UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN RE: BIOMET M2a MAGNUM HIP IMPLANT PRODUCT LIABILITY LITIGATION (MDL 2391)	))))))	**CAUSE NO: 3:12-MD-2391-RLM-CAN** **This Document Relates to All Cases**

BIOMET DEFENDANTS' RESPONSE TO PLAINTIFFS' EXECUTIVE COMMITTEE'S BRIEF CONCERNING COMMON BENEFIT FEES AND COSTS

Pursuant to the Court's September 8, 2015 Memorandum, the Biomet Defendants ("Biomet") submit this response to the Plaintiffs' Executive Committee's ("PSC II") application for the entry of an interim "Holdback Order" in anticipation of the issuance of a future common benefit order. (Doc. No. 2973). PSC II argues that it is entitled to the entry of a Holdback Order which will apply to any case: (i) identified on Exhibit "A" to PSC II's September 17, 2015 submission, *i.e.,* pending cases that have not been resolved pursuant to the terms of the Master Settlement Agreement ("MSA"); and (ii) cases filed in this MDL, on or after April 16, 2014, that are resolved by way of settlement, judgment, or other final disposition on or after June 1, 2015. For the reasons explained below, PSC II's request for the entry of a Holdback Order is both improper and premature.

I. Background

Biomet agrees with PSC II that the Court issued an order in July 2013 concerning timekeeping and cost reimbursement obligations for plaintiffs in anticipation of the issuance of a future common benefit order. (Doc. No. 669). This Order remains in effect. Biomet notes that the Court entered this timekeeper and expense recording order approximately nine months into the litigation – after four case management conferences, multiple meet and confers over core

MDL discovery orders, complex motion practice regarding electronic discovery, and a "Science Day" presentation by both sides. This type or level of activity has yet to occur with PSC II in a leadership position. Biomet further notes that PSC I never hinted at the entry of a Holdback Order when the timekeeper and expense recording order was entered three years ago.

Biomet also agrees that the Court entered a Common Benefit Fund Order ("CBF Order") on February 3, 2014, in conjunction with the MSA that ultimately resolved more than 90% of the cases filed in this MDL. (Doc. No. 1317-2). At the time this CBF Order was entered, the "proximate cause" for the "benefits" Plaintiffs' Steering Committee I ("PSC I") conferred on all plaintiffs was obvious. Thus, entry of the CBF Order made good sense and was consistent with longstanding precedent on the propriety of common benefit orders, when such an order should be issued, what cases it applied to, and the amounts of the common benefit assessments.

While PSC II points to the assessment paragraph of the CBF Order in its September 17 submission (Doc. No. 2973 at 6), PSC II ignores a related provision in the MSA which obligated Biomet to make a $6M payment to PSC I if certain participation percentages for different groups of cases were achieved. (Doc. No. 1317-1 at 6–7). And the Court will recall from conversations with PSC I and Biomet at the time the MSA was approved in 2014, this $6M provision was an important element of the settlement dialogue because it effectively meant that if the settlement worked, no plaintiff would, in fact, have to pay a common benefit assessment. PSC II's proposed Holdback Order, on the other hand, will be a real and substantial tax on the resolution of any case going forward.

Biomet does not dispute that creating a common benefit fund is warranted when plaintiffs' attorneys expend significant amounts of time, effort, and money drafting pleadings, reviewing documents, and taking or defending depositions. *See, e.g., Downing v. Goldman*

