

### Multiple Documents

Part	Description
1	12 pages
2	Exhibit A
3	Certificate of Service

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

IN RE: ZIMMER DUROM HIP CUP  
PRODUCTS LIABILITY  
LITIGATION

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2:09-cv-04414-SDW-MCA

MDL-2158

This Document Relates To All Cases

**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF**  
**MOTION TO MODIFY CASE MANAGEMENT ORDER NO. 3**

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Plaintiffs file this Reply Brief in Support of Plaintiff's Motion to Modify Case Management Order No. 3 ("CMO 3") to Provide for Contribution to the Common Benefit Fund by State-Court Plaintiffs [Doc. # 652]. The responses by the Zimmer Defendants and the Maglio, Christopher, & Toale, P.A. State-Court Plaintiffs ("MCT State-Court Plaintiffs"), at most, may highlight logistical hurdles the Court can address through its discretionary authority, but do not demonstrate a legal basis to deny Plaintiffs' motion.

**I. The Court Has Jurisdiction to Modify CMO 3 as Requested by Plaintiffs**

In their motion to modify CMO 3, Plaintiffs cited several orders by other federal MDL courts that ordered contribution to a Common Benefit Fund (CBF) from settlements or judgments achieved in state court litigation involving the same subject matter. *See, e.g., In re: Biomet M2A Mangum Hip Implant Products Liability Litigation*, (MDL-2391), 2014 WL 2602250 (N.D.Ind., Feb. 3, 2014); *In re: Orthopedic Bone Screw Products Liability Litigation*, (MDL-2014), 1996 WL 900349 (E.D.Pa., June 17, 1996.); *In re: Oil Spill By The Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, (MDL- 2179) 2011 WL 6817982 (E.D.La., Dec. 28, 2011), *superseded by* 2012 WL 161194 (E.D.La., Jan. 18, 2012); *See also In re: Avandia Marketing, Sales Pracs., & Prods. Liab. Litig.*, 2012 WL 6923367 (E.D.Pa., Oct. 19, 2012)(listing numerous cases in which CBF contribution assessed to state court litigants). Just as those federal MDL courts ordered state

court litigants to contribute to the federal CBF, this Court has the inherent authority to order the same remedy to protect and compensate Plaintiffs' Liaison Counsel for their efforts supporting the common prosecution of these cases.

The MCT State-Court Plaintiffs and Zimmer argue this Court lacks jurisdiction to compel payments by state court litigants to the Common Benefit Fund, but at most the cases they cite show a split among jurisdictions on this issue. *See In re: Showa Denko K.K. L-Tryptophan Prods. Liab. Litig. II*, 953 F.2d 162 (4th Cir. 1992). A few MDL courts have reached a similar conclusion, albeit reluctantly. *See, e.g., In re: Genetically Modified Rice Litig.*, 2010 WL 716190 (E.D.Mo., Feb. 24, 2010). However, even the *Genetically Modified Rice* court explicitly mentioned one federal court, from the Third Circuit, that reached an opposite conclusion and found that state court cases were properly subjected to the federal MDL's CBF assessment. *Id.* at \*5, citing *In re Latex Gloves Prods. Liab. Litig.*, 2003 U.S. DIST. LEXIS 18118 (E.D.Pa., Sept. 5, 2003).

Zimmer cites *In re: Pantopaque Prods. Liab. Litig.*, 938 F.Supp. 266 (D.N.J. 1996) to suggest that the District Court of New Jersey has adopted *Showa Denko's* holding that an MDL court cannot order state court or untransferred federal claimants, but *Pantopaque* is clearly distinguishable. There, the court merely held it did not have jurisdiction to resolve a private contract dispute between two nondiverse nonparties (a plaintiffs' attorney and the former liaison counsel),

particularly when the controversy was not related to the court's supervisory powers or its enforcement of any of its orders. *Id.* at 275-76. *Pantopaque* is silent as to whether this Court has the authority to modify its own CMO as requested by Plaintiffs here.

Similarly, *In re: Linerboard Antitrust Litig.*, 292 F.Supp.2d 644 (E.D. Pa. 2003) is less persuasive than Zimmer makes it out to be. While the *Linerboard* MDL court cited *Showa Denko's* holding that the MDL transferee court did not have authority to require contribution from cases that had not been transferred to it, it also explicitly: (1) based its ruling "on the present state of the record" and (2) recognized at least one MDL court (*In re Diet Drugs*) in which a federal sequestration order was applied "to untransferred federal cases and state cases by agreement of the parties or the assigned judges." *Id.* at 665 fn.12 (internal citation omitted). Indeed, the *Linerboard* court also rejected tag-along plaintiffs' argument that the MDL court no longer had authority over them after remand, as it had "equitable power" to protect the "integrity" of its orders. *Id.* at 665.

