

### Multiple Documents

Part	Description
1	8 pages
2	Text of Proposed Order
3	Exhibit A-D



3. On August 8, 2011 pursuant to 29 U.S.C. § 1407 the Judicial Panel on Multidistrict Litigation (“JPML”) transferred for consolidated and coordinated pretrial proceedings cases involving claims by Plaintiffs injured as a result of alleged defective Zimmer NexGen knee implants. Transfer Order, Aug. 8, 2011, ECF No. 110.

4. After this MDL was established by the JPML, this Court thereafter appointed certain plaintiffs’ counsel to serve as Co-Lead Counsel, Plaintiffs’ Liaison Counsel and as members of the Steering Committee (hereafter collectively “PSC”). See Doc. No. 48, filed Sept. 16, 2011.

5. Since their appointment, members of the PSC, and other plaintiffs counsel as directed by the PSC, have conducted common-benefit work including, but not limited to, engaging in bi-weekly meet and confers on discovery issues, meet and confers with Defendants on proposed case management orders, scheduling of 30(b)(6) depositions, conducting numerous depositions, drafting and filing master and short form complaints and responding to numerous motions filed by defendants. The PSC has conducted coordinated and related administrative functions and provided plaintiffs’ attorneys representing plaintiffs in this litigation with regular updates regarding this Court’s Orders and guidance regarding procedural issues. The PSC expects to continue to invest many resources in common-benefit work.

6. While the common benefit doctrine reflects the inherent right of every federal district judge to ensure equity in a variety of procedural circumstances, it has become a staple of effective case management in modern complex litigation, especially contemporary multidistrict litigation. The court in *Florida Everglades* gave practical implementation to court-appointed lead/liaison counsel and PSC structures by holding that because “lead counsel’s services are in part for all parties with like interests and their lawyers,” a multidistrict litigation transferee court

is obligated to compensate counsel who developed and prosecuted a case from the recovery of others who reaped the benefit of that work and followed on its coat-tails.

*In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1019-21 at 1017 (5<sup>th</sup> Cir. 1977). Thus, under the common benefit doctrine, multidistrict transferee courts are empowered to require that fees be equitably shared in complex civil litigation. See, e.g. *Id.* at 1016 (“We hold that the district court had the power to direct that the Committee and its counsel be compensated and that requiring the payment come from other [non-member] attorneys was permissible.”); *Smiley v. Sincoff*, 958 F.2d 498, 501 (2d Cir. 1992) (“District courts have exercised this power to establish fee structures designed to compensate committee members for their work on behalf of all plaintiffs involved in consolidated litigation.”).

7. The Manual for Complex Litigation (4th ed. 2004) (the “Manual 4th”), emphasizes that, together with an MDL court’s power and obligation to appoint responsible counsel, comes the power and obligation to ensure that counsel who have undertaken core work on the litigation, particularly court-appointed counsel, receive compensation, including from later-filed (or unfiled) cases and settlements that take advantage of and piggy-back on their work. The *Manual 4th* recognizes and endorses the hold back mechanism as follows: “Class counsel generally have the benefit of the common fund doctrine to support payment for their efforts on behalf of the class or consolidated litigants. MDL judges generally issue orders directing that defendants who settle MDL-related cases contribute a fixed percentage of the settlement to a general fund to pay national counsel.” *Id.* § 20.312; see also *id.* §§ 11.211, 14.211, 14.215, 22.927.

8. In *Boeing v. Van Gemert*, 444U.S. 472, 478 (1980), the Supreme Court explained that the court must have “[j]urisdiction over the fund involved in the litigation.” This criterion is

satisfied by jurisdiction over a party that controls the fund, usually the defendant. In the MDL context, transferee courts create this fund through orders directing defendants to “hold back” a specified percentage from settlements that release claims asserted in the MDL. The account into which these holdback funds are deposited becomes the source of common benefit fees and costs awards that are made, at the close of the proceedings, pursuant to duly-noticed motion and a court approval process.

9. The Proposed Order subjects cases in this MDL or outside the MDL who have signed the Participation Agreement to an eight percent (8%) assessment of the gross monetary recovery (3% from the Plaintiffs’ share of the recovery and 5% from the share of recovery payable to the Plaintiffs’ attorney as attorney fees) to be paid to a an escrow account referred to as the “Zimmer NexGen Knee Common Benefit Fund.” The common benefit funds will be held as funds subject to the direction of the Court and no party or attorney would have any individual right to any of these funds except to the extent of amounts directed to be disbursed to such person by order of the Court.

10. The proposed order is consistent with fair and equitable assessments that have been ordered in other MDLs recently. See *In re Nuvaring® Products Liability Litigation*, MDL 1964, Amended CMO No. 3 at ¶ A.1.b. entered 12/09/2011 (ordering eleven percent (11%) to be subtracted from the attorneys’ fees portion of the individual case fee and four and one-half percent (4.5%) from the client’s portion of any recovery); see also, *In re Kugel Mesh Hernia Patch Products Liability Litigation*, MDL 1842, PPO 22 at ¶ 2.A, entered 12/18/2009 (ordering a twelve percent (12%) assessment of the gross monetary recovery).

11. When a Common Benefit Fund is established, with time and expenses for work benefitting all plaintiffs to be paid from such Fund, it is appropriate to appoint an outside auditor

to review time and expense reports submitted by common benefit attorneys and to submit reports to the Court as requested. As with the time and expense reporting protocols, early auditing of time and expense reports helps reduce the risk of conflicts regarding payment for fees and expenses from a Common Benefit Fund by ensuring consistency and accurate reporting early in the case.

