

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN RE: BIOMET M2a MAGNUM	)	CAUSE NO. 3:12-MD-2391-RLM-CAN
HIP IMPLANT PRODUCT	)	Judge Robert L. Miller, Jr.
LIABILITY LITIGATION	)	
(MDL2391)	)	
	)	
	)	
This Document Relates to All Cases	)	

**AGREED MOTION TO ESTABLISH QUALIFIED SETTLEMENT FUND AND  
APPOINT FUND ADMINISTRATOR**

The Biomet Plaintiffs' Executive Committee ("PEC"), appointed by this Court, on behalf of all plaintiffs enrolled in the Biomet Resolution Program move this Court for an Order to: (i) establish a Qualified Settlement Fund, which shall be called the "PEC Biomet Qualified Settlement Fund" (the "Fund"); and (ii) to appoint an administrator for the Fund. In support of this Motion, the PEC respectfully states as follows:

1. Plaintiffs are seeking damages from Biomet, Inc. and its related entities that are part of *In re: Biomet M2A Magnum Hip Implant Products Liability Litigation*, MDL No. 2391 ("Defendants") arising from implantation, use and/or removal of the Biomet M2-a Magnum hip replacement.

2. Plaintiffs, by and through counsel, have conferred with counsel for Defendants and Defendants have agreed to this filing and to the relief sought herein.

3. Defendants, the Plaintiffs' Executive Committee, and Plaintiffs' Counsel entered into a Settlement Agreement dated as of January 31, 2014, as amended, September \_\_, 2014 (the "Biomet Master Settlement Agreement"), which establishes a private settlement program to resolve: (a) all cases currently filed in this Court and/or state courts; and (b) any pending lawsuit

or lawsuits which were filed on or before April 15, 2014, against Biomet, which concerned Biomet hip implant device cases as defined in the Biomet Master Settlement Agreement, and which followed the timely notice procedures of the Biomet Master Settlement Agreement; through which individual Plaintiffs have agreed to settle these Biomet claims. A copy of the Biomet Master Settlement Agreement can be found on the Court's ECF docket (Document No. 1317-1).

4. At this time the exact distribution of settlement funds to the Plaintiffs and any entities asserting a claim of subrogation or reimbursement cannot be finalized. Hence, in the best interest of all parties, and pursuant to Section 6 of the Biomet Master Settlement Agreement, the Plaintiffs ask that the Court should establish the Fund to resolve or satisfy these Biomet Claims, while allowing for the allocation and final disbursement of settlement funds to be finalized.

5. Upon satisfying the requirements for release under Section 6 of the Biomet Master Settlement Agreement, the Defendants by and through counsel, will authorize the creation of and the release of settlement monies to the Fund.

6. The PEC Biomet Qualified Settlement Fund shall be established, managed and distribution procedures created, all subject to the terms, conditions and restrictions of the Biomet Master Settlement Agreement, including the provisions of a release executed by Plaintiffs under Section 11, and the provisions of lien payments under Section 12 of the Biomet Master Settlement Agreement.

7. Further, the distribution of settlement monies from the Fund to or for the benefit of Plaintiffs will be made consistent with, and pursuant to a Settlement Administration

Agreement, to be negotiated and executed by the parties pursuant to Section 13 of the Biomet Master Settlement Agreement.

8. All settlement payment obligations of the Defendants under the Biomet Master Settlement Agreement to the identified Plaintiffs as part of this settlement process will be satisfied once the settlement payments are transferred from the Biomet to the PEC Biomet Qualified Settlement Fund, which is the subject of this Motion. Upon the conditions of paragraphs 11 and 12 of the Settlement Agreement being met, Defendants will have no responsibility for the funds in the PEC Biomet Qualified Settlement Fund, its investments and administration or disbursements therefrom.

9. The Fund shall be a Qualified Settlement Fund as described in Treas. Reg. Section 1.468B1, established by order of this Court, and the Fund shall remain subject to the continuing jurisdiction of this Court.