Phipps, PLLC, 764 F.3d 906, 909 (8th Cir. Mo. 2014). A common benefit fund also can be warranted after attorneys expend significant efforts on the administration of an MDL, serving as a repository of information concerning the litigation, or obtaining favorable discovery and evidentiary rulings that apply on a litigation-wide basis. *See, e.g.* In re *Pradaxa (Dabigatran Etexilate) Prods. Liab. Litig.*, 2012 U.S. Dist. LEXIS 162110 at *2–3 (S.D. Ill. Nov. 13, 2012). For plaintiffs' counsel to be entitled to have a common benefit fund created, however, they must be "the catalyst or proximate cause for the benefits" bestowed on a group of plaintiffs. *See Mulligan Law Firm v. Zyprexa MDL Plaintiff s' Steering Comm. II (*In re *Zyprexa Prods. Liab. Litig.*), 594 F.3d 113, 128-130 (2d Cir. N.Y. 2010); In re *Estate of Maniaci-Canni*, 2013 U.S. Dist. LEXIS 129758, *12 (E.D.N.Y. Sept. 10, 2013). Put differently, a common benefit fund only is appropriate when the plaintiffs "receive[] a substantial benefit from the leadership group's work." In re *Genetically Modified Rice Litig*., 2010 U.S. Dist. LEXIS 19168, *133 (E.D. Mo. Feb. 24, 2010).

None of the yardsticks proposed by PSC II "as lines in the sand" (Doc. No. 2973 at 7) for its Holdback Order – (i) all post-Group 2 cases filed after April 15, 2014, but not currently settled; (ii) all cases on Exhibits A and B; or (c) all MDL and non-MDL cases settled after June 1, 2015 – are legitimate parameters for a common benefit order because PSC II cannot show that it is a proximate cause of a benefit that has led or will lead to the resolution of the cases PSC II proposes to tax. PSC II has the burden to prove that it is entitled to a common benefit assessment, *see Gaffney v. Riverboat Servs.*, 451 F.3d 424, 467 (7th Cir. Ind. 2006), and given the current record in this MDL, PSC II cannot meet this burden for a substantial number of the pending cases.

II. All Post-Group 2 Cases, or Cases Filed After April 16, 2014, is not the Appropriate "Line of Demarcation"

Taking a myopic view of what transpired over the sixteen months between February 2014 and May 2016 in this MDL, PSC II claims that the MSA only applied to Group I and 2 cases, not post-Group 2 cases, and therefore, all post-Group 2 cases will "benefit" from PSC II's work and expenses. (Doc. No. 2973 at 4–5).

PSC II's position ignores efforts by the Court, Biomet, and PSC I to resolve post-Group 2 cases within the MSA framework. In this regard, the Court twice extended the time to resolve cases pursuant to the MSA: (i) once on November 18, 2014, extending the deadline until January 30, 2015, and (ii) a second time on January 30, 2015, extending until deadline until March 2, 2015. The second extension was made by way of a Joint Motion prompted by discussion with the Court at the January 30, 2015 Case Management Conference.

The record in this MDL demonstrates that the Court discussed settlement status of post-Group 2 cases within the framework of the MSA multiple times in 2014 and 2015, as reflected in the following reports and orders:

1. December 9, 2014 Joint Status Report (Doc. No. 2800);
2. The Court's Memorandum of the December 23, 2014 Status Conference (Doc. No. 2811) (the Court specifically noting that discussions regarding settlement of cases filed after 4/15/14 had commenced);
3. January 23, 2015 Joint Status Report (Doc. No. 2822);
4. March 10, 2015 Joint Status Report (Doc. No. 2840);
5. Joint Status Conference Agenda for May 18, 2015 Status Conference and Exhibit A to same (submitted via email to Chambers, attached hereto as Exhibit 1).

Through this Court-supported process, more than 200 post-Group 2 cases have been resolved pursuant to the MSA. PSC II's submission ignores this record.

Given the Court's instruction to resolve post-Group 2 cases pursuant to the MSA, Biomet worked with numerous plaintiffs' counsel, with the assistance and support of PSC I, to resolve cases that were filed after April 15, 2014 or submitted completed fact sheets after June 13, 2014. While many of these cases settled, some did not, and those cases remain pending in the MDL. The fact that those cases remain pending in the MDL does not automatically mean they should be subject to some new common benefit assessment, as PSC II has requested.