12. The Proposed Order allows for the appointment of a certified public accountant (the “CPA”) by the Court to act as the outside auditor for the time and expenses submitted to be paid from the Common Benefit Fund. The CPA will be charged with determining which items submitted for payment of common benefit time and expenses meet the criteria established by the Proposed Order. The subsequent order, should one be entered by the Court appointing a CPA, shall specify the hourly rates charged by the CPA and direct the CPA to submit quarterly detailed bills to Lead Counsel of the PSC. Such bills will be paid from an account established by the PSC and will be considered a shared cost.

13. Entry now of an Order establishing a protocol governing permissible common benefit time and expenses invested in this matter and requiring periodic reporting by plaintiffs’ counsel conducting such common-benefit work will help ensure only reasonable and necessary fees and costs inuring to the benefit of all plaintiffs are incurred. Establishing such guidelines early in the course of this litigation, along with the establishment of a Common Benefit Fund, will help ensure that staffing levels for common-benefit work are appropriate and common-benefit time and expenses are reasonable, and will reduce the risk of later conflict over fees and expenses. See *Manuel for Complex Litigation (Fourth)* §§ 14.242, 14.213 (2004). Further, imposing record-keeping procedures and requiring the submission of periodic reports

“encourages lawyers to maintain records adequate for the Court’s purposes,” and facilitates Court review of later-submitted fee petitions, if any. See *id.* §§ 14.212-214.

14. Accordingly, the Proposed Order requires members of the PSC to contribute assessments to a Fund administered by Plaintiffs’ Lead Counsel in amounts agreed to by the PSC to cover interim litigation expenses for administration of this MDL. It likewise requires all counsel conducting common-benefit work to maintain contemporaneous and detailed time and expense records in a specific electronic format. See *id.* § 14.213. (recommending that time keeping be addressed early in the case and that contemporaneous records identifying the activity and nature of work be required, along with the use of computer programs to facilitate analysis and agreed-on forms of summaries). Such records must be submitted quarterly to the PSC-designated attorney and shall be subject to further review by the Court-appointed auditor (proposed herein) for compliance with guidelines of the time and expense reporting protocol.

15. The Proposed Order delineates compensable common benefit time categories, such as time spent conducting discovery, in motions practice, pursuing organizational functions, preparing for and conducting trial, and related litigation functions. To ensure common benefit fees are reasonable, compensable categories exclude, inter alia, time spent not authorized by the PSC, time spent on individual client cases, time spent reading and reviewing court documents unless necessary to conduct a compensable function and any duplicative time. Similarly, the Proposed Order limits compensable expenses to those necessary to carry out legitimate compensable work, and imposes limitations on both travel and non-travel expenses, such as limiting reimbursement for coach-class fare only and excluding most secretarial functions, to ensure only reasonable costs are reimbursed.

16. Such time and expense limitations are appropriate to ensure the appropriate level of staffing and expenses. See *id.*, § 14.212. (discussing guidelines regarding who may charge for discovery, court and trial time); § 14.216 (discussing limitations on expense categories).

17. Accordingly, other MDL courts have entered orders establishing similar time keeping and expense reporting protocols at early stages of the litigation. See e.g. Pretrial Order No. 9, *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on April 20, 2010, No. 10-md-02179 (E.D. La. Oct. 8, 2010), ECF No. 508 (entered three months after transfer by the MDL panel); Mem. & Order, *In re: Oral Sodium Phosphate Solution-Based Prods. Liab. Action*, No. 1:09-SP-80000, MDL No. 2066 (N.D. Ohio Sept. 30, 2009), ECF No. 34 (entered three months after transfer and setting forth guidelines "in anticipation of the possibility that, at some time in the future, there may be applications . . . for payment of common benefit fees or expenses"); Pretrial Order No. 6, *In re Vioxx Prods. Liab. Litig.*, No. 05-md-01657 (E.D. La. Apr. 8, 2005), ECF No. 245 (entered two months after transfer).

18. For the foregoing reasons, Plaintiffs respectfully request entry of the Proposed Order establishing a time and expense reporting protocol and establishing a Common Benefit Fund.

Dated: November 21, 2012

Peter Flowers  
Foote Meyers Mielke & Flowers, PC  
3 North 2<sup>nd</sup> Street, Suite 300  
Saint Charles, IL 60174  
Tel. (630) 232-6333  
Email: [pjf@foote-meyers.com](mailto:pjf@foote-meyers.com)

Respectfully Submitted,

/s/ James Ronca  
James Ronca, Esq. (SBN 25631)  
ANAPOL SCHWARTZ  
1710 Spruce Street  
Philadelphia, PA 19103  
Tel: (215)735-1130  
Fax: (866)735-2792  
Email: [Jronca@anapolschwartz.com](mailto:Jronca@anapolschwartz.com)

*Plaintiffs' Liaison Counsel*

Timothy Becker  
Johnson Becker PLLC  
33 South Sixth Street, Suite 4530  
Minneapolis, MN 55402  
Phone: (612) 333-4662  
Fax: (612) 339-8168  
Email: [tbecker@johnsonbecker.com](mailto:tbecker@johnsonbecker.com)

Tobias Milrood  
Pogust, Braslow and Millrood  
Eight Tower Bridge, Suite 1520  
161 Washington Street  
Conshohocken, PA 19428  
Phone: (610) 941-4204  
Fax: (610) 941-4245  
Email: [tmillrood@pbmattorneys.com](mailto:tmillrood@pbmattorneys.com)

*Co-Leads for Plaintiffs' Counsel*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

IN RE: ZIMMER NEXGEN KNEE	)	
IMPLANT PRODUCTS LIABILITY	)	MDL NO. 2272
LITIGATION	)	This Document Relates To All Actions
	)	
This Document Relates to All Cases	)	Master Docket Case No. 1:11-cv-05468
	)	
	)	Honorable Rebecca Pallmeyer