10. This Court has jurisdiction over this matter under Treas. Reg. Section 1.468B-1(c)(1), which states in relevant part that a Qualified Settlement Fund “is established pursuant to an order of, or is approved by, the United States, any state (including the District of Columbia), territory, possession, or political subdivision thereof, or any agency or instrumentality (including a court of law) . . . and is subject to the continuing jurisdiction of that governmental authority.”

11. The PEC requests that the Court approve the engagement of Garretson Resolution Group, Inc. as the “Fund Administrator” and “Trustee” (the “Fund Administrator”). Fund Administrator’s address is as follows: 6281 Tri-Ridge Blvd., Suite 300, Loveland, OH 45140. Garretson Resolution Group, Inc. submits personally to the jurisdiction of this Court. Upon the dissolution or bankruptcy of Garretson Resolution Group, Inc., its appointment as Fund

Administrator shall terminate and the PEC and Defendants will seek Court approval of their nominated successor Fund Administrator.

12. Until such time that the distribution of the Total Settlement Proceeds from the PEC Biomet Qualified Settlement Fund can be identified, no settlement monies shall be set apart for a Plaintiff, or otherwise made available so that he or she may draw upon or otherwise control said settlement monies.

13. The Fund, by and through the Fund Administrator, consistent with the Biomet Master Settlement Agreement, shall only make payments to Plaintiffs' Counsel, on behalf of Plaintiffs, or to otherwise established Plaintiff Qualified Settlement Funds, or to such other claimants to the Fund with valid claims and/or liens against Plaintiffs.

14. The Fund, by and through the Fund Administrator, may purchase and assign any structured settlements created under any Release Agreements. Any structured settlement annuity contract shall be issued by a life insurance company that is rated A+ or better by A.M. Best Company.<sup>1</sup>

15. The claims made against the Defendants are made on account of physical bodily injury and arise out of alleged liability in tort or violation of law. The applicable Plaintiffs' Counsel shall agree in writing to discharge the Fund and the Fund Administrator's liabilities in the making of any structured settlement payments, also known as periodic payments, by

---

<sup>2</sup> Structured Settlement Payments are assigned to a qualified assignee by entering into qualified assignments of such structured settlement payments within the meaning of Section 130(c) of the Internal Revenue Code. The qualified assignee shall, respecting each person who is to receive periodic payments under a settlement agreement, purchase one or more qualified funding assets within the meaning of Section 130(d) of the Internal Revenue Code to fund any structured settlement payments assigned to the qualified assignee.

executing, along with the Fund Administrator, any necessary documents required or related to the discharge of those liabilities.

16. The Total Settlement Proceeds are the sole property of the Fund. Until such time as monies are distributed, the Plaintiffs shall not possess any rights to demand or receive any portion of the Total Settlement Proceeds or the escrowed funds or to mortgage, pledge, or encumber the same in any manner. To the extent possible, this Motion shall be construed so as to prevent the Plaintiffs from being in constructive receipt, as determined under federal income tax principles, of any amounts held by the Fund.

17. The Fund Administrator shall be indemnified and held harmless by the Plaintiffs from any claims made by any alleged lien holder, or other person or entity that attempts to assert a right of payment, reimbursement or garnishment against the Fund. Should the Fund Administrator be named as a party to, or threatened to be made a party to, any threatened, pending or completed action, suit or proceeding of any kind, whether civil, administrative or arbitrative, and whether brought by or against or otherwise involving the Fund, by reason of the Fund Administrator having served in any capacity on behalf of the Fund, the Fund Administrator shall be indemnified and held harmless by the Plaintiffs against reasonable expenses, costs and fees (including attorneys' fees), judgment, awards, costs, amounts paid in settlement, and liabilities of all kinds incurred by the Fund Administrator in connection with or resulting from such actual or threatened action, suit or proceeding; except to the extent that it is finally determined by this Court that the Fund Administrator was grossly negligent or acted with willful misconduct in connection with the administration of this Fund.