Biomet is unaware of any court looking at a holdback or common benefit order as a type of an annuity for some counsel. Rather, courts uniformly require a showing of a benefit having been conferred on a group of cases before a common benefit assessment can be imposed. *See, e.g. Gaffney*, 451 F.3d at 466; In re *Pradaxa*, 2012 U.S. Dist. LEXIS 162110 at *2–3; In re *Yasmin & Yaz (Drospirenone) Mktg.,Sales Practices & Prods. Liab. Litig.*, 2010 U.S. Dist. LEXIS 22361, *2-3 (S.D. Ill. Mar. 8, 2010). At this time, PSC II cannot make such a showing for pending post-Group 2 cases. Accordingly, the Court should reject the "line in the sand" for these cases.

Both before and after March 2, 2015, plaintiffs' counsel with pending post-Group 2 cases have contacted Biomet about the possibility of resolving their cases consistent with the MSA. And Biomet has made settlement offers on these cases (which contemplated that there would not be any common benefit assessment pursuant to the MSA). As best Biomet can determine, PSC II has had nothing to do with these counsel approaching Biomet, and Biomet suspects more plaintiffs' counsel with post-Group 2 cases will approach Biomet regarding settlement offers before the end of this year. To the extent these cases get resolved, PSC II will not have had anything to do with the resolution of these cases. Moreover, PSC II is asking to retroactively impose a tax on settlements for which the discussions regarding resolution preceded the

existence of PSC II. Again, Biomet is unaware of any court contemplating an annuity-type common benefit order – which is what PSC II is requesting with respect to almost all post-Group 2 cases.

III. All Pending Cases is not an Appropriate "Line of Demarcation"

The cases on Exhibit B to PSC II's proposed Holdback Order demonstrate why the proposed Holdback Order is improper and should not be entered.

As the chart below establishes, Biomet resolved ten of the twelve cases on Exhibit B on or before the date the Court appointed PSC II.[1] Therefore, PSC II could not have been a "catalyst or proximate cause" of any benefit to the resolution of these cases. With respect to the remaining two cases on Exhibit B – *Smith* and *Aderhold* – settlement discussions in these cases pre-dated the appointment of PSC II. Because *Smith* and *Aderhold* involve bilateral revisions with the second revision occurring after each case was filed, however, it took longer to complete discussions regarding the resolution of these two cases.

No.	Last Name	First Name	Plaintiff's Counsel	Docket No.	Date of Resolution
1	Smith	Eugene	Cellino & Barnes	3:14-cv-01568	6/29/15
2	O'Brien	Linda	Franklin D. Azar & Associates	3:14-cv-01876	4/15/15
3	Tolbert	Carolyn	Hollis Wright Clay & Vail	3:14-cv-01828	4/14/15
4	Schanck	Louis	Jones Ward	3:14-cv-01995	2/23/15
5	Hall	Phillip	Jones Ward	3:14-cv-01867	2/23/15

[1] If the Court deems it necessary, Biomet will submit *en camera* the emails that were exchanged between counsel, confirming the dates counsel resolved the cases on Exhibit B. *Mata* was a 2014 "agreed to" Group 2 case. The spreadsheet can also be provided to the Court *en camera* reflecting the agreement on *Mata*.

No.	Last Name	First Name	Plaintiff's Counsel	Docket No.	Date of Resolution
6	Mata	Velma	Nash and Franciskato	3:14-cv-01710	"Agreed to" Group 2 Case
7	Westervelt	Howard	Sanders Viener	3:14-cv-02028	3/24/15
8	Thompson	Mary	Sanders Viener	3:14-cv-01836	3/18/15
9	Sklenar	Kathryn	White & Weddle	3:14-cv-01501	4/7/15
10	Coats	Leon	White & Weddle	3:14-cv-01537	4/7/15
11	Lamb	Larry	White & Weddle	3:14-cv-01466	4/7/15
12	Aderhold	Susan	White & Weddle	3:15-cv-00359	8/20/15

