

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

**DEFENDANTS' RESPONSE TO PLAINTIFFS' LIAISON
COUNSEL'S APPEAL OF MAGISTRATE JUDGE'S ORDER ON
MOTION TO REDUCE COMMON BENEFIT FUND ASSESSMENT (DCT. 802)**

Plaintiffs' Liaison Counsel's Appeal of Magistrate Judge's Order on Motion to Reduce Common Benefit Fund Assessment (Dct. 802) ("Plaintiffs' Liaison Counsel's Motion") raises numerous issues to which the Defendants (collectively "Zimmer") are compelled to respond. First, Plaintiffs' Liaison Counsel makes multiple omissions and misstatements to support its argument that the Court should overrule the reduction of an individual plaintiff's Common Benefit Fund assessment. Most glaring among these is Plaintiffs' Liaison Counsel's failure to inform the Court that the sole plaintiff's verdict in a California Durom Cup case was vacated by the trial court, and a new trial was ordered, largely due to the misconduct of the plaintiff's trial counsel, Waters Kraus & Paul ("Waters Kraus") – one of the Plaintiffs' Liaison Counsel in this MDL and the moving party for Plaintiffs' Liaison Counsel's Motion. Second, Plaintiffs' Liaison Counsel's primary argument that Waters Kraus' litigation tactics have resulted in increased leverage and settlement values for all MDL plaintiffs is unsubstantiated and untrue. Instead, Waters Kraus' tactics, which have resulted in 3 defense verdicts and 1 vacated plaintiff's verdict, have hindered, not helped, other plaintiffs' leverage and the settlement value of these cases. Thus, while Zimmer views the subject of Plaintiffs' Liaison Counsel's Motion to be largely between Plaintiffs' Liaison Counsel and the other MDL plaintiffs and their counsel,

Zimmer submits this response because consideration of any such motion should be based on an accurate record.

I. Plaintiffs' Liaison Counsel's Omissions And Misstatements

In support of their request, Plaintiffs' Liaison Counsel relies on multiple omissions and misstatements. First and foremost, Plaintiffs' Liaison Counsel cites a plaintiff's verdict in California state court that purportedly supports their argument that Waters Kraus' litigation tactics have increased leverage and settlement value for all MDL plaintiffs. However, Plaintiffs' Liaison Counsel omits that the California court vacated the verdict and ordered a new trial based on Waters Kraus' misconduct. That misconduct included (1) violating the parties' stipulations and court's orders excluding evidence, (2) misrepresenting the total amount of recoverable medical expenses, (3) falsely representing in closing argument that Zimmer's expert witnesses were paid while the plaintiff's experts testified without compensation, and (4) violating the court's *in limine* order excluding evidence of subsequent remedial measures by implying that after the plaintiff's implant surgery Zimmer recalled the Durom Cup from the market. Together, the court found this misconduct to be "highly prejudicial" and, as a result, vacated the jury's award and ordered a new trial. Accordingly, it is a misstatement for Plaintiffs' Liaison Counsel, including Waters Kraus, to now argue that the vacated verdict has benefitted the other MDL plaintiffs.

Second, Plaintiffs' Liaison Counsel misstates (1) that the Court has reduced individual plaintiffs' Common Benefit Fund assessments 6 times in 2015, (2) that the reductions have been from a "modest" 4% to a "miniscule" 0.5 or 1%, (3) that the reductions have been made despite vigorous opposition from Plaintiffs' Liaison Counsel, and (4) that the most recent reduction (Dct. 802) reduced the assessment so that Plaintiffs' Liaison Counsel would receive

only 1%. (Pl. Mot. at 2-3). To the contrary, in 2015, the Court has reduced individual plaintiffs' assessments only 5 times. (*See* Orders at Dct. 708, 716, 723, 770, and 802).¹ Of those 5 reductions, Plaintiffs' Liaison Counsel only opposed 3 of them. (Dcts. 708, 770, and 802). And, while 3 of the reductions were an assessment of 1% (Dcts. 708, 716, and 723), the 2 most recent reductions (which Plaintiffs' Liaison Counsel opposed) were a more favorable assessment of 2% (Dcts. 770 and 802). Finally, nothing in the Court's most recent Order (Dct. 802) suggests that Plaintiffs' Liaison Counsel will not receive the full 2% assessment.² Thus, the factual foundation upon which Plaintiffs' Liaison Counsel asserts their argument is flawed.

Third, Waters Kraus itself was the beneficiary of an Order reducing their own clients' Common Benefit Fund assessments. (*See* Dct. 131). Waters Kraus made many of the same arguments that recent plaintiffs have made when requesting a reduction: (1) the settlements were accomplished as a result of direct negotiations between the individual plaintiffs' counsel and counsel for Zimmer, with no participation by then-Plaintiffs' Liaison Counsel,³ (2) the settlement negotiations focused on the medical circumstances and damages specific to the individual plaintiffs, and not the product of contributions from then-Plaintiffs' Liaison Counsel, and (3) the work that led to settlement was conducted by the individual plaintiffs' counsel, and was not assisted by the discovery conducted by then-Plaintiffs' Liaison Counsel. (Pl. Mot. for Reduction, Dct. 129-1 at 2-4). Thus, like the vast majority of individual plaintiffs in this MDL

¹ The other order cited by Plaintiffs' Liaison Counsel (Dct. 709) was the Court's denial of their motion to require contribution to the Common Benefit Fund by state court plaintiffs.

