

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

IN RE: SORIN 3T HEATER-COOLER	)	MDL DOCKET NO. 2816
SYSTEM PRODUCTS LIABILITY	)	Civil Action No. 1:18-MD-2816
LITIGATION (NO. II)	)	
	)	Hon. John E. Jones III
	)	
	)	THIS DOCUMENT RELATES TO:
	)	<b>ALL CASES</b>

**CASE MANAGEMENT ORDER NO. 5  
ESTABLISHING COMMON BENEFIT FEE AND EXPENSE FUND**

**June 19, 2018**

**Jones, Judge:**

**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 this complex litigation. This Order shall relate to all cases now pending in or later filed in, transferred to, or removed to this Court and treated as part of the coordinated proceeding known as *In re: Sorin 3T Heater-Cooler System Products Liability Litigation (No. II)*, MDL 2816.

**A. Governing Principles and the Common Benefit Doctrine**

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-Lite Co.*, 396 U.S. 375 (1970); and *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 plaintiffs, including pre-trial matters, discovery, trial preparation, a potential settlement process, and all other work that advances this litigation to conclusion.

**B. Application of this Order**

This Order applies to all cases now pending in or later filed in, transferred to, or removed to this Court and treated as part of the coordinated proceeding known as *In re: Sorin 3T Heater-Cooler System Products Liability Litigation (No. II)*, MDL 2816. This Order further applies to each attorney who represents a plaintiff with a case now pending in or later filed in, transferred to, or removed to this Court, regardless of whether the plaintiff's attorney signs the Participation Agreement attached hereto as Exhibit A.

This Order shall also apply to any private lienholder who obtains reimbursement from any plaintiff whose case is subject to this Order, because that lienholder is benefiting from the common benefit work performed by Participating Counsel. Such private lienholders shall be subject to this Order regardless of execution of the Participation Agreement, as they are seeking to obtain part of the recovery obtained by a plaintiff who is subject to this Order and the jurisdiction of this Court. Counsel for private lienholders shall pay amounts consistent with the terms of section V.B.3. of this Order into the Common Benefit Fee Fund and the Common Benefit Expense Fund (as those terms are defined herein). Counsel for private lienholders shall not be eligible to make a claim to receive any distribution from the Common Benefit Fee Fund or the Common Benefit Expense Fund.

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

Exhibit A, attached hereto and incorporated herein, is a voluntary Participation

Agreement between plaintiffs' attorneys who have cases pending in the MDL and/or in state court. The Participation Agreement is a private and cooperative agreement between plaintiffs' attorneys only ("Participating Counsel"), and not Defendants or Defendants' counsel. Participating Counsel shall automatically include every plaintiffs' lawyer who has already filed or will in the future file a case in Federal Court, and any other plaintiffs' attorneys who executes the Participation Agreement. Any State Court Liaison Counsel who may be appointed by the Court and who has not filed a case in Federal Court shall not be bound by the Participation Agreement, unless any State Court Liaison Counsel executes the Participation Agreement subjecting all of the State Court Liaison Counsel's firm's cases to the assessment.

Any plaintiffs' attorney who wishes to enter the Participation Agreement in any state court shall execute the Participation Agreement within 45 days of the entry of this Order. Any plaintiffs' attorney who wishes to enter the Participation Agreement shall do so (a) within 45 days of the date his/her first case is filed in or otherwise docketed in this Court via transfer or removal, or (b) within 45 days of the date his/her first case is filed in any state court. Failure to execute a Participation Agreement within the time frames set forth in this paragraph may result in an increased common benefit assessment as a result of such later participation.

Participating Counsel shall be entitled to receive all the common benefit work product of those counsel who have also signed the Participation Agreement. Any plaintiffs' attorney who does not to execute the Participation Agreement is not entitled to receive common benefit work product and may be subject to an increased common benefit assessment on all Sorin 3T cases in which he/she has a fee interest if he/she receives common benefit work product or otherwise benefits from the work product created by Plaintiffs' Leadership Group (Plaintiffs' Lead Counsel and Plaintiffs' Executive Committee appointed on May 31, 2018 as may be amended from time

to time by Court Order) and other Participating Counsel. Notwithstanding the foregoing, Plaintiffs' Lead Counsel, at his discretion, may provide common benefit work product to any plaintiffs' attorney with one or more cases in state court if Lead Counsel believes doing so will benefit all plaintiffs in this MDL.

