

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

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

PLAINTIFFS' EXECUTIVE COMMITTEE'S
AMENDED MOTION AND PROPOSED HOLDBACK ORDER RE: COMMON
BENEFIT FEES AND COSTS

I.

BRIEF SUMMARY

At the October 17, 2015 Status Conference, the Court reviewed and heard arguments from the Plaintiffs' Executive Committee ("PEC II") and Biomet's Counsel concerning Plaintiffs' Steering Committee's ("PSC II") Motion for Interim Common Benefit Attorneys' Fees and Costs and the Proposed Holdback Order.

The Court agreed that a Holdback Order was appropriate and requested that PEC II submit the instant, Amended Motion and Proposed Holdback Order. In short, any cases that are resolved **after Monday, November 30, 2015** shall be subject to a provisional six percent (6%) holdback. This order does not apply to any cases involving a *pro se* plaintiff, which will be addressed on an individual, case-by-case basis. For purposes of clarity, any cases that do not have a Notice of Settlement filed into the individual case's docket on or before November 20, 2015 shall be subject to the six percent (6%) Holdback Order.

II.

LEGAL AUTHORITY

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 National 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 MGM Grand Hotel Fire Litigation*, 660 F.Supp. 522, 525-29 (D. Nev. 1987); and *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1019-21 (5th Cir. 1977).

Moreover, there is a long line of precedent supporting use of a Holdback Order in an MDL context. *See, e.g., In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010*, 2011 WL 6817982 (E.D.La. 12/28/2011) (citing *In re Air Crash Disaster at Florida Everglades on Dec. 29, 1972*, 549 F.2d 1006, 1017-1018 (5th Cir. 1977); *In re Zyprexa Products Liability Litigation*, 594 F.3d 113, 128-130 (2nd Cir. 2010) (Kaplan, J., concurring); *In re Genetically Modified Rice Litigation*, 2010 WL 716190, at *4 & n.2 (E.D.Mo. 2/24/2010); and *In re Vioxx Products Liability Litigation*, 2012 WL 1448135, at *1 (E.D.La. 4/25/2012) (Fallon, J.). *See also Downing v. Goldman Phipps, PLLC*, 764 F.3d 906, 909-910 (8th Cir. 2014); *In re Guidant Corporation Implantable Defibrillators Products Liability Litigation*, 2010 WL 145278, *1 (D.Minn 1/8/2010) (Frank, J.); *In re Zyprexa Products Liability Litigation*, 451 F.Supp.2d 458, 462 (E.D.N.Y. 9/11/2006).

B. Application

This Holdback Order shall apply to any cases that are settled or otherwise resolved **after Monday, November 30, 2015**. The six percent (6%) holdback shall be provisionally comprised of five percent (5%) withheld for common benefit attorneys' fees and one percent (1%) for common benefit costs. Settlement shall be defined by **the filing of a Notice of Settlement** on or before Monday, November 30, 2015 into the individual case's docket. It is not necessary that the settlement agreement be fully executed on or before November 30, 2015.

This Holdback Order shall not apply to any *pro se* plaintiffs that settle or otherwise resolve their case. Rather, each individual *pro se* matter that resolves after November 30, 2015 shall be evaluated by this Court following briefing by PEC II and Biomet concerning the propriety, or lack thereof, of a provisional holdback assessment.

With respect to plaintiffs' attorneys litigating Biomet Hip Implant cases in state courts, the Holdback Order will apply if the respective state court litigant and counsel sought the benefit of the work product of PSC II. In the event the plaintiffs' attorney in state court does not utilize PSC II's work product, then the respective state court litigant and counsel shall not be subject to the Holdback Order.

C. Participating Counsel

Participating Counsel include all members of the Plaintiffs' Executive Committee (PEC), Plaintiffs' Steering Committee (PSC), and Plaintiffs' Liaison Counsel (Liaison) (all as appointed in this Court's Case Management Order No. 3. Dated May 27, 2015, and the Appointment of Plaintiffs' Executive Committee and Liaison Counsel dated June 30, 2015) and any other plaintiffs' attorneys who have Hip Implant cases pending against Biomet in the MDL and/or in state courts and who settle or otherwise resolve one or more cases after November 30, 2015.

The Court recognizes the jurisdictional rights and obligations of the state courts to conduct their state court litigation as they so determine and that the state court litigations include counsel who are Participating Counsel. This Order shall not be cited by Participating Counsel 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.

III.

PLAINTIFFS' LITIGATION FEE AND EXPENSE FUNDS

A. Establishing the Fee and Cost Funds

By subsequent Order of this Court, the Court will appoint a qualified certified public accountant (the "CPA") who is directed to establish two interest-bearing accounts to receive and disburse funds as provided in this Order (the "Funds"). The first fund shall be designated the "Biomet Hip Common Benefit Attorney's Fee Fund" and the second fund shall be designated the "Biomet Hip Common Benefit Cost Fund." These funds will be held subject to the direction of this Court.

