

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN RE: BIOMET M2a MAGNUM HIP	)	
IMPLANT PRODUCTS LIABILITY	)	
LITIGATION (MDL 2391)	)	CAUSE NO. 3:12-MD-2391
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This Document Relates to All Cases	)	
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**CASE MANAGEMENT ORDER REGARDING MANAGEMENT  
OF TIMEKEEPING, COST REIMBURSEMENT  
AND RELATED COMMON BENEFIT ISSUES**

IT IS HEREBY ORDERED that, in the event this Court establishes a Common Benefit Fund, (a) tasks performed for the common benefit of all plaintiffs (“Common Benefit Work”) and (b) time expended, or expenses incurred, in performing Common Benefit Work (“Common Benefit Costs”) shall be compensated from the Fund ONLY in accordance with the rules set forth below.

The recovery of common benefit attorneys’ fees and cost reimbursements will be limited to “participating counsel” as defined herein. Furthermore, participating counsel shall only be eligible to receive common benefit attorneys’ fees and cost reimbursement if the time expended, costs incurred and activity in question were (a) for the common benefit, (b) appropriately authorized, (c) timely submitted, and (d) approved by this Court. This Order sets forth the guidelines regarding the submission and compensability of common benefit time and expenses. Plaintiffs’ counsel who seek to recover Court-awarded common benefit attorneys’ fees and expenses in connection with this litigation shall keep a daily contemporaneous record of their time and expenses, noting with specificity the amount of time, location, and particular activity along with confirmation that authority was obtained to have undertaken that common benefit effort. Such counsel

shall, within 30 days after the end of each quarter, submit to Thomas Anapol and Melissa Hague at [Biomettimeandexpense@anapolschwartz.com](mailto:Biomettimeandexpense@anapolschwartz.com), a report of their time and expense records as noted above for the preceding quarter in the attached format (See Exhibit A and Exhibit B). The failure to secure authority to incur common benefit time and expenses, or maintain and timely provide such records or to provide a sufficient description of the activity will be grounds for denying the recovery of attorneys' fees or expenses in whole or in part.

Signatories to the Motion seeking this order and those counsel who subsequently desire to be considered for common benefit compensation and as a condition thereof agree to the terms and conditions herein (“Participating Counsel”) acknowledge that the Court will have final, non-appealable authority regarding the award of fees, the allocation of those fees and awards for cost reimbursements in this matter. Participating Counsel have (or will have) agreed to and therefore will be bound by the Court’s determination on common benefit attorney fee awards, attorney fee allocations, and expense awards, and the Participating Counsel knowingly and expressly waive any right to appeal those decisions or the ability to assert the lack of enforceability of this Order or to otherwise challenge its adequacy.

After the Court makes the final award of the total amount of common benefit attorney’s fees and costs, a Fee Committee composed of Lead Counsel and the Executive Committee (“Fee Committee”) shall accept submissions from all attorneys seeking payment of common benefit fees and expenses. The Fee Committee shall thereafter recommend an allocation of common benefit fees and expense reimbursements among those participating attorneys who submitted applications for such costs and fees. This

recommendation will be submitted to the Court for a de novo review and final non appealable determination.

## **A. Expense Limitations**

### **1. Travel Limitations**

Except in extraordinary circumstances approved by Lead Counsel and the Executive Committee (hereinafter “Leadership”), all travel reimbursements are subject to the following limitations:

- i. Airfare. Ordinarily only the price of a coach seat for a reasonable itinerary will be reimbursed. Business/First Class Airfare will **not** be fully reimbursed, except for international flights or cross-country flights, which requires prior written approval by Co-Lead Counsel. In the event non-coach air travel is utilized, the attorney shall be reimbursed only to the extent of the full coach fare if the full coach fare for that flight is contemporaneously documented.
- ii. Hotel. Hotel room charges for the average available room rate of a business hotel, including the Hyatt, Hilton, Sheraton, Westin, and Marriott hotels, in the city in which the stay occurred will be reimbursed. Luxury hotels will not be fully reimbursed but will be reimbursed at the average available rate of a business hotel.
- iii. Meals. Meal expenses must be reasonable.
- iv. Cash Expenses. Miscellaneous cash expenses for which receipts generally are not available (tips, luggage handling, pay telephone, etc.) will be reimbursed up to \$30.00 per trip, as long as the expenses are properly itemized.
- v. Rental Automobiles. Luxury automobile rentals will not be fully reimbursed, unless only luxury automobiles were available. If luxury automobiles are selected when non-luxury vehicles are available, then the difference between the luxury and non-luxury vehicle rates must be shown on the travel reimbursement form, and only the non-luxury rate may be claimed, unless such larger sized vehicle is needed to accommodate several counsel.
- vi. Mileage. Mileage claims must be documented by stating origination point, 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.

