

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

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

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**CASE MANAGEMENT ORDER ESTABLISHING COMMON  
BENEFIT FEE AND EXPENSE FUNDS**

**I. SCOPE OF ORDER**

Due to the nature of this particular litigation, this Order is entered to provide for the fair and equitable sharing among plaintiffs, and their counsel, of the burden of services performed and expenses incurred by attorneys acting for the common benefit of all plaintiffs in this complex litigation.

**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).

**B. Application.**

This Order applies 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 *In re: Biomet M2A Magnum Hip Implant Products Liability Litigation*, MDL 2391. This Order further applies to all plaintiffs' attorneys who represent clients, who have cases now pending in, or later filed in, transferred to, or removed to, this Court and state courts.

**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 Organizational Structure Order entered December 5, 2012, and as modified by the Amended Order entered December 30, 2013) and any other plaintiffs' attorneys who have Hip Implant cases pending against Biomet in the MDL and/or in state courts and who settle one or more cases pursuant to the Settlement Agreement Between Biomet, Inc. and Plaintiffs' Executive Committee for In Re: Biomet M2A Magnum Hip Implant Products Liability Litigation, MDL No. 2391. Participating Counsel are entitled to receive the "Common Benefit Work Product," as defined in the Case Management Order Regarding Management of Timekeeping, Cost Reimbursement and Related Common Benefit Issues, filed on July 18, 2013. "Common Benefit Work Product" does not include trial or hearing transcripts, deposition transcripts of defendants' or third-party witnesses or exhibits attached thereto, nor does it include the actual documents/images of documents produced by defendants in response to discovery requests or the discovery requests themselves.

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.

## **II. 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, Thomas Anapol. Upon approval by the Court, the CPA's bills shall be paid from the Biomet Hip Common Benefit Expense Fund. Thomas Anapol shall provide a copy of this Order to the CPA.

### **B. Payments into the Fee and Expense Funds: The Assessment.**

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 for monetary damages or other monetary relief, including such compensatory and punitive damages,

with respect to Biomet Hip Implant claims are subject to an assessment 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. Provisional Assessment Amounts**

(a) The assessment amounts shall be a provisional assessment of a total of six (6) percent of a plaintiff’s gross settlement value, which includes a provisional assessment of one (1) percent for common benefit costs and a provisional assessment of five (5) percent for common benefit attorneys’ fees.

(b) Common Benefit Costs – The funds in the Biomet Hip 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.<sup>1</sup>

(c) **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. The total Common Benefit Attorneys' Fees to be paid by the Fund for qualifying Common Benefit work shall not exceed the lesser of (a) the \$6 million paid by the Defendant, pursuant to the Common Benefit Settlement Agreement and Paragraph 3(a) of this Order or (b) five percent (5%) of the total gross payments ultimately made by the Defendant pursuant to the Master Settlement Agreement and the Common Benefit Fee Agreement. Once the total gross amount to be paid by the Defendant to settling Claimants pursuant to the Master Settlement Agreement is known, and the total Common Benefit Fees to be paid for qualifying Common Benefit work under this provision (c) can therefore be determined, all additional monies in the Fees Fund shall be returned to the primary counsel of record for each settling Claimant in proportion to the provisional assessed contribution to the Fees Fund attributable to that Claimant's gross settlement. The Claimant's counsel shall be entitled to keep that portion of the rebated assessment which is consistent with the total percentage attorneys' fees properly chargeable under the Claimant's attorney-client contract and under applicable state's laws and ethics rules

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<sup>1</sup> 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.

governing the proper handling of contingent attorneys' fees.<sup>2</sup> The remainder of the rebated assessment shall be used by the Claimant's counsel to reduce the total attorneys' fees payable by the Claimant to ensure that the total attorney's fees paid by the Claimant in connection with the settlement do not exceed those properly chargeable under the Claimant's attorney-client contract and under applicable state's laws and ethics rules governing the proper handling of contingent attorneys' fees.

### **3. Parties' Obligations**

(a) Consistent with the Common Benefit Fee Agreement entered into by the Defendant and the Plaintiffs' Executive Committee, the Defendant shall deposit \$6 million into the Common Benefit Biomet Hip Attorney's Fee Fund at the time Biomet's obligation to fund the Master Settlement Agreement vests pursuant to Paragraph 5 of that Agreement.

(b) Plaintiffs and their counsel shall provide the Court, quarterly, with a list setting forth (a) the names of the law firms representing the plaintiff and the names of all attorneys on the pleadings or appearing as counsel of record in all properly served Biomet Hip Implant cases in state and federal courts in the United States, and (b) whether the case is pending in federal or state court, and if it is pending in state court Plaintiffs and their counsel shall identify the state.

The Defendant shall provide at least quarterly a list to the Court or its designee and to the PEC of the names and docket numbers of the cases for which it has agreed to make a settlement payment since the last such report, as well as the amount of that settlement payment.

## **III. COURT APPROVAL AND FEE COMMITTEE**

### **A. Court Approval**

The amounts deposited in the Biomet Hip Common Benefit Attorneys' Fee and Common

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<sup>2</sup> Claimant's Counsel shall receive with the rebated assessment funds a statement indicating the dollar amount credit paid as Common Benefit Attorneys' Fees that should be used when calculating the total portion of the rebated assessment properly to be retained by Claimant's counsel.

Benefit Costs Funds shall be available for distribution to Participating Counsel who have performed professional services or incurred expenses for the common benefit. No amounts will be disbursed without review and approval by the Court or such other mechanism as the Court may order. Specifically, such sums shall be distributed only upon Order of the Court in MDL 2391. Each Participating Counsel who does common benefit work and has complied with this Court's Case Management Order Regarding Management of Timekeeping, Cost reimbursement and Related Common Benefit Issues has the right to present their claim(s) for compensation prior to any recommendation to the Court. Upon order of the Court, payments may be made from the Fund to Participating Counsel who provide services or incur expenses for the joint and common benefit of plaintiffs in addition to their own client or clients. Attorneys eligible are limited to Plaintiffs' Executive Committee, Steering Committee, Liaison Counsel, and other Participating Counsel called on to assist in performing their responsibilities, and other Participating Counsel performing similar responsibilities in state court actions.

B. **Fee Committee**

At the appropriate time, this Court shall appoint a Fee Committee to make recommendations to this Court on the issues of how any money in the Biomet Hip Fee and Expense Funds shall be distributed among Participating Counsel (the "Fee Committee"). The Fee Committee shall determine on its own the most fair and efficient manner by which to evaluate all of the time and expense submissions in making its recommendation to this Court.

**IT IS SO ORDERED.**

**Dated: 2/3/2014**

/s/ Robert L. Miller, Jr.

**Honorable Robert L. Miller, Jr.  
Judge, United States District Court**