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

## **II. COMMON BENEFIT EXPENSES**

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

In order to be eligible for reimbursement of common benefit expenses, the expenses must meet the requirements of this section and the limitations set forth in the Participation Agreement. Specifically, the expenses must be: (a) for the common benefit; (b) appropriately authorized or approved (as defined in footnote 1 in the Participation Agreement); (c) timely submitted within the defined limitations set forth in section IV. of this Order; and (d) verified by a partner or shareholder in the submitting firm.

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

#### **1. Shared Costs**

Shared Costs are costs incurred for the common benefit of all plaintiffs. Shared Costs are costs that will be paid out of a separate Common Benefit Expense Fund established and administered by Plaintiffs' Lead Counsel and funded by Plaintiffs' Leadership Group and other

plaintiffs lawyers willing to work on common benefit issues. All Shared Costs must be approved by Plaintiffs' Lead Counsel prior to payment. Shared Costs include: (a) certain filing and service costs; (b) deposition, court reporter, and video technician costs for non-case specific depositions; (c) costs necessary for creation of a document depository, the operation and administration of the depository, and any equipment required for the depository; (d) Plaintiffs' Lead and Executive Committee administrative matters (*e.g.*, expenses for meetings and conference calls, equipment, technology, courier services, telecopier, electronic service, photocopy and printing, secretarial/temporary staff, etc.); (e) accountant fees; (f) generic expert witness and consultant fees and expenses; (g) printing, copying, coding, and scanning; (h) research by outside third-party vendors, consultants, or attorneys; (i) translation costs; (j) bank or financial institution charges; (k) certain investigative services; and (l) special master and/or mediator charges.

## **2. Held Costs**

Held Costs are those costs that will be carried by each Participating Counsel. Held Costs are those costs that do not fall into any of the above categories of Shared Costs, but are incurred for the benefit of all plaintiffs. Held Costs can also include authorized, but unreimbursed, Shared Costs. No specific client-related costs shall be considered as Held Costs unless the case is determined by Plaintiffs' Lead Counsel to be a "common benefit case" (*e.g.*, certain bellwether cases as determined by Plaintiffs' Leadership Group).

## **C. Expenses Limitations**

### **1. Travel Limitations**

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

- i. Airfare: Only the price of a coach class seat for a reasonable itinerary will be reimbursed. First class airfare will not be fully reimbursed, except on an international flight for which there is prior approval by Plaintiffs' Lead Counsel. Use of a private aircraft will not be reimbursed. If business class airfare is used on domestic flights, the difference between the business class airfare and coach class airfare must be shown on the travel reimbursement form, and only the coach class airfare will be reimbursed.
- ii. Hotel: Hotel room charges for the average available room rate of a business hotel, including Hyatt, Westin, and Marriott hotels, in the city in which the stay occurred will be reimbursed. If a luxury hotel room charge is submitted, the difference between the luxury hotel room charge and the average available room rate of a business hotel must be shown on the travel reimbursement form, and only the average available room rate of a business hotel will be reimbursed.
- iii. Meals: Meal expenses must be reasonable.
- iv. Cash Expenses: Miscellaneous cash expenses for which receipts generally are not available (*e.g.*, 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 are available or a luxury automobile is needed to accommodate several counsel. If luxury automobiles are selected when non-luxury automobiles are available or when a luxury automobile is not needed to accommodate several counsel, the difference between the luxury and non-luxury automobile rates must be shown on the travel reimbursement form, and only the non-luxury rate will be reimbursed.
- 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 submitting firm. The maximum allowable rate will be the maximum rate allowed by the IRS (currently \$0.535 per mile).
- vii. Uber/Taxi: The use of Uber/Lyft or other ride share services shall be at the standard rate unless the standard rate is not available due to surge rate implementation. Use of Uber Black,

Uber Select, or any premium level of rate charge shall not be utilized unless there is no available alternative.

## **2. Non-Travel Limitations**

- i. Shipping, Courier, and Delivery Charges: All claimed expenses must be documented with invoices showing the sender, origin, recipient, and destination of the package.
- ii. Postage Charges: A contemporaneous postage log or other supporting documentation must be maintained and submitted. Postage charges are to be reported at actual cost.
- iii. Telefax Charges: A contemporaneous telefax log must be maintained and submitted showing faxes sent and received. The per fax charge shall not exceed \$1.00 per page.
- iv. In-House Photocopy: A contemporaneous photocopy log or other supporting documentation must be maintained and submitted. The maximum copy charge is \$0.15 per page.
- v. Computerized Research: Charges for Lexis, Westlaw, and other computerized legal research should be in the exact amount charged to or allocated by the submitting firm.

