

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
CENTRAL DIVISION  
AT LEXINGTON

IN RE: ONGLYZA (SAXAGLIPTIN) AND  
KOMBIGLYZE XR (SAXAGLIPTIN AND  
METFORMIN) PRODUCTS LIABILITY  
LITIGATION

Master File No. 5:18-md-2809-KKC  
MDL No. 2809

ALL CASES

Case Management Order No. 5

**CASE MANAGEMENT ORDER ESTABLISHING STANDARDS AND  
PROCEDURES FOR COUNSEL SEEKING REIMBURSEMENT FOR COMMON  
BENEFIT FEES AND COSTS**

**I. SCOPE OF ORDER**

This Order is entered to provide standards and procedures 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.

**A. Governing Principles – 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 Nat'l Bank, 307 U.S. 161 (1939); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Boeing Co. v. Van Gemert, 444 U.S. 472 (1980); and approved and implemented in the MDL context in, *inter alia*, In re Air Crash Disaster at Florida Everglades on December 29, 1972, 549 F.2d 1006, 1019-21 (5th Cir. 1977); and in 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, bellwether trials, 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 and all cases later filed in, transferred to, or removed to this Court and treated as part of the coordinated proceedings known as *In re: Onglyza (Saxagliptin) and Kombiglyze XR (Saxagliptin and Metformin) Products Liability Litigation*, MDL 2809. This Order further applies to each attorney representing a plaintiff with a case now pending in, 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. The Participation Agreement need only be signed by state court counsel without any cases filed in the MDL as set forth in Section C below; however, if the California Coordinated Proceeding (JCCP 4909) enters a similar common benefit order setting forth the same assessment to obtain common benefit work, attorneys with cases only in the California Coordinated Proceeding no longer will be required to sign the MDL Participation Agreement and this Order will apply to them as well (each case will only pay one assessment). This Order further applies to all cases or claims (filed or unfiled) of all Participating Counsel as defined in Section C and all cases or claims (filed or unfiled) in state or federal court where the Participating Counsel has a fee interest. This Order explicitly incorporates the terms of the Participation Agreement.

**C. Participating Counsel and Participation Agreement – Exhibit A**

The Participation Agreement (attached as Exhibit A, and hereinafter, "Participation Agreement") is a voluntary agreement for plaintiffs' attorneys to be executed only if otherwise not subject to this self-executing agreement. The Participation Agreement is a private and cooperative agreement between plaintiffs' attorneys only ("Participating Counsel") and does not include

Defendants or Defendants' counsel. Participating Counsel is defined as: (i) any lawyer and his or her law firm with a case on file in the MDL now or in the future; (ii) any other lawyer and his or her law firm who signs the Participation Agreement; and (iii) any other lawyer and his or her law firm who utilizes and benefits from the work product of the MDL. Counsel who do not have a case pending in this MDL and who choose not to execute the Participation Agreement are **not** entitled to receive common benefit work product.

Participating Counsel are entitled to receive the MDL Common Benefit Work Product and the state court work product of those attorneys who have also signed the Participation Agreement, including the work product developed in the California Coordinated Proceeding and any other state court proceeding if the leadership in those litigations represent that the counsel in the state court litigation(s) agree. Participating Counsel are eligible to make a submission for common benefit time and cost reimbursement in accordance with the terms of the agreement and this Order.

All Participating Counsel with cases in this MDL and/or who receive the Common Benefit Work Product, shall have their cases assessed pursuant to this Order. Counsel who only have cases filed in state court may also receive the Common Benefit Work Product by signing the Participation Agreement. Participating Counsel shall be entitled to receive all the Common Benefit Work Product of those counsel who have also signed the Participation Agreement. Counsel who choose not to execute the Participation Agreement are not entitled to receive Common Benefit Work Product.

The Court recognizes that Participating Counsel who have cases in separate and independent jurisdictions are voluntarily agreeing to share the Common Benefit Work Product developed in these jurisdictions. The Court further recognizes the separate and independent rights of each jurisdiction, including 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**

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 by Plaintiffs' Executive Committee ("PEC") pursuant to Section III(C) of this Order; (c) timely submitted within the defined limitations set forth in this Order; and (d) verified by a partner or shareholder in the submitting firm.