**PRETRIAL ORDER NO. \_\_\_\_\_**  
**(Common Benefit Fund/Time and Expense Reimbursement)**

This Order is entered to provide for the fair and equitable sharing among plaintiffs of the cost of services performed and expenses incurred by attorneys acting for MDL administration and common benefit of all plaintiffs in this complex litigation. This Court's authority in this regard derives from the Supreme Court's common benefit doctrine, as established in *Trustees v. Greenough*, 105 U.S. 527 (1881), and further applied in *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1884); *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); and *Boeing Co. v. Van Gernert*, 444 U.S. 472 (1980). Courts have approved the doctrine's application in the MDL context in, inter alia, *In re MGM Grand Hotel Fire Litigation*, 660 F. Supp. 522, 525-29 (D. Nev. 1987), and *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1019-21 (5th Cir. 1977). Any disputes arising under this Order that cannot be resolved by agreement of counsel will be resolved by this Court in the exercise of its jurisdiction under the equitable principles of the common fund/common benefit doctrine.

It is hereby ORDERED:

**A. Establishing the Fee and Expense Funds**

1. Plaintiffs' Steering Committee ("PSC") has established an escrow account to receive and disburse funds contributed by PSC for payment of "shared" common benefit expenses as defined below. These funds will be held subject to the direction of the PSC. No party or attorney has any individual right to any of these funds except to the extent of amounts directed to be disbursed to such person by Co-Lead Counsel of the PSC. These funds do not constitute the separate property of any party or attorney and are not subject to garnishment or attachment for the debts of any party or attorney except when and as directed to be disbursed to a specific person as directed by the PSC.

2. When funds may become available under subparagraph 3 of this paragraph, an escrow account will be established by the PSC to receive and disburse funds as provided in this Order. These funds will be held as funds subject to the direction of the Court and are hereinafter referred to as the "Zimmer NexGen Knee Common Benefit Fund." No party or attorney has any individual right to any of these funds except to the extent of amounts directed to be disbursed to such person by order of the Court. These funds do not constitute the separate property of any party or attorney and are not subject to garnishment or attachment for the debts of any party or attorney except when and as directed to be disbursed to a specific person as provided by court order. The Court shall appoint by subsequent order a qualified certified public accountant (the "CPA") to establish this account and act as escrow agent, keep detailed records of all deposits and withdrawals and to prepare any necessary tax returns and other tax filings. Such subsequent order shall specify the hourly rates to be charged by the CPA and the CPA's assistants, who shall be utilized where appropriate to control costs. The CPA shall submit

quarterly detailed bills to the Court and to Plaintiffs' Lead Counsel. Upon approval, the CPA's bills shall be paid from the fund established by the Plaintiffs' Steering Committee (the "PSC Fund") and shall be considered a shared cost in accordance with B.2.c below.

3. Assessments for the Common Benefit Expense Fund

(a) This order expressly applies to the following categories of cases:

(i) all cases now pending or later filed in, transferred to, or removed to MDL-2272 as part of these centralized proceedings;

(ii) all filed or unfiled cases of plaintiffs' lawyers who submit to the jurisdiction of this Court either by: (1) filing a case directly in this Court; (2) filing a case that is transferred to or removed to this Court as part of these coordinated proceedings; or (3) through execution of a Participation Agreement (Exhibit A hereto) under this or subsequent orders; and all cases under Section 2b below;

(iii) all cases of plaintiffs' lawyers and their law firms who are members of the PSC or participate in any way in PSC common benefit work; and

(iv) all cases subsequently ordered by this Court to be subject to this Order,

AND, which are settled, compromised, dismissed, or which have had the amount of the claim reduced, with or without trial, recovered a judgment for monetary damages or other monetary relief, including compensatory and punitive damages, based upon alleged injury (including death) arising from the use of a Zimmer NexGen product within the scope of MDL 2272 ("Zimmer NexGen Knee Implants"), such cases will be subject to an assessment of eight percent (8%) of the gross monetary recovery, said assessment to be withheld by defendant and paid into the Common Benefit Fund, the terms and conditions of which will be established by this Court.

This assessment will be for the payment of attorneys' fees and expenses as set forth in this Order or any subsequent Order of the Court. The eight percent assessment will be divided proportionally, three percent (3%) coming from the plaintiffs' share of any recovery to cover common benefit expenses and five percent (5%) coming from the share of any recovery payable to plaintiffs' attorney as attorneys' fees. If the PSC later determines that the three percent (3%) designated to come from the individual plaintiffs' share is insufficient to cover all reasonable and necessary out of pocket costs and expenses, the PSC may request relief from the Court in the form of additional assessment.

(b) Any economic loss plaintiffs, including class action plaintiffs, and their attorneys who are subject to this Order as set forth in A3(a), and who have agreed or agree to settle, compromise, dismiss, or reduce the amount of a claim or, with or without trial, recover a judgment for monetary damages or other monetary relief, including compensatory and punitive damages, with respect to any Zimmer NexGen Knee economic loss claims are subject to an assessment of 8 percent (8%) of the gross monetary recovery to be withheld by defendant and paid into the Common Benefit Fund by defendant.

(c) For all cases in which a settlement was or is entered into, or a judgment was or is paid, beginning with the date of this Order

(d) If for any reason the assessment is not or has not been withheld, the plaintiff and her attorney are deemed jointly responsible for promptly paying the assessment into the Common Benefit Fund.

