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

PLAINTIFFS' LIAISON COUNSEL'S NOTICE OF APPEAL OF MAGISTRATE JUDGE'S DECEMBER 2, 2015 ORDER ON MOTION TO REDUCE ASSESSMENT [D.E. 802] PURSUANT TO LOC. R. CIV. 72.1(c)(1) AND BRIEF IN SUPPORT THEREOF

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COME NOW Plaintiffs' Liaison Counsel, by and through the undersigned, and submit this Notice of Appeal of Magistrate Judge's December 2, 2015 Order on Motion to Reduce Assessment [D.E. 802] Pursuant to L. Civ. R. 72.1(c)(1) ("Notice of Appeal") and Brief in Support Thereof.

I. PRELIMINARY STATEMENT

Plaintiffs' Liaison Counsel files this Notice of Appeal because the Magistrate Judge's December 2, 2015 Order on Motion to Reduce Assessment [D.E. 802] would result in yet another unjust outcome. On at least six occasions over the last year [D.E. 708, 709, 716, 723, 770 and 802], Plaintiffs' Liaison Counsel's Common Benefit Fund fee has been reduced from the modest 4% initially established in this MDL to a miniscule 0.5 or 1%. This uninterrupted series of reductions – despite vigorous opposition from Plaintiffs' Liaison Counsel – does not accurately reflect the extent of the work performed by Plaintiffs' Liaison Counsel in this matter, or how those efforts have benefitted all Plaintiffs in this MDL.

II. BACKGROUND

A. Procedural Background

Plaintiff Brent E. Rhoads ("Rhoads") filed his Motion to Reduce Common Benefit Fund Assessment ("Motion to Reduce") on November 13, 2015. *See* Mot. of Pl. Brent E. Rhoads to Reduce Common Benefit Fund Assessment [D.E. 788],

dated Nov. 13, 2015 ("Mot. to Reduce"). In his Motion to Reduce, Plaintiff Brent Rhoads ("Rhoads") asserted that a reduction from 4% was warranted because "plaintiffs' liaison counsel had no significant involvement" in his case. *See id*. at 1. As set out below and in Plaintiffs Liaison Counsel's Brief in Opposition to Plaintiff Brent E. Rhoads' Motion to Reduce Common Benefit Fund Assessment [D.E. 790], that statement is inconsistent with the record in this case, which demonstrates the active and sustained nature of Plaintiffs' Liaison Counsel's work over several years.

Without oral argument or any discussion of the specific procedural history of *this case*, the Magistrate Judge entered his Order on Motion to Reduce Assessment on December 2, 2015 [D.E. 802]. That Order reduced the Common Benefit Fund assessment on Rhoads' settlement from 4% to 2%, with just 1% going to Plaintiffs' Liaison Counsel. *See id*. at 1-2. Pursuant to L. Civ. R. 72.1(c)(1), Plaintiffs' Liaison Counsel now appeals the Magistrate Judge's Order for the reasons set forth below, and requests that the District Court restore the original 4% Common Benefit Fund assessment on Rhoads' settlement.

B. History of the MDL

1. The Court correctly perceived the need for a common benefit fund in this litigation.

On January 21, 2011, in CMO 3, this Court established the Common Benefit Fund to provide for fair and equitable sharing among plaintiffs of the cost of

services performed and expenses incurred by Plaintiffs' Liaison Counsel and the attorneys who have acted and provided for the common benefit of all plaintiffs with cases in MDL No. 2158. Specifically, paragraph 3 provides:

> All plaintiffs and their attorneys in cases centralized in *In re Zimmer Durom Hip Cup Products Liability Litigation*, MDL-2158 ("MDL Cases") and who have, beginning December 2, 2010, 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 Durom Cup Hip Implant product liability claims are subject to a four percent (4%) assessment of the plaintiffs' Gross Monetary Recovery, to be withheld by defendants and paid into the Common Benefit Fund by defendants, as provided herein. The Court reserves the right to change this percentage based on the factors set forth in Model Rule of Professional Conduct 1.5 for determining the reasonableness of a fee.

2. Plaintiffs' Liaison Counsel has been the driving force behind this litigation.

a. Discovery

After some very preliminary common issue discovery was undertaken in 2011, no meaningful discovery in this action took place until March of 2013. At that time, Zimmer started producing documents and offering witnesses for deposition as a result of the significant efforts of Plaintiffs' Liaison Counsel to overcome Zimmer's resistance to allowing any discovery in this case. Plaintiffs' Liaison Counsel performed a massive review of the documents ultimately produced by Zimmer during the summer of 2013, and ultimately began taking common issue depositions in the fall of 2013.

