

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

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| IN RE: DEPUY ORTHOPAEDICS, |) | MDL Docket No. 1:10-md-2197-DAK |
| INC. ASR HIP IMPLANT |) | |
| PRODUCTS LIABILITY |) | |
| LITIGATION |) | HON. DAVID A. KATZ |
| |) | |
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| |) | |
| This Document Relates to: |) | |
| ALL CASES |) | |
| _____ |) | |

**THE PLAINTIFFS’ STEERING COMMITTEE’S MOTION TO MODIFY THE
COMMON BENEFIT ATTORNEY FEE HOLD BACK TO 5% OF THE GROSS
RECOVERY AMOUNT**

Pursuant to the Court’s directive at the hearing announcing the settlement on Nov. 19, 2013 and as set forth in the Master Settlement Agreement (MSA), the Plaintiffs’ Steering Committee (PSC) moves this Court to amend the common benefit fund hold back from the previous 3% for fees to 5% for fees, while leaving the 1% cost hold back intact, to compensate for work performed and to be performed for the benefit of the Plaintiffs.

This Motion was anticipated and is in recognition of the resources and time incurred to advance all Plaintiffs’ claims in this Multi-District Litigation (MDL) and the cooperating state litigations, and the achievement of a favorable global resolution of cases involving up to 8,000 individuals who have had revision surgery to remove their DePuy ASR and ASR XL hip implant, and for establishing the groundwork for both future settlements and for future litigation on behalf of those individuals who were not yet eligible to participate in the present settlement. Moreover, this motion recognizes that there is substantial ongoing work for the members of the Settlement Oversight Committee in overseeing this very large settlement and on behalf of the

PSC and cooperating state court litigation leadership in pursuing the claims of those plaintiffs who need revisions and medically were unable to have them and those who had revisions or will have revisions after the settlement cut-off of August 31, 2013.

Accordingly, the PSC moves this Court to amend Amended Case Management Order 13 to modify the hold back for common benefit attorney fees from a 3% hold back on the Gross Recovery Amount to a 5% hold back on the Gross Recovery Amount. Amendment of the 1% hold back for expenses is not presently necessary. Amended CMO 13 specifically addresses the possibility of modifying the hold back amount and establishes a procedure for doing so. Per the requirements of that Order, the PSC has been consulted and has been given an opportunity to be heard and has approved this proposed change. Further, paragraph 4.1.8 and footnote 12 of the MSA expressly contemplate this motion to amend CMO 13 to conform to the assessment that is set forth as a term of the settlement agreement.

I. Introduction

As this litigation is still in progress, final common benefit attorney fee numbers are not yet available. Given the amount of substantial and necessary work performed to date by Co-Lead Counsel for Plaintiffs, Plaintiffs' Liaison Counsel, the Plaintiffs' Executive Committee, the Plaintiffs' Steering Committee and participating attorneys from the state court litigations in California, New Jersey, Illinois, and Florida, the PSC anticipates the 3% hold-back will be insufficient to provide for the fair and equitable distribution among the Plaintiffs of the costs of services already performed and to be performed by attorneys acting for MDL administration and common benefit of all Plaintiffs. The scope of the litigation has evolved. At the outset of the MDL case, the parties and the Court adopted the modest hold back amounts based on the assumption that the matter would settle substantially prior to trials, given that this was a recalled

product. While settlement talks ensued, they were in tandem with a rigorous discovery schedule. Resolution could not be reached until after two trials in coordinated state courts and imminent MDL and other coordinated state court trials. The original hold-back did not anticipate these costly evolutions.

To ensure maximum efficiency and to avoid duplicative efforts, the PSC has coordinated seamlessly with state court attorneys to produce a single work product. This cooperation has the significant benefit of pooling the skills of numerous experienced attorneys to create a cohesive work product. The PSC therefore requests a hold back of 5% of Gross Recovery Amounts that will be subject to later requests for common benefit attorney fee awards made according to the procedure provided in Amended CMO 13. This hold back has been known to all parties by virtue of the provisions in the Master Settlement Agreement and the express discussion of such at the November 19 settlement announcement.

II. The Changed Focus and Increase Scope of This Litigation Justifies an Increased Hold Back for Common Benefit Attorney Fees.

The 3% hold back was established by this Court more than two and a half years ago, when the litigation was at an earlier stage and much was still unknown. The extent of the multi-million paged document production was unknown, *inter alia*. At that time, Plaintiffs knew the ASR/ASR XL devices had been recalled by Defendants and that Defendants had established the Broadspire program. As a result, it was anticipated that resolution, rather than consecutive trials would be likely. The PSC anticipated discovery would go forward on a parallel track with resolution efforts, but the PSC did not anticipate that cases would actually go to trial prior to resolution. The projected development of a settlement case involved less time and expense than full, trial-focused litigation. Therefore, the Court and the PSC thought the 3% hold back was sufficient at the time.