Expense records shall be submitted on the 15th of each month and shall cover the time period through the end of the preceding month on the form attached hereto as Exhibit B. Expense records are still considered timely so long as they are submitted within six (6) months. Any expense records submitted more than six (6) months in arrears may not be considered or included in any computation of expense calculation and shall be disallowed, except for good cause shown. All expense submission should be accompanied by contemporaneous records.

Common benefit expenses include, but are not limited to: capital contributions made by the PEC, and PSC members to fund an operating fund to pay for shared expenses that fund the operation of this MDL; costs necessary for creation of a document depository (including the operation and administration of the depository); deposition and court reporter costs incurred for non-case specific depositions; certain Court filing and services costs for matters involving the

MDL; leadership group administration matters (such as copies, travel, meetings and conference calls); costs for the electronic storage, retrieval and searches of ESI; legal and accountant fees; expert witness and consultant fees and expenses; investigator fees and expenses; printing, copying, coding, scanning (out-of-house services and/or extraordinary firm costs where applicable); research by attorneys, outside third-party vendors, consultants; common witness expenses (including witness travel); translation costs; bank/financial institution charges; claims administrator charges; special master and/or mediator charges; and reasonable travel expenses (including lodging and meals and other expenses associated in connection with leadership-approved meetings, events, and other common benefit tasks).

## **B. Expense Limitations**

### **1. Travel Limitations**

Except in extraordinary circumstances approved in advance by the PEC, all travel reimbursements are subject to the following limitations:

- i. Airfare: Only the price of a coach airfare seat for a reasonable itinerary will be eligible for reimbursement. Airfare expense submissions must be supported by an invoice or receipt for airfare that shows price, class of airfare purchased, name of traveler, and destination. Business/First Class Airfare will not be fully reimbursed, except for flights that exceed four hours non-stop flight time or international flights, which require prior approval by the PEC in order to be considered for reimbursement. If Business/First Class Airfare is used on domestic flights, then the difference between the Business/First Class Airfare must be shown on the reimbursement request, and only the equivalent coach fare will be eligible for reimbursement.
- ii. Hotel: Hotel room charges for the average available room rate of a business hotel, including the Hyatt, Westin, Marriott, and Hilton hotels (or comparable), in the city in which the stay occurred will be eligible for reimbursement. Luxury hotels will not be fully reimbursed but will be reimbursed at the average available rate of a business hotel (rate at Hyatt, Westin, Marriott and/or Hilton must be documented and accompany the reimbursement request). Hotel expense submissions must be supported by a hotel issued receipt.

- iii. Meals: Meal expenses must be reasonable. Meal expense submissions must be supported by receipts or credit card statements that reflect the date and those partaking in the meal.
- iv. Cash Expenses: Miscellaneous cash expenses for which receipts are generally not available (tips, luggage handling, pay telephone, *etc.*) will be reimbursed up to \$50.00 per trip, as long as the expenses are properly itemized.
- v. Rental Automobiles: Luxury automobile rentals will not be eligible for full reimbursement, unless only a luxury automobile was available. If luxury automobiles are selected when non-luxury automobiles are available, then the difference between the luxury and non-luxury vehicle rates must be shown on the reimbursement request, and only the non-luxury vehicle rate may be claimed for reimbursement (unless a larger vehicle is necessary to accommodate several counsel).
- vi. Mileage: Mileage claims must be documented by stating origination, destination, total actual miles for each trip, and the rate per mile paid by the member's firm. The maximum allowable rate will be the maximum rate allowed by the IRS (currently 54 cents per mile).

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

- i. Shipping, Courier, and Delivery Charges: All claimed expenses must be documented with bills showing the sender, origin of the package, 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 the actual cost.
- iii. 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.
- iv. Computerized Research: Claims for Lexis or Westlaw, and other computerized legal research expenses should be in the exact amount charged to or allocated by the submitting firm.

