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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. | : | |
| _____ | : | |

NOTICE OF FILING WITH MULTIDISTRICT PANEL

Come Plaintiffs David Foscue and Teresa Foscue, by and through their attorney, Paul W. Keith, Gibson & Keith, PLLC, and give notice that the Plaintiffs' Motion For Remand, Brief in Support of Remand, and Affidavit of Counsel were filed with the Clerk of the Multidistrict Litigation Panel.

RESPECTFULLY SUBMITTED
DAVID FOSCUE & TERESA FOSCUE

by:

Paul W. Keith Ark. Bar No. 94008
GIBSON & KEITH, PLLC
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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 20, 2018 the foregoing NOTICE OF FILING was filed electronically 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)

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-7491-SDW) MDL No. 2158

PLAINTIFFS' MOTION FOR REMAND

Come Plaintiffs David Foscue and Teresa Foscue, by and through their attorney, Paul W. Keith, Gibson & Keith, PLLC, and for their Motion For Remand state:

1. This cause was filed in the Circuit Court of Bradley County, Arkansas on March 12, 2012 and was removed to the U.S. District Court for the Western District of Arkansas on July 18, 2012, and was transferred to the District of New Jersey for inclusion in MDL No. 2158, **MDL ECF 265**.

2. On May 12, 2014, Plaintiffs and their counsel traveled to New Jersey for mediation with Zimmer before the Magistrate Judge, but no settlement was reached.

3. The time for common issue fact discovery and for disclosure of common

issue expert disclosure having run, on November 24, 2015, the Plaintiffs moved the District of New Jersey for suggestion of remand. *Exh. A.* Zimmer objected. *Exh. B.* Plaintiffs responded to the objection. *Exh. C.* Zimmer replied that it objected to remand. *Exh. D.* When there had been no ruling on the Motion For Suggestion of Remand by February 1, 2016, Plaintiff wrote the Court requesting a ruling, noting, *inter alia*, that four years had passed since the Plaintiffs filed their complaint. *Exh. E.* Zimmer again objected, without addressing the four-year delay, but asking the Court to delay remand to permit an as-then-unfinalized settlement agreement between Zimmer counsel and some of the Plaintiffs' Liaison to be finalized. *Exh. F.*

4. On March 19, 2016, Plaintiffs wrote the Court to object to a proposed Case Management Order that would require all of the Plaintiffs to participate in an 18-month-long settlement process with Zimmer, noting that – in light of previous settlement attempts by the Plaintiffs – further mediation between the Plaintiffs and Zimmer would be useless and a waste of time. *Exh. G.* On April 7, 2016, the District of New Jersey denied the Plaintiffs' November 24, 2015 motion for suggestion of remand as being premature in light of the possibility of a settlement process. *Exh. H.*

5. Over the course of the next year, Plaintiffs completed the settlement forms and provided all of the documents requested of them by Zimmer pursuant to

the Court-Ordered Settlement program and, on June 24, 2017, participated in the Court-Ordered mediation with an intermediary chosen from among those mediators that Zimmer would accept. That mediation was unsuccessful and, on June 25, 2017, Plaintiffs moved the District of New Jersey for Suggestion of Remand. **Exh. I.** Zimmer again objected, disingenuously arguing that remand was premature because Zimmer was still “continuing to mediate Durom cases pursuant to the Durom Cup Settlement Program Agreement.” **Exh. J.** Zimmer also complained that Plaintiffs had not met and conferred with Zimmer on the issue of remand and that Plaintiffs had not received leave of the Court to file the Motion For Remand. **Id.**

6. Having not received a ruling on their June 25, 2017 Motion, the Plaintiffs wrote the Court on August 21, 2017 requesting a ruling. **Exh. K.** On September 5, 2017 the District of New Jersey denied the Plaintiffs’ June 25 Motion for failure to meet and confer with Zimmer counsel and because leave had not been granted for the Plaintiffs to file the motion, noting the Court’s belief that questions of remand should be coordinated and not handled on a case-by-case basis. **Exh. L.**

7. On September 11, 2017 Plaintiffs and their counsel conferred by telephone with Zimmer counsel regarding remand and no agreement was reached as to remand. On September 12, 2017, Plaintiffs wrote the Court reporting the meet-and-confer results and requesting leave to file their Motion for Suggestion of

Remand. *Exh. M.* On September 13, 2017, the District of New Jersey entered a MDL Text order denying the Plaintiffs' request for leave to file a Motion for Suggestion of Remand. *Exh. N.* The District of New Jersey stated that it was denying the request for the reasons set forth in footnote 2 of its September 5, 2017 letter, which read:

This Court is aware of its ruling on the Lexecon waiver issue, addressed in this Court's Opinion dated September 1, 2015 which recognized Plaintiffs' right to seek remand of their case. However, this Court retains the authority to implement an orderly and efficient process for the remand of eligible cases. In order to effectively manage the Durom Cup Settlement Program, this Court is satisfied that questions of remand should be coordinated and not handled on a case-by-case basis.

