UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE: ZIMMER DUROM HIP CUP PRODUCTS LIABILITY LITIGATION	2:09-cv-04414-SDW-MCA MDL-2158 This Document Relates to All Cases Motion Date: March 2, 2015

ON BEHALF OF ITS STATE-COURT PLAINTIFFS, MAGLIO CHRISTOPHER & TOALE, P.A.'s OPPOSITION TO THE MDL PLAINTIFFS' LIAISON COUNSEL'S 1/26/15 MOTION TO MODIFY CMO 3

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I. Introduction

COME NOW all state court plaintiffs represented by the undersigned attorney's law firm, Maglio Christopher & Toale, P.A., and whom either filed or will file an action in various state court jurisdictions against any of the Defendants in this MDL as a result of injuries sustained from the implantation of a Zimmer Durom metal-on-metal hip replacement system, (hereafter "MCT State Court Plaintiffs") and file this Brief in Opposition to the MDL's Plaintiffs' Liaison Counsel's January 26 2015 Motion to Modify CMO 3 to Provide for Contribution to the Zimmer Durom Hip Cup MDL Common Benefit Fund by State-Court Plaintiffs.

At issue is the request, by the MDL Plaintiffs' Liaison Counsel (hereafter "PLC"), to amend CMO 3 to require *all state court* plaintiffs to contribute to the Common-Benefit Fund set up by and for the *federal* MDL. The request must fail for two reasons: First, the federal court is not vested with the authority to compel payment of fees by state court plaintiffs. Second, assuming, *arguendo,* that such authority exists, the particular request is too broadly worded to be just.

II. This Court Is Without Jurisdiction To Compel The Payment of Common Benefit Fees by Litigants in State Court Proceedings

First, the PLC's requested amendment seeks federal action that undermines the Constitutional separation between the federal and state judicial system. Quite simply, this Court is without jurisdiction to impose fees to litigants in state court. Such overarching power is not provided and therefore disallowed by the Constitution. The Manual for Complex Litigation discusses this issue:

> Increasingly, complex litigation involves related cases brought in both federal and state courts. Such litigation often involves mass torts (see section 22.2). Some sets of cases may involve numerous claims arising from a single event, confined to a single locale (such as a plane crash or a hotel fire). Other more complicated litigations may arise from widespread exposure to harmful products or substances dispersed over time and place. **No single forum has jurisdiction over these**

> **groups of cases.** Unless the defendant files for bankruptcy, **no legal basis exists for exercising exclusive federal control over state litigation.**

Fed. Judicial Ctr., Manual for Complex Litigation, Fourth, 229-30 (2004) (emphasis added). Therefore, even assuming, *arguendo*, that any unjust enrichment occurs, the federal court is without power to unilaterally enforce the payment of common benefit fees upon litigants not before it.

The court in *In re Genetically Modified Rice Litig.*, in the U.S. District Court for the Eastern District of Missouri, Eastern Division, echoed this very position even where it felt unjust enrichment actually existed:

> First, I will not require defendants to hold back and contribute amounts from settlements and judgments related to cases pending in state courts. I reach this conclusion reluctantly, because it is abundantly clear that the plaintiffs in the related state-court cases have derived substantial benefit from the work of the leadership counsel in these federal cases. In fact, most of the lawyers representing plaintiffs in state cases have agreed to join in the trust. The lawyers and plaintiffs who have not agreed to join in the trust will have been unjustly enriched if they are not required to contribute to the fees of the leadership lawyers. **But I do not have jurisdiction to order hold-backs for those state cases. This is so even though the plaintiffs' lawyers who have state cases also have cases before me.**

In re Genetically Modified Rice Litig., 2012 U.S. Dist. LEXIS 175590, 213-214 (E.D. Mo. Nov. 2, 2012) (emphasis added).

The Manual for Complex Litigation underscores the complexity and importance of cooperation between jurisdictions without the domination of independent state courts by the federal court. "Coordination becomes much more complex when cases are dispersed across a number of states, even where the federal cases are all centered in a single MDL transferee court." Fed. Judicial Ctr., Manual for Complex Litigation, Fourth, 231-32 (2004). "Reciprocity and cooperation create trust and mutual respect so that attempts to coordinate are not perceived as attempts to dominate."

Discussing the orders applicable to common benefit fees, the MDL in *In Re Diet Drugs* clarified the voluntary and cooperative nature of the common benefit fees applied to coordinated state court cases:

> That order, which was extended by Pretrial Order No. 517, was also designed to facilitate state-federal coordination in the diet drugs litigation. Pursuant to those orders, any state action became eligible for state-federal coordination in the event **a court with jurisdiction over the state court action** entered an order requiring, among other things, the sequestration of a 6% assessment for the MDL 1203 Fee & Cost Account. Moreover, in exchange for access to the PMC's work product and "trial package," nearly 100 separate state attorneys signed coordination agreements, **voluntarily** stipulating to the 6% set-aside in all of their state cases.

