UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

IN RE: LUMBER LIQUIDATORS CHINESE-MANUFACTURED FLOORING PRODUCTS MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION,	CASE NO.: 1:15-MD-02627 (AJT/TRJ)
This document relates to cases with a personal injury component	

REQUEST FOR HEARING ON PERSONAL INJURY PLAINTIFFS' MOTION FOR: (1) SEPARATE TRACK, AND (2) PARTICIPATION IN SETTLEMENT NEGOTIATIONS

COME NOW the Plaintiffs with personal injury claims in this MDL and request:

1. The Court hold a hearing on the Personal Injury Plaintiffs' Motion for Separate Case Track (ECF No. 1156, filed 7/21/2017).

2. The Court order that these Plaintiffs, through lead settlement counsel appointed by this Court, Shawn Reed and Kevin Sullivan, be allowed to participate in settlement negotiations.

This motion is submitted by Ms. Reed and Mr. Sullivan and is approved by all counsel for personal injury plaintiffs.

I. BACKGROUND TO MOTION

A. THE EARLY STAGES OF THE CASE.

This MDL started on March 9, 2015. Soon thereafter, the Court appointed Steve Toll, Nancy Fineman, and Steve Berman as Lead Plaintiff's Counsel, and Diane Flannery as Lead Defense Counsel.

Personal injury plaintiffs filed actions in their local districts that were then transferred to this court as part of the MDL. Universally, these plaintiffs would have preferred to have litigated their cases and gone to trial in their home districts.

Lead counsel — for both Plaintiffs and Defendant —elected to conduct discovery and motion practice **on only the consumer fraud claims**. No discovery or activity in the MDL occurred with respect to the personal injury claims. Effectively, the personal injury Plaintiffs were forced to sit on the sidelines for two years.

In spring 2017, this Court entered orders on Defendant's motion for summary judgment, allowing the consumer fraud cases to proceed. Counsel for the personal injury plaintiffs were hopeful that their cases would now be litigated after a hiatus of two years.

B. THE JULY 11, 2017 HEARING AND PLAINTIFF'S MOTION FOR SEPARATE CASE TRACK.

On July 11, 2017, Ms. Reed and Mr. Sullivan attended a status conference before Judges Trenga and Jones. These lawyers requested that the personal injury plaintiffs' claims be placed on a separate case track, and that they be allowed to participate in settlement negotiations. None of the Lead Plaintiffs' Counsel represented personal injury plaintiffs. A copy of the transcript of that status conference is attached hereto as **Exhibit 1**.

This Court instructed Ms. Reed and Mr. Sullivan to file a motion concerning their requested relief, and also instructed them to coordinate with Lead Plaintiffs' Counsel with respect to coordination of discovery. On July 21, 2017, Ms. Reed and Mr. Sullivan filed their motion for an order establishing a separate case track. (ECF No. 1156). In that motion, these lawyers reiterated their request that "[t]he Court include them in the settlement process. For example, these Plaintiffs should be allowed to participate in all settlement conferences, have an attorney appointed to represent their interests, and conduct settlement negotiations on their own behalf." *Id.*, at 3.

Defendant did not oppose this Motion (ECF No. 1163), but suggested a case schedule that would have delayed remand until early 2019. These Plaintiffs filed their reply on August 3, 2017. (ECF No. 1168)

C. PERSONAL INJURY PLAINTIFFS' COMPLIANCE WITH DISCOVERY AND REQUESTS FOR SETTLEMENT INFORMATION.

On August 18, 2017, the Court entered an order staying all discovery [ECF 1181]. Because this came as a surprise, Mr. Sullivan contacted Lead Plaintiff's Counsel and was told information

that came as an even greater surprise. See Declaration of Kevin Sullivan dated November 7, 2017 attached as **Exhibit 2** with attachments A-F. See Declaration of Shawn C., Reed dated November 7, 2017 attached as **Exhibit 3** with attachments A-H. The reason for the discovery stay was because a settlement mediation had occurred the day before, on August 17, 2017. Neither Mr. Sullivan nor Ms. Reed had been told about the mediation or been invited to participate, although both lawyers had made this request in open court and in their pending motion.