The scope of this work undertaken by Plaintiffs' Liaison Counsel is staggering. A list of depositions related to common issue discovery, as well as those taken in preparation of the two bellwether trials, all coordinated and conducted by Plaintiffs' Liaison Counsel, is attached hereto as **Exhibit A**. A declaration containing a numerical summary of how many documents have been reviewed is attached hereto as **Exhibit B**. All Plaintiffs benefit from these efforts to the extent that such document review was required to take meaningful depositions and prepare the case on common issues for trial. A summary of hours spent by Waters & Kraus from 2013 to 2014 alone is included in **Exhibit B**. The total for each of these common benefit work categories is:

Depositions	212.00
Documents Reviewed	524.09
Attorney and Staff hours	3,906.25.

b. Trials

After a grueling and intensive period of fact and expert discovery, the first Zimmer Durom Cup trial took place in November of 2014. Although this trial took place in Illinois state court, it was tried by Waters & Kraus, part of the MDL Plaintiffs' Liaison Counsel, utilizing common issue discovery conducted in the MDL. That trial resulted in a defense verdict, as did two subsequent trials in Illinois state court and the MDL.

However, in July 2015, Waters & Kraus, again using common issue discovery conducted in the MDL, obtained a $9.1 million verdict in a state court action in Los Angeles, California – the first plaintiffs' verdict in the United States in a Durom Cup case. Currently, MDL Plaintiffs' Liaison Counsel has another six additional Zimmer Durom Cup cases set for trial in the next nine months, including two MDL trials. The MDL common issue discovery conducted by the MDL Plaintiffs' Liaison Counsel and the common issue pre-trial case work-product developed by the MDL Plaintiffs' Liaison Counsel will form the basis for the trial of these cases.

III. ARGUMENT AND AUTHORITIES

A. Purpose of the Common Benefit Fund

The common-fund doctrine, established by the United States Supreme Court, "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Given the nature of multidistrict litigation, wherein lead counsel and committees are appointed to spearhead pre-trial discovery and motion practice, MDL courts consistently rely on the doctrine as a basis for establishing funds to compensate lead attorneys for their work, the benefits of which are afforded to all plaintiffs. *See In re Vioxx Prods. Liab. Litig.*, 802 F. Supp. 2d 740, 758 (E.D. La. 2011). Thus, Common Benefit

Funds promote the purpose of multidistrict litigation, where "proceedings [are] for the convenience of the parties and witnesses and [promote] the just and efficient conduct of such actions," by ensuring that those who take on leadership roles in the coordination of the litigation are fairly and equitably compensated. 28 U.S.C. § 1407. Federal case law recognizes that the purpose of the common fund is to "compensate attorneys for the time and funds expended by them for the common benefit of all … plaintiffs in the conduct of the litigation …." *In Re: Zyprexa Products Liability Litigation*, 467 F. Supp. 2d 256, 263 (E.D.N.Y. 2006).

A district court's authority to establish a Common Benefit Fund in multidistrict litigation is derived from its power to consolidate and manage litigation as prescribed by 28 U.S.C. § 1407. Specifically, the managerial authority given to a MDL "necessarily implies [the] corollary authority to appoint lead or liaison counsel . . . [which] would be illusory if it is dependent upon lead counsel's performing the duties desired of them for no additional compensation." *In re Vioxx Prods. Liab. Litig.*, at 758 (citing *In re Air Crash Disaster at Fl. Everglades on Dec. 29, 1972*, 549 F.2d 1006 (5th Cir. 1977)).

Moreover, the Federal Judicial Center has specifically recognized the authority and common practice of MDL transferee judges to issue orders directing a fixed percentage of funds derived from settlements to be contributed to a central fund for compensation of lead counsel. *See* Fed. Judicial Ctr., Managing

Multidistrict Litigation in Products Liability Cases, A Pocket Guide for Transferee Judges 14 (2011). It is thus clear that the purpose of Common Benefit Funds, demonstrated *supra*, is to prevent unjust enrichment of plaintiffs who benefit from the labor of MDL lead attorneys and fairly compensate those attorneys for the time and funds expended by them for the common benefit of all MDL plaintiffs.

B. The Time and Funds Expended by Plaintiffs' Liaison Counsel Have Been Significant and Have Greatly Benefited All MDL Plaintiffs.