(e) The PSC shall provide Defendant's Lead Counsel and the Court or its designee with a list of plaintiffs' attorneys and/or firms who are subject to assessment under this order under section A(3)(a) above and shall provide quarterly updates to this list as they

occur ("Participation List"). In the event a plaintiffs' attorney objects to the inclusion of a case on the list, Plaintiffs' Lead Counsel shall attempt to resolve the objection with the plaintiffs' attorney. If resolution is not achieved, either party may seek disposition of the matter by motion to the Court.

(f) Defendants' counsel shall provide quarterly reports to the Court, or its designee, and Plaintiffs Lead Counsel of the names and docket numbers of the cases on the Participation List whose cases are subject to withholding that quarter. A report is not due if there are no payments made into the Fund by Defendants during that quarter or if payment into the Fund has been on fewer than five (5) cases during the quarter. However, Defendants shall provide a report at least every two quarters regardless of the number of settlements, compromises, dismissals, awards, verdicts or other forms of payment are made subject to the assessment.

(g) In measuring the "gross monetary recovery,"

(1) Court costs that are to be paid by a defendant shall be excluded.

(2) The present value of any fixed and certain payments to be made in the future shall be included.

(3) Nothing in this Order shall be deemed to modify, alter, or change the terms of any fee contracts between plaintiffs' counsel and their individual clients.

The assessment represents a hold back (*In re Zyprexa Prods. Liab. Litig.*, 467 F.Supp.2d 256, 266 (2d. Cir. 2006)) and shall not be altered in any way unless each of the following occurs: (a) the entire Plaintiffs' Steering Committee ("PSC") is consulted and provided an opportunity to be heard prior to the filing of any motion to change the assessment amount; (b) the PSC approves

the proposed change to the assessment by a majority vote; and (c) noticed motion with an opportunity to be heard is granted by the Court and the Court determines that good cause warrants a modification.

**4. Non-participation in MDL**

(a) Any plaintiff's attorney who has cases in state court and who chooses not to execute a Participation Agreement with the PSC may seek access from the PSC to MDL and/or PSC non-work product materials by contacting Plaintiffs' Co-Lead Counsel in writing. The PSC, however, shall have no obligation to allow such attorney access to any MDL materials. Further, nothing in this Order shall limit the PSC's right or ability to seek an equitable contribution against any state court case in which the plaintiffs' attorney requested in writing and was provided access to MD L work product.

(b) Any plaintiff or attorney who utilizes common benefit work product created in this litigation including but not limited to the document platform, depositions of witnesses and generic expert work product shall be deemed to have agreed to participate as set forth in paragraph A1(a)(iii) above and both that plaintiff and the Defendants shall be responsible to withhold the assessment set forth in paragraph 1 above. The obligations of this paragraph includes plaintiffs' attorneys or law firms who appear on the Participation List under paragraph A(3)e above, or who have filed cases in, transferred to, or removed to this Court as part of these centralized proceedings or file coordinated cases in state courts. For purposes of this Order, when an attorney makes an appearance in a case in, transferred to, or removed to this Court as part of these coordinated proceedings or, any cases where that attorney or his/her law firm represents a plaintiff in a coordinated state court case that attorney and that attorney's law firm will be subject to the assessment set forth in paragraph 3 for any case which is settled,

compromised, dismissed, or which have had the amount of the claim reduced, with or without trial, recovered a judgment for monetary damages or other monetary relief, including compensatory and punitive damages, based upon alleged injury (including death) arising from the use of an MDL product. This paragraph recognizes that once an attorney has access to MDL PSC work product it inures to the benefit of all that attorney's clients.

**5. Disbursements from Common Benefit Fund**

(a) Upon subsequent order of the Court, payments may be made from the Common Benefit Fund to attorneys who provide services or incur expenses for the joint and common benefit of plaintiffs in addition to their own client(s), including, at the discretion of the PSC, services provided and expenses incurred in preparation and trial of the bellwether cases. Attorneys eligible thereto are limited to Plaintiffs' Lead Counsel, members of the PSC, Plaintiffs' Federal Liaison Counsel, attorneys who are called upon by Co-Lead Plaintiffs Counsel to assist in performing PSC responsibilities (e.g., discovery and science committees), and other attorneys performing PSC-approved responsibilities in MDL or state court actions as designated and confirmed by correspondence from co-lead counsel. All for attorneys' fees and expense reimbursement must be timely made and accompanied by contemporaneous records. If an attorney whose cases are otherwise exempt from this Order applies for and receives common benefit treatment, all of the cases in which the attorney and/or his or her law firm are counsel of record are subject to assessment.

(b) Payments to non-lawyers will only be allowed for special services performed, and to reimburse for special expenses incurred, for the joint and common benefit of all plaintiffs, which have been specifically authorized by the PSC. Payment may, for example, be made for services and expenses related to obtaining, reviewing, and indexing hard copies or

computerized images of documents; conducting depositions; and activities connected with the coordination of federal and state litigation. The Common Benefit Fund will not, however, be used to pay for services and expenses related to a particular case, such as the deposition of a treating physician, excluding common benefit services and expenses relating to the bellwether cases, even if such activity results in some incidental and/or consequential benefit to other plaintiffs, or for an attorney to "learn the case."

(c) Payments will not exceed the fair value of the services performed, plus any court approved multiplier, or the reasonable amount of the expenses incurred and, depending upon the amount of the Common Benefit Fund, may be limited to part of the value of such services and expenses.

(d) No amounts will be disbursed without review and approval by the Court or such other mechanism as the Court may deem just and proper under the circumstances.