On August 21, 2017, Mr. Sullivan and Ms. Reed each spoke separately with Mr. Toll about the ongoing settlement process — in which they were not participating. **In sum, Mr. Toll advised that he did not want to negotiate on behalf of the personal injury plaintiffs.** *Id.*

On August 24, 2017, this Court entered the following Order [ECF No. 1188]:

> **Ordered that Shawn C. Reed of Howard Reed & Pedersen and Kevin P. Sullivan of The Sullivan Law Firm, be, and the same hereby are, APPOINTED as Co-Lead Settlement Counsel for Plaintiffs in this MDL claiming personal injuries**; that Co-Lead Settlement Counsel contact and appear, as directed by the Honorable Leonie M. Brinkema for the purposes of settlement discussions.

On August 29, 2017, as directed, Ms. Reed and Mr. Sullivan participated in a conference call with Judge Brinkema. During the conference, Ms. Reed and Mr. Sullivan informed Judge Brinkema of their concerns that Lead Plaintiffs' Counsel had no interest in negotiating on behalf of the personal injury claimants and requested a format to inform the defense about the nature of the personal injury claims. (See **Exhibits 2** and **3**). As a result of this conference, Judge Jones issued an order requiring each personal injury plaintiff to answer Supplemental Fact Sheets, and provide medical records and other documents supporting their claims. Judge Jones instructed that these plaintiffs should provide this information and documents to facilitate settlement. *Id.* (ECF No. 1202)

The personal injury plaintiffs answered the Supplemental Fact Sheets by September 17, 2017, and provided their responses to Ms. Flannery as instructed.

On September 18, 2017, Ms. Flannery, via email to Ms. Reed and Mr. Sullivan, advised that a mediation was scheduled for September 20, 2017, before Judge Brinkema — two days later.

(See **Exhibits 2** and **3**). Neither Mr. Sullivan nor Ms. Reed had been provided notice of the September 20 mediation. Rather ominously, Ms. Flannery also advised: **"Although Mr. Toll and Mr. Robertson can speak for themselves, my understanding is that they do not want to you to be part of the global settlement.** Therefore, I recommend you contact Judge Brinkema to determine how she would like to deal with the personal injury plaintiffs." Ms. Flannery also requested that she be provided by September 19, 2017 — the next day — "realistic settlement demands." *Id.*

This required that the lawyers for the personal injury plaintiffs (estimated to represent approximately 75 injured people) obtain settlement authority and provide it to Lead Counsel on 24-hours' notice. In fact, the majority of these plaintiffs did provide the requested demands, and they were forwarded by Lead Counsel in a summary tally to Ms. Flannery that night. *Id.*

As Ms. Flannery suggested, Mr. Sullivan contacted Judge Brinkema, and advised that Ms. Reed and Mr. Sullivan were willing to attend the mediation in spite of such short notice, **but were instructed not to attend the September 20 mediation, and were also told that the court would advise when a settlement mediation for the personal injury plaintiffs would later occur.** *Id.*

On September 21, 2017, Mr. Sullivan asked Mr. Toll in an email: "Did you settle at yesterday's mediation?" Mr. Toll responded: "Kevin — I refer you to Diane Flannery on this." *Id.* After this response, Ms. Reed accordingly contacted Judge Jones and requested information of the status of the personal injury track. Ms. Reed noted that she and Mr. Sullivan were "Now fielding many, many telephone calls with questions . . . Will discovery resume for personal injury claimants? Should we complete a grid of the types of personal injury claims? Is mediation anticipated for these claimants? . . . We have no answers and await the guidance of the court." *Id.*

Judge Jones advised that he was aware of these concerns and forwarded Ms. Reed's email to Judges Trenga and Brinkema. *Id.* To date, none of these questions have been answered. Additionally, the court canceled the October and November status conferences closing the door to informal communication with the court about the future of the personal injury cases.

