

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DAVID FOSCUE, et ux.,	:	:
	:	
Plaintiffs,	:	Civil Action No. 12-7491 (SDW)
	:	Master Docket No. 09-4414 (SDW)
v.	:	MDL No. 2158
	:	
ZIMMER, INC., et al.,	:	
	:	
	:	
Defendants.	:	

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: ZIMMER DUROM HIP CUP
PRODUCTS LIABILITY LITIGATION
David Foscue, et al. v. Zimmer, Inc., et al.,)
W.D. Arkansas, C.A. No. 1:12-01083)
D. New Jersey No. 09-4414 (main case))
D. New Jersey No. 2:12-CV-17491-SDW) MDL No. 2158

BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR REMAND

At the outset, the Plaintiffs are compelled to repeat the first rule of Federal Civil

Procedure:

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. **They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.**

Fed. R. Civ. P. 1 (Emphasis Supplied). With respect, the administration of the Plaintiffs' case has been anything but speedy and inexpensive. As a consequence, justice is not being served.

Plaintiffs filed their product liability action in the Circuit Court of Bradley County, Arkansas on March 12, 2012. Their action was removed from state court to the Western District of Arkansas on July 18, 2012. Plaintiffs filed (and served on Zimmer counsel) their motion for remand to state court on July 24, 2012. *Exh. T.* On July 24, 2012, Zimmer filed a Notice of tag-along with this Panel, **MDL ECF 185**, and on July 27, 2012, a Conditional Transfer Order (CTO) was entered, **MDL ECF 186**. Plaintiffs filed their Notice of Opposition to the Conditional Transfer Order on August 8, 2012, **MDL ECF 188**, and filed their Motion To Vacate the CTO on August 16, 2102, **MDL ECF 200**.

On August 28, 2012, Plaintiffs moved the Western District of Arkansas for an expedited ruling the motion to remand to state court. *Exh. U.* In a blatant attempt to delay consideration of the Motion For Expedited Ruling, Zimmer responded on September 6, 2012 by requesting oral argument, falsely stating that this Panel would

take up the Plaintiffs' objection on September 20, 2012, *Exh. V*. Plaintiffs responded by pointing out the falsity of Zimmer's statements and asking the Court to take up the remand issue on the pleadings. *Exh. W*. Hearing was held by this Panel on November 29, 2012, **MDL ECF 219**, and the Transfer Order was entered on December 12, 2012, **MDL ECF 265**.

Plaintiffs continued to prosecute their motion for remand to state court in the District of New Jersey, but the motion was denied by the Magistrate Judge on March 26, 2013, *Exh. P*, and the Plaintiffs' timely objection to that decision was overruled by the District Judge on September 3, 2013. *Exh. Q*.

The Plaintiffs continued in their efforts to bring their action to a timely conclusion by participating in two different mediations with Zimmer, to no avail.¹ Almost six years after filing their lawsuit, the Plaintiffs remain trapped in this MDL with no apparent prospect of a trial setting. Having exhausted all other avenues, Plaintiffs reiterate to this Panel their request for remand.

"Title 28 U.S.C. § 1407(a) authorizes the Judicial Panel on Multidistrict Litigation to transfer civil actions with common issues of fact 'to any district for

¹ It should also be noted that the Plaintiffs were the only individual parties who objected to a Case Management order filed on October 3, 2014 stating that all Plaintiffs in the MDL had waived their right to have remand of their claims against the Defendants for trial. *Exh. R*. The Plaintiffs' objection was sustained and their right to remand remains inviolate. *Exh. S*.

coordinated or consolidated pretrial proceedings,’ but imposes a duty on the Panel to remand any such action to the original district ‘at or before the conclusion of such pretrial proceedings.’ *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28, 118 S. Ct. 956, 958, 140 L. Ed. 2d 62 (1998). With respect to the Court of the District of New Jersey, that time has long since passed.

Moreover, all common-issue discovery was completed prior to two state-court trials were had in November of 2014 and in July of 2015 using the common -issue discovery and two bell wether trials were scheduled for February and May of 2016. ***Exh. O at 8.*** And, the last-imposed Settlement Agreement process was completed by the Plaintiffs on June 24, 2017. In short, nothing remains to be done in the District of New Jersey concerning the Plaintiffs’ case.

The Honorable Court of the District of New Jersey states that it believes that questions of remand should be coordinated and not handled on a case-by-case basis. ***Exh. L at 2(fn 2).*** As one may expect, Defendant Zimmer harbors the same belief. ***Exh. J at 3.***(“[R]emand should be coordinated across the litigation and not on a case-by-case basis.”). With respect, no legal authority is given for this belief.

The statute on the subject is to the contrary. *See*, 28 U.S.C. § 1407, which provides, in pertinent part:

When civil actions involving one or more common questions of fact are

pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred ***shall*** be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: . . .

28 U.S.C.A. § 1407 (West) (Emphasis Supplied). *See, also, Lexecon, supra* (“§ 1407 not only authorizes the Panel to transfer for coordinated or consolidated pretrial proceedings, but obligates the Panel to remand any pending case to its originating court when, **at the latest**, those pretrial proceedings have run their course.”) (Emphasis Supplied).

WHEREFORE, Plaintiffs move this Multidistrict Litigation Panel to remand this cause to the Western District of Arkansas for case-specific proceedings and trial.

RESPECTFULLY SUBMITTED
DAVID FOSCUE & TERESA FOSCUE

by:  _____

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CERTIFICATE OF SERVICE

I, Paul W. Keith, an attorney for David Foscue and Teresa Foscue, do hereby certify that on this February 19, 2018 the foregoing MOTION FOR REMAND was filed electronically pursuant to CM/ECF procedures for the MultiDistrict Litigation Panel and pursuant to CM/ECF procedures for the District of New Jersey, which caused enrolled counsel of record to be served by electronic means, as more fully reflected on the Notices of Electronic Filing.



Paul W. Keith Ark. Bar No. 94008

cc: Hon. Susan Wigenton (regular mail)
Hon. Stephen Mannion (regular mail)