

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN RE: BIOMET M2a MAGNUM HIP)
IMPLANT PRODUCTS LIABILITY) CAUSE NO. 3:12-MD-2391
LITIGATION (MDL 2391))
)
)
_____)
This Document Relates to All Cases)
_____)

CASE MANAGEMENT ORDER NO. 3

A status conference was held on May 18. While much was discussed, the matters admitting of rulings today fall into two categories: Biomet's settlement strategy and practices under the Master Settlement Agreement, and the segue from one Plaintiff's Steering Committee to another. I begin with the settlement issues.

I. BIOMET'S SETTLEMENT STRATEGY

Attorney Gregg Borri of the Borri Law Offices in New York City, represents the plaintiff in a case in this centralized docket. Mr. Borri wrote to me on April 24, expressing concern about how Biomet was handling settlement discussions and mediation under the Master Settlement Agreement. Mr. Borri reported having been told that in every case in which a plaintiff sought an enhanced award through mediation under the Master Settlement Agreement, Biomet had sought a reduced award, and refused to alter its positions in mediation. Mr. Borri said Biomet and the Plaintiff's Steering Committee should report on the accuracy of what he had

heard. I entered an order inviting Mr. Borri to attend the May 18 status conference in South Bend, and he did so. Attorney Jeff Lowe of Carey Danis & Lowe in St. Louis, sent me a letter sharing Mr. Borri's understanding. Mr. Lowe has settled ten cases in this docket, and has ten cases remaining. Mr. Lowe, too, attended the May 18 conference.

The Plaintiffs' Steering Committee responded to Mr. Borri's letter, opining that Mr. Borri had misapprehended the Master Settlement Agreement, and that the information he sought went well beyond his case. Biomet responded to Mr. Borri and to Mr. Lowe. Biomet reported that it had engaged in pre-mediation discussions with Mr. Borri, who, once he concluded that Biomet was going to stand firm, decided not to mediate. Biomet also responded to Mr. Lowe's letter, saying it had reached out to Mr. Lowe because of dealings with him in other litigation, and that Mr. Lowe hadn't responded to its communication in a timely manner.

Several other attorneys (some of whom had settled their cases) wrote me, echoing Mr. Borri's concerns. Those attorneys included John Dow of Concord, MA, Scott Perlmutter of Cleveland, Wendell Tong of New York City, and Terrence Smith of Teaneck, New Jersey. Attorney David Riggs of Tulsa also echoed Mr. Borri's concerns, and added that during his mediation, the mediator (after asking Biomet's counsel to leave the room) told him that Biomet never budes in the mediations (his letter also reported that he settled his case for 150 percent more

than what Biomet offered when the mediation opened, for whatever that might be worth).

Plaintiffs' co-lead counsel, Thomas Anapol, and Biomet's lead counsel, John Winter, explained the parties' understanding of how the Master Settlement Agreement was supposed to work. Various situations were assigned a presumptive settlement value. A plaintiff who thought herself entitled to a higher award could seek an enhancement in mediation; if Biomet thought a plaintiff was entitled to a lower award, Biomet could seek a reduction in mediation. For the most part, given the number of cases and plaintiffs, Biomet wouldn't go behind the presumptive numbers to factors such as obesity, smoking, or statutes of limitations, when a plaintiff agreed to the presumptive number without seeking an enhancement. But when a plaintiff sought an enhancement, Biomet would open the file and see things that Biomet thought justified a lower award.

Biomet agreed that it has sought a reduction in every case in which the plaintiff has sought an enhancement.

Of course, the attorneys' explanation of their intent in drafting the proposed Master Settlement Agreement counts for nothing if the Master Settlement Agreement itself provides something different. But while the Master Settlement Agreement doesn't articulate the principle that if a plaintiff seeks an enhancement, Biomet can assert whatever it otherwise would have overlooked, nothing in the Master Settlement Agreement is inconsistent with that practice. The Master Settlement Agreement allows Biomet to seek a reduced award for any

good cause, and gives examples of reasons Biomet might have. Nothing in the Master Settlement Agreement allows a plaintiff to use the presumed award as a floor while the plaintiff seeks an enhancement, just as nothing allows Biomet to use the presumed award as a ceiling while it seeks a reduction.