(e) Whether case(s) have been settled and the specifics of any settlement(s), including but not limited to amount(s) paid or deposited, shall be confidential and shall not be disclosed by the CPA to Plaintiffs' Lead Counsel, the PSC, any other plaintiffs' lawyer, the Court, the Court's designee, or to anyone else. It may be provided to the Court, and to the Court only, should the Court request that it receive that information. Monthly statements from the CPA shall be provided to Plaintiffs' Counsel, Defendant's Liaison Counsel, and the Court or the Court's designee, showing, with respect to the funds controlled by the CPA, only the aggregate of the monthly deposits, disbursements, interest earned, financial institution charges, if any, and current balance. If a particular settlement agreement contains a less restrictive confidentiality provision, the terms of that settlement agreement will control the confidentiality obligation of the lawyers who were counsel of record in the settled case.

(e) If the Common Benefit Fund exceeds the amount needed to make all payments of court-approved costs, fees, and any court-approved multiplier on any fees, the Court may order a refund to those who have contributed to the Common Benefit Fund. Any such refund will be made in proportion to the amount of the contributions.

(f) If the Common Benefit Fund is insufficient to pay all court approved costs and fees, then disbursements shall be made for shared costs first. From any funds that remain after shared costs are paid, common benefit counsel fees without multiplier shall be paid second. From any funds that remain after shared costs and common benefit counsel fees are paid, held costs shall be paid third. From any remaining funds after the above is paid, counsel fees generated by operation of a multiplier shall be paid.

**6. Incorporation by Reference.** The individual attorney agreement attached hereto as Exhibit A is incorporated by reference and has the same effect as if fully set forth in the body of this Order.

**B. Common Costs and Submission of Time and Expenses**

**1. Plaintiffs' Counsel Time and Expense Submissions.** Reimbursement for costs and/or fees for services of all plaintiffs' counsel performing functions in accordance with this Order will be set at a time and in a manner established by the Court, after due notice to all counsel. The Court shall receive and consider recommendations from Plaintiffs' Co-Lead Counsel concerning distribution of the Common Benefit Fund. The following standards and procedures are to be utilized by any counsel who seeks fee and/or expense reimbursement. **Time and expense records shall be submitted electronically.**

(a) Time Reporting

(1) Only time spent on matters common to all claimants in the MDL and that has been authorized by the PSC as set forth above ("common benefit work"), including common benefit time spent on the bellwether cases, will be considered in determining fees. No time spent on developing or processing individual issues in any case for an individual client will be considered or should be submitted, except as set forth in A.3 .a. above.

(2) Time submissions shall be kept in accordance with the guidelines set out herein and on the forms provided as Exhibits "B" & "C". Time submissions shall be made by January 20, 2013, for time up to and including the fourth quarter of 2012 and, going forward, shall be made quarterly 30 days after the end of the quarter. For example, submission for the first quarter of 2013 will be by April 30, 2013. Time submissions should be submitted to Plaintiffs' Co-Lead Counsel, James Ronca until such time as a court appointed accountant is appointed and after that additionally to the court appointed accountant. Time records which are submitted late shall be considered for payment at the discretion of the PSC.

(3) All counsel shall keep a daily record of their time spent in connection with common benefit work on this litigation, indicating with specificity the hours stated in at least quarter hour increments, location and particular activity (e.g., "conducted deposition of John Doe"). Time entries that are not sufficiently detailed may not be considered for common benefit payments.

## **2. Expense Reporting**

### **(a) Shared Costs**

(1) Shared Costs are costs that will be paid out of the PSC Fund administered by Plaintiffs' Lead Counsel. Each PSC member and each attorney performing Common Benefit work shall contribute to the PSC Fund at times and in amounts sufficient to

cover plaintiffs' expenses for the administration of the MDL. The timing and amount of each assessment will be determined by Plaintiffs' Co-Lead Counsel, and each assessment will be paid within 30 days as instructed by Plaintiffs' Lead Counsel. Failure to pay assessments will be grounds for removal from the PSC.

(2) Shared Costs are costs incurred for the common benefit of the MDL as a whole. No client-related costs, other than common benefit costs relating to the bellwether cases, shall be considered Shared Costs, unless exceptional circumstances exist and are approved by later order of this Court. All Shared Costs must be approved by Plaintiffs' Lead Counsel prior to payment.

(3) All costs that meet these requirements and fall under the following categories shall be considered Shared Costs and qualify for submission and payment directly from the PSC Fund:

- (a) certain court, filing and service costs;
- (b) deposition and court reporter costs for depositions (excluding those that are client specific);
- (c) document depository creation, operation, staffing, equipment and administration;
- (d) Plaintiffs' Lead Counsel, Liaison Counsel, Plaintiffs' Steering Committee, administrative matters (e.g., expenses for equipment, technology, courier services, long distance, telecopier, electronic service, photocopy and printing, secretarial/temporary staff, etc.);
- (e) PSC administration matters, such as meetings and conference calls;

(f) legal and accountant fees;

(g) expert witness and consultant fees and expenses for experts whose opinions and testimony would be generic and for the common benefit of a substantial number of cases. There shall be non reimbursement from the Common Benefit Fund for case specific experts, except for liability and causation experts in bellwether cases, at the discretion of the PSC;

(h) printing, copying, coding, scanning related to the above (out-of-house or extraordinary firm cost);

(i) research by outside third-party vendors/consultants/attorneys, approved by Plaintiffs' Co-Lead Counsel;

(j) translation costs related to the above;

(k) bank or financial institution charges;

(l) investigative services, approved by Plaintiffs' Co-Lead Counsel; and

(m) Any assessment paid by a firm for common benefit work before or after the first meeting of this MDL (including particularly funds used for the creation of the common document depository platform and for retaining generic expert witnesses).