15. The PEC and Plaintiffs' Counsel shall be indemnified and held harmless by the Fund Administrator from any claims which arise from the negligence or willful misconduct of

the Fund Administrator as determined by this Court. Should the PEC, any member thereof, and / or any or all of Plaintiffs' Counsel be named as a party to, or threatened to be made a party to, any threatened, pending or completed action, suit or proceeding of any kind, whether civil, administrative or arbitratve, by reason of the Fund Administrator's negligence or willful misconduct, such parties named herein shall be indemnified and held harmless by the Fund Administrator against reasonable expenses, costs and fees (including attorneys' fees), judgment, awards, costs, amounts paid in settlement, and liabilities of all kinds incurred by such parties in connection with or resulting from such actual or threatened action, suit or proceeding.

16. The PEC requests that no bond be required, provided that all monies received by the Fund, which includes all principal and interest earned thereon, shall be deposited in an investment agency or similar account held in custody at The PrivateBank and Trust for the benefit of and titled in the legal name of the Fund and invested in instruments/securities comprised of (a) United States Agency, Government Sponsored Enterprises or Treasury securities or obligations (or a mutual fund invested solely in such instruments) (b) cash equivalent securities including SEC registered money market funds and collateralized money market accounts; and/or (c) non-interest bearing corporate accounts subject to unlimited Federal Depository Insurance Corporation protections as available.

17. The Fund shall be held at The PrivateBank and Trust, a financial institution doing business in Chicago, IL according to the above terms and conditions. The PrivateBank and Trust shall be responsible for any and all investment related decisions, following the instructions of the Fund Administrator and/or its investment advisor pursuant to these terms and conditions, such that a principal preservation driven investment policy is implemented. Notwithstanding the foregoing, The PrivateBank and Trust shall not be allowed to distribute any income or principal

from the Fund except upon instructions of the Fund Administrator, or, if requested, upon the order of this Court upon the joint motion of the parties. The Fund Administrator retains the right to remove The PrivateBank and Trust, with or without cause, in its sole and absolute discretion. The Fund Administrator may designate a replacement bank upon the written consent of the PEC. In the event of such replacement, the terms and conditions of this paragraph 17, including without limitation, those addressing bond requirements, investments, and distributions from the Fund, shall apply to any such replacement bank.

18. The PEC has received information concerning, and consent to the Fund Administrator's flat fees with respect to the administration of the Fund, including any fees received by the Fund Administrator from the Bank as part of a Preferred Banking Program, as described in the correspondence to the PEC dated September 5, 2014.

19. The Fund Administrator will establish a minimum of two sub-accounts. The "Biomet Sub-account" shall be used to hold funds for claimants who have not yet satisfied paragraph 11 of the Settlement Agreement, nor approved for distribution from the sub-account by Biomet and/or the PEC. The "PEC Sub-account" shall be used to hold funds for claimants that have satisfied paragraph 11 of the Settlement Agreement, but have not yet satisfied paragraphs 12 of the Settlement Agreement, nor approved for distribution from the sub-account by Biomet and/or the PEC. With regards to the Biomet Sub-account, after the payment of all fees associated with the administration of the Fund, related expenses and related taxes, remaining interest, or any portion thereof, shall be accumulated and added to the settlement funds, and further provided that any such interest or investment income earned shall remain in the Fund to be later distributed to Biomet. With regards to the PEC Sub-account, the Fund Administrator is permitted to distribute all excess interest accrued to the Fund, after the payment of all fees

associated with the administration of the Fund, related expenses and related taxes, to a charity or charities of the PEC's choice, using the doctrine of *cy pres*.

20. The Fund Administrator shall be authorized to distribute all attorneys' fees and litigation expenses to Plaintiffs' Counsel, consistent with existing contingency fee contracts or, to the extent required by law, and, where required by law in an individual case, upon Court approval on motion of a Plaintiffs' Counsel.

21. All taxes on the income of the Fund and expenses and costs incurred in connection with the taxation of the Fund (including, without limitation, the expenses of tax attorneys and accountants) shall be paid out of the Fund, shall be considered to be a cost of administration of the settlement, and shall be paid as instructed by the Fund Administrator.