Mr. Anapol told all of us at the status conference that the Steering Committee tried to make it clear to all plaintiffs' attorneys that Biomet would seek a reduction if a plaintiff sought an enhancement. There have been a lot of plaintiffs' attorneys of record during the life of this docket, and it may well be that some attorneys didn't receive or fully appreciate that information. But the success of the communication, in the final analysis, serves more as reassurance than as an indication of Biomet's good faith or bad faith in performing under the Master Settlement Agreement. What Biomet was accused of having done — what Biomet concedes it did — was permissible under the Master Settlement Agreement and was no surprise to the Plaintiffs' Steering Committee with which it was negotiated. There is no basis for me to say Biomet has acted in bad faith.

After being invited to speak at the status conference, Mr. Borri filed a motion for award of damages for breach of settlement agreement in Ms. Chadwick's case. That motion isn't yet ripe, and might present case-specific facts that would justify the motion; nothing in this ruling addresses the merit of that motion, except to the extent the motion might be grounded in part in the bad faith allegations just discussed. Mr. Borri also filed a set of interrogatories to be answered by the Plaintiffs' Steering Committee and Biomet. Those interrogatories

seem designed to discover what Biomet told everyone at the status conference: that when a plaintiff has sought enhancement, Biomet has sought reduction. Little more seems to be gained from requiring responses to the interrogatories. More fundamentally, the Plaintiffs' Steering Committee isn't a party, and so isn't subject to discovery by interrogatory. *See* Fed. R. Civ. P. 33. While Biomet is a party, I have stayed all discovery, except that conducted by the Plaintiffs' Steering Committee or by Biomet. *See* Feb. 15, 2013 Case Management Order, Sec. VII(A) [Doc. No. 242]. Accordingly, I will schedule a hearing on the Chadwick motion once it becomes ripe, but I won't require either the Plaintiffs' Steering Committee or Biomet to respond to the interrogatories that accompanied that motion [Doc. Nos. 132 and 133 in 3:12-CV-614][Doc. Nos. 2887 and 2889 in 3:12-MD-2391].

II. PLAINTIFFS' STEERING COMMITTEES

Most of the rest of the May 18 status conference consisted of discussion about the future of this or another Plaintiffs' Steering Committee. The Multi-District Litigation docket, formed in 2012, has reached an unusual stage. The docket has fallen from nearly 2,500 case to what is predicted to be about 230 cases once the dust settles on settlements now in the pipeline. While this docket will no longer be among the nation's largest, it still will be larger than the average MDL docket, requiring use of many of the techniques discussed in the Manual for Complex Litigation 4th, including the use of a plaintiffs' steering committee.

Of the 22 attorneys named to PSC I, most will have no cases left once the Master Settlement Agreement runs its course. I agree with the PSC I and Biomet that the current members of PSC I without cases of their own shouldn't be required to continue their work for the common benefit of cases filed by others. So not only do we need a steering committee, we need a new steering committee.

Anticipating this, I solicited applications for membership on what would become PSC II. No applications were filed. Two attorneys - - PSC I member Navan Ward of Montgomery, Alabama, and non-PSC I member John Fiske of San Diego, California - - submitted expressions of interest and appeared at the April 20 status conference to discuss their concerns. Both sought information about the remaining cases - - *e.g.*, what issues they present, why they didn't settle - - before committing to participate on the PSC II. Some of the information they seek is available from PSC I, other information would require disclosure of what Biomet believes is its work product.

On May 14, PSC I moved to disband the current leadership structure, to be succeeded by what I have been calling PSC II.

In the weeks between the April 20 conference and the May 18 conference, I received three applications for PSC II. The first was from Ms. Amber Pang Parra of Justinian PLLC with primary offices near Austin, Texas [Doc. No. 2872]. The next two came from attorneys J. Kyle Bachus and Lauren Bronson, both of the firm of Bachus & Shanker, LLC, in Denver, Colorado [Doc. Nos. 2896 and 2899].

Attorney Ahmed Diab¹ of Mr. Fiske's firm attended the May 18 conference in furtherance of the firm's "provisional application" to serve on PSC II [Doc. No. 2898]. Finally, attorney Justin Presnal of the Houston, Texas law firm of Fisher, Boyd, Johnson & Huguenard filed a hybrid application, asking to replace his partner Wayne Fisher on PSC I and to continue onto PSC II [Doc. No. 2895].