Exh. L at 2.

8. It is now more than five months since the District of New Jersey denied the Plaintiffs' request for leave to file a Motion For Remand. There is no entry on the docket of the District of New Jersey indicating that consideration is being given to remand of Plaintiffs' case or any other case.

9. Common issue discovery was completed prior to the first Zimmer Durom cup trial in November, 2014. *Exh. O at 7-8.* Case specific discovery and the remaining pretrial proceedings should be conducted in the transferor Court (Western District of Arkansas) due to the circumstance that the witnesses and evidence are located in the State of Arkansas and the trial is to be had there.

10. The Plaintiffs have completed their obligations under the Global Settlement Agreement procedure imposed by the District of New Jersey:

- a. Completing all Global Settlement documents and submitting all required documents;
- b. Timely requesting mediation; and
- c. Participating in mediation on June 23, 2017, which did not result in a settlement;

11. The District of New Jersey offers no pretrial procedure that remains. By mandate of the statute set out in 28 U.S.C. § 1407, the matter is to be remanded to the Western District of Arkansas:

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).

12. This lawsuit has languished for five years and eleven months and it is anticipated that, upon remand, it will take another year before the matter can come to

trial in the Western District of Arkansas. By then, more than seven years will have passed since the suit was filed in this straightforward product liability action.

WHEREFORE, Plaintiffs move this Multidistrict Litigation Panel to remand this cause to the Western District of Arkansas.

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 20, 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)

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-7491-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, 2012, **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 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.

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.*

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: 

Paul W. Keith Ark. Bar No. 94008
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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 20, 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)

**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-7491-SDW) MDL No. 2158

STATE OF ARKANSAS
COUNTY OF DESHA

**AFFIDAVIT OF COUNSEL
FOR
PLAINTIFFS' MOTION FOR REMAND**

Comes Paul W. Keith, being first duly sworn, and states under oath:

1. My name is Paul W. Keith. I am an attorney for Plaintiffs David Foscue and Teresa Foscue.
2. The Plaintiffs requested Suggestion of Remand on November 24, 2015. *See, Exh. A.* On April 7, 2016, the District of New Jersey denied the requested Suggestion of Remand. *See, Exh. B.*
4. The Plaintiffs again requested Suggestion of Remand on June 25, 2015. *See, Exh. I.* On September 5, 2017, the District of New Jersey denied the requested

Suggestion of Remand. *See, Exh. L.*

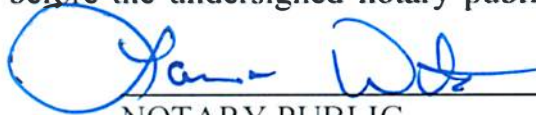
5. The Plaintiffs again requested Suggestion of Remand on September 12, 2017. *See, Exh. M.* On September 13, 2017, the District of New Jersey denied the requested Suggestion of Remand. *See, Exh. N.*

6. The common issue discovery is complete and the Court-ordered Settlement procedure has been completed. The Plaintiffs have complied with all of the orders of the District of New Jersey.



Paul W. Keith Ark. Bar No. 94008

SUBSCRIBED AND SWORN TO before the undersigned notary public on this February 20, 2018.



NOTARY PUBLIC

MY COMMISSION EXPIRES:

3-22-2026



RESPECTFULLY SUBMITTED
DAVID FOSCUE & TERESA FOSCUE

by: _____

Paul W. Keith Ark. Bar No. 94008
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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 20, 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)

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

DAVID FOSCUE, et ux.,

Plaintiffs,

V.

ZIMMER, INC., et al.,

Defendants.

Civil Action No. 12-7491 (SDW)
Master Docket No. 09-4414 (SDW)
MDL No. 2158

MOTION FOR SUGGESTION OF REMAND

Come David Foscue and Teresa Foscue, by and through their attorneys, Gibson & Keith, PLLC, and for their Motion state:

1. This action was filed in the Circuit Court of Bradley County, Arkansas on March 12, 2012 and was removed to the Western District of Arkansas on July 18, 2012 and was transferred to this Court on December 6, 2012. This is an action concerning defects in the Zimmer Durom Cup hip replacement device.

