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Honorable Robert L. Miller
United States District Court
for the Northern District of Indiana
204 South Main Street
South Bend, IN 46601

Re: In re Biomet, MDL - 2391

Dear Judge Miller:

We write on behalf of Biomet, Inc. in response to Gregory Borri's April 27, 2015 letter regarding his client's case Chadwick v. Biomet, 3:12-cv-614 and Jeffrey Lowe's April 30, 2015 letter concerning his clients' pending cases. We agree with the Plaintiffs' Steering Committee's ("PSC") observations that Mr. Borri misunderstands the terms of the Master Settlement Agreement ("MSA"), misunderstands how the terms of the MSA applied to his client's case, and has not accurately reported what he was told about the MSA process by Biomet and the leadership of the PSC. With regard to Mr. Lowe and his clients' cases, Biomet could not think of a better example of a lawyer in this MDL who did not communicate in accordance with any of the MSA deadlines and who filed many cases which, but for the existence of this MDL, would never have been filed because they are meritless.

A. Mr. Borri's Case

With respect to Mr. Borri's specific assertions relating to Chadwick, as part of Group 1, plaintiff timely sought an enhancement and Biomet timely challenged the case pursuant to the terms of the MSA. Thereafter, on November 26, 2014, plaintiff's counsel inquired of the PSC when mediation could be scheduled. The PSC promptly forwarded the inquiry to Biomet and, on December 2, 2014, Mr. Borri was advised that Biomet was working with the mediator to propose a mutually convenient date for mediation pursuant to Section 3(c) of the MSA. Ultimately, mediation was confirmed for January 27, 2015 – which was consistent with an Order of this Court that mediations be completed in January 2015.

Prior to the scheduled mediation, the parties had informal settlement discussions over the telephone and exchanged demands and an offer. After two informal discussions, it became clear that the parties had different views on the value of this particular case. On January 23, 2015, after Biomet indicated that it was not going to change its view about the value of this

case, Mr. Borri decided to not move forward with the mediation. In conjunction with these discussions, in January 2015, Mr. Borri asked questions of the PSC, which in turn, inquired of Biomet about the settlement discussions. Biomet believes it appropriately and accurately responded to the PSC's inquiries about Chadwick.

In Chadwick, there were frank exchanges between the parties as to why plaintiff believed she was entitled to an enhancement and why Biomet disagreed and contested this case. These are positions both sides are allowed to take pursuant to the MSA. To the extent Mr. Borri asserts that Biomet did not act in good faith, he is mistaken. While Mr. Borri may be disappointed that Biomet did not offer to pay his client an amount that is consistent with "enhanced" agreed to payments in other Metal-on-Metal litigations, it was not because of bad faith. Rather, the terms of the MSA for this MDL do not guarantee any plaintiff an enhanced award and give Biomet the right to "contest" the value of cases. In good faith and consistent with its obligation to its client, Biomet's counsel is and was allowed to have a different view than a plaintiff on the value of a specific case.

B. Mr. Lowe's Cases

With regard to Mr. Lowe, because of a prior negative experience we had in another MDL with Mr. Lowe's firm, Biomet was proactive in addressing his cases. On December 12, 2014, evaluations were sent to Mr. Lowe concerning the four cases that qualified for Group 2. Two of these cases were straight Category 2 (Categories 2(b)(4) and 2(b)(5)) $20,000 cases. A third case was a bilateral, with one of the revised hips being a Category 2(b)(3) hip and the fourth case was contested by Biomet and Biomet's reasons for "contesting" this case were independent of any request for an enhancement. On January 21, 2015 Biomet sent its evaluation on a post-Group 2 case to Mr. Lowe and on January 30, 2015 Biomet advised Mr. Lowe on its analysis of three more post-Group 2 cases. Two of these post-Group 2 cases were straight Category 2 cases (2(b)(2) and 2(b)(4)) and the third, Beltran v. Biomet, 3:15-cv-13 was filed in January 2015 on behalf of a deceased person who had not been revised prior to his death. Consistent with a representation Biomet previously made to the Court about trying to resolve post-Group 2 cases, specific offers were made on these cases on January 30, but Biomet suggested that Beltran never should have been filed. Mr. Lowe was advised to call Biomet's counsel if he had any questions.

The next communication from Mr. Lowe was an email on February 18, 2015 inquiring about the status of his cases. In response, Biomet reminded Mr. Lowe of the prior settlement communications and offers described above and then offered to arrange mediation of Mr. Lowe's remaining cases for March 19, 2015. Thereafter, the PSC clarified for Mr. Lowe a misunderstanding he had regarding the terms of the MSA. The PSC also reminded Mr. Lowe of the March 2, 2015 mediation deadline set by the Court, but suggested that Mr. Lowe take advantage of Biomet's offer to mediate his cases. Mr. Lowe never responded to Biomet's offer to mediate his cases on March 19, 2015.