(4) Plaintiffs' Co-Lead Counsel shall prepare and be responsible for distributing reimbursement procedures and the forms associated therewith. Request for payments from the PSC Fund for common benefit expenses shall include sufficient information to permit Plaintiffs' Co-Lead Counsel and the CPA to account properly for costs and to provide adequate detail to the Court.

(a) Held Costs

(1) Held Costs are those that will be carried by each attorney in the MDL and reimbursed as and when determined by the PSC.

(2) Held Costs are costs incurred for the global benefit of the MDL. Held Costs are those that do not fall into the above Shared Costs categories but are incurred for the benefit of all plaintiffs in general. No client specific costs can be considered Held Costs, other than common benefit costs relating to the bellwether cases at the discretion of the PSC.

(3) Held Costs submissions shall be made by January 20, 2013 for time up to and including the fourth quarter of 2012 and, going forward, shall be made quarterly within 30 days after the end of the quarter. For example, submission for the first quarter of 2013 will be due by April 30, 2013. Held Costs submissions should be submitted to Plaintiffs' Co-Lead Counsel, James Ronca. Held costs shall be kept in accordance with the guidelines set out herein and on the form provided as Exhibit "D".

(b) Travel Limitations. Except in extraordinary circumstances approved by Plaintiffs' Lead Counsel, all travel reimbursements are subject to the following limitations.

(1) Airfare. Only the price of a coach seat for a reasonable itinerary will be reimbursed. First class airfare will not be reimbursed.

(2) Hotel. Hotel room charges above the average available room rate of the Hyatt, Hilton, and Marriott hotels in the city in which the stay occurred will be closely scrutinized by the Court and be subject to disallowance or reduction.

(3) Meals. Meal expenses must be reasonable. No alcoholic beverages will be reimbursed.

(4) Cash Expenses. Miscellaneous cash expenses for which receipts generally are not available (e.g., tips, luggage handling, pay telephone, etc.) will be reimbursed up to \$50.00 per trip, as long as the expenses are properly itemized.

(5) Rental Automobiles. Luxury automobile rentals will not be fully reimbursed, unless only luxury automobiles were available. If luxury automobiles are selected when non-luxury vehicles are available, then the difference between the luxury and non-luxury vehicle rates must be shown on the travel reimbursement form, and only the non-luxury rate may be claimed, unless such larger sized vehicle is needed to accommodate several travelers.

(6) Mileage. Mileage claims must be documented by stating origination point, destination, total actual miles for each trip, and the rate per mile paid by the attorneys' firm. The maximum allowable rate will be the maximum rate allowed by the IRS.

(c) Non-Travel Limitations. Except in extraordinary circumstances approved by Plaintiffs' Lead Counsel, all non-travel reimbursements are subject to the following limitations.

(1) Long Distance and Cellular Telephone. Long distance and cellular telephone charges must be documented. Copies of the telephone bills must be submitted with notations as to which charges relate to the MDL litigation.

(2) Shipping, Courier, and Delivery Charges. All claimed expenses must be documented with bills showing the sender, origin of the package, recipient, and destination of the package.

(3) Postage Charges. A contemporaneous postage log or other supporting documentation must be maintained and submitted. Postage charges are to be reported at actual cost.

(4) Telefax Charges. Contemporaneous records should be maintained and submitted showing faxes sent and received. The per-fax charge shall not exceed \$1.00 per page.

(5) In-House Photocopy. A contemporaneous photocopy log or other supporting documentation must be maintained and submitted. The maximum copy charge is \$0.20 per page.

(6) Secretarial and Clerical Time. Submission of secretarial or clerical time must be pre-approved by Plaintiffs' Lead Counsel. An itemized description of the task and time spent must be submitted for secretarial and clerical time. All overtime must be approved by the Plaintiffs' Lead Counsel before submission.

(7) Computerized Research (Lexis/Westlaw): Claims for Lexis, Westlaw, and other computerized legal research expenses should be in the exact amount charged to or allocated by the firm for these research services.

(d) Procedures to be Established by Plaintiffs' Lead Counsel for Cost and Time Submission:

(1) Plaintiffs' Co-Lead Counsel shall establish forms and procedures to implement and carry out any time and expense submissions required by the Court and for reimbursement from the PSC Fund for Shared Costs. Once developed, these forms may be obtained from Plaintiffs' Co-Lead Counselor Liaison Counsel. The forms shall be

certified by a senior partner in each firm attesting to the accuracy and correctness of the submissions.

(2) Questions regarding the guidelines or procedures or the completion of any forms should be directed to Plaintiffs' Lead Counsel or the court appointed CPA.

IT IS SO ORDERED.

---

THE HONORABLE REBECCA R. PALLMEYER  
U.S. DISTRICT COURT JUDGE

# **EXHIBIT “A”**

EXHIBIT "A"  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION  
Master Docket Case No. 1:11-cv-05468  
Honorable Rebecca Pallmeyer

IN RE: ZIMMER NEXGEN KNEE IMPLANT PRODUCTS LIABILITY  
LITIGATION MDL NO. 2272

AGREEMENT

This Agreement is made this \_\_\_ day of \_\_\_\_\_, 201\_, by and between the Plaintiffs' Steering Committee ("PSC") appointed by the United States District Court for the Northern District of Illinois in MDL Docket No. 2272 and \_\_\_\_\_ (hereinafter "the Participating Attorneys").