## **II. The State-Court Plaintiffs Would Be Unjustly Enriched if They Were Not Ordered by This Court to Contribute to the Common Benefit Fund**

Even the *Genetically Modified Rice* MDL court, cited favorably by the MCT State-Court Plaintiffs and Zimmer, found that contributions by state court litigants would prevent unjust enrichment and would fairly compensate the federal MDL counsel for their common benefit work. Specifically, that court recognized: : (1) it



was “abundantly clear” that state court plaintiffs “derived substantial benefit” from the work of the federal MDL counsel; (2) most of the state court lawyers had agreed to join in the trust; and (3) the nonparticipating lawyers and plaintiffs would be unjustly enriched. *Id.* at 1. However, the court also “reluctantly” determined she did not have jurisdiction over state court litigants but urged the parties – or the state courts – to “rectify this unfair free-riding by requiring their participation in the fund.” *In re: Genetically Modified Rice Litig.*, 2010 WL 716190 at \*5.

**A. There is No Question Regarding PLC’s Contribution to this MDL or to Cases Against Zimmer Generally**

In this case, the undersigned firm was added to the Plaintiffs’ Liaison Committee in June 2013. While this MDL had been in existence for several years prior, it is undisputed that the level of discovery and trial preparation has increased exponentially in the last 18 months. The following chart shows the increased costs and expenses generated by Waters & Kraus, LLP, as Plaintiffs Liaison Counsel pursued discovery, including commissioning cadaver testing of Durom Cups, and prepared cases for bellwether trials beginning in late 2014<sup>1</sup>:

<b>Year</b>	<b>Costs</b>	<b>Attorney Fees</b>
2012	\$27,489.31	\$141,975.50
2013	\$97,035.65	\$351,465.17

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<sup>1</sup>See **Exhibit A**, *Declaration of George G. Tankard, III* (“Tankard Decl.”). The supporting applications for such fees and costs will be filed in the near future.

2014	\$708,492.01	\$1,323,848.58
<b>Total (current)</b>	<b>\$833,016.97</b>	<b>\$1,817,289.25</b>

As detailed in Plaintiffs' original motion, Plaintiffs' Liaison Counsel have taken 8 bellwether trial depositions, 31 common issue depositions, and 21 expert depositions, and reviewed over 33,000 documents, out of which more than 80% were used for some purpose related to the work-up of Zimmer Durom Cup common issue liability. It is disingenuous for Zimmer to claim that these discovery efforts did not benefit or influence state court litigation; Zimmer insisted that these depositions be cross-noticed so that state court plaintiffs could attend and use (and potentially be bound by) these depositions in the state court litigation.

Moreover, the documents and testimony gathered and discovered by Plaintiffs' Liaison Counsel has been made accessible to numerous other plaintiffs' lawyers, including those who represent Durom Cup plaintiffs in state court litigation. Each of these lawyers (nearly 25 in number) has signed this MDL Court's confidentiality order and has benefitted from access to this potential treasure trove of liability information which likely would have been cost-prohibitive to obtain in individual cases. See Exhibit A, Tankard Decl. As the Third Circuit noted, even the "mere availability of discovery ... 'substantially influenced [defendant's] evaluation of every plaintiff[']s case.'" *In re Diet Drugs*, 582 F.3d 524, 548 (3d Cir. 2009). Moreover, the court acknowledged liaison

counsel had, “to the benefit of every claimant, helped to administer the MDL by tracking individual cases, distributing court orders, and serving as a repository of information concerning the litigation and settlement.” *Id.* at 548 (internal citation omitted). Plaintiffs’ request to bolster the CBF with contributions by state court litigants merely reflects the effort undertaken by Plaintiffs’ counsel to benefit all cases.<sup>2</sup>

### **B. The Court Can Fashion a Remedy to Address Specific Objections**

Aside from the question of jurisdiction, the MCT State-Court Plaintiffs and Zimmer both raise various other equitable issues, which Plaintiffs believe can be addressed by the Court through its discretionary authority. One such question is retroactivity. For example, the MCT State-Court Plaintiffs aver that their counsel have been “litigating and settling Zimmer Durom cases since 2008,” and thus those plaintiffs should not have to pay into the CBF. First, Plaintiffs point to evidence, outlined above and in their initial motion, outlining the accelerated efforts in

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<sup>2</sup> Zimmer makes a pithy argument that the discovery generated in the MDL has thus far weakened, rather than strengthened, the value of individual Durom Cup cases. Leaving aside the merits of this contention, which Plaintiffs vigorously dispute, Plaintiffs also note that early returns of litigation are not always a fair barometer of future success in mass tort litigation. *See In re NuvaRing Prods. Liab. Litig.*, 2014 WL 7271959 (E.D.Mo., Dec. 18, 2014)(awarding “common benefit attorneys” compensation for their efforts, while noting that early cases ended in voluntary dismissal or summary judgment in favor of defendants, thereby increasing the risk of proceeding with the case which ultimately led to increased risks of continuing with the litigation, particularly in light of “aggressive and tenacious” defense counsel).

discovery, expert reports, and bellwether trial preparation which have occurred since June 2013. Plaintiffs believe that any case resolved, either through trial or settlement, since that time should be included in the Court's order, regardless of when it was filed.