## **C. Verification**

Forms detailing expenses shall be certified by a senior partner in each firm attesting to the accuracy of the submission. 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.

**D. Costs and/or Expenses in Excess of Amounts Available in the Expense Fund or Fee Fund**

To the extent the Onglyza Expense Fund or Fee Fund is insufficient to appropriately address or reimburse common benefit expenses and time, the Court may equitably apportion the amounts in either fund to the other as is just and appropriate.

**E. 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 fund established and administered by Plaintiffs' Co-Lead Counsel and assessed to the PEC, PSC, and other plaintiffs' lawyers willing to work on common benefit issues. All shared costs must be approved by Plaintiffs' Co-Lead Counsel prior to payment. Shared costs include, but are not limited to: deposition and court reporter costs incurred for non-case specific depositions; costs necessary for creation and maintenance of a document depository; Plaintiffs' Leadership administrative costs; legal and accountant fees; expert witness and consultant fees and expenses incurred for non-case specific cases; vendor bills; special master and/or mediator charges; and expenses necessary for operation of the litigation. Shared costs shall be reimbursed from the Common Benefit Expense Fund.

**2. Held Costs**

Held costs are costs that will be carried by 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 Held costs unless the case is determined by Plaintiffs' Co-Lead Counsel to be a "common benefit case" (to include certain bellwether cases as determined by the PEC). Held Costs are costs that will be paid out of the Common Benefit Expense Fund, if sufficient funds exist.

### **3. Authorization and Submission**

This Order and the Participation Agreement set forth the guidelines for authorizing and submitting expenses for the common benefit. Said expenses shall be submitted to the PEC, specifically to Jennifer A. Moore, Moore Law Group, PLLC, at [jennifer@moorelawgroup.com](mailto:jennifer@moorelawgroup.com) and [kara@moorelawgroup.com](mailto:kara@moorelawgroup.com), on a monthly basis accompanying the time record submissions set forth herein.

## **III. COMMON BENEFIT WORK**

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

Only Participating Counsel are eligible for reimbursement for time and efforts expended for the common benefit. 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 by the PEC; (c) timely submitted; and (d) verified by a partner or shareholder in the submitting firm. Moreover, if counsel is a member of the PEC or PSC and fails to timely submit capital contributions as may be requested by the PEC throughout this litigation, such counsel and members of his or her firm shall not be allowed to submit common benefit time or expenses for reimbursement unless and until the capital contributions are paid.



## **B. Compensable Common Benefit Work Defined**

Common Benefit Work shall only include work specifically assigned. Only time spent on matters common to all claimants in this MDL will be considered in determining reimbursements. No time spent on individual cases will be considered nor should it be submitted.

As the litigation progresses, Plaintiffs' Co-Lead Counsel may assign Participating Counsel common benefit work. 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 or other work associated with preparation for trial and the trial of any cases designated as "common benefit cases" by the PEC.

## **C. Authorization for Compensable Common Benefit Work**

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

### **i. Examples of Authorized and Unauthorized Work**

- a. Depositions of corporate and expert witnesses: Any attorney not designated as one of the authorized questioners or otherwise authorized to attend a deposition on behalf of the PEC 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 the PEC 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 the PEC from submitting common benefit time for participation in the PEC calls and meetings that are germane to all members of the PEC 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 the PEC and the attorneys designated by the PEC 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 the PEC 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 the PEC, 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 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 the PEC 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 the PEC 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 PEC from submitting common benefit time for reviewing pleadings and orders that are germane to all members of the PEC 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 the PEC 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 PEC from submitting common benefit time for reviewing discovery responses that are germane to all members of the PEC 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 the PEC to the extent it complies with the other provisions of this Agreement and the Common Benefit Order.
- j. Duplicative billing: Having multiple attorneys within one firm bill for duplicative work will be a fact to be considered by the PEC and may not be compensated and should not be submitted. Law firms are free to staff cases in any way they deem appropriate for their law firm, however, the MDL will not compensate one law firm for duplicative billing. This paragraph is not intended to prevent, by way of example, having one lawyer create the first draft and another lawyer review and edit the draft, nor does this paragraph prevent having multiple attorneys within one firm assist the questioning attorney in preparation for a deposition.