Throughout the MSA process, there have been cases in which it has taken months for a plaintiff and his or her counsel to finalize the paperwork to get in-line for payment. Almost all the cases on Exhibit B are examples of this sometimes-unavoidable delay. Biomet has conferred with some of the plaintiffs' counsel whose clients' cases are on Exhibit B, and they are uniform in: (i) objecting to any type of holdback being applied to their cases; and (ii) willing to confirm to the Court directly that PSC II had nothing to do with the resolution of their cases and provided no benefits to these plaintiffs' counsel in the handling of their respective cases. Thus, if the Court is inclined to consider PSC II's request to assess cases on Exhibit B, Biomet asks that plaintiffs' counsel on Exhibit B be given an opportunity to be heard before the Court rules.

IV. Cases Resolved After June 1, 2015 is not an Appropriate "Line of Demarcation"

Plaintiffs' counsel with pending cases continue to unilaterally ask Biomet if it is willing, within the MSA framework, to resolve cases for amounts a specific plaintiff previously rejected or for amounts very close to the amounts Biomet previously offered. Between June 1 and August 31, 2015, Biomet settled several cases after being asked to put back on the table a

previously rejected MSA settlement offer. Moreover, since the last case management conference, attorneys with pending cases have approached Biomet regarding offers previously extended in late 2014 and early 2015. PSC II cannot legitimately say it was a catalyst for the resolution of these cases if they, in fact, settle.

There also have been settlement discussions in state court cases that did not opt-in to the MSA. Like the plaintiffs' counsel with cases on Exhibit B, these state court plaintiffs' counsel object to a holdback being applied to their cases and will confirm to the Court that PSC II provided no benefits to them. And also like counsel with cases on Exhibit B, state court cases that did not opt-in to the MSA want the opportunity to be heard about their cases being taxed for multiple reasons. *See* In re *Nineteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 616 (1st Cir. 1992); FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION, FOURTH § 14.232 (2004).

The Court already has determined when counsel's efforts qualify as a "catalyst or proximate cause" worthy of establishing a common benefit fund, and the mere existence of a PSC is not a basis for a common benefit assessment. *See Mulligan Law Firm v. Zyprexa MDL Plaintiff s' Steering Comm. II (*In re *Zyprexa Prods. Liab. Litig.*), 594 F.3d 113, 128-130 (2d Cir. N.Y. 2010); In re *Estate of Maniaci-Canni*, 2013 U.S. Dist. LEXIS 129758, *12 (E.D.N.Y. Sept. 10, 2013). Biomet respectfully submits that the work PSC II has done does not come close to the work done and benefit achieved by PSC I. To date, PSC II's mantra has been that the inventory of cases in this MDL is highly individualized. (Doc. No. 2961). If this is true, it is another reason not to enter a common benefit order. *See In re Zyprexa Prods. Liab. Litig*., 594 F.3d at 129. Only time will tell if PSC II's individualized case prediction is accurate and if PSC II can

properly demonstrate that it performed work separate and distinct from the common benefit work done by PSC I, so that the entry of a second common benefit order would be appropriate.

When and if that day comes, as Biomet sees it, such a comment benefit order only could apply to: (i) federal court cases filed after any plaintiff could no longer have a reasonable expectation of benefiting from the "no common benefit assessment" terms of the MSA, which Biomet submits would be a case filed on or after March 3, 2015; or (ii) a federal court case filed before March 2015 that benefited from the future efforts of PSC II. With respect to this second group, a plaintiff's counsel and Biomet will know (and can document for the Court, if necessary) whether the resolution of a particular pre-March 2015 case resulted from the work of PSC I and the MSA or the work that will be performed by PSC II.

V. Conclusion

PSC II's proposed Holdback Order, to a great extent, is taken verbatim from the Court's CBF Order. This Order was entered because PSC I conferred significant and obvious benefit. Respectfully, PSC II has not yet come close to bestowing a comparable benefit on the cases that remain in this MDL.