**2. Non-Travel Limitations**

- i. Long Distance, Conference Call and Cellular Telephone Charges: Common benefit long distance, conference call and cellular telephone charges must be documented as individual call expenses in order to be compensable. Copies of the telephone bills must be submitted with notations as to which charges relate to the Biomet M2A Magnum Hip MDL litigation. Such charges are to be reported at actual cost.
- ii. Shipping, Overnight, Courier, and Delivery Charges: All claimed common benefit shipping, overnight, courier or delivery expenses must be documented with bills showing the sender, origin of the package, recipient, and destination of the package. Such charges are to be reported at actual cost.
- iii. Postage Charges: A contemporaneous postage log or other supporting documentation must be maintained and submitted for common benefit postage charges. Such charges are to be reported at actual cost.
- iv. Telefax Charges: Contemporaneous records should be maintained and submitted showing faxes sent and received for common benefit matters. The per- fax charge shall not exceed \$1.00 per page.
- v. In-House Photocopy: A contemporaneous photocopy log or other supporting documentation must be maintained and submitted. The maximum copy charge is 20¢ per page.
- vi. Computerized Research – Lexis/Westlaw: Claims for Lexis or Westlaw, and other computerized legal research expenses should be in the exact amount charged the firm and appropriately allocated for these research services.

**B. Verification**

The forms detailing expenses shall be certified by a senior partner in each firm attesting to the accuracy of the submissions. Attorneys shall keep and submit copies of physical receipts for all expenses upon request from the Fee Committee. Credit card receipts are an appropriate form of verification so long as accompanied by a declaration from counsel that work was performed and paid for the common benefit.

**COMMON BENEFIT WORK**

**A. Authorization for Compensable Common Benefit Work**

Authorized Common Benefit Work includes assignments made by the Leadership. 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 will time spent on any unauthorized work.

1. Examples of authorized and unauthorized work include but are not limited to:

- a. Depositions: Participating Counsel may attend any deposition space permitting; however, if such counsel has not been designated as one of the authorized questioners or otherwise authorized to attend the deposition by Leadership, your time and expenses shall not be considered common benefit work, but rather considered as attending on behalf of such counsel's individual clients;
- b. Periodic MDL Conference Calls: These calls are held so that individual attorneys are kept up-to-date on the status of the litigation, and participation by listening to such calls is not common benefit work. Each attorney has an obligation to keep themselves informed about the litigation so that they can best represent their clients, and that is a reason to listen in on those calls. The attorneys designated by Leadership 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 for common benefit. Nothing in this paragraph shall be construed to prevent members of the PSC from submitting common benefit time for participation in PSC communications that are germane to all members of the PSC and are necessary to fulfill their PSC obligations;

- c. Periodic Status Conferences: Regular 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 and participation, but attending and listening to such conferences is not common benefit work. Each attorney has an obligation to keep themselves 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. The attorneys designated by Leadership to address issues that will be raised at a given status conference or requested by Leadership to be present at a status conference are working for the common benefit and their time will be considered for common benefit. Similarly, any attorney whose attendance at a status conference is specifically requested by the Judge in that case may submit their time to the Fee Committee for evaluation as common benefit time;
- d. Committee Meetings or Calls: During committee phone calls or other meetings there is a presumption that only one participant per firm will qualify for common benefit time, unless otherwise authorized by the Leadership;
- e. Identification and Work Up of Experts: Participating Counsel are encouraged to identify experts in consultation with the Leadership. If a Participating Counsel travels to and retains an expert without the knowledge and approval of the Leadership they understand that the MDL

may not need or use that expert, and their time and expenses may not be eligible for common benefit expenses/work;