22. Upon request, the Fund Administrator will prepare and deliver Fund Statements ("Statements") to Plaintiffs' Counsel and/or this Court. The Statements shall include a statement of receipts, investment earnings, and disbursements. The Fund Administrator shall provide the Statement no later than ten (10) business days following the request.

23. The Fund Administrator shall have the right to rely upon any affidavit, certificate, letter, notice, electronic mail or other document believed by the Fund Administrator to be genuine and sufficient, and upon any other evidence believed by the Fund Administrator, in its reasonable judgment, to be genuine and sufficient, which may be provided to the Fund Administrator by a Plaintiffs' Counsel.

24. Upon final distribution of all monies paid into the Fund, the Fund Administrator shall take appropriate steps to wind down the Fund and thereafter be discharged from any further responsibility with respect to the Fund.



25. The Fund Administrator will obtain a Federal Taxpayer Identification Number for the PEC Biomet Qualified Settlement Fund upon the execution of an Order by this Court establishing the Fund.

**WHEREFORE**, the PEC and Plaintiffs' Counsel respectfully request that the Court consent to take continuing jurisdiction over the Fund pursuant to Treas. Reg. Section 1.468B-1(c)(1), and issue an Order which:

1. Establishes said Fund as a Qualified Settlement Fund within the meaning of Treasury Regulation Section 1.468B-1;

2. Appoints Garretson Resolution Group, Inc. as Fund Administrator and Trustee pursuant to the terms, conditions and restrictions of this Motion, thereby granting the Fund Administrator the authority to conduct any and all activities necessary to administer this Fund as described in this Motion;

4. Authorizes the Fund Administrator to effect qualified assignments of any resulting structured settlement liability within the meaning of Section 130(c) of the Internal Revenue Code to the qualified assignee.

5. Authorizes the Fund Administrator to distribute all attorneys' fees and litigation expenses to counsel for a Plaintiff, as well as with those persons who are represented by a Plaintiffs' Counsel in future settlements, consistent with their existing contingency fee contracts.

6. Authorizes the Fund Administrator, upon final distribution of all monies paid into the Fund, to take appropriate steps to wind down the fund and thereafter discharging the Fund Administrator from any further responsibility with respect to the Fund.

**DATED** this 18th day of September, 2014.

Respectfully submitted on behalf of Plaintiffs'  
Executive Committee

**S/ Thomas R. Anapol, Esquire**

**On behalf of the Plaintiffs Executive  
Committee**

**//S:Thomas R. Anapol//**

Thomas R. Anapol

**ANAPOL SCHWARTZ**

1710 Spruce Street

Philadelphia, PA 19103

(215) 735-1130

[tanapol@anapolschwartz.com](mailto:tanapol@anapolschwartz.com)

W. Mark Lanier

**LANIER LAW FIRM, PC**

6810 FM 1960 West

Houston, Texas 77069

Phone: (713) 659-5200

Fax: (713) 659-2204

[wml@lanierlawfirm.com](mailto:wml@lanierlawfirm.com)

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on September 18, 2014, a copy of foregoing **AGREED MOTION TO ESTABLISH QUALIFIED SETTLEMENT AND TO APPOINT FUND ADMINISTRATOR** was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's system.

s/ Robert T. Dassow

Robert T. Dassow, #15145-64  
Hovde Dassow + Deets, LLC  
201 W. 103<sup>rd</sup> Street, Suite 500  
Indianapolis, IN 46290  
Phone: (317) 818-3100  
Fax: (317) 818-3111  
Email: rdassow@hovdelaw.com

**SETTLEMENT AGREEMENT ADDENDUM**

**BETWEEN**

**BIOMET, INC.**

**AND**

**PLAINTIFFS EXECUTIVE COMMITTEE FOR IN RE: BIOMET M2A MAGNUM HIP  
IMPLANT PRODUCTS LIABILITY LITIGATION, MDL No. 2391**