Rhoads completely ignores the efforts Plaintiffs' Liaison Counsel has put forth in common benefit discovery and pre-trial case work up by claiming that "Mr. Keyes and his law firm committed all of the time and effort expended to resolve Mr. Rhoads' case."[1] This statement completely disregards the fact that the time and effort expended by Plaintiffs' Liaison Counsel are the driving forces behind this entire litigation, helping all Plaintiffs, including Rhoads, reach settlement. To suggest otherwise is to pretend Rhoads' case existed in a vacuum, rather than as part of a federal multi-district litigation.

If Rhoads' argument is to be believed, the only prerequisites to reaching a settlement in this action are: (1) file a complaint; (2) gather and provide Zimmer with medical records and subrogation information; and (3) present a settlement demand. However, both the factual record and common sense show that reaching

[1] Mot. of Pl., Brent E. Rhoads, to Reduce Common Benefit Fund Assessment [Dkt. 788] at 2.

a settlement is not so simple. Plaintiffs' Liaison Counsel's efforts have been the driving force behind this litigation, moving it from where it was in 2013 – when no common issue discovery had taken place, no experts had been worked up, no trials had taken place – to the point it is at today, allowing informed, good-faith settlement negotiations to take place with the potential of trial if a settlement is not reached.

C. Allowing MDL Plaintiffs to Benefit from the Efforts of this MDL's Lead Counsel Without Contribution to the Common Benefit Fund Would Result in Unjust Enrichment and Not Fairly Compensate Them for Their Time and Funds Expended.

Plaintiffs' Liaison Counsel and the Steering Committee in this MDL case have put forth an intensive amount of effort in conducting common issue discovery, common issue motion practice, and the other common issue case work-product needed to try Zimmer Durom Cup cases to verdict. Plaintiffs with cases pending in the MDL actions against the Zimmer Defendants are afforded the opportunity, at any time, to access discovery material and other work product from Plaintiff's Liaison Counsel (upon the signing of a confidentiality agreement). Indeed, a number of attorneys representing other MDL plaintiffs have already availed themselves of the use of these materials.

Zimmer, of course, is well aware of the efforts that have been expended by Plaintiffs' Liaison Counsel and the cluster of pending trial settings on the horizon. Prior to the gearing up of discovery and trial settings described herein, this MDL

was relatively dormant and was not actively litigated. Without the meaningful threat of a trial, the leverage for settling that case is significantly lessened. In the setting of the MDL, the efforts of the Plaintiffs' Liaison Counsel, by design, fills what would otherwise be a void and provides that leverage.

Accordingly, the benefits of the extensive efforts of Plaintiffs' Liaison Counsel in this litigation extend to all MDL plaintiffs, regardless of direct or indirect use of discovery or other work-product materials. Each inculpatory fact uncovered, substantiated, and corroborated by Plaintiffs' Liaison Counsel through its extensive discovery conducted, motion practice, or pre-trial case work product against Zimmer in the MDL increases the settlement values of all pending MDL cases. To allow MDL Plaintiffs to benefit in this way from the efforts of Plaintiffs' Liaison Counsel without shouldering their fair share of the costs and expenses would allow non-contributing Plaintiffs to be unjustly enriched and not fairly compensate Plaintiffs' Liaison Counsel for their time and funds expended.

D. The Model Rules of Professional Conduct Factors Cited by Moving Plaintiff Do Not Support Reducing the Common Benefit Fund Assessment.

Rhoads cites the eight factors found in Rule 1.5 of the Model Rules of Professional Conduct ("Rule 1.5"), claiming they support his contention that the

Common Benefit Fund should be reduced.[2] However, he provides no argument for how the factors support his position; instead, he merely states "Liaison Counsel did not have an attorney-client relationship with Mr. Rhoads and did not participate in his case." *Id*. Although Liaison Counsel may not have had a direct attorney-client relationship with Mr. Rhoads – which is not even a factor to be considered under Rule 1.5 – as discussed *supra*, Liaison Counsel participated heavily in the case of every single MDL Plaintiff – Rhoads included.

Furthermore, several of the Rule 1.5 factors support maintaining the 4% assessment, not reducing it. The first factor listed in Rule 1.5 is "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." Model R. Prof. Cond. 1.5(a)(1). Similarly, factor number 7 provides that "the experience, reputation, and ability of the lawyer or lawyers performing the services," should be considered in determining whether a fee is reasonable. Model R. Prof. Cond. 1.5(a)(7). Both of these factors weigh heavily in favor of maintaining the 4% assessment. As discussed *supra*, a considerable amount of time and labor has been spent over the past two years performing services that Plaintiffs' Liaison Counsel had the experience, reputation and ability to provide. This time and labor culminated in a huge Plaintiffs' verdict in Los Angeles, benefitting the settlement value of all

[2] *See* Mot. of Pl., Brent E. Rhoads, to Reduce Common Benefit Fund Assessment [Dkt. 788] at 3.