Like Mr. Borri, Mr. Lowe appears not to appreciate the terms of the MSA because pursuant to the MSA, Biomet did not have to agree to mediate any case in Categories 2(b)(5) or 2(b)(7) and there were limitations on the mediation of cases Biomet believed were Category 2(b)(4) cases. Similarly, Biomet was under no obligation pursuant to the MSA to offer to mediate Mr. Lowe's post-Group 2 cases. These limitations apply to all but two of Mr. Lowe's pending cases. Thus, for Mr. Lowe to now question a process which: (a) arguable did not apply to the majority of his cases; and (b) he did not participate in despite several opportunities to do so, makes no sense to Biomet.

On April 13, 2015 Biomet reached out to Mr. Lowe and confirmed that he had not responded to the offer to mediate and informed him "[r]ight now your firm will have the most remaining cases and we are pretty sure on April 21 Judge Miller is going to ask us for a list of firms with the most remaining case so he can replace the leadership on the plaintiffs' side of the MDL." Biomet also sent this communication to the PSC.

On April 27, 2015 Biomet received an executed release for one of Mr. Lowe's $20,000 Category 2(b)(4) cases, Holladay v. Biomet, 3:14-cv-1054. So Mr. Lowe now has nine cases pending including Beltran, the non-revision case which Biomet has moved to dismiss.

Messrs. Borri and Lowe's Claims About the MSA Process

To the extent Messrs. Borri and Lowe are claiming that there has been some type of global breakdown in the mediation process contemplated by the MSA, they both are mistaken. More than 2,500 lawsuits have been filed and made part of this MDL proceeding. To date, more than 500 of these cases have been dismissed without any payment from Biomet, and almost 1,750 have been settled and dismissed or settled and in the process of finalizing settlement papers and resolving liens. In other words, 90% of the cases in this MDL have been disposed of within a fifteen-month period. Biomet expects more cases to be resolved before the next case management conference.

As part of this MSA process, more than 600 cases were "agreed to" by the parties, close to 1,100 cases were mediated on an informal basis and almost 50 cases were successfully mediated with the able assistance of the Court-appointed mediator, Thomas S. Rutter, Esq. To date, 82 cases have been mediated. So the success rate at mediation has been approximately 60%. This percentage is not materially different than the 67% threshold initially contemplated by the PSC and Biomet in the MSA for the resolution of contested and/or mediated cases. If the cases mediated by three firms (Beasley Allen, Searcy, Denny and Gomez Lagmin) are excluded because none of these firms' cases could be resolved, the formal mediation success rate would be closer to 85%. With the exception of the three firms identified above and a handful of individual cases, firms with multiple cases have resolved all, or most of the cases that have been mediated with Mr. Rutter.

Biomet submits that by whatever metric is chosen, the MSA process has worked exceptionally well here. The PSC, Biomet and the vast majority of plaintiffs' counsel have worked well together to implement the MSA and come to a meeting of minds on an extremely high percentage of the pending cases. It is not surprising that there are cases in which a plaintiff believes she experienced a catastrophic injury worthy of a six figure enhanced payment, but Biomet believes the case should be contested. In some of these types of cases the informal and formal mediation process has worked. In other cases like Chadwick, the mediation process has not worked.

For Mr. Lowe's cases, he never took up Biomet's offer to mediate cases, many of which Biomet did not have to mediate. Moreover, Mr. Lowe's inventory of cases is quite weak, as cases participating in the MSA have been evaluated. As the PSC will confirm, to make this settlement process work successfully and quickly, Biomet had to be consistent with its evaluation of cases across law firm inventories. He may not like it, but in fairness to lawyers and more than 1,800 plaintiffs who have reached a meeting of minds with Biomet on the value of cases, Biomet cannot and will not treat Mr. Lowe and his clients, or any other lawyer and his or her other respective clients, differently.

For Messrs. Borri and Lowe's cases, the PSC played its role communicating with individual plaintiffs' counsel and interacting with Biomet to ensure that the terms of the MSA were being uniformly applied. Biomet obviously is not privy to the communications between and among the PSC and all the plaintiffs' counsel who informally and formally mediated their cases. But Biomet can say that the approach the PSC took with Messrs. Borri and Lowe's cases regarding the uniform application of the MSA has been the same in other cases. To the extent Messrs. Borri and Lowe thought they could be "squeaky wheels" and get special treatment by making baseless allegations about the MSA process, they made a big mistake.

When the MSA was presented to the Court in January 2014, the PSC and Biomet informed the Court that all the pending cases might not settle and that core discovery with a new PSC probably would be necessary sometime in 2015. On January 23, 2015, when settlement discussions ended on the Chadwick case, we advised Mr. Borri "Chadwick will be part of the cases for discovery when the MDL resumes in April or May." On April 13, 2015 Mr. Lowe received a similar message after he ignored Biomet's offers to mediate his cases. These circumstances clearly are contemplated by the MSA, and being in this circumstance is the choice Messrs. Borri and Lowe and their clients made for themselves.

Respectfully submitted,

John D. Winter

cc: Thomas Anapol, Esq.
Mark Lanier, Esq.
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