

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

IN RE JUST FOR MEN® MASS TORT LITIGATION This Document Applies To All Actions	3:16-cv-00638-DRH Hon. David R. Herndon

**EXHIBIT A TO CMO #5
(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 *Just For Men® Mass Tort Litigation 3:16-cv-00638-DRH* 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 Richard W. Schulte, Roger C. Denton, John J. Driscoll, Kristine K. Kraft, Joseph Osborne, Jon C. Conlin, Angela Mason, Jay Urban and Tad Thomas 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 *Just For Men®* hair color products.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

¹ The United States District Court for the Southern District of Illinois has appointed Richard W. Schulte and Roger C. Denton to serve as Co-Lead Counsel and has appointed Kristine K. Kraft to serve as Liaison Counsel.

work product that will be valuable in all proceedings involving *Just For Men*® 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 *Just For Men*® 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.

B. Early Participation vs. Late Participation. For any counsel who enters into this Participation Agreement within 20 days of the entry of this Order or 20 days of their first case being docketed in the Mass Tort Litigation or any other jurisdiction working cooperatively with the Mass Tort Litigation PSC, the assessment shall be 8% as computed and determined below (“Early Participation”). For any counsel who enters into this Participation Agreement after 20 days of the entry of this Order or 20 days of their first case being docketed in the Mass Tort Litigation or any other jurisdiction working

cooperatively with the Mass Tort Litigation PSC (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 *JUST FOR MEN*® 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 *JUST FOR MEN*®. Participating Counsel shall supplement the lists on a quarterly basis and provide this list to Liaison Counsel, Kristine Kraft at kkraft@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 *JUST FOR MEN*[®] 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 Mass Tort Litigation 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 eight (8) percent (four (4) percent for common benefit attorneys’ fees and two (4) percent for costs) for Early Participation Counsel;

(b) Late Participation – The assessment amount shall be ten (10) percent (six (6) percent for common benefit attorneys' fees and four (4) percent for costs) for Late Participation Counsel.

C. Covered Cases.

The assessment amount set forth above and in the related Order shall apply to all cases now pending, or later filed in, transferred to, or removed to, this Court and treated as part of the coordinated proceeding known as *In re: Just for Men® Mass Tort Litigation, 3:16-cv-00638-DRH* 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.

D. Attorney Fee Lien

With respect to each client who they represent in connection with *JUST FOR MEN®* 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 #5) each Participating Counsel shall agree to have Defendants deposit or cause to be deposited in the *JUST FOR MEN®* Fee and Expense Fund established by Judge Herndon in the Mass Tort Litigation, 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 *JUST*

FOR MEN® Fee and Expense Fund, 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 *JUST FOR MEN*® 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 authorized 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 *Just For Men® Mass Tort Litigation* 3:16-cv-00638-DRH that have been assigned by the Co-Lead or Liaison Counsel.

The Special Master 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.

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.

Expense records shall be electronically submitted to Kristine K. Kraft, of Schlichter, Bogard & Denton at kkraft@uselaws.com on a monthly basis. Untimely submission of expense records will result in a waiver of said expenses.

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, (c) timely submitted and (d) approved by this Court.

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 authorized by Plaintiffs' Co-Lead Counsel and Liaison Counsel.

C. Authorization.

Time spent on matters common to all claimants in *Just For Men® Mass Tort Litigation* 3:16-cv-00638-DRH must be assigned by the Co-Lead or Liaison Counsel to be eligible for consideration for common benefit. 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, Mass Tort Litigation 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: If a Participating Attorney travels to and retains an expert without the knowledge and approval of the co-leads or Liaison Counsel they understand that the Mass Tort Litigation 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 *Just For Men®* litigation is not common benefit work or a common benefit expense;
- f. Document Review: 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 that review is not considered common benefit;

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 to review and summarize those pleadings or Orders for the Mass Tort Litigation 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;

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 to review and summarize those discovery responses for the Mass Tort Litigation 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. 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.

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 will 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.

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 November 15, 2016 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 November 15, 2016.
4. All time submissions must be electronically sent in the designated form on a monthly basis to the attention of Kristine K. Kraft of the law firm of Schlichter Bogard & Denton at kkraft@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. Failure to provide timely records shall result in a waiver of attorney's fees claimed for the time period in the untimely 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 *JUST FOR MEN®* Fee Fund shall be available for distribution to attorneys who have performed professional services or incurred expenses for the common benefit. The Mass Tort Litigation Court retains jurisdiction over any common benefit award. 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. Special Master - I understand that at a later date the Court will appoint a Special Master to make recommendations to the Court on the appropriate distributions from the common benefit and expense funds.

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 20 days of (a) the entry of the Common Benefit Order in Mass Tort Litigation 3:16-cv-00638-DRH, (b) the date my first case was docketed in the Mass Tort Litigation, or (c) **the date my first case was docketed in state court**. 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 20 days since (a) the entry of the Common Benefit Order in Mass Tort Litigation 3:16-cv-00638-DRH, (b) the date my first case was docketed in the MDL, or (c) **the date my first case was docketed in state court**. 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 Mass Tort Litigation 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__

Kristine K. Kraft

Plaintiffs' Liaison Counsel