D. THE OCTOBER 23, 2017 "SETTLEMENT."

Ms. Reed and Mr. Sullivan received no additional information about settlement discussions. On October 23, 2017, Mr. Sullivan contacted Judge Brinkema's chambers to check on the status of the settlement mediation for personal injury claimants. Mr. Sullivan was told that Judge Brinkema had not been involved for several weeks and that he should contact Ms. Flannery. *Id.* After contacting Ms. Flannery as instructed to set up a conference call, Ms. Flannery called Mr. Sullivan on October 24, 2017 and advised that a "global settlement" had just been reached of all claims in the MDL. *Id.*

Between October 24 and October 26, 2017, both Mr. Sullivan and Ms. Reed repeatedly requested information as to how a settlement had been possible without their participation as the court-appointed Settlement Counsel for personal injury plaintiffs. They also asked for information as to the basis for the personal injury plaintiffs' recovery and how much each personal injury plaintiff would receive. Neither lawyer received responsive information[1]. *Id.*

II. ARGUMENT AND LAW.

A. THE CLAIMS OF THE PERSONAL INJURY PLAINTIFFS SHOULD BE PLACED ON A SEPARATE TRACK IN THIS MDL.

As explained above, on July 21, 2017, the personal injury plaintiffs filed a motion that the Court should establish a separate track for their claims. Defendant did not oppose this motion. Therefore, the motion is ripe for decision and these plaintiffs request that the Court schedule a hearing on this motion on the earliest date convenient.

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[1] Diane Flannery kindly responded to Ms. Reed's email with limited information but instructed that it must be kept strictly confidential. The details have not been shared with other personal injury claimants except that it was the intent of the agreement to include personal injury claims as a part of the settlement since personal injuries were pled in some of the cases in the MDL. Said email is not being attached as same was a confidential settlement communication.

B. THE COURT SHOULD NOT REWARD LEAD COUNSEL FOR EXCLUSION OF COURT-APPOINTED SETTLEMENT COUNSEL FOR PERSONAL INJURY PLAINTIFFS FROM SETTLEMENT NEGOTIATIONS.

The Court appointed Ms. Reed and Mr. Sullivan as Co-Lead Settlement Counsel for personal injury plaintiffs on August 24, 2017.[2] Thereafter, these lawyers worked diligently to perform their duties: communicating with the lawyers representing these personal injury plaintiffs, communicating with the judicial officers in this MDL concerning settlement issues, and promptly providing all requested discovery and settlement information.

Unfortunately, Lead Plaintiffs' Counsel decided to freeze these lawyers out of the settlement process, which was precisely their concern stated in the July 11 hearing. These lawyers were informed that Lead Plaintiffs' Counsel did not wish to negotiate for their clients, but then went ahead and did so. In fact, Ms. Flannery stated that Lead Plaintiffs' Counsel "do not want you to be part of the global settlement." Yet Lead Counsel for both parties proceeded to negotiate a global settlement that includes these claims. Mr. Sullivan and Ms. Reed first learned of a global settlement that purports to include personal injury plaintiffs after the fact on October 24, 2017. They were so advised by Ms. Flannery a few hours before public announcement of the settlement to the financial press via a Lumber Liquidators press release.

These actions were in plain violation of the August 24, 2017, Order appointing attorneys Reed and Sullivan as counsel to protect the interests of personal injury plaintiffs in settlement.

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[2] This appointment is supported by legal precedent because class members are entitled to both unconflicted named representatives and unconflicted class attorneys. "Only the creation of subclasses, ***and the advocacy of an attorney representing each subclass***, can ensure that the interests of that particular subgroup are in fact adequately represented." *In re Literary Works*, 654 F.3d 242, 252 (2d Cir. 2011) (emphasis added); *see also Piambino v. Bailey*, 757 F.2d 1112, 1145 n.88 (11th Cir. 1985) (ordering designation of a separate subclass "with the right to have separate counsel unbeholden to Lead Counsel."); *Hans v. Tharaldson*, No. 3:05-cv-115, 2010 U.S. Dist. LEXIS 45927, at *25 (D.N.D. May 7, 2010) ("The only way to ensure that each group of [plaintiffs] is adequately represented is to create two subclasses with separate counsel appointed to represent the interests of each class; otherwise, the factors of typicality and representativeness under Rule 23(a) will not be satisfied."). "Divergent interests require separate counsel when it impacts the essential allocation decisions of plaintiffs' compensation and defendants' liability." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 233-234 (2d Cir. 2016).