### **D. Verification**

The forms detailing expenses shall be certified by a partner or shareholder in the submitting firm, and such certification should attest 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 the expenses were incurred and paid for the common benefit.

## **III. COMMON BENEFIT WORK**

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

Only Participating Counsel are eligible for reimbursement for time expended for common benefit work. Participating Counsel shall be eligible for reimbursement for time expended for

common benefit work if the time was: (a) for the common benefit; (b) appropriately authorized or approved (as defined in footnote 1 of the Participation Agreement); (c) timely submitted; and (d) verified by a partner or shareholder in the submitting firm.

**B. Compensable Common Benefit Work Defined**

As the litigation progresses, Plaintiffs' Lead Counsel may assign Participating Counsel with common benefit work. Common benefit work shall include only work specifically assigned. Examples of common benefit work include, but are not limited to, maintenance of and working in the document depository; document review and coding; expert retention and development; preparing for and conducting depositions; and activities associated with preparation for trial and the trial of any cases designated as "common benefit trials" by Plaintiffs' Leadership Group.

**C. Authorization and Time Keeping**

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

**IV. COMMON BENEFIT TIME AND EXPENSE SUBMISSION**

Time and expense submissions are to be made on the 15th day of April, July, October and January, beginning on July 15, 2018. Each submission should contain all time and expenses incurred during the quarter prior to the submission date (*i.e.*, the July 15, 2018 submission should include all time and expenses incurred during the months of April, May and June, 2018), though the first submission should include all time and expenses incurred through June 30, 2018. All time and expense submissions should be accompanied by contemporaneous records and verified by a partner or shareholder in the submitting firm. Submissions of time and expenses made may



be rejected. Only time and expenses incurred after the entry of CMO No. 3 appointing Plaintiffs' Leadership Group on May 31, 2018 other than for expert witnesses previously retained and whose work product shall be available to all plaintiffs in this MDL (plus any time and expenses incurred by members of Plaintiffs' Leadership Group in complying with the terms of CMO No. 2) shall be submitted and considered for common benefit consideration.

**V. COMMON BENEFIT FEE AND EXPENSE FUNDS**

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

Plaintiffs' Lead Counsel is directed to establish two interest-bearing accounts to receive and disburse funds as provided in this Order (the "Funds"). The first fund shall be designated the Common Benefit Fee Fund, and the second fund shall be designated the Common Benefit Expense Fund. The Funds will be held subject to the direction of this Court.

By subsequent Order of this Court, the Court will appoint a qualified certified public accountant (the "CPA") to keep detailed records of all deposits and withdrawals and to prepare tax returns and other tax filings in connection with the Funds. Such subsequent Order shall specify the hourly rates to be charged by the CPA and for the CPA's assistants, who shall be utilized where appropriate to control costs. The CPA shall submit quarterly detailed bills to the Court and to Plaintiffs' Leadership Group. Upon approval by the Court, the CPA's bills shall be paid from the Common Benefit Expense Fund and shall be considered a Shared Cost. Plaintiffs' Lead Counsel shall provide a copy of this Order to the CPA.

**B. Payments into the Funds**

**1. General Standards**

All plaintiffs and their attorneys who are subject to this Order and who agree 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 compensatory and punitive damages, with respect to Sorin 3T claims are subject to an assessment of the gross monetary recovery, as defined herein.

## **2. Gross Monetary Recovery**

Gross monetary recovery includes any and all amounts paid to plaintiffs and their 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 Defendants; (b) include any payments to be made by Defendants on an intervention asserted by third-parties, such as to physicians, hospitals, or other healthcare providers in subrogation related to treatment of a plaintiff, and any governmental liens or obligations (*e.g.*, Medicare/Medicaid); and (c) include the actual cost to purchase an annuity for fixed and certain payments to be made in the future. The assessment shall apply to all of the cases of the plaintiffs' attorneys who are subject to this Order, whether as sole counsel or co-counsel, including cases pending in this MDL, pending in state court, unfiled, or tolled, except the assessment shall not apply to any non-MDL-filed cases in which any State Court Liaison Counsel's firm is counsel, unless any State Court Liaison Counsel executes the Participation Agreement subjecting all of any State Court Liaison Counsel's firm's cases to the assessment.

