

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

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

**THE PLAINTIFFS’ EXECUTIVE COMMITTEE’S NOTICE OF  
RESERVATION OF RIGHTS REGARDING THE COURT’S  
AUGUST 29, 2018 PRELIMINARY HOLDBACK ORDER (DOC. 889)**

In part, the catalyst for this notice is the guidance the Court provided in its preliminary holdback order (Doc. 889) where the Court indicated that it would determine the amount or percentage of a common benefit assessment, if any, at a later date. (Order, p.3) And also, where the Court noted that because several factors affect the determination of a common benefit assessment, the Court requires additional information before it can make such an assessment – including, but not limited to, the value of settlements or judgments. (*Id.* p. 3)

Courts are often pressed to set a specific holdback percentage for common benefit fees and costs at a point where neither the parties nor the Court has sufficient information to make an appropriate determination. Plaintiffs’ proposed solution to this conundrum was to delay the determination of a specific holdback



percentage to a date when the need actually arose and at a point in time when the Court had the benefit of the latest instructive data; namely—any settlement amounts and the associated common benefits effort.

On February 5, 2018, the Plaintiffs' Executive Committee (PEC) filed an Omnibus Motion which included a request for a preliminary holdback order with the above described protocol (Doc. 832). When engaging in this exercise to determine the percentage to be withheld, the obvious initial question is: "The percentage of what?" A second closely related question is: "What is the fair amount of common benefit work and expenses that were incurred to get to the settlement?" A percentage of what amount to service what amount of common benefit fees and costs is the real core issue. When neither of these data points are known, the challenge associated with selecting a percentage becomes obvious. Until settlement actually occurs, and the PEC has had an opportunity to brief the common benefit assessment issue in light of same (including submission *in camera* of the time and expenses incurred), an appropriate common benefit assessment becomes guesswork.

After considering Plaintiffs' request (Doc. 832), Defendants' Response (Doc. 836), Plaintiffs' Reply (Doc. 839), and the parties' subsequent communications with the Special Master, the Court entered a Preliminary Holdback Order (Doc. 889), which noted:

- “In making this determination, the Court relies on its nearly eight years of presiding over extensive motion practice, discovery, and bellwether trials consuming 134 days of trial and more than 31,500 pages of trial transcripts. There are more than 880 entries on the docket, the parties have conducted approximately 300 depositions, and more than 100 million pages of documents have been produced in this litigation. The bellwether trials have resulted in extensive post-verdict motions and briefing, and two appeals have been fully briefed and argued to the United States Court of Appeals for the Fifth Circuit.” (Order, p. 2)
- “All Plaintiffs have benefitted from the efforts of counsel.” (*Id.* p. 2)
- “The Court will determine the amount or percentage of common benefit assessment, if any, at a later date.” (*Id.* p. 3)
- “Because several factors affect the determination of a common benefit assessment, the Court requires additional information before it can make such an assessment – including, but not limited to, the value of settlements or judgments.” (*Id.* p. 3)

As the PEC’s prior briefing and other submissions explain, and as the Court’s order notes, determining the amount of any common benefit assessment is premature until such time as a resolution – partial or otherwise – has been reached.

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.

Dated: October 12, 2018

Respectfully submitted:



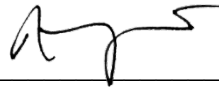
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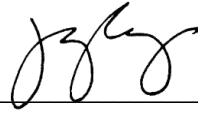
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### CERTIFICATE OF SERVICE

I certify that the foregoing instrument was filed via the court's CM/ECF system on October 12, 2018 and was also served on Defendants by electronic mail.



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Mark Lanier