

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

IN RE: DEPUY ORTHOPAEDICS,	§	
INC., PINNACLE HIP IMPLANT	§	MDL Docket No.
PRODUCTS LIABILITY	§	
LITIGATION	§	3:11-MD-2244-K
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This Document Relates to All Cases	§	
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**PRELIMINARY HOLDBACK ORDER**

Before the Court is Plaintiffs’ Omnibus Motion (Doc. 832), which, among other topics, proposes a “common benefit hold.” Plaintiffs request the Court “order that any case that settles will have a hold on any distribution of the settlement proceeds until this Court enters an appropriate common benefit assessment.” *Id.* at ¶ 15. After considering Plaintiffs’ request, Defendants’ Response (Doc. 836), Plaintiffs’ Reply (Doc. 839), and the parties’ subsequent communications with the Special Master, the Court enters this Preliminary Holdback Order to enable equitable sharing of attorneys’ fees and expenses among Plaintiffs and the counsel who act for the common benefit of all Plaintiffs in the cases that are or were pending in this MDL proceeding.

The Court can create a holdback from potential settlement payments or judgments that may be paid by Defendants through its inherent authority to establish common benefit funds, assess parties and their counsel, and appropriate and distribute those funds. *See In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972*, 549 F.2d

1006 (5th Cir. 1977). A common benefit fund is designed to compensate attorneys for the costs incurred and work performed for the common benefit of all plaintiffs and their counsel. *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640, 647 (E.D. La. 2010). The primary theory supporting such funds is the common benefit doctrine, which holds that persons who obtain the benefits of a lawsuit without contributing to defraying its costs are unjustly enriched at the successful litigant's expense. *See id.*

Defendants propose that no more than 10 percent should be held back from the gross value of settlements and judgments in this MDL. Based on the history of this case and the parties' briefing, the Court finds that this percentage is conservative and appropriate. 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. All Plaintiffs have benefitted from the efforts of counsel.

This Order does not assess or distribute common benefit fees; it reserves funds to compensate attorneys for their work and costs spent for the common benefit of all Plaintiffs and their counsel. The Court enters this Order to avoid later complications that may arise from staggered resolutions, including the possibility of insufficient funds

to compensate attorneys for their work and costs. The Court will determine the amount or percentage of common benefit assessment, if any, at a later date.

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. Effective and efficient management of these MDL proceedings requires the Court and the parties remain timely apprised of settlements or resolution of any Pinnacle-related proceedings, including those in state courts. *See In re: Actos (Pioglitazone) Prods. Liab. Lit.*, Case Management Order: Reporting on Resolved State Court Proceedings – Jan. 16, 2016, *available at* <http://www.lawd.uscourts.gov/court-orders-sorted-category>. The Court may also request briefing and a hearing on the amount of a common benefit assessment.

For these reasons, the Court ORDERS that:

1. Within the earlier of 7 days before releasing settlement funds or 15 days after signing a settlement agreement for any products liability case involving the Pinnacle Acetabular Cup System, including cases pending in any state court, Defendants must provide the following information to the Special Master: 1) the name and cause number of the case; 2) the court in which the case is or was pending; 3) the name of the Plaintiff(s)' counsel; and 4) the amount of the settlement unless that amount is subject to a confidentiality provision. The information given to the Special

Master may be provided to the Court in a manner that does not indicate strategy or violate privilege.

2. Defendants and their counsel shall hold back 10 percent of the gross value of any settlement or judgment in a case that has been or is included in this MDL for the common benefit fund pending the determination of a common benefit assessment, if any. Of the holdback, 70 percent (7 percent of the gross value) shall be held back for common benefit attorneys' fees, and 30 percent (3 percent of the gross value) shall be held back for costs expended for the common benefit of Plaintiffs.

3. Defendants shall deposit all holdback funds in an interest-bearing common benefit fund in the registry of the Court. The money in the Common Benefit Fund shall not be distributed unless the Court makes a common benefit assessment by separate order.

4. Defendants shall abide by this Order for cases in this MDL that are remanded from this Court to a state court or transferred to other federal judicial districts pursuant to 28 U.S.C. § 1407(a).

**SO ORDERED.**

Signed August 29<sup>th</sup>, 2018.

  
ED KINKEADE  
UNITED STATES DISTRICT JUDGE