UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: DEPUY ORTHOPAEDICS, INC.	)	MDL Docket No. 3:11-MD-2244
PINNACLE HIP IMPLANT PRODUCTS LIABILITY LITIGATION	)	
This Document Relates To: ALL CASES	)	Honorable Ed Kinkeade

PLAINTIFFS' EXECUTIVE COMMITTEE'S (PEC) MOTION TO MODIFY THE PRELIMINARY HOLDBACK ORDER AND FOR AN ASSESSMENT ON SETTLING CASES ALONG WITH SUPPORTING BRIEF

Consistent with the clearly articulated protocol announced in the Court's Preliminary Holdback Order (Dkt. No. 889) and based on both newly acquired information and argument of counsel, the PEC requests that the Court modify its Preliminary Order and enter an assessment consistent with the applicable jurisprudence and facts at bar.

INTRODUCTION

Common benefit assessments are always moving targets until the snapshot moment when cases settle. Most recently, in *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, MDL No. 2545, Dkt. No. 2894 (N.D. Ill. Oct. 15, 2018), the court increased the preliminary holdback percentage from 10 percent to 19.5 percent based on work required in the case. Movements of this sort can be expected. They reflect the fact that until settlements occur, the amount of related

work, expenses incurred, and the value of settlements make it impossible to accurately arrive at an appropriate common benefit assessment.

No MDL of this size has been worked so vociferously, moving defendants from a "We will never pay" posture to one where the defendants are settling several thousand cases. This came from the relentless perseverance of the Plaintiffs' counsel put in place by the Court who entrusted the Executive Committee to prosecute this litigation that many thought would be fruitless.

At the outset of this MDL, more than six years ago, this Court entered an Order regarding the management of timekeeping, cost reimbursement and related common benefit issues. Dkt. No. 153 (filed 6/20/12)(attached as Exhibit A). Since then, Court-appointed Plaintiffs' counsel has maintained common benefit time and expense records through four multi-month trials, multiple mandamus attempts, two appeals, and the rigors of six-years of hard-fought litigation with over one-hundred-million pages of documents, more than 300 depositions, and a plethora of contested hearings.

The Court ordered common benefit procedures to facilitate proper compensation for the Court-appointed attorneys working for the common benefit of all Plaintiffs in this MDL. *Importantly*, counsel working under the Court's common benefit Order all recognized that work done would be evaluated by the Court for common benefit assessment purposes and that the decision of the Court would be final. Those counsel have knowingly consented to this procedure, and there is no appeal from the ruling of this Court. Dkt. No. 153 at 2. Indeed, with each time and expense submission, each participating counsel was required to recertify his or her agreement to be bound by the Court's

order precluding an appeal from decisions relating to fees and cost reimbursement. *Id.* at 2-3.

This Court provided further instruction regarding compensation for Court-appointed common benefit counsel on August 29, 2018, when it entered a Preliminary Holdback Order requiring Defendants to hold back ten percent of the gross value of any settlement or judgment in a case that has been or is included in this MDL. Dkt. No. 889 (attached as Exhibit B). The Order was intentionally and unmistakably preliminary in nature and, in fact, was specifically identified as a "**Preliminary Holdback Order**." The Court divided the ten percent preliminary holdback with seven percent allocated for fees and three percent for costs. *Id.*

At that time, the Court found this preliminary holdback amount to be "conservative and appropriate." The Court's view of the Holdback as "conservative and appropriate" was in the context of an often pronounced zero-settlement strategy by Defendants. Defendants even refused to go to settlement mediations stating they would be fruitless because there would be no settlements. In the hearing over the preliminary holdback, counsel for Defendants further stated that to counsel's knowledge, no settlement discussions were ongoing. Consequently, the Court's only frame of reference was the existing bellwether verdicts. A ten percent holdback would be conservative given the current verdicts that average over $100 million per Plaintiff.

Defendants now assert that the ten percent is reasonable for current settlements, where, based on information and belief, the settlement amount is a far cry from any of the verdicts. Regardless of how one reads the Court's "conservative" comment, only looking at the facts – case averages and number of

cases resolved weighed against Plaintiffs' lodestar and expenses – can the Court achieve the correct percentage.