2. Plaintiffs have complied with Case Management Order No. 1 by transmitting to liaison counsel all of the materials required by said Case Management Order to be produced. Plaintiffs have also provided all materials requested by Zimmer for mediation. Mediation was held on May 12, 2014 before then-Magistrate Judge Arleo. The parties were unable to reach a settlement agreement and settlement remains unlikely. Zimmer has not served a Plaintiff Fact Sheet on these

plaintiffs, so Plaintiff Fact Sheet is due per the provisions of the *Order Clarifying The Third Scheduling Order*, **ECF 245**, ¶ **2.b.ii**.

3. The time for common issue fact discovery and for disclosure of common issue expert disclosure (established by the Court's *Case Management Order Regarding Initial Trial Setting and Pretrial Deadlines*, **ECF 227**) has run. According to Plaintiffs' Liaison Counsel, there have already been three Zimmer Durom Cup trials and an additional seven Durom Cup trials are set – all utilizing the materials developed through the MDL common issue discovery and the common issue pre-trial case work-product developed in the MDL. **ECF 790**.

5. “Each action [transferred to the MDL] shall be remanded by the [Multi-District] 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: *Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.” 28 USCS § 1407 (emphasis in the original). There are no claims, cross-claims, counter-claims, or third-party claims to be separated by the Multi-District panel in this matter.

6. The remaining discovery and pretrial proceedings in this matter are case-specific and can be handled most efficiently by the transferor court – the Western District of Arkansas.

WHEREFORE, David Foscue and Teresa Foscue move this Court for a Suggestion of Remand to the Western District of Arkansas.

Respectfully Submitted,

DAVID FOSCUE & TERESA FOSCUE

BY: /s/ Paul W. Keith
Paul W. Keith Ark. Bar No. 94008
GIBSON & KEITH, PLLC
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CERTIFICATE OF SERVICE

I, Paul W. Keith, an attorney for the Plaintiffs David Foscue and Teresa Foscue, do hereby certify that on this November 24, 2015, the foregoing pleading was filed electronically 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 Notice of Electronic Filing.

/s/ Paul W. Keith
Ark. Bar No. 94008

FaegreBD.com

**FAEGRE BAKER
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November 25, 2015

VIA ECF

The Honorable Susan D. Wigenton
United States District Judge
U.S. District Court for the District of New
Jersey
Martin Luther King, Jr. Federal Building &
U.S. Courthouse
50 Walnut Street
Newark, NJ 07102

The Honorable Steven C. Mannion
United States Magistrate Judge
U.S. District Court for the District of New
Jersey
Martin Luther King, Jr. Federal Building &
U.S. Courthouse
50 Walnut Street
Newark, NJ 07102

Re: *In re: Zimmer Durom Cup Products Liability Litigation*
Master Docket, 2:10-cv-04414-SDW-SCM ("Master Docket");
Foscue v. Zimmer, Inc., et al., 2:12-cv-07491-SDW-SCM ("Foscue Docket")

Dear Judges Wigenton and Mannion:

I write on behalf of Defendants to respectfully object to the Motion for Suggestion of Remand [Master Docket No. 791; Foscue Docket No. 65] filed by Plaintiffs David and Teresa Foscue ("Plaintiffs"). Pursuant to Case Management Order No. 1, Paragraph 9, "[n]o motion may be filed without leave of the Court." [Master Docket No. 17; Foscue Docket No. 39]. Plaintiffs have not requested leave, nor should leave be granted. Pursuant to the Court's Order and Opinion on the issue of *Lexecon* waiver [Master Docket Nos. 750 and 751], "[c]ounsel for both parties are directed to meet and confer regarding individual plaintiffs, not represented by Waters & Kraus LLP, who wish to return to their original filing jurisdiction." Defendants' Liaison Counsel and Plaintiffs' Liaison Counsel have had preliminary meet and confer discussions about the remand of cases, but those meet and confer efforts are not yet complete. In addition, Plaintiffs made no attempt to individually meet and confer on this issue. Accordingly, Defendants object to Plaintiffs' Motion for Suggestion of Remand, and the Motion should be stricken.

Sincerely,



Andrew L. Campbell

cc: All counsel via ECF

GIBSON & KEITH, PLLC

A Professional Limited Liability Company

ATTORNEYS AT LAW

119 South Main Street

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MONTICELLO, ARKANSAS 71657-0447

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November 30, 2015

VIA ECF

The Honorable Susan D. Wigenton
United States District Judge
U.S. District Court for the District of New
Jersey
Martin Luther King, Jr. Federal Building &
U.S. Courthouse
50 Walnut Street
Newark, NJ 07102

The Honorable Steven C. Mannion
United States Magistrate Judge
U.S. District Court for the District of New
Jersey
Martin Luther King, Jr. Federal Building
& U.S. Courthouse
50 Walnut Street
Newark, NJ 07102

RE: David Foscue, et al v. Zimmer, Inc., et al
U.S.D.C.N.J. 2:12-CV-07491-SDW-SCM
MDL Lead Case 2:09-CV-04414-SDW-SCM

Dear Judges Wigenton and Mannion:

We write you on behalf of Plaintiffs David and Teresa Foscue.