In addition to Mr. Presnal, three other members of PSC I will have cases remaining when the outstanding i's are dotted and the t's crossed: Ms. Brenda Fulmer of Searcy, Denney, Scarola, Barnhart & Shipley in West Palm Beach, Florida (who joined PSC I after its first year of existence), Mr. Lawrence Jones, II of Jones Ward in Louisville, Kentucky, and Mr. Navan Ward of Beasley, Allen, Crow, Methvin, Partis & Miles in Montgomery, Alabama. Ms. Fulmer, Mr. Ward, and Mr. Presnal attended the May 18 conference and expressed concerns similar to those that Mr. Ward and Mr. Fiske had expressed at the previous conference. They also reported that they had been trying to contact the attorneys on the remaining cases to evaluate the strengths and weaknesses of the cases, and had spoken to the attorneys in about half of those cases. They indicated that if enough information could be collected about the remaining cases, other attorneys might apply to serve on PSC II. Ms. Fulmer proposed that I enter a **census order** requiring all remaining plaintiffs to come forth with some basic information, to

¹ Unable to read my notes, I called Mr. Diab "Mr. Diaz" during the May 20 conference, and apologize profusely for having done so. It's important to me to pronounce names correctly, and I failed miserably with Mr. Diab's name.

allow those thinking about a leadership position to evaluate how viable an economic model might be devised for the PSC II to work effectively.

Plaintiffs' co-lead counsel, Mark Lanier, on behalf of PSC I, said a census order would be helpful to PSC II (but not to PSC I). Mr. Winter, for Biomet, offered no opinion on the census order suggested, but thought it might be time for a "Lone Pine" order. See *Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507 (Sup. Ct. N.J. Nov. 18, 1986).

Under the Master Settlement Agreement, Biomet agreed to fund PSC I's common benefit work. We discussed the possibility of any remainder from that sum being used to help fund PSC II, but Mr. Lanier and Mr. Winter both indicated that too little of the Biomet money will remain to help fund a new PSC. Biomet also objected, arguing that it's contractual obligation to contribute to the Common Benefit Fund was limited to the PSC I's work. We also discussed the concern that prospective PSC II attorneys have about the scheduling order that will follow appointment of the new PSC II.

Nobody addressed how large PSC II should be, but an excellent nucleus either has stepped forward or was on PSC I and still has cases. Those attorneys are Mr. Ward, Ms. Fulmer, Mr. Jones, Mr. Presnal, Mr. Bachus, and Ms. Parra. I very much appreciate Ms. Bronson's willingness to serve, but she is too new to the profession to serve in a steering committee capacity. In addition to those six I listed, four more are logical and reasonable selections: Mr. Fiske and Mr. Diab (who have shown enough interest to travel to South Bend for the spring status

conferences), Altom Maglio (whose firm has the third highest number of remaining cases), and William Jordan (whose firm has the fifth highest number of remaining cases). Those ten excellent attorneys can serve as the members of a PSC II. Mr. Lowe's firm has the second highest number of cases remaining in the docket (well behind Mr. Ward, who leads this category), but Mr. Winter's response to Mr. Lowe's letter leaves me uncertain that placing him in a leadership position would foster advancement of this litigation.

Because Mr. Ward and Ms. Fulmer have been on PSC I the longest (save Mr. Jones, who attended neither of the most recent status conferences in person) — Mr. Ward since the beginning and Ms. Fulmer for a year and a half — and are very experienced in mass tort litigation and multi-district litigation, it also seems logical to appoint them co-lead counsel for the plaintiffs. My only hesitation in appointing two attorneys from the same firm — Mr. Fiske and Mr. Diab — is the risk of duplication of effort. That risk can be reduced by having one of them serve as liaison counsel, and I'll leave it to them to notify me which will do so. Having liaison counsel in San Diego when the MDL docket is in northern Indiana is less than ideal, but the same can be said about the circumstances under which I am appointing PSC II. In an age of electronic filing, liaison counsel's primary task lies in communication among the plaintiffs' attorneys.

Those ten PSC II members might wish to encourage other attorneys who represent plaintiffs in this docket to apply for appointment to PSC II. To facilitate their doing so, I will order Biomet to provide PSC II with any plaintiff's fact sheets

that PSC II can't get from the PSC I. I expect that those fact sheets will cover all but the most recently filed or centralized cases in this docket. I will also authorize PSC II to make the information from the plaintiffs' fact sheets available to attorneys interested in appointment to PSC II, though the information must be shared in such a way that medical records, diagnoses, and medical conditions can't be linked to a particular patient. If, after reviewing those plaintiffs' fact sheets, PSC II still thinks a census order would be helpful, I will happily consider a motion for such an order, accompanied by the proposed order.