While the PSC recognized that a litigation front was necessary to ensure a favorable settlement and to avoid any delays in the event a settlement was not possible, it was envisioned that a settlement would be effected sooner rather than later. Unfortunately, only after millions of pages of documents had been produced and reviewed, dozens of depositions had been taken, and the trial team completely prepared to begin, did Defendants offer a settlement the cooperating leadership believes is acceptable and appropriate to recommend to other counsel and clients. Accordingly, despite the efforts of the cooperating leadership and the Court to advance a global settlement, such a settlement only recently became feasible.

An extraordinary amount of discovery and trial work took place in the interim that far eclipsed initial expectations, with scores of cooperating lawyers incurring thousands of hours of time as set forth below. For example, the initial contract for Crivella West, a third party service managing produced documents, was for approximately 20 million pages. The current number of produced pages is over four times that amount, with almost 80 million pages produced as part of over five million documents. Not only was the contract necessarily increased, but these produced documents all required substantial time commitments from common benefit attorneys to complete the document review and subsequent continued discovery efforts. Similarly, the magnitude of effort required by the cooperating leadership to complete 58 fact witness depositions in six states and three international venues for generic liability witnesses, totaling 101 days of testimony and 37,033 pages of transcripts illustrates the large number of common benefit hours spent on this litigation already. Many other depositions were taken of bellwether plaintiffs, their surgeons, the sales representatives and distributors who sold the implants and numerous expert witnesses in various disciplines including orthopedic surgery, engineering, toxicology, infectious disease, immunology, pathology, tribology, epidemiology and FDA

regulations. Given the amount of time and effort committed to litigation already, a 5% hold back is necessary to ensure eventual compensation for common benefit attorney fees incurred to date and likely to be incurred for MDL administration and the common benefit of all Plaintiffs.

Furthermore, Plaintiffs completed two state court trials in California and Illinois and prepared for five Bellwether trials in the MDL and cooperating state court jurisdictions. Full document review has been conducted, depositions taken, experts prepared and deposed, and extensive motion practice completed for several cases. These necessary tasks required significant hours of attorney work from a number of attorneys, which inure to the common benefit but were not originally contemplated. The completion of these tasks by cooperating counsel, and the anticipation of similar work for upcoming Bellwether and state court trials, provides good cause to reserve a larger hold back to cover these common benefit attorney fees.

III. The PSC and MDL Attorneys Have Coordinated with State Court Attorneys to Produce a Single Work Product and Avoid Unnecessary Work.

As the large scale of this litigation became clear, the MDL Leadership realized the importance of cooperating with attorneys working on the coordinated state court cases. Central aims of this cooperation were efficiency and the avoidance of duplicative work. Realizing that it did not benefit any Plaintiff to have MDL attorneys and state court attorneys repeat the efforts of the other, from the inception, the PSC has cooperated across jurisdictions to achieve a single work product that benefits all Plaintiffs.¹ This Court envisioned that cooperation by selecting co-lead counsel the Court knew would establish cooperative efforts with the two largest state court litigations: California and New Jersey. MDL and state court attorneys worked together during discovery, sharing the responsibility for tasks such as taking the numerous fact and expert

¹ All cooperating state court attorneys either have some cases pending in the MDL or executed a participation agreement. Thus, all of their cases are subject to assessment.

witness depositions necessary in this litigation. These attorneys also collaborated on theme development, demonstrative exhibits, and strategy.

Additionally, MDL and state court attorneys worked together extensively in preparation for both state court trials and Bellwether trials, working on aspects ranging from exhibit lists to motion practice. In fact, these efforts continued as attorneys across the country prepared for coordinated state court cases in California, Florida, Illinois, and New Jersey. Moreover, the MDL has provided substantial contribution for the state court trials, funding, *inter alia*, much of the expert witness fees, all of the trial transcription fees, and the technical support for the California trial. The California trial utilized as key witnesses certain experts hired and funded by the MDL PSC and prepared by MDL attorneys.

These cooperative efforts are done with an emphasis on providing the greatest benefit for all Plaintiffs involved in ASR/ASR XL litigation. Plaintiffs receive the benefits of the combined experience of numerous experienced attorneys from across the country. The collaboration promotes increased efficiency by preventing duplicative or unnecessary work. This also allowed for a more streamlined timeline and timely advancement of the litigation, with a single unified work product. Because of these efforts, the PSC anticipates that a larger hold back is necessary to ensure fair compensation of attorneys working for the common benefit of all Plaintiffs.

IV. The Court has the Authority to Modify the Hold Back and a 5% Hold Back is in Line with Assessments in Other MDLs.

As noted above, the Court explicitly provided a mechanism for modifying the hold back for common benefit attorney fees in Amended CMO 13. Furthermore, there is well-established precedent for MDL courts to increase assessments as necessary² that is supported by the

² In the *In re Viiox Products Liability Litigation*, the court cited the *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*, and noted “the Court’s equitable and managerial authority and duty to award fair

principles of equity, *quantum meruit*, and the Court's inherent managerial authority. *See In re Vioxx Products Liab. Litig.*, 760 F. Supp. 2d 640, 649 (E.D. La. 2010). The PSC's modest 2% requested increase, to a 5% assessment hold back, is well in line with previous MDL assessments.