**Introduction/Explanation**

The original Settlement Agreement between Biomet, Inc. and Plaintiffs Executive Committee for *In re: Biomet M2A Magnum Hip Implant Products Liability Litigation*, MDL No. 2391 was finalized and executed by the parties effective January 31, 2014 (the “Agreement”). The parties now intend to amend the Agreement as follows:

Section 6.0 of the original Agreement provides:

*6. **Escrow:** Within thirty (30) days of an agreement that, or the Court determining that any of the 90% acceptance requirements of Paragraph 5 have been met, Biomet will pay or cause to be paid an initial payment of \$50,000,000 to Esquire Bank to be held in Escrow. Any “early” notice Paragraph 2 cases, as described in Paragraph 5 above, will be paid on or before September 26, 2014. To the extent additional funds are needed to fund settlements and the PEC and Biomet’s counsel have agreed in writing that such funds are needed, within fifteen (15) business days of receipt of a written request co-signed by a representative of the PEC and Biomet’s counsel, Biomet will pay, or cause to be paid sufficient funds to pay the accepted and agreed to settlement payments.*

The parties have agreed to rewrite Section 6.0 of the Agreement in its entirety to read as follows:

*6. **Escrow:** Within thirty (30) days of an agreement that, or the Court determining that any of the 90% acceptance requirements of Paragraph 5 have been met, Biomet will pay or cause to be paid an initial payment of \$50,000,000 to a bank of Plaintiffs’ Counsels’ choosing to be held in Escrow. Any “early” notice Paragraph 2 cases, as described in Paragraph 5 above, will be paid on or before September 26, 2014. To the extent additional funds are needed to fund settlements and the PEC and Biomet’s counsel have agreed in writing that such funds are needed, within fifteen (15) business days of receipt of a written request co-signed by a representative of the PEC and Biomet’s counsel, Biomet will pay, or cause to be paid sufficient funds to pay the accepted and agreed to settlement payments.*

The reason for this amendment is that the Plaintiffs' Executive Committee and the Attorneys for Biomet have agreed it is the best interest of the Biomet Plaintiffs any to have the flexibility to choose a Bank that that can best accomplish the settlement objectives.

This document, dated the 18th day of September, 2014, will serve as an addendum to the original Agreement to further memorialize the agreement between the parties. The original Agreement was finalized and executed by the parties effective January 31, 2014. (See Document No. 1317-1). Upon the execution of the Addendum it shall be deemed as a part of the original Agreement and when taken together, shall constitute one and the same document.

This Agreement is ratified in all other respects as originally written effective January 31, 2014.

**[rest of page intentionally left blank]**

**ADDENDUM SIGNATURE PAGE:**

	<p><b>On behalf of the Plaintiffs Executive Committee</b> <b><u>s/Thomas R. Anapol</u></b> Thomas R. Anapol <b>ANAPOL SCHWARTZ</b> 1710 Spruce Street Philadelphia, PA 19103 (215) 735-1130 <a href="mailto:tanapol@anapolschwartz.com">tanapol@anapolschwartz.com</a></p> <p>W. Mark Lanier <b>LANIER LAW FIRM, PC</b> 6810 FM 1960 West Houston, Texas 77069 Phone: (713) 659-5200 Fax: (713) 659-2204 <a href="mailto:wml@lanierlawfirm.com">wml@lanierlawfirm.com</a></p>
	<p><b>ATTORNEYS FOR BIOMET</b> <b><u>s/John D. Winter</u></b> John D. Winter <b>PATTERSON, BELKNAP, WEBB &amp; TYLER, LLP</b> 1133 Avenue of the Americas New York, NY 10036 (212) 336-2000 <a href="mailto:jwinter@pbwt.com">jwinter@pbwt.com</a></p> <p>John D. LaDue <b>LADUE CURRAN &amp; KUEHN LLC</b> 205 West Jefferson Boulevard South Bend, IN 46601 (574) 968-0760 <a href="mailto:jladue@lck-law.com">jladue@lck-law.com</a></p>