Accordingly, this Court ordered Defendants to alert the Court in the event of any settlements. *Id.* at 2, 4. And that ruling followed a July 25, 2018 conference with Special Master Stanton which was attended by counsel for both sides as well as by Deirdre Kole, a representative of Defendants, wherein the Court was advised by the Defendants that a settlement of some or all of the claims was not contemplated. The Preliminary Holdback Order along with its preliminary finding was also issued with another unmistakable caveat; the Court emphasized that because many factors affect the determination of a common benefit assessment, the Court would require additional information, including the value of the settlements or judgments, before it could set such a final assessment. *Id.* at 3. Thus, the Court was clear, it would "determine the amount or percentage of common benefit assessment, if any, at a later date." *Id.* at 3. That time has now materialized given the Defendants' settlement-related representations to Special Master Stanton on November 21, 2018 (Thanksgiving Eve).

Following the Court's Preliminary Holdback Order, the PEC publicly filed ***The Plaintiffs Executive Committee's Notice of Reservation of Rights Regarding the Court's August 29, 2018 Preliminary Holdback Order***, making absolutely clear that the PEC, consistent with the Court's caveat described above, recognized and alerted all counsel that the Court's determination was neither final nor perhaps adequate, depending, of course, on the settlement amounts. Dkt. No. 898 (filed 10/12/18)(attached as Exhibit C). In this five-page filing, the PEC specifically and definitively reserved the right to file additional

documentation and to request the Court to reconsider its *preliminary* holdback percentage, stating:

> With the instant filing, the PEC seeks to clarify that it does not concede nor agree that 10 percent (7% fees/3% costs) included in the preliminary holdback order represents the appropriate, final percentage assessment. Therefore, the PEC reserves the right (with the Court's guidance and permission) to submit additional briefing and evidence at a later time, and further reserves the right to request that the Court reconsider the percentages set forth in its August 29, 2018 Preliminary Holdback Order.

Id. at 4.

Notably, the Defendants never objected to this notice, nor responded to it in any way.

Furthermore, the Court's Preliminary Holdback Order acknowledged the obvious. In an MDL case where Defendants repeatedly advised the Court that they would never settle any of the cases, and that any mediation or settlement conference would be a waste of time, the PEC's work has now caused the landscape to change. Defendants are now settling cases. Apparently several thousand cases. Perhaps as much as 60% of the revised metal on metal cases pending in the MDL.[1] Indeed, this Court has extensive first-hand, real-time experience with the significant and substantial effort by the PEC in this multi-year litigation. The Court already referenced the "extensive motion practice, discovery and bellwether trials consuming 134 days of trial and more than 31,500

[1] According to Plaintiff Profile Form submission Census data as of November 21, 2018, there are approximately 5,858 Pinnacle metal-on-metal revisions in the MDL. Based on Defendants' representations to the Special Master today, Defendants have settled (or are in the process of settling) somewhere between 3100 and 3700 cases. Assuming those "settling" cases represent plaintiffs with Pinnacle metal-on-metal revisions, Defendants are settling roughly 50 to 60% (and possibly more) of the total number of Pinnacle metal-on-metal revision cases in this MDL.

pages of trial transcripts." Dkt. No. 889 at 2. Each of these bellwether trials lasted for months and required counsel to reside away from their homes and offices for extended periods of time. The Court also pointed to the over 300 depositions which had been taken, many of which were attended or otherwise monitored by the Special Master. These depositions occurred all over the United States and the United Kingdom with one deposition also occurring in Okinawa. In addition to the extensive deposition and trial practice, the Preliminary Holdback Order noted the more than 100 million pages of documents produced, an extensive post-verdict motion and briefing practice, and two fully-briefed and argued appeals to the United States Court of Appeals for the Fifth Circuit. *Id.* The Court concluded its summary of the PEC's work by stating that "[a]ll Plaintiffs have benefitted from the efforts of counsel." *Id.* at 2.

Of course, as noted in the Preliminary Holdback Order, the Court needed more information before any final assessment could be made. Specifically, it needed to know the value of the settlements and judgments. Acknowledging the importance of that information, the Court established a mechanism for the expeditious submission of settlement information within days of any agreement and prior to the release of settlement funds. *Id.* at 3. The Court further required submission of the identity of any settling Plaintiff and their counsel and the court in which the settled case is or was pending. *Id.*[2] But even with this information, still more information is needed in connection with the final assessment, including but not limited to:

[2] The Court did not specifically order Defendants to submit the names of each plaintiff, but it did order Defendants to provide "the name and cause number of the case" together with the presiding court and the name of plaintiffs' counsel for each settled claim. The provision of this information will, by necessity, encompass the names of each settling plaintiff.