Nothing in this Order shall be deemed to modify, alter, or change the terms of any fee contracts between plaintiffs' counsel and their individual clients.

## **3. Assessment Amount**

The assessment amount is six percent (6%) of the gross monetary recovery. Two percent (2%) of this assessment is for the payment of Common Benefit Fees, and four percent (4%) of this assessment is for the payment of Common Benefit Expenses. The assessment represents a

holdback and shall not be altered. *See In re Zyprexa Prods. Liab. Litig.*, 267 F. Supp. 2d 256 (E.D.N.Y. 2006).

#### **4. Initial Assessment**

In order to fund the costs of the litigation as it moves forward, Plaintiffs' Leadership Group shall be empowered to seek funds from Participating Attorneys on an as needed basis. Such funds will be deposited into the Common Benefit Expense Fund and will be considered Held Costs.

#### **5. Defendants' Obligations**

Plaintiffs' Lead/Liaison Counsel shall provide Defendants' counsel, the CPA, and the Court or its designee with a list of plaintiffs' counsel who have entered into the Participation Agreement. This same list shall be made available upon request to plaintiffs' counsel with cases in this MDL and other plaintiffs' counsel who sign the Participation Agreement. In the event there is a dispute as to whether a plaintiff's counsel should be on the list, Plaintiffs' Leadership Group shall seek to resolve the matter with the particular plaintiff's counsel informally, and if that is unsuccessful, by motion to the Court.

For cases subject to this Order, Defendants are directed to withhold an assessment from any and all amounts paid to plaintiffs and their counsel and to pay the assessment directly into the Funds as a credit against the settlement or judgment. Defendants and their counsel shall not distribute any settlement or judgment proceeds in cases subject to this Order to any plaintiff or his/her counsel until after (1) Defendants' counsel notifies Plaintiffs' Lead/Liaison Counsel in writing of the existence of a settlement or judgment and the name of the individual plaintiff's attorney (without disclosing the amount of any settlement), and (2) Plaintiffs' Lead/Liaison Counsel has advised Defendants' counsel in writing whether or not the individual plaintiff's

attorney's cases are subject to the assessment. If there is a dispute as to whether a particular case is subject to the assessment, Defendants shall be prohibited from making any payment to the plaintiff or his/her counsel until the parties resolve the dispute or the matter is disposed of by the Court upon motion of any party. If, for any reason, the assessment is not or has not been withheld, the plaintiff and his/her counsel are jointly responsible for paying the assessment into the Funds promptly.

No orders of dismissal of any plaintiff's case subject to this Order shall be entered unless accompanied by a certificate of plaintiff's counsel and Defendants' counsel that the assessment has been or will be withheld and deposited into the Funds at the same time the settlement or judgment proceeds are paid to plaintiff or his/her counsel.

Counsel for Defendants shall provide at least quarterly to the Court or its designee notice of the names and docket numbers of the cases for which it has paid an assessment into the Funds since the last such report. A report is not due if there are no payments made into the Funds by Defendants during a quarter. Details of any individual settlement agreement, individual settlement amount, and individual amounts deposited into the Funds shall be confidential and shall not be disclosed by the CPA to Plaintiffs' Leadership Group, the Court, or its designee unless the Court requests that it receive that information. Quarterly statements from the CPA shall, however, be provided to Plaintiffs' Lead Counsel and the Court showing the aggregate of the monthly deposits, disbursements, interest earned, financial institution charges, if any, and current balance.

## **VI. DISTRIBUTIONS**

### **A. Court Approval**

The amounts deposited into the Common Benefit Fee Fund and the Common Benefit

Expense Fund shall be available for distribution to Participating Counsel who have performed work or incurred expenses for the common benefit. Disbursements shall be made only after review and approval by the Court, or such other mechanism as the Court may order, and appropriate Order of this Court. This Court retains jurisdiction over any common benefit award or distribution.

**B. Application for Distribution**

Each Participating Counsel who performs work or incurs expenses for the common benefit work has the right to present a claim for compensation and/or reimbursement prior to any distribution approved by this Court. Any counsel who does not sign the Participation Agreement shall not be eligible to receive common benefit payments for any work performed or expenses incurred.