C. EXCLUSION OF PERSONAL INJURY PLAINTIFFS FROM PARTICIPATION IN SETTLEMENT NEGOTIATIONS VIOLATED THEIR DUE PROCESS RIGHTS.

The Due Process Clause "requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (citing *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940)). A trial court may not permit a majority of a class to "wrongfully compromise, betray or 'sell-out' the interests of a minority." *Paradise v. Wells*, 686 F. Supp. 1442, 1444 (M.D. Ala. 1988). Further, Lead Plaintiffs' Counsel had an obligation to represent all members of the class with equal vigor and without compromising results for segments of the class. *Piambino v. Bailey*, 757 F.2d 1112, 1139 (11th Cir. 1985).

In appointing Ms. Reed and Mr. Sullivan, this Court recognized that the personal injury plaintiffs required their own representation in settlement negotiations to properly protect their interests. Because these plaintiffs' claims have been negotiated by lawyers admittedly not representing their interests, these plaintiffs have been denied due process. Any purported settlement is a nullity as a result, and this case must proceed.

D. THE SETTLEMENT NEGOTIATION FAILED SUBSTANTIVELY TO PROTECT THE PERSONAL INJURY PLAINTIFFS.

This MDL has two groups with distinct claims — consumer fraud v. personal injury claims. In a settlement of the first group, the lawyers likely negotiated over the number of potential claimants, the amounts of typical claims for replacement flooring, and the cost of installation. In settlement of the second group, the lawyers must consider a host of different issues: the nature and duration of the exposures, the severity of each plaintiff's past and future medical problems, the amounts of lost income and medical bills, general and specific medical causation, and unique issues of state products liability, causation, and damages law.

Indeed, in a report to the Court, Lead Plaintiff's Counsel confirmed their recognition of the longstanding conflict between the two groups, shortly after the personal injury plaintiffs requested a separate case track:

> Lead Counsel has communicated with counsel for plaintiffs with filed cases in the Formaldehyde MDL (2627). The vast majority of counsel had no objections to the

> Court's summary judgment ruling (ECF No. 1126) applying to their cases. Of the small set that objected, most objected because their cases included personal injury claims and therefore seek consequential and other damages that the Representative Complaint did not. ECF No. 1126 at 8 n. 7 (noting no consequential damages sought in FARC) and 12 (noting none of the Plaintiffs in the FARC alleged any illness or medical injury). ***Furthermore, many of these personal injury actions also contained products liability or strict liability claims. As such, these cases present materially different factual and legal issues than the First Amended Representative Complaint, which seeks economic damages based upon fraud, consumer fraud, and breach of warranty causes of action.*** Finally, two economic damage Plaintiffs have objected to application of the summary judgement order, because they allege their clients did actually rely on the Defendant's representations regarding CARB 2 compliance. The Court found that none of the Plaintiffs in the FARC had relied. As such, these Plaintiffs assert this is a materially different factual issue.

Report on Personal Injury and Objections to Application of the Summ. J. Ruling 1-2, ECF No. 1164 (emphasis supplied).

In *In re Literary Works*, the Second Circuit explained why separate legal counsel is necessary to resolve an intraclass conflict:

> The Supreme Court counseled in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) that subclasses may be necessary when categories of claims have different settlement values. The rationale is simple: ***how can the value of any subgroup of claims be properly assessed without independent counsel pressing its most compelling case?*** It is for this reason that the participation of impartial mediators and institutional plaintiffs does not compensate for the absence of independent representation. Although the mediators safeguarded the negotiation process, and the institutional plaintiffs watched out for the interests of the class as a whole, no one advanced the strongest arguments in favor of Category C's recovery.

654 F.3d 242, 253 (2d Cir. 2011) (emphasis added). As this Court recognized, the same is true here.

The courts have also repeatedly recognized that intraclass conflicts must be properly addressed in settlement negotiations. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 610 (1997) (settlement not approved because it favored those currently injured by asbestos as opposed to those only exposed to asbestos).