WHEREAS the United States District Court for the Northern District of Illinois has appointed Counsel to serve as members of the PSC to facilitate the conduct of pretrial proceedings in the above-captioned litigation; and

WHEREAS the PSC in association with other attorneys working for the common benefit of plaintiffs (with written authorization of the PSC) in MDL 2272 have developed or are in the process of developing work product which will be valuable in the litigation of state court proceedings involving injuries from implantation of the products at issue in the above-captioned litigation, including:

- a. a virtual depository containing images of the documents produced by defendants and third parties
- b. objective coding of key documents selected by the PSC from the document productions of the defendants and third parties;
- c. A bibliographic database providing a "coded" index of such key documents;
- d. The videotaped depositions of a large number of generally applicable fact witness taken in MDL 2272
- e. Time-lines, casts of characters, scientific literature reviews, expert review and/or other work product relating to the facts at issue in MDL 2272;

which will collectively be referred to as the "PSC Work Product"; and

WHEREAS the Participating Attorneys are desirous of acquiring the PSC Work Product and establishing an amicable working relationship with the PSC for the mutual benefit of their clients;

NOW, THEREFORE, in consideration of the covenants and promises contained herein, and intending to be legally bound hereby, the parties agree as follows:

1. With respect to each client who they represent in connection with a Nexgen knee replacement related claim (as said claims are defined with the scope of MDL 2272), whether currently with a filed claim in state or federal court or unfilled or on a tolling agreement, each of the Participating Attorneys;
  - (a) be subject to all orders of this MDL related to Common Benefit work and any assessment related to Common Benefit work; and
  - (b) shall deposit or cause to be deposited in an MDL 2272 Fee and Cost Account established by the District Court in the MDL a percentage proportion of the gross amount recovered by each such client which is equal to eight percent (8%) of the gross amount recovered by each such client (5% of the gross amount recovered coming from the Participating Attorneys' attorneys' fees and 3% of the gross amount recovered coming from the client's share as a cost).

For purposes of this Agreement, the gross amount of recovery shall include the present value of any fixed and certain payments to be made to the plaintiff or claimant in the future or the cost of any annuity.

2. The Participating Attorneys, on behalf of themselves, their affiliated counsel, and their clients, hereby grant and convey to the PSC a lien upon and/or a security interest in any recovery by any client who they represent in connection with any Nexgen knee replacement induced injury, to the full extent permitted by law, in order to secure payment in accordance with the provisions of paragraph 1 of this Agreement. The Participating Attorneys will undertake all actions and execute all documents which are reasonably necessary to effectuate and/or perfect this lien and/or security interest. The Participating Attorneys also hereby warrant that they have informed their clients of this agreement and have obtained their clients' consent regarding same.
3. The amounts deposited in the MDL 2272 Fee and Cost Account shall be available for distribution as attorneys' fees and/or cost reimbursement to PSC attorneys and other attorneys who have performed work and/or incurred expenses of the common benefit of plaintiffs (with written authorization from the PSC) in MDL 2272. Such sums shall be distributed upon an Order of the Court in MDL 2272, which will be issued in accordance with applicable law governing the award of fees and costs in cases involving the creation of a common benefit.
4. This Agreement shall apply to each and every claim or action (whether state or federal, filed or unfilled) arising from the implantation of a NexGen Knee Implant in which the Participating Attorneys have or may have a right to a fee recovery.
5. As the litigation progresses and work product of the same type and kind continues to be granted, the PSC will provide Participating Attorneys with such work product and will otherwise cooperate with the Participating Attorneys to effectuate the just and efficient resolution the MDL and the state court litigation(s) for the benefit of the plaintiffs.

6. The undersigned counsel confirms that he/she has reviewed the Protective Order entered by the Court in the above-captioned litigation and agrees to be bound by its terms. Consistent with the Protective Order, the undersigned counsel will execute the Confidentiality Agreement attached to the Order prior to receipt of any confidential information, including items (a) to (e) above.
7. The undersigned represents that he or she has authority to enter this agreement on behalf of his/her law firm and clients

Signed \_\_\_ day of \_\_\_\_\_, 201 –

---

Name:

Law Firm:

# **EXHIBIT “B”**

## MEMORANDUM

TO: Zimmer Nexgen Knee Committee

FROM: James Ronca/Tobi Milrood/Tim Becker, Co-Lead Counsel

DATE: November 21, 2012

RE: Re: IN RE: ZIMMER NEXGEN KNEE IMPLANT PRODUCTS LIABILITY LITIGATION - Quarterly Time and Expenses Reports – Common benefit fee procedures

---

Counsel:

This letter addresses the general rules and standards for keeping and submitting time and expenses in this litigation, MDL No. 2272.

### **General Rules and Standards:**

1. All time and expenses submitted must be incurred only for work authorized by and at the direction of the PSC.
2. These time and expense guidelines are intended to govern all activities performed and expenses incurred by counsel that relate to matters common to all claimants in MDL No. 2272. They do not relate to time or expenses incurred for prosecuting individual claims, unless such work is necessary to the advancement and administration of MDL No. 2272 and explicitly requested by PSC.
3. Time and expense submissions must be made on two of the forms provided to you, which are attached in excel format. These are the Zimmer Nexgen Knee Firm Time Spreadsheet and the Zimmer Nexgen Knee Firm Expense Spreadsheet. There is an additional (OPTIONAL) Zimmer Nexgen Knee Individual Time Spreadsheet that is intended for individuals of each firm. Please use and maintain these in-house in case the Court later requires an audit of individual time. Time and Expense submissions should be made quarterly from each participating firm. The submission should be a compilation of time and expenses for all the participating individuals of that firm for the quarter.
4. At this time, supporting receipts, logs or other documentation for both time and expenses (e.g., detailed time entry reports, hotel, food or airfare receipts, etc.) do not need to be submitted with the quarterly reports, but you need to keep scans/copies/proof of the receipts either by the actual receipt or a credit card bill. The PSC reserve the right to request these documents at any time. These documents must be maintained for auditing purposes as the litigation progresses and it is likely that PSC and/or the Court will require this documentation prior to making any payments for MDL No. 2272.
5. All quarterly Time Reports and quarterly Expense Reports must be submitted to [nexgen@mtcbte.com](mailto:nexgen@mtcbte.com)

## **Compliance**

Failure to follow any of the standards and procedures outlined herein or timely submit any of the quarterly reports may result in partial or complete disallowance of the claimed time or expenses. We will be monitoring all time and expenses to ensure there is timely recording of reasonable time and expenses for MDL No. 2272. The PSC, or a designated committee on their behalf, reserves the right to audit the detail of any time and expense report submitted in this litigation at any time.