At the appropriate time, this Court shall request that Plaintiffs' Lead Counsel make recommendations (after consultation with Plaintiffs' Executive Committee) to this Court for distributions to Participating Counsel who have performed common benefit work and/or incurred common benefit expenses. Plaintiffs' Lead Counsel shall determine on his own, with consultation with the Plaintiffs' Executive Committee, 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 Plaintiffs' Lead Counsel.

**SO ORDERED:**

Dated: 6/19/2018

John E. Jones III  
Honorable John E. Jones III  
United States District Court Judge



**EXHIBIT A**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

IN RE: SORIN 3T HEATER-COOLER	)	MDL DOCKET NO. 2816
SYSTEM PRODUCTS LIABILITY	)	Civil Action No. 1:18-MD-2816
LITIGATION (NO. II)	)	
	)	Hon. John E. Jones III
	)	
	)	<b>THIS DOCUMENT RELATES TO:</b>
	)	<b>ALL CASES</b>

**THIS AGREEMENT** is made this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and between Plaintiffs’ Lead/Liaison Counsel and Plaintiffs’ Executive Committee (collectively “Plaintiffs’ Leadership Group”) appointed by the United States District Court for the Middle District of Pennsylvania in MDL 2816 and \_\_\_\_\_  
[name of firm executing the Agreement] (the firm and each of its lawyers are collectively referred to as “Participating Counsel”).

**WHEREAS**, the United States District Court for the Middle District of Pennsylvania has appointed Sol H. Weiss as Plaintiffs’ Lead Counsel and Liaison Counsel and Michael K. Johnson, Karen A. Lorenzen, Roopal P. Luhana, Matt Schultz, Steven W. Sanford, and James L. Ward, Jr. as members of Plaintiffs’ Executive Committee to facilitate the conduct of pretrial proceedings in the federal actions alleging injuries caused by use of the Sorin 3T Heater-Cooler System (“Sorin 3T”); and

**WHEREAS**, Plaintiffs’ Leadership Group, in association with other attorneys working for the common benefit of plaintiffs, have developed or are in the process of developing work product that will be valuable in all proceedings and benefit all plaintiffs alleging injury caused by use of the Sorin 3T (“Common Benefit Work Product”); and

**WHEREAS**, Participating Counsel are desirous of acquiring the Common Benefit Work Product and establishing an amicable working relationship with Plaintiffs' Leadership Group 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 pursuant to the Order Establishing Common Benefit Fee and Expense Fund (CMO No. \_\_\_\_, hereafter the "Common Benefit Order") and this Agreement. Any plaintiffs' attorney who executes this Agreement ("Participating Counsel") is entitled to receive the Common Benefit Work Product created by those attorneys who have also executed, or have been deemed to have executed, this Agreement, regardless of the venue in which the attorney's cases are pending. This Agreement shall relate to any and all claims, filed or not, as they relate specifically to injuries associated with the use of the Sorin 3T.

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

Upon execution of this Agreement, Plaintiffs' Leadership Group will provide Participating Counsel access to the Common Benefit Work Product, including access to the document depository. Participating Counsel agree that all cases in which Participating Counsel have a fee interest, including unfiled cases, tolled cases, and/or cases filed in state and/or federal court, are subject to the terms of this Agreement. Participating Counsel shall produce a list that correctly sets forth the name of each client represented by them (and/or clients in whose case Participating Counsel have an interest in the attorneys' fee, regardless of what that interest is)



who has filed a civil action alleging injuries caused by use of the Sorin 3T. Such list shall include the court and docket number of each such case. Participating Counsel shall also produce a list that contains the name of each Sorin 3T client represented by them (and/or clients in whose case Participating Counsel have an interest in the attorneys' fee, regardless of what that interest is) who has not yet filed a civil action. Participating Counsel shall supplement the lists on a quarterly basis and provide the lists to Plaintiffs' Leadership Group. 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 Common Benefit Order, all plaintiffs and their attorneys who agree 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 compensatory and punitive damages, for any Sorin 3T claims are subject to an assessment of the gross monetary recovery, as defined herein.

