and legal issues are resolved with the Court. Individual attorneys are free to attend any status conference held in open court in order to keep up-to-date on the status of the litigation and participation by attending and listening to such conferences is not common benefit work. Each attorney has an obligation to keep themselves informed about the litigation so that they can best represent their clients. Mere attendance at a status conference will not be considered a common benefit expense or common benefit time. The attorneys designated by Co-Lead and Liaison Counsel to address issues that will be raised at a given status conference or requested by Co-Lead or Liaison Counsel to be present at a status conference are working for the common benefit and their time will be considered for common benefit. Similarly, any attorney whose attendance at a status conference is specifically requested by the Judge in that case, may submit their time to the Fee Committee for evaluation as common benefit time;
- d. Identification and Work Up of Experts: Participating Attorneys are encouraged to identify experts in consultation with the co-Chairs of the

Science and Expert Committee. If a Participating Attorney travels to and retains an expert without the knowledge and approval of the co-Chairs of the MDL Science and Expert Committee they understand that the MDL may not need or use that expert and their time and expenses may be determined to not be considered common benefit expenses/work and therefore not compensable;

- e. Attendance at Various Seminars: Attendance at a seminar that has as an agenda item information about the Yaz/Yasmin/Ocella litigation is not common benefit work or a common benefit expense;
- f. Document Review: In the MDL, only document review specifically assigned and authorized to an attorney will be considered common benefit work. If an attorney elects to review documents that have not been assigned to that attorney by co-Lead or Liaison Counsel or one of the co-chairs of the Discovery or Science Committees that review is not considered common benefit. In state court, only document review specifically assigned and authorized to an attorney will be considered common benefit work. If an attorney elects to review documents that have not been assigned to that attorney by state-court leadership that review is not considered common benefit. The Fee Committee will review all fee submissions related to document review and document review that is duplicative of what has been assigned in the MDL may not be compensated consistent with ¶ IV(c)(1)(i) below;
- g. Review of Pleadings and Orders: Each attorney has an obligation to keep themselves informed about the litigation so that they can best represent their clients and review of Pleadings and Orders is part of that obligation. Only those attorneys designated by Co-Lead and Liaison Counsel or one of the co-chairs of the Discovery, Science, or

Law and Briefing Committees to review and summarize those pleadings or Orders for the MDL are working for the common benefit and their time will be considered for common benefit. All other counsel are reviewing those Pleadings and Orders for their own benefit and the benefit of their own clients and the review is not considered common benefit. Nothing in this paragraph shall be construed to prevent members of the PSC from submitting common benefit time for reviewing Orders of the Court that are germane to all members of the PSC and are necessary for review to fulfill their PSC obligations;

- h. Review of Discovery Responses: Each attorney has an obligation to keep themselves informed about the litigation so that they can best represent their clients and that is a reason to review discovery responses served in this litigation. Only those attorneys designated by Co-Lead and Liaison Counsel or one of the co-chairs of the Discovery Committee to review and summarize those discovery responses for the MDL are working for the common benefit and their time will be considered for common benefit. All other counsel are reviewing those discovery responses for their own benefit and the benefit of their own clients and the review is not considered common benefit;
- i. State Court Document Depositories: The PSC recognizes that any state court is free to establish its own depository, however, they must do so at their own expense. The expenses incurred in doing so may be treated as a held cost and if submitted to the Fee Committee will be evaluated to determine if a separate depository conferred a benefit for the common good. The work of reviewing documents in a state court depository, may be considered common benefit work, if authorized by court-appointed state litigation co-lead or liaison counsel and if the

MDL and state court agree that the state court and MDL document reviews will be undertaken in a cooperative and mutually-agreeable methodical manner and the work product derived therefrom will be made available to all Participating Counsel. The Fee Committee may reject state document review efforts that are duplicative or that have not been authorized or approved by the State-court leadership.

- j. In the event you are unsure if the action you are about to undertake is considered a common benefit action, you should ask Co-Lead or Liaison Counsel or one of the co-chairs of the Discovery/Science/Law Committee in advance.
- k. Bellwether Trials: While the work-up of individual cases is *not* considered common benefit, in the event that a case is selected as part of an approved bellwether trial process in the MDL, California, New Jersey or Pennsylvania, the time and expenses in trying the case (including work performed as part of the approved bellwether process) may be considered for common benefit to the extent it complies with the other provisions of this Order and Participation Agreement.