- f. Attendance at Seminars: Attendance at a seminar does not qualify as common benefit work or a common benefit expense;
- g. Document Review: Only document review specifically assigned and authorized to an attorney will be considered common benefit work. If an attorney elects to review documents that have not been assigned to that attorney by the Leadership, that review is not considered common benefit. Counsel will receive periodic reports from ILS, the vendor retained to manage the electronic production, of computer billing time for depository review. ILS has the capability to track actual time spent by each attorney in reviewing documents. Participating Counsel should bring any discrepancy to the attention of the Leadership or its designee within thirty days of receipt of the ILS report. Failure to timely bring any claimed discrepancy to the attention will result in the compensable document review time being presumptively deemed that which was electronically logged by ILS. The Fee Committee at the appropriate time will review all fee submissions related to document review, and document review that is duplicative of what has been assigned in the MDL may not be compensated;
- h. Review of Pleadings and Orders: Each attorney has an obligation to keep themselves 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 Leadership to review or summarize those pleadings or Orders for the MDL are working for the common benefit

and their time will be considered for common benefit. 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. Nothing in this paragraph shall be construed to prevent Leadership and the PSC from submitting common benefit time for reviewing orders of the Court that are germane to all members of the PSC and are necessary for review to fulfill their committee obligations;

- i. Emails: Time recorded for reviewing emails, and providing non-substantive responses, generally is not compensable unless germane to a specific task being performed by the receiving or sending attorney or party that is directly related to that email. Thus, for example, review of an email sent to dozens of attorneys to keep them informed on a matter on which they are not specifically working would not be compensable. Each attorney has an obligation to keep themselves informed about the litigation so that they can best represent their clients and that is a reason to review emails to a larger group which involves a matter on which the recipient is not directly and immediately working. If time submissions are heavy on email review and usage with little related substantive work, that time may be heavily discounted or not compensated at all.
- j. Review of Discovery Responses: Each attorney has an obligation to keep themselves 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 Leadership to review and summarize those discovery responses for the MDL are working for the



common benefit and their time will be considered for common benefit. 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;

- k. Bellwether Trials: While the work-up of individual cases is **not** considered common benefit, in the event that a case is selected as part of an approved early preference or bellwether trial process in the MDL or participating state court proceedings, the time and expenses in trying the case (including work performed as part of the approved bellwether process) may be considered for common benefit to the extent it complies with the other provisions of this Order or Participation Agreement.

In the event Plaintiffs' Counsel are unsure if the action they are about to undertake is considered a common benefit action, counsel shall ask Leadership in advance as to whether such time may be compensable.

**B. Time Keeping and Submission of Time Records**

All time must be authorized and accurately and contemporaneously maintained. Time shall be kept according to these guidelines as noted herein. Participating Counsel shall keep a daily record of their 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 a tenth-of- an-hour increment.

The following shall be noted:

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 (Exhibit A). All expense submissions must be made on the form attached (Exhibit B).
3. All time and expenses are subject to proper and timely submission (within 30 days of the end of each quarter, beginning on June 30, 2013) of contemporaneous records certified to have been timely received for the previous quarter. By July 15, 2013, submissions shall be made for all time and expenses incurred prior to the entry of this Order, if such time and expenses have not already been submitted.
4. All time and expense submissions must be electronically sent in the designated form on a quarterly basis to the attention of Thomas Anapol and Melissa Hague at [Biomettimeandexpense@anapolschwartz.com](mailto:Biomettimeandexpense@anapolschwartz.com). Each will cooperatively share and maintain the data submitted. It is therefore essential that each firm, on a quarterly basis, timely submit its records for the preceding quarter.
5. Untimely Submissions. Failure to provide time and expense records within thirty (30) days after notice from the Leadership that time records were not timely submitted shall result in a waiver of same.

IT IS SO ORDERED

SIGNED: July 18, 2013

/s/ Robert L. Miller, Jr.  
Judge Robert L. Miller  
United States District Judge