### **A. Assessment Amount**

The assessment amount is six percent (6%) of the gross monetary recovery. Two percent (2%) of this assessment is for the payment of Common Benefit Fees, and four percent (4%) of this assessment is for the payment of Common Benefit Expenses. The assessment represents a holdback and shall not be altered. *See In re Zyprexa Prods. Liab. Litig.*, 267 F. Supp. 2d 256 (E.D.N.Y. 2006). By entering this Agreement, Participating Counsel understand and agree not to move, join, or otherwise support a motion that seeks a common benefit assessment in excess of this amount unless it becomes apparent that a higher assessment is required to reasonably and adequately advance the litigation.

Any plaintiffs' attorney who wishes to enter this Agreement and who has a case pending in this MDL or in any state court shall execute this Agreement within 45 days of the entry of the Common Benefit Order. Any plaintiffs' attorney who wishes to enter this Agreement and who does not yet have a Sorin 3T case filed in any federal or state court shall execute this Agreement (a) within 45 days of the date his/her first case is filed in or otherwise docketed in this Court via transfer or removal, or (b) within 45 days of the date his/her first case is filed in any state court. Failure to execute the Participation Agreement within the time frames set forth in this paragraph may result in an increased common benefit assessment as a result of such later participation.

**B. Gross Monetary Recovery Defined**

Gross monetary recovery includes any and all amounts paid to plaintiffs or their 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 Defendants; (b) include any payments to be made by Defendants on an intervention asserted by third-parties, such as to physicians, hospitals, or other healthcare providers in subrogation related to treatment of a 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.

**C. Covered Cases**

The assessment amount set forth above and in the Common Benefit Order shall apply to all cases now pending in or later filed in, transferred to, or removed to this Court and treated as part of the coordinated proceeding known as *In re: Sorin 3T Heater-Cooler System Products Liability Litigation (No. II)*, MDL 2816, regardless of whether the plaintiff's attorney is a Participating Counsel. Participating Counsel further agree that the assessment shall apply to all unfiled cases, tolled cases, and/or cases filed in state court in which Participating Counsel have a

fee interest, regardless of what that interest is.

Non-participating counsel are not required to pay an assessment on state court cases or on unfiled 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 common benefit assessment on all Sorin 3T cases in which they have a fee interest if they receive any Common Benefit Work Product or otherwise benefit from the work product created by Plaintiffs' Leadership Group and other Participating Counsel. Notwithstanding the foregoing, Plaintiffs' Lead Counsel, at its discretion, may provide common benefit work product to any plaintiffs' attorney with one or more cases in state court if Plaintiffs' Lead Counsel believes doing so will benefit all plaintiffs in this MDL. Non-participating counsel shall not be eligible to receive common benefit payments for any work performed or expenses incurred.

**D. Attorneys' Fee Lien**

With respect to each client represented in connection with Sorin 3T claims that are filed or pending in any federal court, are unfiled, or are subject to a tolling agreement, each Participating Counsel agrees to have Defendants deposit or cause to be deposited in the Common Benefit Fee Fund and the Common Benefit Expense Fund (collectively the "Funds") a percentage of the gross monetary recovery by each such client that is equal to the assessment amount. In the event Defendants do not deposit the assessed percentage into the Funds, plaintiff and plaintiff's Participating Counsel shall deposit or cause to be deposited in the Funds a percentage of the gross monetary recovery by each 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 Plaintiffs' Leadership Group 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

Sorin 3T claim, 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.

### **III. COMMON BENEFIT EXPENSES**

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

In order to be eligible for reimbursement of common benefit expenses, the expenses must be: (a) for the common benefit; (b) appropriately authorized and timely submitted<sup>1</sup>; (c) within the defined limitations set forth in this Agreement and the Common Benefit Order; and (d) verified by a partner or shareholder in the submitting firm.

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

Participating Counsel must submit expenses consistent with the Common Benefit Order. Only expenses authorized by Plaintiffs' Leadership Group and incurred on matters common to all claimants in the MDL may be submitted for reimbursement.

#### **C. Verification**

The forms detailing expenses shall be certified by a partner or shareholder in the submitting firm, and such certification should attest 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.

Expense records shall be submitted as set forth in section IV.C. of this Agreement.

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<sup>1</sup> For the purposes of this Participation Agreement, "authorized" or "approved" in terms of common benefit expenses and common benefit work shall mean authorized and approved by Plaintiffs' Leadership Group.

Reimbursement for unsubstantiated and untimely submitted expense records may be disallowed.