Common benefit orders are not about "lines in the sand," but rather are about a showing being made regarding the expenditure of significant time, energy, and resources by a group of attorneys on behalf of a group of plaintiffs that are a "catalyst or proximate cause" of a substantial benefit. Merely being on a PSC does not qualify for the entry of a holdback or common benefit assessment order. This is especially true for this MDL when a prior PSC was a catalyst for substantial benefit to almost 2,000 cases and may be the catalyst for a fair number of still pending cases.

For these reasons and those set forth above, PSC II has not met its burden, particularly as it relates to any case filed before March 2, 2015, of establishing that PSC II is the proximate cause of benefits being bestowed on any pending case so as to justify the Holdback Order PSC II asks the Court to impose.

Dated: October 1, 2015

Respectfully submitted:

/s/ Erin Linder Hanig

John D. LaDue
Erin Linder Hanig
LADUE CURRAN & KUEHN LLC
200 First Bank Building
205 West Jefferson Boulevard
South Bend, IN 46601
Tel: (574) 968-0760
jladue@lck-law.com
ehanig@lck-law.com

John D. Winter
Jenya Moshkovich
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
Tel: (212) 336-2000
jwinter@pbwt.com
jmoshkovich@pbwt.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that on October 1, 2015, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which provided electronic service upon all counsel of record.

/s/ Erin Linder Hanig
Erin Linder Hanig (29113-71)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

In re BIOMET M2A MANGUM HIP IMPLANT PRODUCTS LIABILITY LITIGATION	CAUSE NO. 3:12-md-02391-RLM-CAN (MDL-2391) THIS DOCUMENT RELATES TO: ALL CASES

JOINT STATUS CONFERENCE AGENDA- MAY 18, 2015

The parties jointly submit the following list of topics as a proposed agenda for the May 18, 2015 case management conference.

1. Update on Pending Case Statistics. See Exhibit A
2. Letters submitted by Messrs. Borri, Lowe, Dow, Perlmuter, Tong, and Riggs
3. Motion re Escrow Agreement
4. Common Benefit Petition Scheduling Order
5. Administration of the Master Settlement Agreement
6. Termination of Current Plaintiffs' Leadership
7. Appointment of New Plaintiffs' Leadership
8. MDL Next Steps
9. Other Business

EXHIBIT 1

Dated: May 14, 2015 /s/ Erin Linder Hanig

Plaintiffs' Lead Counsel	Defendants' Lead and Liaison Counsel
Thomas R. Anapol Anapol Schwartz 1700 Spruce Street Philadelphia, PA 19103 (215) 790-1130 tanapol@anapolschwartz.com W. Mark Lanier Lanier Law Firm PC 6810 FM 1960 West Houston, TX 77069 (713) 659-5200 jan.manning@lanierlawfirm.com	John D. Winter Jenya Moshkovich Pattterson Belknap Webb & Tyler 1133 Avenue of the Americas New York, NY 10036 (212) 336-2836 jwinter@pbwt.com jmoshkovich@pbwt.com John D. LaDue Erin Linder Hanig LaDue Curran & Kuehn LLC 200 First Bank Building 205 West Jefferson Boulevard South Bend, IN 46601 (574) 968-0760 jladue@lck-law.com ehanig@lck-law.com

EXHIBIT 1

EXHIBIT A

Group 1 Cases:	513
Settled Group 1 cases:	483
Remaining Group 1 cases:	30 (7 involve Pro Se litigants)
Percentage of Group 1 cases that are settled:	94%
Group 2 Cases:	1,096
Settled Group 2 cases:	1,025
Remaining Group 2 cases:	71
Percentage of Group 2 cases that are settled:	93%
Number of Settled Groups 1 and 2 cases receiving some type of enhanced award:	425
Remaining MDL cases that were filed after April 15, 2014 or did not otherwise qualify for Groups 1 or 2:	231 (3 involve Pro Se litigants)
Number of Non-Groups 1 or 2 cases that already have been resolved:	241
Number of remaining MDL cases filed after April 15, 2014:	87