

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE: ZIMMER DUROM HIP CUP
PRODUCTS LIABILITY
LITIGATION

Civil Action No.

2:09-CV-04414-SDW-SCM

**ORDER ON MOTION TO MODIFY
CMO NO. 3, [D.E. 652]**

THIS MATTER comes before the Court on notice by way of motion by counsel for the MDL plaintiffs to modify Case Management Order No. 3 to require certain state-court plaintiffs to contribute to the Common Benefit Fund through assessment. (ECF Docket Entry No. (“D.E.”) 652, 663, 669). The motion is opposed by state court plaintiffs’ counsel Maglio Christopher & Toale, P.A., (D.E. 662) and by defendants. (D.E. 663).

This Court may take judicial notice that the U.S. Judicial Panel on Multidistrict Litigation (“JPMDL” or “the Panel”) centralized this product liability action and any “tag-along” federal actions for pre-trial management to promote the just and efficient conduct of the litigation. (D.E. 11 at 1). Also, that the Panel reasoned centralization would “eliminate duplicative discovery, prevent inconsistent pretrial rulings on discovery and other issues, and conserve the resources of the parties, their counsel and the judiciary.” (Id. at 2).

Pursuant to Case Management Order No. 1, liaison counsel for plaintiffs were appointed for, among other reasons: a) the coordination of discovery “to the fullest extent practicable with related litigation proceeding in state court;” b) ensuring “that plaintiffs in both federal and state court have access to a common document depository;” c) coordinating with plaintiffs’ counsel in state court where practical to avoid duplicative depositions or other inefficient discovery;” and d) receiving discovery from defendants subject to a Discovery Confidentiality Order. See (D.E. 17 at ¶¶ 23, 23k, 23l, 38).

Plaintiffs’ Liaison Counsel subsequently established a “Common Benefit Fund”. (Case Management Order (“CMO”) No. 3, D.E. 33) to receive assessments from plaintiffs and their

counsel in this centralized litigation. **This Court rejected “without prejudice” the inclusion of language in CMO No. 3 that would permit counsel in certain state court cases to apply for payment from the Common Benefit Fund and also subject those state court cases to the assessment.** See (CMO No. 3, D.E. 33 at ¶ 11).

The movants’ papers discuss the purpose of the Common Benefits Fund, the Court’s authority and jurisdiction, and unjust enrichment, (Pl. Brf., D.E. 652-1). Their papers also include a certification concerning the work performed by lead counsel and Plaintiffs’ Liaison Counsel. See (D.E. 652-2, 652-4, 669). Their papers do not, however, specify what efforts were made to coordinate discovery “to the fullest extent practicable with related litigation proceeding in state court;” which state court plaintiffs, if any, accessed the 83,344 documents in the “document depository;” or what was done to coordinate with plaintiffs’ counsel in state court to “avoid duplicative depositions or other inefficient discovery”. The papers are also silent regarding any agreement by the state court plaintiffs to contribute to the Common Benefit Fund in exchange for assistance or benefits received.

The opposition contends that this Court lacks jurisdiction to compel contribution from the state-court plaintiffs. See (Opposition Brief, D.E. 662)(citing Manual for Complex Litigation, Fourth (“MCL 4th)(2004 ed.)). The opposition also notes that there are approaches to bring state court plaintiffs within the reach of CMO No. 3 voluntarily or upon an order from their respective state court judge, but there is no indication of effort to pursue these avenues.

This Court, having considered the papers in support of the Motion and those papers submitted in opposition, makes the following findings of fact and conclusions of law:

- a) **This Court lacks jurisdiction over the state-court plaintiffs; and**
- b) **The movants have not demonstrated the benefits conferred upon the class of state court plaintiffs or any specific state court plaintiffs that would support a finding of unjust enrichment.**

For these reasons,

IT IS on this Thursday, April 30, 2015:

1. **ORDERED**, that the motion, D.E. 652 to modify CMO No. 3 is **DENIED**.



A handwritten signature in black ink that reads "Steven C. Mannion".

Honorable Steve Mannion, U.S.M.J.
United States District Court,
for the District of New Jersey
phone: 973-645-3827

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