

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

IN RE: ZIMMER DUROM HIP CUP
PRODUCTS LIABILITY LITIGATION

This Document Relates to:
All Cases

Master Docket No. 09-4414
(SDW)(MCA)
MDL No. 2158

**PLAINTIFFS' LIAISON COUNSEL'S REPLY TO DEFENDANTS'
RESPONSE TO PLAINTIFFS' LIAISON COUNSEL'S APPEAL OF
MAGISTRATE JUDGE'S ORDER ON MOTION TO REDUCE
COMMON BENEFIT ASSESSMENT**

COME NOW Plaintiffs' Liaison Counsel, by and through co-liaison counsel Waters & Kraus, and file this Reply to Defendants' Response to Plaintiffs' Liaison Counsel's Appeal of Magistrate Judge's Order on Motion to Reduce Common Benefit Assessment, and would show as follows:

I. PRELIMINARY STATEMENT

Zimmer concedes in the first page of its Response to Plaintiffs' Liaison Counsel's Appeal of Magistrate Judge's Order on Motion to Reduce Common Benefit Fund Assessment [Doc. 808] ("Zimmer's Response") that the dispute over the appropriate amount that should be paid by settling Plaintiffs into the common benefit fund is "**largely** between Plaintiffs' Liaison Counsel and the other MDL

plaintiffs and their counsel[.]”¹ That concession does not go far enough; in truth, this dispute is **entirely** between Plaintiffs’ Liaison Counsel and a small number of MDL Plaintiffs and their counsel. It is simply of no consequence to Zimmer whether 2% or 4% of the settlement funds it pays to a settling plaintiff go to Plaintiffs’ Liaison Counsel. Yet despite this obvious, indisputable fact, and Zimmer’s counsel’s acknowledgment of it on the very first page of their Response, Zimmer’s lawyers nevertheless chose to spend another six pages (and however many hours required to write those pages) disparaging Plaintiffs’ Liaison Counsel – at their client’s expense. While Zimmer’s counsel’s decision to spend that time writing a response that – by their own admission – does not affect their client is largely between Zimmer’s counsel and their client, the serious allegations and misrepresentations in Zimmer’s Response are not.

II. ARGUMENTS & ANALYSIS

First, Zimmer’s contention that Plaintiffs’ Liaison Counsel has “fail[ed] to inform the Court that the sole plaintiff’s verdict in a California Durom Cup case was vacated by the trial court”² is simply not true. As one of the signatories, (J. Joseph Tanner) of Zimmer’s Response knows, the fate of that verdict was discussed at length by both parties with the Court at the mandatory settlement

¹ Zimmer’s Resp. at 1 (emphasis added).

² *Id.* at 1.

conference held on December 7, 2015.³ Insofar as Zimmer suggests that a unanimous verdict against it in the amount of \$9.2 million – regardless of what the trial judge did with that verdict – has not altered its perception of its potential liability exposure in these lawsuits, Plaintiffs feel comfortable letting this Court assess the credibility of that statement without any further comment.

Second, Zimmer’s argument that Plaintiffs’ Liaison Counsel’s current position on the issue of the appropriate common benefit percentage is inconsistent with the position taken by co-liaison counsel Waters & Kraus in the Motion to Reduce Contribution to Common Benefit Fund [Doc. 129] filed on October 9, 2012, is specious. Plaintiffs’ Liaison Counsel’s current request that the Court reinstate a common benefit assessment of 4% in the case of Plaintiff Brent E. Rhoads is based, in large part, on the amount of work expended by Plaintiffs’ Liaison Counsel since 2013 in developing the case against Zimmer and trying that case to verdict on multiple occasions. As of October 9, 2012, the date of the motion cited by Zimmer in its Response, none of that work had taken place, none of that discovery had been collected and analyzed, and none of those trials had occurred. Given those circumstances, the Motion to Reduce Contribution to

³ If Zimmer was serious about presenting an “accurate record,” it would have noted in its Response that the California trial court only vacated the \$9.2 million verdict *after* the plaintiff in that action rejected the trial court’s proposed remittitur of \$828,153.

Common Benefit Fund [Doc. 129] filed by Waters & Kraus was both entirely appropriate at the time and in no way inconsistent with the present position taken by Plaintiffs' Liaison Counsel. Further, the resolution of that motion in 2012 on an entirely different factual record has no bearing on the issue currently before the Court.

Finally, Zimmer's contention that "Waters & Kraus' litigation tactics have hindered, not helped, the settlement of . . . cases for other plaintiffs in the MDL"⁴ is neither surprising nor meaningful. One would certainly not expect Zimmer's counsel, after several years of contentious litigation, to heap any praise on or accord any credit to Plaintiffs' Liaison Counsel. Indeed, it would be against its client's interests to suggest to plaintiffs in this MDL or future plaintiffs in other litigation that actively litigating cases against Zimmer will drive up settlement values. While Zimmer's counsel apparently has no qualms filing a seven-page brief on a dispute that they concede "Zimmer does not necessarily have an interest in[,]"⁵ Plaintiffs' Liaison Counsel would not expect them to go the next step further and make statements that are actually against its clients interests.

⁴ Zimmer's Resp. at 5.

⁵ *Id.*

III. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court ignore the arguments contained in Defendants' Response to Plaintiffs' Liaison Counsel's Appeal of Magistrate Judge's Order on Motion to Reduce Common Benefit Assessment.

DATED: January 20, 2016.

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 20th day of January, 2016.

/s/ Gibbs C. Henderson

Gibbs C. Henderson