Durom Cup Plaintiffs, regardless of jurisdiction. The final factor listed in Rule 1.5, "whether the fee is fixed or contingent," also supports maintaining the current fee assessment, as Plaintiffs' Liaison Counsel's fee is contingent upon recovery. Model R. Prof. Cond. 1.5(a)(8).

E. The 4% Assessment is Reasonable When Compared to the Common Benefit Fee in Other MDL Cases.

An analysis of the common benefit fee assessed in other MDL cases shows that, not only is the 4% assessment reasonable, it is actually less than what is typically assessed. In *In re MGM Grand Hotel Litig.*, 660 F. Supp. 522 (D. Nev. 1987), for example, the Plaintiffs' Legal Committee petitioned the court to increase the fee assessment form 5% to 7%. The court granted the petition after recognizing that the 5% fee was "in the court's view below what would normally be expected by the application of standard principles for attorneys' work in class action type-litigation." *Id.* at 525. Similarly, the court in *In re Orthopedic Bone Screw Products Liab. Litig.*, No. MDL 1014, 1996 WL 900349, at *3 (E.D. Pa. June 17, 1996) required 5% of the aggregate amount to be deducted from any payments to be deposited into the MDL's PLC Costs Account. *In re Orthopedic* further provided that the 5% fee applied "regardless of whether a plaintiff's case is disposed of during the time it is on the docket of the transferee, or following remand or transfer from the transferee court[.]" *Id.* The District Court for the Eastern District of Pennsylvania determined that a 9% assessment was appropriate

to properly compensate the Plaintiffs' Management Committee for the work they put forth in *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liab. Litig.*, Case No. 1203, 199 WL 124414, at *2 (E.D. Pa. Feb. 10, 1999). Likewise, the United States District Court for the District of Maryland also determined that a 9% assessment was necessary to reimburse Plaintiffs' Lead Counsel for costs and attorney's fees. *See In re Protegen Sling & Vesica Sys. Products Liab. Litig.*, Case No. 1387, 2002 WL 31834446, at *1 (D. Md. Apr. 12, 2002). Finally, the court in *Turner v. Murphy Oil USA, Inc.*, looked to the Manual for Complex Litigation (Fourth) to help determine that a 12% assessment was consistent with what has been awarded in other cases under the common-fund doctrine. *See Turner*, 422 F. Supp. 2d 676, 683 (E.D. La. 2006) (citing Manual for Complex Litigation (Fourth) §14.121 (2004) (citing two studies of fee awards in class action cases, one of which found fee percentages ranging from 4.1% to 17..92%, the other of which found fee percentages ranging from 5% to 22%, with 8% as the median award)).

In each of the above-mentioned cases, the common benefit fund was established to properly compensate the attorneys for time and expenses associated with conducting pre-trial discovery and assembling the liability story against the respective defendants, just like Plaintiffs' Liaison Counsel has done in the present matter. However, the compensation in the each of those cases ranged anywhere

from 5% to 12%, whereas the common benefit fund assessment currently at issue is only 4%.

It should also be noted that most MDL litigations involve tens of thousands of cases, resulting in a huge number for the steering committee counsel. Here, there are only a few hundred cases to help Plaintiffs' Liaison Counsel defray a portion of the massive cost associated with assembling the liability story against Zimmer; there is already virtually no chance of a windfall, even at 4%. As the Manual for Complex Litigation points out, one important reason for assessing a percentage fee towards a common fund is "ensuring that competent counsel continue to be willing to undertake risky, complex, and novel litigation." Manual for Complex Litigation (Fourth) §14.121 (2004). The current 4% assessment is already lower than the assessments found in similar litigation. Reducing it even further would only serve to penalize Plaintiffs' Liaison Counsel for undertaking this litigation and dedicating a large amount of resources time and resources to the benefit of all plaintiffs, including Mr. Rhoads.

IV. CONCLUSION

For the reasons stated above, Plaintiffs' Liaison Counsel respectfully requests that this Court reverse the Magistrate Judge's Order on Motion to Reduce Assessment, dated December 2, 2015 [D.E. 802], and restore the 4% Common Benefit Fund assessment on Rhoads' settlement.

DATED: December 11, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document has been served upon counsel of record for the aforementioned Defendant via ECF, this 11th day of December, 2015.

/s/ Gibbs C. Henderson
Gibbs C. Henderson