² Specifically, the Order states that "plaintiff's assessment to the Common Benefit Fund be reduced to 2 percent to be split 1% by plaintiff(s) and 1% by their counsel." (Dct. 802 at 3). This language merely reflects from whom the assessment shall be taken (*i.e.*, split between the plaintiff's proceeds and the lawyer's fee), not limit to whom the assessment is paid (*i.e.*, Plaintiffs' Liaison Counsel). Case Management Order 3: Order Establishing Common Benefit Fund ("CMO 3"), paragraph 5, makes it clear that the assessment shall be split between lawyer and plaintiff, with half the assessment "deemed fees to be subtracted from the attorneys' fees portions of the individual fee contracts between plaintiffs and their attorneys" and the other half "deemed to be costs to be subtracted from the client portion of the individual fee contracts." (Dct. 33 at 2).

³ These negotiations and settlements occurred before Waters Kraus was appointed Plaintiffs' Co-Liaison Counsel.

who have reached a settlement without the benefit of purported common litigation efforts, Waters Kraus itself knows – and has taken advantage of – the ability to resolve cases without the litigation tactics for which it now seeks compensation. In other words, Waters Kraus’ first-hand experience is inconsistent with what it purports to be the benefit of its litigation tactics on the settlement process. (*See* Pl. Mot. at 8 (arguing that the “factual record and common sense” show that Waters Kraus’ litigation tactics have been the “driving force” for “good-faith settlement negotiations”)).

Finally, the Court impliedly has taken into account remuneration for Waters Kraus’ tactics (deservedly or not) by limiting the 2 most recent reductions to a 2% assessment (Dcts. 770 and 802), rather than all previous reductions to a 1% assessment (*See* Dcts. 65, 98, 124, 131, 708, 716, and 723). Thus, Plaintiffs’ Liaison Counsel are simply wrong to suggest that the most recent reduction is “yet another unjust outcome.” (Pl. Mot. at 2).

II. Effect Of Waters Kraus’s Litigation Tactics

The stated basis for Plaintiffs’ Liaison Counsel’s Motion is that the plaintiffs who obtain the benefit of the MDL without contributing to its costs are unjustly enriched “at the successful litigant’s expense.” (Pl. Mot. at 6, citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). Specifically, Plaintiffs’ Liaison Counsel boasts that they are “the driving force ... allowing informed, good-faith settlement negotiations to take place with the potential of trial if a settlement is not reached.”⁴ (*Id.* at 9). Nothing could be further from the truth. Zimmer and over 290 plaintiffs’ firms throughout the county have established good-faith settlement values long-before or in spite of Waters Kraus’ decision to actively push their cases to trial. And, those

⁴ Importantly, 3 of the trials on which Waters Kraus relies for its argument took place in state court. However, the work done in state court cases is not eligible for Common Benefit Fund payments. Indeed, Common Benefit Fund payments for work done in state court was disputed and specifically excluded from CMO 3. (*See* CMO 3, Dct. 33, stricken paragraph 11).

tactics have been consistently unsuccessful. Indeed, Zimmer won defense verdicts in 3 cases (including 2 cases that were Waters Kraus' own trial picks) and, in the only other case tried, the court ordered a new trial largely due to Waters Kraus' misconduct. Besides trials, the universe of discovery collected in the MDL has revealed that plaintiffs' cases are weaker, not stronger, than originally believed, and that the value of the cases is less, not more. With certainty, the work done by Waters Kraus has not increased the leverage of MDL plaintiffs or the settlement value of these cases.

III. Conclusion

Although Zimmer does not necessarily have an interest in and, therefore, does not outright oppose Plaintiffs' Liaison Counsel's Motion, the omissions, misstatements and underlying context for Plaintiffs' Liaison Counsel's Motion is nevertheless important: Plaintiffs' Liaison Counsel's misstatements of the California jury verdict, the facts related to the Court's reductions of Common Benefit Fund assessments, Waters Kraus' own experience receiving a reduction for its own clients, and the Court's more favorable adjustment of recent reduction amounts. Also important is that Waters Kraus' litigation tactics have hindered, not helped, the settlement of these cases for other plaintiffs in the MDL. Thus, while Waters Kraus made a strategic decision to push its own cases to trial, it is questionable whether Waters Kraus should be compensated by other plaintiffs when those tactics have been unsuccessful and unhelpful.

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CERTIFICATE OF SERVICE

I certify that on December 21, 2015, a copy of the foregoing Defendant Zimmer Holdings, Inc.'s Response to Plaintiffs' Liaison Counsel's Appeal of Magistrate Judge's Order on Motion to Reduce Common Benefit Assessment was served via ECF on all counsel of record.

/s/ Andrew L. Campbell _____