The CPA shall serve as Escrow Agent over the Funds and keep detailed records of all deposits and withdrawals and to prepare tax returns and other tax filings in connection with the funds. Such subsequent Order appointing the CPA shall specify the hourly rates to be charged by the CPA and for the CPA's assistants, who shall be utilized where appropriate to control costs. The CPA shall submit quarterly detailed bills to the Court and to Plaintiffs' Co-Lead Counsel, Brenda Fulmer. Upon approval by the Court, the CPA's bills shall be paid from the Biomet Hip Common Benefit Expense Fund. Brenda Fulmer shall provide a copy of this Order to the CPA.

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B. Payments into the Fee and Cost Fund

All Plaintiffs and their attorneys who are subject to this Order and who, either agree or have agreed — for a monetary consideration — to settle, compromise, dismiss, or reduce the amount of a claim or, with or without trial, and with or without mediation, recover a judgment or monetary damages or other monetary relief, including such compensatory and punitive damages, with respect to Biomet Hip Implant claims are subject to a holdback of the “gross monetary recovery,” as provided herein.

1. Gross Monetary Recovery

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, and other healthcare providers in subrogation related to treatment of 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. The assessment shall apply to all of the cases of the Plaintiff’s attorneys who are subject to this Order that are pending in the MDL or state court.

2. Holdback Amounts

As set forth herein, the Holdback Amount shall be a total of six percent (6%) of a plaintiff’s gross settlement value. The six percent (6%) holdback shall be comprised of five percent (5%) withheld for common benefit attorneys’ fees and one percent (1%) for common benefit costs. It is agreed and understood by the parties that this Holdback Order is provisional

in nature; i.e., the holdback of six percent (6%) and the distribution of same will ultimately need to be ruled upon by this Court at a later date should a subsequent Master Settlement Agreement or other disposition of the cases pending in this MDL be reached.

a. Common Benefit Costs

The funds in the Biomet Hip Common Benefit Cost Fund shall be used solely to reimburse common benefit expenses that meet the requirements of this Court's Case Management Order Regarding Management of Timekeeping, Cost Reimbursement and Related Common Benefit Issues entered on July 18, 2013. After all qualifying expenses are reimbursed from this Cost Fund pursuant to the applicable provisions of this Order and the July 18, 2013 Order, any monies remaining in the Cost Fund shall be returned to each settling Claimant's primary counsel of record in proportion to that Claimant's provisional assessed contribution to the Cost Fund. It shall be the obligation of each Claimant's counsel in that event to ensure that those rebated monies are further distributed to the relevant Claimant in accordance with the applicable state's laws and ethics rules governing the proper handling of litigation costs/expenses.¹

b. Common Benefit Attorneys' Fees

The funds in the Biomet Hip Fees Fund shall be used solely to compensate those attorneys who performed qualifying Common Benefit work, as specified further in this Court's Case Management Order Regarding Management of Timekeeping, Cost Reimbursement and Related Common Benefit Issues entered on July 18, 2013.

¹ In a small number of states, Claimant's counsel may be obligated by applicable laws and/or ethics rules to take any litigation expenses/costs "off the top" of a Claimant's gross recovery; the counsel's contingent fee percentage is then applied to the remainder of the recovery. In those states, the initial cost assessment under this Order is therefore being borne both by the Claimant and his/her counsel, and an appropriate portion of the rebated Cost Fund assessment may therefore be properly distributed to Claimant's counsel.

IV.

CONCLUSION

As set forth herein, the effect of this Amended Motion and Proposed Holdback Order can be summarized as follows:

1. Cases that do not have a Notice of Settlement filed into the individual case's docket on or before **Monday, November 30, 2015** shall be subject to a provisional six percent (6%) holdback;
2. The Holdback Order does not apply to any cases involving a *pro se* plaintiff, which will be addressed on an individual, case-by-case basis;
3. The Holdback Order is provisional in nature; i.e., the holdback of six percent (6%) and the distribution of same will ultimately need to be ruled upon by this Court at a later date should a subsequent Master Settlement Agreement or other disposition of the cases pending in this MDL be reached; and
4. Any objectors to this proposed Holdback Order must file an objection on or before Friday, November 20, 2015.

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Finally, and consistent with the October 8, 2015 Memorandum of October 7, 2015 Status Conference issued by the Court, Plaintiffs' Liaison Counsel shall send a copy of the instant motion and proposed order to the attorneys of record in the pending state court actions that PSC II is aware of.

Dated: November 6, 2015

Respectfully submitted,

/s/ Navan Ward Jr. _____

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Plaintiffs' Executive Committee

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2015, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which provided electronic service upon all counsel of record.

/s/ Ahmed S. Diab
Ahmed S. Diab