#### **D. 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.

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 a CPA to be appointed by the Court.

These guidelines are intended for all activities performed and expenses incurred by Participating Counsel in MDL 2809:

1. All time submissions must be incurred only for work authorized under this Order;
2. All time submissions must be made on the form attached as Exhibit C;
3. Time and expense submissions are to be made on the 15th of each month. Each submission should contain all time and expenses incurred during the calendar month prior to the submission date. All time and expense submissions should be accompanied by contemporaneous records and verified by a partner or shareholder in the submitting firm. Only time and expenses incurred after the entry of *Order Appointing Plaintiffs' Leadership Structure* (Dkt. 162) entered on September 9, 2018, shall be submitted and considered for common benefit consideration. In addition, each firm that makes a common benefit time and/or cost submission for a given month shall also be required to submit a brief summary (2-3 sentences) summarizing the contribution toward the common benefit and advancement of the litigation (1 for each person submitting time/expense). Only that time and those expenses incurred for the common benefit of all cases consistent with the terms of the common benefit Order and this Participation Agreement, shall be considered. Any firm making a common benefit time submission may request from the PEC an extension beyond the 15<sup>th</sup> of each month for submission of the form attached as Exhibit C, if needed.
4. All time submissions must be sent electronically in the designated form to the attention of the PEC 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 the PEC, or any other method approved by the PEC, 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 the PEC or special circumstances, failure to cure the deficiency within the 15-day period shall result in (a) that month's submission being rejected, and (b) the submitting firm waiving compensation for the time and expenses submitted that month. Upon a determination by the PEC 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.

#### **IV. COMMON BENEFIT ACCOUNT**

##### **A. Establishing the Fund**

Plaintiffs' Executive Committee will direct the establishment of the "Onglyza Common Benefit Expense Fund" (hereafter, "Expense Fund") and the "Onglyza Common Benefit Fee Fund" (hereinafter, "Fee Fund") and the accounts will be held subject to the direction of this Court.

##### **B. Payment into the Fund**

###### **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, with or without trial, or who recover a judgment for monetary damages or other monetary relief, including compensatory and punitive damages with respect to Onglyza/Kombiglyze XR claims are subject to an assessment of the “gross monetary recovery,” as defined below.

## **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) include any payments to be made by Defendants on an intervention asserted by third-parties, such as physicians, hospitals, or other healthcare providers in subrogation related to treatment of a plaintiff, and any governmental liens or obligations (*e.g.*, Medicare or Medicaid); and (b) 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 plaintiffs’ attorneys who are subject to this Order, whether as sole counsel or co-counsel, including cases pending in the MDL, pending in state court, unfiled or tolled. Nothing in this Order shall be deemed to modify, alter, or change the terms of any fee contract between plaintiffs’ counsel and their individual clients.

## **3. Assessment Amount**

The assessment amount shall be a total of twelve percent (12%) of the gross monetary recovery. Nine percent (9%) of this assessment is for the payment of Common Benefit Fees to be paid into the Fee Fund and three percent (3%) of this assessment is for the payment of Common Benefit Expenses to be paid into the Expense Fund. The assessment represents a holdback. *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256 (E.D.N.Y. Dec. 5, 2006).

The PEC may seek from this Court a reallocation of the total assessment between fees and expenses at the time the application for disbursement is made, or for modifications of the assessment amount for good cause shown. The total assessment shall not be altered in any way unless each of the following occurs: (1) the entire PEC and PSC is consulted and provided an opportunity to be heard prior to the filing of any motion to change the assessment amount; (2) the entire PSC approves the proposed change to the assessment by a majority vote; and (3) noticed motion with an opportunity to be heard is granted by the Court and the Court determines that good cause warrants a modification.

#### **4. Initial Assessment/Capital Contributions**

To fund the costs of litigation as this MDL moves forward, the PEC shall be empowered to seek capital contributions from Participating Counsel on an as-needed basis without further Court intervention or order. Such funds will be deposited into the Expense Fund and are considered Held costs.