#### IV. **COMMON BENEFIT WORK**

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

In order to be eligible for reimbursement, time expended must be: (a) for the common benefit; (b) appropriately authorized or approved; (c) timely submitted; and (d) verified by a partner or shareholder in the submitting firm. Reimbursement for unsubstantiated and untimely submitted time records may be disallowed. Moreover, if Participating Counsel fail to timely submit capital contributions as may be requested by Plaintiffs' Leadership Group throughout this litigation, such Participating Counsel and members of his/her firm shall not be allowed to submit common benefit time or expenses for reimbursement.

##### B. **Authorization**

Time spent on matters common to all claimants in the MDL must be assigned by Plaintiffs' Leadership Group to be eligible for consideration as common benefit time. No time spent on unauthorized work or time spent on developing or processing individual issues in any case for an individual client will be considered for payment. Thus, it should not be submitted.

##### 1. **Examples of Authorized and Unauthorized Work:**

- a. Depositions of corporate witnesses: Any attorney not designated as one of the authorized questioners or otherwise authorized to attend a deposition on behalf of Plaintiffs' Leadership Group shall not submit time or expenses for preparing for or attending such deposition, as such attendance is deemed to be on behalf of that attorney's individual clients.
- b. Periodic Conference Calls and Meetings: Such calls and meetings are held so that individual attorneys are kept up-to-date on the status of the litigation. Therefore, participation is not common benefit work. Attorneys have an obligation to stay informed about the litigation so they can best represent their clients, and that is a reason to participate in such calls and meetings. The attorneys designated by Plaintiffs' Leadership Group to run those calls are

working for the common benefit by keeping other attorneys informed and educated about the case, and their time will be considered common benefit time. Nothing in this paragraph shall be construed to prevent members of Plaintiffs' Leadership Group from submitting common benefit time for participation in Plaintiffs' Leadership Group calls and meetings that are germane to all members of Plaintiffs' Leadership Group and are necessary to fulfill their MDL obligations.

- c. Periodic Status Conferences: Periodic status conferences are held so that the litigation continues to move forward and legal issues are resolved with the Court. Attorneys are free to attend or listen to any status conference held in open court in order to keep up-to-date on the status of the litigation, but participation by attending or listening to such conferences is not common benefit work. Members of Plaintiffs' Leadership Group and the attorneys designated by Plaintiffs' Leadership Group to present or address issues that will be raised at a given status conference are working for the common benefit, and their time will be considered common benefit time.
- d. Identification and Work Up of Experts: Participating Counsel are encouraged to identify experts in consultation with Plaintiffs' Leadership Group or the chair of any science and/or expert committee that may be established. If a Participating Counsel travels to and retains an expert without the knowledge and approval of Plaintiffs' Leadership Group, the associated time and expense may not be considered common benefit work or common benefit expense, and therefore will not be compensable.
- e. Attendance at Various Seminars: Attendance at a seminar that has an agenda item about the Sorin 3T litigation is not common benefit work or a common benefit expense, and therefore will not be compensable.
- f. Document Review: Only document review specifically assigned to an attorney and authorized by Plaintiffs' Leadership Group or the chair of any discovery or science committee that may be established will be considered common benefit work. If an attorney elects to engage in document review that has not been assigned and authorized, the review time will not be compensable.
- g. Review of Pleadings and Orders: Attorneys have an obligation to stay informed about the litigation so they can best represent their clients, and review of pleadings and orders is part of that obligation. Only those attorneys designated to review and

summarize pleadings or orders by Plaintiffs' Leadership Group or the chair of any discovery or science committee that may be established are working for the common benefit, and their time will be considered common benefit time. All other attorneys 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 work. Nothing in this paragraph shall be construed to prevent members of the Plaintiffs' Leadership Group from submitting common benefit time for reviewing pleadings and orders that are germane to all members of the Plaintiffs' Leadership Group and the review of which is necessary to fulfill their MDL obligations.