This Court has previously modified the assessment in another MDL, raising the assessment for common benefit attorney fees in the *Ortho Evra* litigation from 1.5% or 3% (depending on the time period in which the assessment was agreed to) to 4% or 6%, respectively. *See In re Ortho Evra Products Liability Litigation*, MDL No. 1742, Third Amended Case Management Order No. 9 (Amending Second Amended CMO No. 9 and CMO No. 9A Regarding Common Benefit Fees and Expenses) (N.D. Ohio July, 23, 2009). The Court in the *Vioxx* litigation similarly increased the assessment, granting a 6.5% fee award. *In re Vioxx Products Liab. Litig.*, 760 F. Supp. 2d 640, 662 (E.D. La. 2010). In *In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation*, the Court allowed the assessment for common benefit attorney fees to be increased from 2% to between 8% and 10%. *In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation*, MDL No. 1699, Pretrial Order No. 8A: Amendment to Order Establishing Common Benefit Fund (N.D. Cal. July 7, 2008).

The 5% hold back for common benefit attorney fees requested here falls at the very low range of fee awards granted in other MDLs, which generally range from 5% to 12%. *See In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1011 (5th Cir. 1977) (8% assessment); *In re MGM Grand Hotel Fire Litig.*, 660 F. Supp. 522, 529 (D. Nev.

common benefit fees or to adjust contingent fees" that existed independent of any contractual agreement. 760 F. Supp. 2d 640, 649 n. 15 (E.D. La. 2010).

1987) (increased to 7% assessment from 5%); *In re Orthopedic Bone Screw Products Liab. Litig.*, MDL 1014, 1996 WL 900349 at *4 (E.D. Pa. June 17, 1996) (12% fee assessment); *In re Diet Drugs*, 553 F. Supp. 2d. 442,485 (E.D. Pa 2008) (6.75% fee award); *In re Protegen Sling and Vesica System Prods. Liab. Litig.*, MDL 1387, 2002 WL 31834446 at *1, 3 (D. MD. 2002) (9%/6% assessment); *In re Fosamax Prods. Liab. Litig.*, MDL 1789, CMO 17 3(f)(3), (S.D.N.Y. Apr. 28, 2011(6% - 9% assessment); *In re St. Jude Med., Inc.*, MDL 1396, 2002 WL1774232, at *2 (D. Minn. Aug. 1, 2002) (6% assessment); *In re Baycol Prods. Litig.*, MDL 1431, 2002 WL 32155266, at *4 (D. Minn. June 14, 2002) (6% assessment).

V. The Hold Back Applies to All Filed and Unfiled Cases in the MDL, Participating in the Settlement Program or Held by Attorneys Entering into the Participation Agreement or Settlement Program as Well as Later Resolved Cases.

If granted, the requested 5% hold back for common benefit attorney fees and the existing 1% hold back for costs will apply to all Plaintiffs and their counsel participating in the Settlement Program. These Plaintiffs will be subject to the hold back by applicability of Amended CMO 13 or by consent. Further, it is recognized that the settlement does not fully resolve the litigation since it applies to individuals who were revised prior to August 31, 2013 which is estimated to encompass 8,000 persons. Additional plaintiffs have been revised subsequently and others will continue to be revised, based upon the medical literature and experience, and those cases will get addressed either in a second contemplated settlement agreement, or else by additional litigation activities. The PSC must still undertake efforts to achieve that goal and for example must provide various degrees of assistance for cases that are not settled but go to trial, For example, the substantial monthly costs of the electronic database for documents is ongoing so that document productions are available to those who are not

participating in the settlement. The medical library is constantly updated with new articles, among other support activities that will continue.

Any case to which Amended CMO 13 applies is subject to the common benefit attorney hold back. According to the existing terms of Amended CMO 13, this includes all cases now pending, later filed in, transferred to, or removed to this Court as part of the MDL. *See* Amended CMO 13 at I.B. Because Amended CMO 13 also applies to all Plaintiffs' attorneys and their law firms who have such cases in the MDL, the hold back applies to any Plaintiffs represented by these attorneys, including those Plaintiffs with claims in state courts only. *Id.* Similarly, the assessment applies to any unfiled cases, whether based on federal or state claims, held by Plaintiffs' attorneys and their law firms with cases in the MDL or *pro se* plaintiffs in the MDL or who avail themselves of the pending settlement. *Id.*

Furthermore, by signing the Participating Agreement, state court attorneys consent to the application of the hold back to all filed and unfiled cases held by the attorneys and their law firms. By entering any case into the Settlement Program, Plaintiffs' attorneys and their law firms also explicitly consent to be subject to Amended CMO 13. This consent subjects all cases held by such attorneys and their firms to the assessment hold backs. Similarly, Pro Se Plaintiffs entering into the Settlement Program consent to be bound by the orders of this Court, including Amended CMO 13 and the hold back. Lastly, according to the terms of the Settlement Program, unfiled Pro Se cases are also bound by the orders of this Court and subject to the hold back.

VI. Conclusion

The PSC has satisfied the requirements of Amended CMO 13 for requesting modification of the common benefit attorney fee hold back assessment, the Court has the authority to modify its previous Order, and a 5% hold back is both merited in this case because of the work involved