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

Defendants and their counsel shall not distribute any settlement or judgment proceeds to any plaintiffs' counsel in this MDL or to any other plaintiff's counsel to whom this Order applies (nor directly to any plaintiff), until after: (a) Defendants' counsel notifies Plaintiffs' Co-Lead Counsel in writing of the existence of a settlement or judgment and the name of the plaintiff and individual plaintiff's attorney; and (b) Plaintiffs' Co-Lead Counsel has advised Defendants' counsel in writing, whether or not the individual plaintiff's attorney's case(s) is/are subject to the assessment. For cases subject to an assessment, Defendants are directed to withhold the assessment from any and all amounts paid to plaintiffs and their counsel, and to pay the assessment directly into the Fee Fund and Expense Fund as a credit against the settlement or judgment. 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 and plaintiff's counsel until the parties resolve the dispute or the matter is disposed of by the Court upon motion of either party. If, for any reason, the assessment is not or has not been withheld, the plaintiff and his/her counsel are jointly responsible for the payment of the assessment into the Funds promptly.

Any motion, stipulation, or proposed Agreed Order that states a case should be dismissed pursuant to a settlement must be accompanied by a certificate of plaintiffs' counsel and defendant's counsel that the assessment has been or will be withheld, and deposited into the Fee and Expense Funds at the same time the settlement or judgment proceeds are paid to plaintiff and/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 Defendants have paid an assessment into the Fee and Expense Funds since the last such report. A report is not due if there are no payments made into the Fee and Expense Funds by Defendants during the quarter. Details of any individual settlement agreement, individual settlement amount, and individual amounts deposited into escrow shall be confidential and shall not be disclosed, unless the Court requests that it receive that information. A court-approved Certified Public Accountant (CPA) shall provide to the PEC, Defendants, and the Court, quarterly statements reflecting the aggregate of the monthly deposits, disbursements, interest earned, financial institution charges, and current balance.

Upon Motion of the PEC, the CPA shall be appointed by subsequent order of this Court and will keep detailed records of all deposits, withdrawals, and to prepare tax returns and/or any other tax filings in connection with the Fee Fund and Expense Fund. Said subsequent order will specify the hourly rates to be charged by the CPA. Upon approval by the Court, the CPA's bills



shall be paid from the Expense Fund and shall be considered a Shared Cost. Plaintiffs' Co-Lead Counsel shall provide a copy of this Order to the CPA.

**V. DISTRIBUTIONS**

**A. Court Approval**

The amounts deposited into the Fee Fund and 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. This Court retains jurisdiction over any common benefit award or distribution.

**B. Application for Distribution**

Each Participating Counsel who performs work or incurs expense for the common benefit has the right to present his/her claims for compensation and/or reimbursement prior to any distribution approved by this Court.

At the appropriate time, this Court shall request that the PEC make recommendations for distributions to Participating Counsel who have performed common benefit work and/or incurred common benefit expenses. The PEC shall dictate the recommended distribution for common benefit work, and shall determine the most fair and efficient manner by which to evaluate all of the time and expense submissions in making its recommendations to this Court. The Court will give due consideration to the recommendations.

**IT IS SO ORDERED**, this 7th day of November, 2019.



*Karen K. Caldwell*  
KAREN K. CALDWELL  
UNITED STATES DISTRICT JUDGE  
EASTERN DISTRICT OF KENTUCKY

# EXHIBIT A

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
CENTRAL DIVISION  
AT LEXINGTON**

**IN RE: ONGLYZA (SAXAGLIPTIN) AND  
KOMBIGLYZE XR (SAXAGLIPTIN AND  
METFORMIN) PRODUCTS LIABILITY  
LITIGATION**

Master File No. 5:18-md-2809-KKC  
**MDL No. 2809**

ALL CASES

**EXHIBIT A TO CMO NO. 5**  
**(Common Benefit Participation Agreement)**

**THIS AGREEMENT** is made this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and between the Plaintiffs’ Executive Committee (“PEC”) appointed by the United States District Court for the Eastern District of Kentucky in MDL 2809 and \_\_\_\_\_ [Name of Counsel and 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 Eastern District of Kentucky has appointed Jennifer A. Moore and Timothy Clark as Plaintiffs’ Co-Lead Counsel and as members of the PEC along with Daniel C. Burke, Fred Olinde, and Timothy Porter to facilitate the conduct of pretrial proceedings in the federal actions alleging injuries caused by the drugs Onglyza and Kombiglyze XR; and