## **Representations as to Time and Expense Submissions**

Each attorney submitting a time or expense report shall be considered as representing that the time and expense submitted meets the criteria set forth herein.

## **Time Reporting**

1. Only time spent on matters common to all claimants in MDL No. 2272 (“common benefit work”) will be considered in determining fees. No time spent on developing or processing individual issues in any case for an individual client (claimant), with the exception of bellwether, ADR, or neutral evaluation cases (or by other agreement with the PSC), will be considered or should be submitted.
2. All time must be accurately and contemporaneously maintained. All counsel shall keep a daily record of their time spent in connection with common benefit work on this litigation, indicating with specificity the hours and particular activity.
3. All time spent by each firm on matters relating to MDL No. 2272 shall be maintained in one-tenth increments. The following categories should be used:
  - a. PSC Calls/Meetings
  - b. PSC Calls/Meetings
  - c. Lead/Liaison Duties
  - d. Administrative
  - e. MDL Status Conf.
  - f. Court Appearance
  - g. Research
  - h. Discovery
  - i. Doc Review
  - j. Litigation Strategy & Analysis
  - k. Dep: Prep/Take/Defend
  - l. Pleadings/Briefs/Pre-trial Motions/Legal
  - m. Science
  - n. Experts/ Consultants
  - o. Settlement
  - p. Trial Prep/Bellwether
  - q. Trial
  - r. Appeal
  - s. Miscellaneous (Describe)

## Expense Reporting

1. Plaintiffs' Lead Counsel shall maintain a litigation fund for "Shared Expenses" of MDL No. 2272 for payment of expenses that may include experts, deposition transcripts and court reporter costs, document depository, witness fees, administrative matters (e.g., bank charges, equipment charges, conference calls, meeting costs, legal and accounting fees), investigative services and other necessary shared expenses common to MDL No. 2272. Plaintiffs' Lead Counsel is charged with administering this fund and those expenditures are administered separately from expenses incurred and submitted in the quarterly time and expense reports. The following Categories should be used:
  - a. Assessment Fees
  - b. Federal Express / Local Courier, etc
  - c. Postage Charges
  - d. Facsimile Charges
  - e. Long Distance
  - f. In-House Photocopying
  - g. Outside Photocopying
  - h. Hotels
  - i. Meals
  - j. Mileage
  - k. Air Travel
  - l. Deposition Costs/ Expert Witness/Other
  - m. Lexis/Westlaw
  - n. Court Fees
  - o. Witness / Expert Fees
  - p. Investigation Fees / Service Fees
  - q. Transcripts
  - r. Ground Transportation (Ie. Rental)
  - s. Miscellaneous (Describe)
2. "Held Expenses" are those expenses authorized, incurred and submitted in the quarterly time and expense reports that are not client sPSCific, but inure to the global benefit of plaintiffs in MDL No. 2272 and may include, among other things, authorized travel costs, postage, photocopies, computerized legal research and meals.
3. All supporting receipts, logs or documentation for held expenses must be maintained for auditing purposes. Failure to maintain these supporting documents may result in a partial or complete disallowance of the claimed expenses. Moreover, the PSC may require quarterly submission of expenses as the litigation progresses.
4. Only the price of a coach seat for a reasonable itinerary for airfare will be reimbursed, unless there are extraordinary conditions requiring travel at a higher fare and this expenditure is approved by the Lead Counsel prior to the travel taking place. If a person chooses to fly first class, they will only be reimbursed for the cost of the coach ticket on the same flight.
5. Hotel room charges must be reasonable, taking into account the availability of business class hotels in the location of the event requiring the hotel stay. As the litigation progresses, the PSC reserves the right to impose a cap on the price of hotel rooms.

6. Meal expenses must be reasonable and reasonably tied to the work being performed in MDL 2272.
7. Miscellaneous cash expenses for which official receipts are not generally available (*e.g.*, tips, luggage handling) will be reimbursed up to \$25.00 per trip, as long as these expenses are properly documented.
8. Luxury rental automobiles will not be fully reimbursed, unless they are the only automobiles available for rental. When luxury automobiles are rented and non-luxury automobiles are available, then the difference between the luxury and non-luxury vehicle rates must be shown and only the non-luxury rate may be claimed.
9. If a mileage claim is submitted, documentation must be kept stating origination point, destination, total miles and the purpose of the trip. Approved mileage claims will be reimbursed at the maximum rate allowed by the IRS.
10. A contemporaneous log must be maintained for in-house photocopy charges, which are subject to reimbursement at a maximum of 15 cents per page.
11. Claims for electronic research (*e.g.*, Westlaw, Lexis) should be in the exact amount charged to the firm for these services.

We are trying to make this as easy as possible and as simplified as possible. All of the requirements outlined in this letter are designed to be as reasonable as possible, while ensuring we meet all obligations. Please make sure that you keep track of all original receipts. Again, if you have questions about time and expense reporting, please direct them to us.

TRULY YOURS,

JIM/TOBI/TIM/PETE

attachments via email

# **EXHIBIT “C”**



# **EXHIBIT “D”**