- Identification of any cases resolved by dismissal without settlement payments;
- Lodestar submissions from Court-appointed Plaintiffs' counsel;
- Common benefit expenses incurred by Court-appointed Plaintiffs' counsel;
- The amount of any compensation, direct or indirect, provided by Defendants or on their behalf to lawyers representing Plaintiffs or to Plaintiffs themselves in connection with anything related to settlements, including but not limited to assistance in brokering the settlement to other Plaintiffs' attorneys;
- The number of cases that have settled;
- Settlement term sheets and associated nondisclosure agreements;
- The number of cases where settlements are anticipated or where offers have been extended in anticipation of settlement;
- The number of cases and corresponding identification of plaintiff's counsel that are considering settlement and have been provided with proposed settlement terms;
- Whether the settlements are individual or aggregated in some global manner;
- The aggregate value of all settlements and anticipated settlements; and
- The account and bank where holdback funds will be deposited and retained.

And now, for the first time, much of this needed information appears to be available. Specifically, on November 21 (Thanksgiving Eve), Defendants provided the Special Master with settlement information for numerous cases covered by the Court's Preliminary Holdback Order. Plaintiffs likewise intend to immediately submit common benefit time and expense records under seal to Special Master Stanton for an *in camera* review and evaluation by the Court. The Defendants confirmed on the record today that they did not oppose the *in camera*

review. These new developments now allow the Court to order a common benefit fee and cost assessment on those cases that have settled. And this morning in a status conference scheduled by Special Master Stanton, Plaintiffs were advised that approximately twenty law firms have entered into settlement agreements involving approximately 2200 cases with another 1500 or so in play. Obviously, the critical question regarding assessments is when will the settlements be funded so that assessments can be withheld. Stunningly, when defense counsel was specifically questioned by Special Master Stanton as to when the settlements would be funded, the response was "I don't know."

The Defendants' agenda here is painfully obvious and nefarious. One of the seminal instructive cases that is repeatedly cited in connection with common benefit motion practice is *In Re Air Crash at Florida Everglades on Dec. 29, 1972*, 549 F.2d 1006 (5th Cir. 1977), and oft-cited by Judge Eldon Fallon. It explains the rather obvious. If the plaintiffs' bar is not appropriately motivated to engage in massive multi-year litigation, no sensible plaintiff counsel will step up to the plate and take the very risks that the PEC at bar has taken. Of course, defendants would welcome the opportunity to litigate against plaintiffs' counsel that lack the requisite funding, experience, and infrastructure to level the playing field. And that is precisely why defendants now routinely seek to intervene in the composition of plaintiff steering committees along with associated common benefit compensation. Imagine if the PEC filed a motion to cap defense counsel's hourly rates or expenses. Using the defendants' logic, plaintiffs would argue that defense counsel with unlimited budgets and hourly rates ranging from $1000 to

$1500 per hour have no incentive to quickly resolve litigation.[3] Instead they are motivated to engage in protracted litigation much like the nearly eight-year sojourn of this MDL.

ARGUMENT

This Court's authority to use a holdback order to create a common fund for the payment of attorneys' fees and expenses in an MDL proceeding is well-anchored in Fifth Circuit and other federal jurisprudence. *See e.g. In re Air Crash Disaster,* 549 F.2d at 1016-19; *In re Vioxx Prods. Liab. Litig.,* 802 F. Supp. 2d 740, 769-71 (E.D. La. 2011); *In re Oil Spill by the Oil Rig DEEPWATER HORIZON,* MDL No. 2179, 2011 WL6817982 at *1 (E.D. La. Dec. 28, 2011); *In re Zyprexa Prods. Liab. Litig.,* 594 F.3d 113, 128-30 (Kaplan, J., concurring). Its justifying rationale is rooted both in the equitable common benefit fund doctrine was well as the statutory authority of an MDL court to exercise managerial power over the litigation. *In re Air Crash Disaster,* 549 F.2d at 1016-20; *Vioxx,* 802 F. Supp. 2d at 769-70. Indeed, in *In re Air Crash Disaster*, the Fifth Circuit made clear that the interests to be served in an MDL are too important to be left for volunteers or unpaid draftees and that that an MDL court must have the means available to order appropriate compensation for MDL lead counsel. 549 F.2d at 1016. Thus, this Court indisputably possesses the authority to require parties to this MDL to set aside percentage amounts from monies paid in settlement (or judgments) to compensate the Court-appointed counsel who have taken the lead in prosecuting this litigation.