In re Diet Drugs Prods. Liab. Litig., 401 F.3d 143, 149 (3d Cir. Pa. 2005) (emphasis added). As emphasized in the quoted passage, the MDL's order only became effective once "a court with jurisdiction over the state court action entered an order requiring" a common benefit fee. Thus, the MDL was careful not to overstep its Constitutional bounds and allowed for a cooperative solution without domination of the state courts. Further, the assessment of the common benefit fee to state court litigants was voluntary, as it should be here. This safeguards plaintiffs from being unfairly taxed for services that may not have been rendered or benefits that may not have been conferred in their particular case.

The PLC's Motion here, unfortunately, goes against the suggested cooperation espoused in the Manual for Complex Litigation and would result in the un-Constitutional federal domination of state courts. Accordingly, this Court is without jurisdiction to compel the payment of common benefit fees by litigants in state court.

III. No Unjust Enrichment Exists Because No Measurable Benefit Has Been Conferred

Even if this Court did have the Constitutional authority to assess fees to state court litigants, the PLC's Motion must fail for a second reason: No measurable benefit has *actually* been conferred upon the MCT Plaintiffs by the PLC. The Motion is so broadly worded that it

encompasses all state court cases without regard to whether any unjust enrichment actually occurs. Indeed, the Motion mistakenly presumes that no state court settlement can be accomplished without it benefiting, directly or indirectly, from the work done by the PLC. For example, the PLC argues:

> Each inculpatory fact uncovered, substantiated, and corroborated by Plaintiffs' Liaison Counsel through its extensive discovery and motion practice against the Zimmer Defendants in the MDL increases the settlement values of those cases pending in state courts. To allow these plaintiffs to benefit in this way from the efforts of the MDL Plaintiffs' Liaison Counsel without shouldering their fair share of the costs and expenses incurred to fuel these efforts is to allow non-contributing plaintiffs to be unjustly enriched.

PLC's Brief in Support of Motion for Contribution by State-Court Plaintiffs, at *10

The PLC's position regarding the MCT State Court Plaintiffs is unsupportable given the fact that undersigned counsel's firm has been litigating and settling Zimmer Durom cases since 2008, **well before this MDL even existed**, and continues to do so even after the existence of the PLC. That these settlements are achieved wholly independently from the PLC makes it is unreasonable to assume that the MCT Plaintiffs would be unjustly enriched if they, too, independently resolve their claims without paying a common benefit fee to the PLC.

MDLs litigating similar metal on metal hips have conferred at least some ascertainable benefit upon state court plaintiffs by providing *voluntary global settlement programs*. In each of these settlement programs, the state court plaintiffs had the choice to continue to litigate their claims, independently, without being subject to the MDL's common benefit fee, or to participate in the global settlement program in exchange for paying common benefit fees to the attorneys whom put the settlement together. Here, no settlement program is available to the MCT State Court Plaintiffs as a result of the PLC. Additionally, the PLC argues that it "increases the settlement values" for the MCT Plaintiffs. However, without a settlement option provided by

the PLC, no comparison can even be drawn in order to support this conclusion. Thus, no actual benefit has been conferred upon the MCT Plaintiffs.

Once any cognizable benefit to state court plaintiffs is defined, such as a voluntary settlement program, a contextually appropriate amendment to CMO #3, with the cooperative efforts of both the state and federal courts may be appropriate. Such an approach is important to avoid "concerns over federal dominance. *See* Fed. Judicial Ctr., Manual for Complex Litigation, Fourth, 234 (2004) (citing *In re Diet Drugs*, MDL No. 1203, Order No. 467 (establishing a deduction of 9% from all settlements of MDL cases transferred from California federal district courts and 6% from all settlements in California state court actions, and creating a coordinated discovery plan)).

Moreover, the PLC's logic regarding unjust enrichment is unsound for a number of reasons. First, their Motion would have this Court believe that the mere access to discovery taken by the PLC would effectuate unjust enrichment by any state court plaintiff whom does not pay a common benefit fee. However, access to previously produced discovery is commonplace in litigation. In order for parties not to re-invent the discovery wheel, parties often times request, from an opposing party, discovery that was produced in previous, similar cases. Further, many documents enter the public domain once used for trial. In some fashion, *every case benefits a future case*—however, fees are not paid to previous counsel. This is because such benefits do not equate to unjust enrichment. Instead, they are an important efficiency built into our judicial system.

Second, because the PLC's Motion here would unjustly force all state court plaintiffs to pay a common benefit fee to the PLC regardless of whether the PLC *actually* confers any benefit, an Order granting the PLC's motion would flip the PLC's unjust enrichment argument on its head.

An Order granting the PLC's requested amendment would guarantee *that the PLC will be unjustly enriched* by unfairly (and un-Constitutionally) taxing state court plaintiffs whom are not conferred any benefit by the PLC.

In conclusion, this Court does not have jurisdiction to grant the relief requested by the PLC. Further, because the PLC has conferred no *actual* benefits upon the MCT State Court Plaintiffs, it is *impossible for any unjust enrichment to have occurred*.

WHEREFORE, this Court should DENY the PLC's Motion.

DATED: February 9, 2015.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent via the Court's CM/ECF system to all parties and counsel indicated on the electronic filing receipt on this 13th day of February, 2015. Copies may also be accessed through the Court's electronic filing system.

s/Ilyas Sayeg