The time hasn't come for a *Lone Pine* order. This docket has moved rapidly through a shake-out period in which nine out of ten cases pending barely a year ago were resolved, either by settlement or by dismissal. New leadership is stepping up for the plaintiffs, and deserves an opportunity to get their bearings. A census order, if PSC II persuades me to issue one, might provide much of the same information as a *Lone Pine* order might produce. For now, though, I consider a *Lone Pine* order inappropriate.

The plaintiffs' new leadership, and others who might seek to join the new leadership, have expressed concern about the pace of the scheduling order to be entered for the balance of the proceeding. I will invite proposals from PSC II and Biomet before resuming and modifying the earlier scheduling order. I intend, of course, to be reasonable in what I order, but it won't be leisurely. This MDL docket is three-and-a-half years old (with no blame to be assigned) and some plaintiffs

might have been concerned about the Biomet product for five years. We have an obligation to do this right, but we also have an obligation to get it done.

The appointment of the new PSC II will take effect June 1, 2015. Effective that date, all members of PSC I who aren't members of PSC II will be relieved of their duties in this docket (recognizing that Mr. Anapol and Mr. Dassow have pledged to help PSC II get up and running). I will entertain any request from PSC II for a census order, accompanied by a proposed order specifying precisely what information will be sought. A telephonic hearing will be scheduled on the motion in *Chadwick* when the motion becomes ripe; I will assume that PSC II doesn't wish to participate in that hearing unless it informs me otherwise. We will gather in early September to discuss the scheduling order. I urge lead counsel to confer and agree on the matters in the scheduling order as well as they can, and to file their proposals with me at least a week before that conference, including brief statements of reasons why agreement couldn't be reached.

III. FUNDING FOR PSC II

I anticipate that a new common benefit fund order will need to be entered soon after PSC II is able to acquaint itself with the cases remaining in this docket. I invite PSC II to submit a proposed common fund order before September 1, 2015.

Given the number of *pro se* cases among the cases remaining in this docket, I also anticipate the need to appoint a *pro se* liaison counsel. I invite the eventual input of PSC II.

IV. ORDER

The motion to substitute Justin Presnal as a member of the Plaintiff's Steering Committee in lieu of Wayne Fisher [Doc. No. 2895] is GRANTED.

The motion to terminate the existing Plaintiffs' Steering Committee [Doc. No. 2890] is GRANTED, effective June 1, 2015.

I appoint the following attorneys to PSC II, effective June 1, 2015:

Brenda Fulmer of Searcy, Denney, Scarola, Barnhart & Shipley
Navan Ward of Beasley, Allen, Crow, Methvin, Partis & Miles PC
J. Kyle Bachus of Bachus & Shanker, LLC
Ahmed Diab of Gomez Trial Attorneys
John Fiske of Gomez Trial Attorneys
Lawrence Jones of Jones, Ward
William Jordan of Law Offices of William Jordan
Altom Maglio of Maglio Christopher & Toale PA
Amber Pang Parra of Justinian PLLC
Justin Presnal of Fisher, Boyd, Johnson & Huguernard

Ms. Fulmer and Mr. Ward will serve as Lead Counsel for PSC II. Mr. Diab or Mr. Fiske shall serve as Liaison Counsel, and shall inform me, the PSC II, and Biomet's Lead Counsel by June 15 which of them will serve in that capacity.

The appointments to PSC II are of a personal nature. Today's appointees can't be substituted by other attorneys, including members of the appointee's law firm, to perform the PSC II's exclusive functions, such as committee meetings and

court appearances, except with my prior approval. The appointments to PSC II are for nineteen months, until January 1, 2017. Appointees may apply to be reappointed when their term expires. If or when they reapply, their application should contain references to the nature and scope of their work on the PSC including the time and resources expended during the past term.

Co-Lead Counsel of PSC II will have the same responsibilities as Lead Counsel of PSC I (*see* [Doc. No. 127]).

SO ORDERED.

ENTERED: May 27, 2015

/s/ Robert L. Miller, Jr.
Judge, United States District Court
Northern District of Indiana