In the event the Court has concerns of exercising authority over purely "unrelated" state court cases, Plaintiffs submit that the Court could limit its order modifying CMO 3 only to cases involving state court plaintiffs who have signed the Protective Order in this case and/or have requested documents or other discovery materials from Plaintiffs Liaison Counsel. This approach has been taken in numerous MDL CBF orders to address the inequity, at least in part, created when noncontributors to the CBF are unjustly enriched.<sup>3</sup> *See, e.g., In re Guidant Corp. Prods. Liab. Litig.*, 2008 WL 682174 (D.Minn., March 7, 2008); *In re Oil Spill, supra*, 2012 WL 161194 (E.D.La., Jan. 18, 2012).

Zimmer also raises several other concerns - mainly related to procedural safeguards (e.g., whether, and in what forum, state court plaintiffs can challenge a

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<sup>3</sup> Of course, all parties should be mindful of recent opinions regarding unjust enrichment and quantum meruit causes of action flowing from the Eighth Circuit as a result of the *Genetically Modified Rice* MDL order which chose not to extend its CBF order to state court litigants. *See, e.g., Downing v. Goldman Phipps, PLLC, et al.*, 704 F.3d. 906 (8th Cir. 2014)(reversing trial court's dismissal of quantum meruit and unjust enrichment claims by lead counsel for plaintiffs in MDL against counsel for federal and state court litigants who chose not participate in CBF); *Downing v. Riceland Foods, Inc.*, 2014 WL 4145406 (E.D.Mo., Aug. 20, 2014)(discussing lead plaintiffs' counsel's claims against Riceland, a party who was both a defendant and a co-plaintiff in numerous federal and state cases).

CBF contribution order, whether Zimmer needs to respond to what it views as an inter-plaintiffs dispute, who bears the cost of notifying state court litigants, etc.). Addressing these issues at this point is premature, at least until this Court has reached a preliminary conclusion as to the scope of its authority to order state court litigants to contribute to the CBF - either as to all state court litigants or at least the ones who have sought to access discovery materials or other evidence produced in this case.

### **III. Conclusion**

For the reasons set forth in this reply brief, as well as the initial motion, Plaintiffs respectfully request the Court enter an order GRANTING Plaintiffs' Motion to Modify Case Management Order No. 3 ("CMO 3") to Provide for Contribution to the Common Benefit Fund by State-Court Plaintiffs. Plaintiffs also request any additional relief to which they are entitled.

DATED: February 23, 2015.

Respectfully submitted,

**WATERS & KRAUS, LLP**



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**ATTORNEYS FOR PLAINTIFFS**

# EXHIBIT

A

**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

**DECLARATION OF GEORGE G. TANKARD, III**

GEORGE G. TANKARD, III, hereby state the following:

1. I am an attorney-at-law of the State of Maryland and a member of the firm Waters & Kraus, LLP, attorneys for Plaintiffs. I am submitting this Declaration in support of Plaintiffs' Reply Brief in Support of their previously-filed Motion for Contribution by State-Court Plaintiffs to the Common Benefit Fund. I have personal knowledge of the matters stated herein.

2. Since 2012, our firm has expended the following amounts in costs and attorneys fees to conduct discovery and otherwise prepare for trial, including in two bellwether cases, against the Zimmer defendants in Durom Cup litigation:

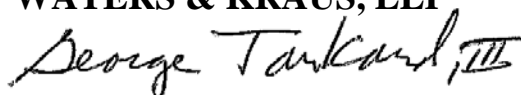
<b>Year</b>	<b>Costs</b>	<b>Attorney Fees</b>
2012	\$27,489.31	\$141,975.50
2013	\$97,035.65	\$351,465.17
2014	\$708,492.01	\$1,323,848.58
<b>Total (current)</b>	<b>\$833,016.97</b>	<b>\$1,817,289.25</b>

3. Our firm has also received numerous requests for documentary evidence and deposition transcripts obtained in this federal MDL from other plaintiffs' counsel. As of this date, approximately 25 individuals have signed this Court's confidentiality order, which is required to access discovery materials in this case.

I declare by penalty of perjury that the foregoing statements are true.

DATED: January 19, 2015.

**WATERS & KRAUS, LLP**



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**UNITED STATES DISTRICT COURT  
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**CERTIFICATE OF SERVICE**

GEORGE G. TANKARD, III, hereby certifies as follows:

1. I am an attorney-at-law of the State of Maryland and a member of the firm Waters & Kraus, LLP, attorneys for Plaintiffs.

2. On February 23, 2015, I caused a true copy of the foregoing Reply Brief and attached Exhibit to be served upon Defendants' Counsel of Record by CM/ECF.

I certify that the foregoing statements by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

DATED: February 23, 2015.

**WATERS & KRAUS, LLP**

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