

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

_____)	
IN RE:)	MDL NO. 2753
)	
ATRIUM MEDICAL CORP. C-QUR MESH)	
PRODUCTS LIABILITY LITIGATION)	MDL Docket No.
)	1:16-md-02753-LM
)	ALL CASES
_____)	

THIS AGREEMENT is made this _____ day of _____, 20____, by and between the Plaintiffs’ Leadership Group appointed by the United States District Court for New Hampshire in MDL 2753 and _____ [**Name of the Firm Executing the Agreement**] (the “Participating Counsel”).

WHEREAS, the United States District Court for New Hampshire has appointed Jonathan Orent, D. Todd Mathews, Davis Selby, Adam Evans, Anne Schiavone, Russell Hilliard and James Matthews to serve as members of the Plaintiffs’ Leadership Group (also referred to the Plaintiffs’ Executive Committee or “PEC”, Plaintiffs’ Steering Committee or “PSC”, Plaintiffs’ Liaison Counsel and/or Plaintiffs’ State Liaison Counsel), to facilitate the conduct of pretrial proceedings in the federal actions relating to the use, marketing, and sales of Atrium Medical C-Qur Mesh; and

WHEREAS, the 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 Atrium Medical C-Qur Mesh (“Common Benefit Work Product”); and

WHEREAS, the Participating Counsel are desirous of acquiring the Common Benefit Work Product and establishing an amicable, working relationship with the 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 and this Participation 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, the Participation 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 Atrium C-Qur Hernia Mesh products, including but not limited to: C-QUR, C-QUR Mosaic, C-QUR Edge, C-QUR TacShield, C-QUR Lite Mesh V-Patch, and C-QUR Mesh V-Patch.

B. Rights and Obligations of Participating Counsel

Upon execution of this Participation Agreement, the 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 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 attorney fee, regardless of what that interest is, who has filed a civil action arising from the use, marketing, and/or sale of Atrium Medical C-Qur Mesh. 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 client represented by them and/or in which they have an interest in the attorney 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' Executive Committee. 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, the provisions set forth below, and the terms of CMO _____, 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 Atrium Medical C-Qur Mesh claims are subject to an assessment of the Gross Monetary Recovery, as provided herein.

A. Assessment Amount

As the size and complexity of this matter has yet to be determined, Plaintiffs' Executive Committee will make a motion with the court, at a later time, for a determination of the assessment amount for both attorneys' fees and expenses. The assessment shall represent a holdback (*See In re Zyprexa Prods. Liab. Litig.*, 267 F.Supp.2d 256 (E.D.N.Y. 2006)). By entering this Participation Agreement, the undersigned understands and avers to not move, join, or otherwise support a motion that seeks a common benefit fee assessment in excess of the

Plaintiffs' Executive Committee suggested amount, nor a motion that seeks common benefit costs in excess of the Plaintiffs' Executive Committee suggested amount, unless it should become apparent that costs and expenses in excess of the Plaintiffs' Executive Committee suggested amount, is required to reasonably and adequately advance the litigation.

However, to obtain the benefit of this assessment amount, all plaintiffs' counsel with a case pending in this MDL or in any state court shall execute this Participation Agreement within 45 days of the entry of the Common Benefit Order. Any plaintiffs' attorney who does not yet have an Atrium Medical case filed in any state or federal court shall execute this Participation Agreement (a) within 45 days of the date their first case is filed in or otherwise docketed in this Court via transfer or removal, or (b) within 45 days of the date their first case is filed in any state court. Failure to execute the Participation Agreement within these time frames may result in an increased assessment as determined by Plaintiffs' Executive Committee.

B. 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, 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 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 *Atrium Medical Corp. C-Qur Mesh Products Liability Litigation*, MDL 2753, regardless of whether the plaintiff's attorney is either Participating or Non-Participating Counsel. Counsel who sign this Participation Agreement further agree that the assessment shall apply to all un-filed cases, tolled cases, and/or cases filed in state court in which they have a fee interest, regardless of the size of that fee interest.