[3] *See,* Sara Randazzzo & Jacqueline Palank, *Legal Fees Cross New Mark: $1500 an Hour*, Wall Street Journal, Feb. 9, 2016; Claire Zillman, *Some Lawyers Are Now Charging $1500 Per Hour*, Fortune.com, Feb. 9, 2016.

MDL courts attempt to set the holdback percentage based upon an approximation of the expected amount and value of the attorneys' fee. *In re Actos (Pioglitazone) Prods. Liab. Litig.*, 274 F. Supp. 3d 485, 526-27 (W.D. La. 2017); *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, MDL No. 2545, Dkt. No. 2894 (N.D. Ill. Oct. 15, 2018)(increasing holdback percentage from ten percent to 19.5 percent based on work required in case). To calculate the amount of attorneys' fees, courts in the Fifth Circuit use either a percentage method based upon the amount recovered or a lodestar method whereby the court computes fees by multiplying the number of hours reasonably expended in the litigation by a reasonable hourly rate and in its discretion applying an upward or downward multiplier. *Union Asset Management Holding A.G., v. Dell Inc., et. al.*, 669 F.3d 632, 642-43 (5th Cir. 2012); *In re Actos,* 274 F. Supp. 3d at 522. Courts in the Fifth Circuit often use a percentage method, which they then cross-check by comparing it to the plaintiffs' lodestar submission. Comparison of the amounts produces a multiplier which, if within an appropriate range, will support the reasonableness of the requested fee. *Union Asset,* 669 F.3d at 643; *In re Oil Spill by the DEEPWATER HORIZON,* MDL No. 2179, 2016 WL 6215974 at *20 (E.D. La. Oct. 25, 2016)(comparing percentage fee and lodestar to produce a multiplier of 2.34 and finding on that basis that percentage fee was reasonable).

To further assist in the quantification of a reasonable multiplier, courts apply the factors identified in *Johnson v. Ga. Highway Express Inc.,* 488 F. 2d 714, 717-19 (5th Cir. 1974), *overruled on other grounds, Blanchard v. Bergeron,* 489 U.S. 87 (1989). The *Johnson* factors are:

1. the time and labor required;

2. the novelty and difficulty of the issues;

3. the skill required to perform the legal service adequately;

4. the preclusion of other employment by the attorney because he accepted this case;

5. the customary fee for similar work in the community;

6. whether the fee is fixed or contingent;

7. time limitations imposed by the client;

8. the amount involved and the results obtained;

9. the experience reputation and ability of the attorneys;

10. the undesirability of the case;

11. the nature and length of the professional relationship with the client; and

12. awards in similar cases.

This Court has many examples of similar litigation demonstrating multiplier amounts that span a large range. For example, in *In re Oil Spill by the DEEPWATER H*ORIZON, 2016 WL 6215974 at *20, the Court determined that the average multiplier in cases with settlements in the $1 billion range was 3.14 and that the median was 2.87.[4] Based on this determination the court upheld a percentage award cross-checked by 2.34 multiplier. Similarly, in *Altier v. Worley Catastrophe Response, LLC*, No. CIV.A. 11-241, 2012 WL 161824, at *23 (E.D. La.

[4] The Court based this determination on a chart prepared by Plaintiffs' expert showing lodestar multipliers in eighteen cases with settlement amounts above $1 billion. The chart can be found in the ECF filings for MDL No. 2179 in the Eastern District of Louisiana. It is on page 21 of Dkt. No. 21098-3.

Jan. 18, 2012), the court noted that multipliers in the range of 2.17 and higher are "regularly awarded," *citing, Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 n. 6 (9th Cir. 2002) and 3 *Newberg on Class Actions* § 14.03 at 14–5 (surveying multipliers in common fund cases and finding a range of 0.6 to 19.6, with more than three-fourths between 1.0 and 4.0 and a bare majority in the 1.5 to 3.0 range). *See also In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640, 661-662 (E.D. La. 2010)(cataloging multipliers in mass tort cases between 1.19 and 4.45 and approving a percentage fee cross-checked against a lodestar with a 1.2633 multiplier); *City of Omaha Police & Fire Retirement Sys. v. LHC Group,* Civil No. 6:12-1609, 2015 WL965696 at *10 (W.D. La. March 3, 2015) (noting that multipliers ranging from one to four frequently are awarded in common fund cases); *Di Gacomo v. Plains All American Pipeline et.al.,* No. Civ.A.H-99-4137, 2001 WL 3463373 at *11 (S.D. Tex. Dec. 19, 2001)(noting that courts typically apply multipliers ranging from one to four but approving a 5.3 multiplier based on a significant risk of no recovery).