Thus, in *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on April 20, 2010*, 910 F. Supp. 2d 891, 916-20 (E.D. La. 2012), *aff'd sub nom. In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014), the trial court noted the care with which all parties suffering economic losses were actually included in settlement negotiations:

1. "The settlement terms for each identifiable subgroup were subjected to the approval of a seventeen-member Plaintiffs' Steering Committee." *Id.* at 918.

2. The lawyers who had clients with a particular category of claims "took an active role in advising the negotiators." *Id.*

3. The settlement funding mechanism insured that one group's payments did not reduce another group's payments. "The Settlement is not a zero-sum game." *Id.*

4. The court-appointed neutral "heard directly from the various categories of claimants, to determine the initial and subsequent allocations." *Id.*

5. "The benefits of the Settlement are directed towards those who are most impacted . . ." *Id.*

6. "There was no discussion of attorney's fees" until all proposed settlement terms were in writing and submitted to the court for formal approval. *Id.*

In this case, none of these actions occurred to protect the interests of the personal injury plaintiffs in the global settlement. Instead, the personal injury plaintiffs were intentionally excluded from settlement negotiations and were then presented with a "take it or leave it" deal.[3]

E. THE PLAINTIFFS LEAD COUNSEL HAVE FAILED TO PROVIDE ANY INFORMATION ABOUT THE SETTLEMENT.

Ms. Reed and Mr. Sullivan have repeatedly requested information from Plaintiffs' Lead Counsel concerning the amounts that each personal injury plaintiff is to receive. (See **Exhibits 2** and **3**). No information has been provided. Given that there are only about 75 personal injury

[3] Lead Counsel have already suggested that the "global settlement is acceptable" because the personal injury plaintiffs can opt out. Numerous circuit authorities have held that the availability of opt-out does not eliminate an intraclass conflict. *See Epstein v. MCA, Inc.*, 50 F.3d 644, 667 (9th Cir. 1995), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996) ("Regardless of whether class members are given opt-out rights, the court is still required to ensure that representation is adequate and that the settlement is fair to class members."); *In re GMC Pickup Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 809 (3d Cir. 1995) ("[T]he right of parties to opt out does not relieve the court of its duty to safeguard the interests of the class and to withhold approval from any settlement that creates conflicts among the class."); *Phillips v. Klassen*, 502 F.2d 362, 367 (D.C. Cir. 1974) (holding that conflicting interests of class members "cannot be avoided merely by saying that it is always open to members of a class to 'opt out' of any relief to which they are held entitled"). If opt-out could eliminate an intraclass conflict, *Amchem*, would have reached a different result. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 610 (1997).

plaintiffs, it should not be difficult for Lead Plaintiffs' Counsel to provide at least the methodology for negotiation of these claims.

Without such information being provided to Ms. Reed and Mr. Sullivan, any purported settlement of the claims of the personal injury plaintiffs must be rejected. *See, e.g.*, *Haggart v. Woodley*, 809 F.3d 1336, 1348-51 (Fed. Cir. 2016), *cert. denied*, 136 S. Ct. 2509 (2016), where the Federal Circuit Court of Appeals reversed the approval of a class settlement. Several class members had requested information on the methodology that class counsel utilized to determine relative settlement values and thus the total proposed settlement. *Id.* The court held that because class counsel "did not provide any additional documents such as the spreadsheets detailing the precise methodology used to calculate the fair market value of the properties," class members were not "in a position to determine for themselves whether the allocation of the settlement agreement was fair, reasonable, and adequate." *Id.* at 1351.

III. CONCLUSION

For all the above reasons, the personal injury plaintiffs respectfully request that the Court schedule hearing on their motion for a separate case track, and order that their appointed lawyers be allowed — finally — to participate in settlement negotiations.

Dated this 8th day of November, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on Wednesday, November 8, 2017 a true and correct copy of the foregoing was filed electronically with the clerk of this Court using the CM/ECF system, and in accordance with Local Rules and the procedures adopted in the Initial Order and Pretrial Order No. 1A. This filing will cause a copy of the same to be served, via a notice of Electronic Filing, upon counsel of record in this matter who have consented to electronic service.

Dated this 8th day of November, 2017.

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