Non-Participating Counsel are not required to pay an assessment on state court cases or on un-filed cases. However, counsel who do not sign the Participation Agreement are not entitled to receive Common Benefit Work Product, and may be subject to an increased assessment on all Atrium Mesh 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 working with the MDL. Non-Participating Counsel shall not be eligible to receive Common Benefit payments for any work performed or expenses incurred.

D. Attorney Fee Lien

With respect to each client represented in connection with Atrium Medical related claims that are filed or pending in any Federal court, are un-filed, or are subject to a tolling agreement, consistent with I.B. and I.C. of the associated Case Management Order Establishing Common Benefit Fee and Expense Fund (Case Management Order #____), each Participating Counsel shall agree to have Defendants deposit or cause to be deposited in the Atrium Medical Fee and Expense Funds established by the District Court in the MDL a percentage of the gross amount recovered 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 Atrium Medical Fee and Expense Funds established by the District Court in the MDL a percentage 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 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 Atrium Medical C-Qur-induced injury and Atrium Medical C-Qur 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 Plaintiffs' Leadership Group 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, Plaintiffs' Leadership Group 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 be: (a) for the common benefit; (b) appropriately authorized and timely submitted¹; (c) within the defined limitations set forth in this Participation Agreement and associated Order; and (d) verified by a partner or shareholder in the submitting law firm.

B. Authorization and Submission of Expenses

¹ 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 Co-Lead Counsel

Participating Counsel must submit expenses consistent with the Order of this Court. Expenses incurred on matters common to all claimants in MDL 2753 and assigned by Plaintiffs' Executive Committee of the MDL may be submitted for reimbursement.

C. Verification

The forms detailing expenses shall be certified by a senior partner in each 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.

Cost records shall be electronically submitted to CPA and Plaintiffs' Executive Committee on a monthly basis. Untimely submission of Cost records will result in a waiver of said costs. Unsubstantiated costs may be disallowed, as recommended by the CPA and/or Plaintiffs' Executive Committee.

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; (*see* Footnote 1 *supra*); (c) timely submitted; and (d) verified by a partner or shareholder in the submitting law firm. Moreover, if counsel fails to timely submit capital contributions as may be requested by Plaintiffs' Executive Committee throughout this litigation, such counsel and members of his/her firm shall not be allowed to submit common benefit time or expenses for reimbursement. Unsubstantiated costs may be disallowed, as recommended by the CPA and/or Plaintiffs' Executive Committee.

B. Counsel Involved

Participating Counsel are prohibited from sharing Common Benefit Work Product with Non-Participating Counsel, as defined herein. Counsel eligible to perform common benefit work includes Plaintiffs' Executive Committee, Liaison Counsel, State Court Liaison Counsel, members of the PSC, and other Participating Counsel.

C. Authorization

Time spent on matters common to all claimants in the MDL must be assigned by Plaintiffs' Executive Committee members to be eligible for consideration as common benefit time. 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 should time spent on unauthorized work be submitted for consideration.

(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 the Plaintiffs' Leadership 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 PEC, PSC, MDL or Full-Committee 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 by listening to such calls is not common benefit work. Each attorney has an obligation to stay informed about the litigation so that they can best represent their clients, and that is a reason to participate in such calls and

meetings. The attorneys designated by Plaintiffs' Executive Committee 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 common benefit time. Nothing in this paragraph shall be construed to prevent members of the Plaintiffs' Leadership from submitting common benefit time for participation in Plaintiffs' Leadership communications that are germane to all members of the Plaintiffs' Leadership and are necessary to fulfill their Plaintiffs' Leadership 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. 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, but participation by attending and listening to such conferences is not common benefit work. Each attorney has an obligation to stay 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, nor shall participation in such status conferences via telephone be considered common benefit time. The attorneys designated by Plaintiffs' Executive Committee to address issues that will be raised at a given status conference or requested by Plaintiffs' Executive Committee to be