Application of the *Johnson* factors should lead to the use of a multiplier as part of this Court's lodestar cross-check. The Court has already acknowledged the extensive amount of time, labor and skill required to prepare and try four bellwether cases and to fully brief and argue two appeals. Dkt. No. 889 at 2. Moreover, it cannot be disputed that these cases have presented difficult factual and legal issues. Defendants retained a multitude of scientific experts who had to be studied and then cross-examined. This work required not only an extensive amount of trial advocacy skill and expertise, but also the ability to understand and apply reams of scientific literature to the cross-examination of Defendants' employees and experts. The PEC of course has also retained and prepared a large

number of world-class experts to testify in Plaintiffs' cases regarding innumerable fields ranging from pathology to bio-mechanical engineering to marketing. This work has been ongoing since early 2012. Indeed, it has been more than four years since the first bellwether trial.

Further, the lawyers on the PEC have been retained to work on a contingent fee basis. Thus, they have not been paid and, in addition, have invested a substantial amount of capital into the prosecution and presentation of these cases. The PEC attorneys have succeeded in overcoming innumerable legal obstacles to bring these cases to trial and obtained substantial jury verdicts in three of the four bellwether trials. And they have done so against a team of highly-skilled attorneys retained by the Defendants to defend this litigation. These facts all counsel in favor of a multiplier of at least 3 to sustain a lodestar-checked percentage fee to the common-benefit counsel in this case.

In the oral hearing of November 26, 2018, Defendants argued against modification of the preliminary holdback asserting that lawyers would not want to settle if the amount of the lawyers' fees were adjusted. Of course, lawyers must necessarily make their decisions based on the best interests of the clients, not the lawyers' pockets. An assessment increase does not affect the ability of the parties to settle, any more than the profit motive of the defense counsel wanting litigation to proliferate for purposes of increasing their billable hours.

For Defendants to insert themselves into this process is akin to hijacking the process to attack the very rubric of plaintiff MDL work. It is the same thing as plaintiffs moving to restrict the hourly rate of defense counsel, and thus inserting themselves into the attorney client relationship with the hope of making it unprofitable for counsel to continue defending DePuy/J&J.

Moreover, Defendants' misinterpretation of the Preliminary Holdback Order has created an unfair environment for Defendants to negotiate MDL cases with counsel not involved in the day-to-day litigation of this MDL. Using the Preliminary Holdback, Defendants have now not only settled a significant percentage of the MDL inventory, but have also effectively impacted the common benefit award, for the PEC and other MDL active counsel. Common benefit awards are universally recognized as the mechanism whereby plaintiff counsel and all plaintiffs overseen by an MDL transferee court can competently and effectively litigate a coordinated case. Defendants also greatly benefit from MDL coordination as it allows for the consolidation of arguments, discovery and trial before a single judge. Now the Defendants attempt to undermine that entire process by selecting certain inventories to settle while at the same time inappropriately championing a common benefit amount that will not fairly reflect the time and expense necessary to litigate the MDL in the first place.

CONCLUSION & REQUEST FOR EXPEDITED RELIEF

The additional data the Court anticipated requiring to order a common benefit fee and cost assessment has now materialized. Consequently, the Plaintiffs' Executive Committee requests that this Court consider the new information and order an appropriate assessment consistent with the controlling jurisprudence and the instant facts. The PEC requests that the Court rule on this request on an expedited basis and further that the Court order that no settlement funds be released until the Court has ruled on this Motion.[5]

[5] The Defendants have chosen this settlement strategy and its associated timing. They chose to keep the Court in the dark. They chose to announce their settlement scheme on Thanksgiving Eve. They chose not to put the Court on notice months ago when the settlement dialogues began. And they rejected the Court's invitation to

Respectfully submitted:

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employ mediation. They also rejected the PEC's requests to engage in settlement discussions.

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CERTIFICATE OF SERVICE

I certify that the foregoing instrument was served on counsel for the Defendants by the Court's ECF system and also by electronic mail on November 26, 2018.

W. Mark Lanier