- h. Review of Discovery Responses: Attorneys have an obligation to stay informed about the litigation so they can best represent their clients, and review of discovery responses is part of that obligation. Only those attorneys designated to review and summarize discovery responses by Plaintiffs' Leadership Group or the chair of any discovery or science committee that may be established are working for the common benefit, and their time will be considered common benefit time. All other attorneys are reviewing those discovery responses for their own benefit and the benefit of their own clients, and the review is not considered common benefit work. Nothing in this paragraph shall be construed to prevent members of the Plaintiffs' Leadership Group from submitting common benefit time for reviewing discovery responses that are germane to all members of the Plaintiffs' Leadership Group and the review of which is necessary to fulfill their MDL obligations.
- i. Bellwether Trials: While the work-up of individual cases is not considered common benefit work, in the event that a case is selected as part of an approved bellwether trial process in the MDL, or any state court action, the time and expenses incurred in trying the case (including work performed as part of the approved bellwether process) may be considered common benefit work at the discretion of Plaintiffs' Leadership Group to the extent it complies with the other provisions of this Agreement and the Common Benefit Order.

### **C. Common Benefit Time and Expense Submission**

All time must be accurately and contemporaneously maintained. Participating Counsel shall keep a daily record of time spent in connection with common benefit work, indicating with specificity the hours, location, and particular activity (*e.g.*, "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 tenth-of-an-hour increments. Time submissions will be audited by the certified public accountant to be appointed by the Court (the “CPA”).

These guidelines are intended for all activities performed and expenses incurred by Participating Counsel:

1. All time submissions must be only for work authorized under this Agreement;
2. All time submissions must be made on the forms provided by Plaintiffs’ Leadership Group;
3. Time and expense submissions are to be made on the 15th day of April, July, October and January, beginning on July 15, 2018. Each submission should contain all time and expenses incurred during the quarter prior to the submission date (*i.e.*, the July 15, 2018 submission should include all time and expenses incurred during the months of April, May and June, 2018), though the first submission should include all time and expenses incurred through June 30, 2018. All time and expense submissions should be accompanied by contemporaneous records and verified by a partner or shareholder in the submitting firm. Submissions of time and expenses made after the 15th day of the month following the quarter in which the time or expenses were incurred may be rejected. Only time and expenses incurred after the entry of CMO No. 3 appointing Plaintiffs’ Leadership Group on May 31, 2018 (plus any time and expenses incurred by members of Plaintiffs’ Leadership Group in complying with the terms of CMO No. 2) shall be submitted and considered for common benefit consideration. Moreover, only that time and those expenses incurred for the common benefit of all cases, consistent with the terms of this Agreement and the Common Benefit Order, shall be considered.
4. All time submissions must be sent electronically in the designated form to the attention of the CPA and Plaintiffs’ Leadership Group so they can be reviewed, compiled, and submitted to the Court at the appropriate time.
5. Failure to provide submissions in a timely manner may result in a waiver of fees and expenses claimed for the time period that is the subject of the submission. Failure to submit time and expense records in electronic, searchable format on the Excel forms approved by Plaintiffs’ Leadership Group, or any other method approved by Plaintiffs’ Leadership Group,



will result in a notice of deficiency, after which the submitting firm shall have 15 days to cure the deficient submission. Absent prior approval from Plaintiffs' Leadership Group or special circumstances, failure to cure the deficiency within the 15-day period shall result in (a) that quarter's submission being rejected, and (b) the submitting firm waiving compensation for the time and expenses submitted that quarter. Upon a determination by Plaintiffs' Leadership Group that a Participating Counsel repeatedly fails to comply with the requirement to timely submit time and expense records in the required format, that Participating Counsel may be barred from performing future common benefit work.

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

**D. Distribution of Fees**

1. No Individual Right to the Funds: No party or attorney has any individual right to any common benefit funds except to the extent directed by Court Order. Common benefit funds will not constitute the property of any plaintiff or attorney or be subject to garnishment or attachment for the debts of any plaintiff or attorney except when and as directed by Court Order. These limitations do not preclude a plaintiff or attorney from transferring, assigning, or creating a security interest in potential disbursements from the Funds 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 Funds shall be available for distribution to attorneys who have performed professional services and/or incurred expenses for the common benefit. The Court retains jurisdiction over any common benefit award. Each Participating Counsel who does common benefit work has the right to present a claim for compensation and reimbursement prior to any recommendation by Plaintiffs' Leadership Group to the Court. It is expected that the Court will give due consideration to Plaintiffs' Leadership Group's recommendation for the payment of common benefit fees and expenses.

Dated: \_\_\_\_\_, 20\_\_\_\_\_

**Firm Name:** \_\_\_\_\_

**Attorney's Name:** \_\_\_\_\_

**PLAINTIFFS' LEAD COUNSEL**

Dated: \_\_\_\_\_, 20\_\_\_\_ \_\_\_\_\_