D. Time Keeping and Submission of Time Records.

All time must be accurately and contemporaneously maintained. Participating Counsel shall keep a daily record of their time spent in connection with common benefit work on this litigation, indicating with specificity the hours, location and particular activity (such as “conducted deposition of John Doe.”). Time entries that are not sufficiently detailed may not be considered for common benefit payments. All common benefit work time for each firm shall be maintained in a tenth-of-an-hour increment.

Upon order of the Court payments may be made from the YASMIN/YAZ/OCELLA Fee Fund to Participating Counsel who provide services or incur

expenses for the joint and common benefit of plaintiffs in addition to their own client or clients. Attorneys eligible are limited to Plaintiffs' Co-Lead and Liaison Counsel and members of the Plaintiff's Steering Committee, and other Participating Counsel called upon by them to assist in performing their responsibilities and Court appointed State Liaison Counsel, and other Participating Counsel performing similar responsibilities in state court actions. These guidelines are intended for all activities performed and expenses incurred by counsel that relate to matters common to all claimants in MDL 2100 and California, Pennsylvania or New Jersey Coordinated Proceedings.

1. All time submissions must be incurred only for work authorized under this Participation Agreement.
2. All time submissions must be made on the forms provided by the PSC.
3. All time and expenses are subject to proper and timely submission (on the 15th of each month beginning on April 15, 2010) of contemporaneous records certified by a partner in the submitting firm, which must be timely received within thirty (30) days after the 15th of the previous month. The initial submission shall include all Common Benefit time and expense incurred prior to and including March 15, 2010.
4. All time submissions must be electronically sent in the designated form on a monthly basis to the attention of Roger C. Denton of the law firm of Schlichter Bogard & Denton at rdenton@uselaws.com so they can be reviewed, compiled, and submitted to the Court at the appropriate time. It is therefore essential that each firm, on a monthly basis, timely submit its records for the preceding month.
5. Untimely Submissions. Failure to provide time records within thirty (30) days after notice from the PSC that time records were not timely submitted shall result in a waiver of attorney's fees claimed for the time period in the submission.

E. Distribution of Fees.

1. No Individual Rights to the Funds - No party or attorney has any individual right to any of these funds except to the extent of amounts directed to be disbursed to such person by Order of this Court. These funds will not constitute the property of any party or attorney or be subject to garnishment or attachment for the debts of any party or attorney except when and as directed to be disbursed as provided by court order to a specific person. These limitations do not preclude a party or attorney from transferring, assigning, or creating a security interest in potential disbursements from the fund if permitted by applicable state laws and if subject to the conditions and contingencies of this Agreement.

2. Court Approval – The amounts deposited in the YASMIN/YAZ/OCELLA Fee Fund shall be available for distribution to attorneys who have performed professional services or incurred expenses for the common benefit. The MDL Court retains jurisdiction over any common benefit award; and in furtherance of state federal cooperation, the MDL Judge may seek input from the state court judges, including the coordinating judges in California, Pennsylvania and New Jersey if the MDL Judge deems it appropriate. Each Participating Counsel who does common benefit work has the right to present their claim(s) for compensation prior to any recommendation to the Court.

3. Fee Committee – I understand that at a later date the MDL Court will appoint a Fee Committee as described in § IV. D. 3. of the Order Establishing Common Benefit Fee and Expense Fund to make recommendations to the MDL Court on how funds in the Yasmin/Yaz Fee and Expense Fund should be distributed.

___ EARLY PARTICIPATION ELECTION

Dated: _____, 20__

Firm Name:
Attorney's Name:

I elect to be an **Early Participating Counsel** and hereby certify that I am signing this Participation Agreement within 45 days of (a) the entry of the Common Benefit Order in MDL 2100, (b) the date my first case was docketed in the MDL, or (c) the date my first case was docketed in state court in California, New Jersey or Pennsylvania. I also certify that have the authority and power to bind my law firm into this Participation Agreement.

___ **LATE PARTICIPATION ELECTION**

Dated: _____, 20__

Firm Name:
Attorney's Name:

I elect to be a **Late Participating Counsel** and hereby certify that I am signing this Participation Agreement after the passage of 45 days since (a) the entry of the Common Benefit Order in MDL 2100, (b) the date my first case was docketed in the MDL, or (c) the date my first case was docketed in state court in California, New Jersey or Pennsylvania. I also certify that have the authority and power to bind my law firm into this Participation Agreement.

___ **NON-PARTICIPATION ELECTION**

Dated: _____, 20__

Firm Name:
Attorney's Name:

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

AND

PLAINTIFFS' STEERING COMMITTEE

Dated: _____, 20__

Roger C. Denton
Plaintiffs' Liaison Counsel