present at a 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 Attorneys are encouraged to identify experts in consultation with the Co-Chairs of the Science and/or Expert Committees. If a Participating Attorney travels to and retains an expert without the knowledge and approval of the Plaintiffs' Executive Committee, the MDL may not need or use that expert, and the associated time and expense may not be considered common benefit expenses/work, and therefore may not be compensable;
- e. Attendance at Various Seminars: Attendance at a seminar that has as an agenda item about the Atrium Medical C-Qur litigation is not common benefit work or a common benefit expense;
- f. Document Review: In the MDL, only document review specifically assigned to an attorney and authorized by Plaintiffs' Executive Committee or Chairperson of the Discovery or Science Committees will be considered common benefit work. If an attorney elects to review documents that have not been assigned to that attorney by Plaintiffs' Executive Committee or Chairperson of the Discovery or Science Committees, that review is not considered common benefit work;
- g. Review of Pleadings and Orders: Each attorney has an obligation to stay 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 Plaintiffs' Executive Committee or Chairperson

of the Discovery or Science Committees to review and summarize those pleadings or orders for the MDL are working for the common benefit, and their time will be considered common benefit time. 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 work. Nothing in this paragraph shall be construed to prevent members of the Plaintiffs' Leadership submitting common benefit time for reviewing orders that are germane to all members of the Plaintiffs' Leadership and review of which is necessary to fulfill their Plaintiffs' Leadership obligations;

- h. Review of Discovery Responses: Each attorney has an obligation to stay 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 Plaintiffs' Executive Committee or Chairperson of the Discovery or Science Committees to review and summarize discovery responses for the MDL are working for the common benefit, and their time will be considered common benefit time. 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 work;
- 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 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' Executive Committee to the extent it complies with the other provisions of this Order and Participation Agreement.

D. Time Keeping and Submission of Time Records

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

These guidelines are intended for all activities performed and expenses incurred by Participating Counsel in MDL 2753:

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 PEC;
3. Time and expense submissions are to be made on the 15th of each month, beginning on June 15, 2017. Each submission should contain all time and expenses incurred during the calendar month prior to the submission date (i.e., the June 15, 2017 submission should include all time and expenses incurred during the month of May, 2017), though the first submission should include all time and expenses incurred through May 31, 2017. 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 expense made after the 15th day of the month following the month in which the time or expense were incurred may be rejected. Only time and expense incurred after the entry of CMO #3 by this Court appointing Plaintiffs' Leadership on March 13, 2017 (plus any time and expense incurred by those appointed to leadership in complying with the terms of CMO #1) 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 the Common Benefit Order and this Participation Agreement, shall be considered.

4. All time submissions must be electronically sent in the designated form to the attention of CPA and Plaintiffs' Executive Committee so they can be reviewed, compiled, and submitted to the Court at the appropriate time.
5. Failure to provide submissions in a timely manner shall result in a waiver of attorney 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' Executive Committee, or any other method approved by Plaintiffs' Executive Committee, 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' Executive Committee

or special circumstances, failure to cure the deficiency within the fifteen-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 Plaintiffs' Executive Committee that a Participating Law Firm repeatedly fails to comply with the requirement to timely submit time and expense records in the required format, that Participating Law Firm may be barred from performing future common benefit work.

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

E. 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 Order of this Court. Common benefit 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 by court order. 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 Atrium Medical Fee Fund shall be available for distribution to attorneys who have performed professional services or incurred expenses for the common benefit. The MDL Court retains

jurisdiction over any common benefit award. Each Participating Counsel who does common benefit work has the right to present their claim(s) for compensation and reimbursement prior to any recommendation to the Court. It is expected that due consideration of payment of common benefit fees and expenses will be given to the recommendation of Plaintiffs' Executive Committee by the MDL Court.

Dated: _____, 20____

Firm Name:
Attorney's Name:

PLAINTIFFS' EXECUTIVE COMMITTEE

Dated: _____, 20____

Dated: _____, 20____