**WHEREAS**, the PEC, 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 Onglyza and Kombiglyze XR including pre-trial matters, discovery, trial preparation, bellwether trials, a

potential settlement process, and all other work that advances this litigation to conclusion (“Common Benefit Work Product”); and

**WHEREAS**, Participating Counsel are desirous of acquiring the Common Benefit Work Product and establishing an amicable working relationship with the PEC 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. The Common Benefit Order is explicitly incorporated herein. 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 caused by Onglyza and/or Kombiglyze XR.

The Participation Agreement is being signed by counsel who are not already independently bound to the terms of the Common Benefit Order.

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

Upon execution of this Agreement, the PEC 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 Onglyza and/or Kombiglyze XR. 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 Onglyza and/or Kombiglyze XR 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 the PEC. The initial list shall be provided within 15 days of signing this Agreement.

## **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 Onglyza and/or Kombiglyze XR claims are subject to an assessment of the gross monetary recovery, as in the Common Benefit Order.

### **A. Assessment Amount**

The assessment amount is twelve percent (12%) of the gross monetary recovery. Nine percent (9%) of this assessment is for the payment of Common Benefit Fees, and three percent (3%) 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.*, 467 F. Supp.

2d 256 (E.D.N.Y. Dec. 5, 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.

### **B. 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: Onglyza (Sitagliptin) and Kombiglyze XR (Sitagliptin and Metformin) Products Liability Litigation*, MDL 2809, regardless of when the plaintiff's attorney signs the Participation Agreement. 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. By signing this Participation Agreement, thereby receiving access to common benefit work product, Participating Counsel agrees to the jurisdiction of this Court with respect to this Participation Agreement.

### **C. Attorneys' Fee Lien**

With respect to each client represented in connection with Onglyza and Kombiglyze XR 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 the PEC 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 Onglyza and/or Kombiglyze XR 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.

I \_\_\_\_\_ [Name of the lawyer executing the Agreement] hereby represent to the PEC that I have authority to execute this Agreement on behalf of my law firm and have the authority to bind my law firm to the terms of this Agreement.

\_\_\_\_\_  
Participating Counsel

Dated: \_\_\_\_\_  
Firm Name: \_\_\_\_\_

PLAINTIFFS' PEC:

\_\_\_\_\_

Dated: \_\_\_\_\_

Exhibit

B



**IN RE: ONGLYZA (SAXAGLIPTIN) AND KOMBILGLYZE XR (SAXAGLIPTIN & METFORMIN) PRODUCTS LIABILITY  
LITIGATION (MDL No. 2809) - MONTHLY EXPENSE REPORT**

**Month:** \_\_\_\_\_ **Year:** \_\_\_\_\_

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

**Certification by Firm Partner**

<b>Date:</b> _____	<b>By:</b> _____
	<b>Print Name:</b> _____

Date Expense Incurred	Payable To	Category	Detailed Description of Expense	Amount of Expense
<b>Total:</b>				

\*Must attach proof of payment

Exhibit

C

**IN RE: ONGLYZA (SAXAGLIPTIN) AND KOMBILGLYZE XR (SAXAGLIPTIN & METFORMIN) PRODUCTS LIABILITY LITIGATION  
(MDL No. 2809) - MONTHLY TIME REPORT**

Month: \_\_\_\_\_

Year: \_\_\_\_\_

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

**Certification by Firm Partner**

Date: \_\_\_\_\_

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Date	Timekeeper Name	Hours by 0.1 Increments	Detailed Description of Work Performed	Professional Status*	Hourly Rate
<b>Total:</b>					

\*Professional Status: P - Partner A - Associate OC - Of Counsel PL - Paralegal LC - Law Clerk