We have seen the Defendants' recent letter transmitted by ECF [Foscue Doc. #66] wherein Defendants objected to Plaintiffs Foscue's motion for a suggestion of remand of their case. The reasons given for the objection were that (1) Plaintiffs Foscue did not have leave of the Court to file their motion, and (2) counsel for Plaintiffs Foscue had not conferred with defense counsel before filing the motion.

First, the provisions in the Case Management Order No. 1, paragraphs 8 & 9, [Foscue Doc. #39] pertain to extending time for Defendants to respond to Complaints, and to staying of discovery, and in connection with those subjects the Court prohibited the filing of motions

Judges Wigenton & Mannion

RE: Foscue v. Zimmer, No. 2:12-CV-07491-SDW-SCM

November 30, 2015 – Page 2

without leave of the Court. Our reading of these provisions of the Case Management Order is that the prohibition against filing motions without leave of the Court does not apply to other matters such as remand, and that is consistent with leave not being raised or required for the earlier motion filed by the Plaintiffs Foscue in opposition to Defendants' claim that they and the other Plaintiffs had waived their *Lexicon* rights to remand. [Master Doc. #732]. However, to the extent leave is now needed, we hereby request same from the Court so that it may proceed to consider the Plaintiffs Foscue's motion for suggestion of remand.

Second, defense counsel contends that we were supposed to confer with them before filing the motion for remand to the original filing jurisdiction. That is apparently based on the concluding language of the Court's Order that Plaintiffs Foscue had not waived their *Lexicon* rights to remand. [Master Docs. #750 & 751]. It was our understanding that Plaintiff liaison counsel would set up that phone conference as there were a large number of Plaintiffs involved. We communicated with Plaintiffs' liaison counsel in effort to be included in that phone conference, but despite follow up on that request we were not included in same. Given the passage of some two months, and the fact that a conference between liaison counsel for both parties had occurred, we filed our motion for suggestion of remand of the Foscue case. Upon seeing Mr. Campbell's objection letter alleging our failure to confer with him before filing the motion, we immediately contacted him and this morning had a cordial conversation with him.

We learned from Mr. Campbell that the Defendants want to keep all MDL cases up in New Jersey for case specific (as opposed to common issue) discovery in the some 400 Plaintiff cases pending in the MDL. As we appreciate it, the MDL statute, 28 U.S.C. § 1407, directs that upon conclusion of common issue discovery that each of the Plaintiff cases will be remanded back to the original filing jurisdiction so that case specific discovery can be scheduled and done and trials held. That only makes sense because nearly all of the witnesses in the Foscue case are located in the El Dorado, Arkansas, district of the original filing federal court which is more than 2,600 miles (round trip) from Newark, New Jersey.

Mr. Campbell also informed that the Defendants want to have an "orderly process" for case specific discovery so that no particular case gets ahead of the others, and that the way to do this is to keep all of the cases in the MDL until all of the case specific discovery is completed. Such assumes, of course, that the Arkansas federal court is unable to handle case specific discovery in an orderly fashion. We also are compelled to note that if the MDL keeps all of the cases through the conclusion of case specific discovery, then the Defendants

Judges Wigenton & Mannion

RE: Foscue v. Zimmer, No. 2:12-CV-07491-SDW-SCM

November 30, 2015 – Page 3

may have some 400 jury trials across the country to try at essentially the same time – an impossible task for even the formidable defense firms involved. Such a situation undoubtedly will lead to Defendants' counsel seeking continuances in the majority of the cases remanded because of trial scheduling conflicts that will necessarily arise, and that will lead to even further delay in getting these cases finally decided.

Further delay is a real problem for David and Teresa Foscue. The defective Zimmer hip device was implanted in David Foscue in 2009. We are now almost seven (7) years after that happened, and still there is no jury trial in sight. We respectfully submit that Plaintiffs Foscue's case should be immediately remanded so that their case can be scheduled for case specific discovery and jury trial on the docket of the Arkansas federal court – which likely still means that Plaintiffs Foscue are more than a year out in getting to their long awaited jury trial.

Thank you for your consideration.

Sincerely,



C. C. Gibson, III



Paul W. Keith

CCG/vks

cc: David & Teresa Foscue
All counsel via ECF

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December 1, 2015

VIA ECF

The Honorable Susan D. Wigenton
United States District Judge
U.S. District Court for the District of New
Jersey
Martin Luther King, Jr. Federal Building &
U.S. Courthouse
50 Walnut Street
Newark, NJ 07102

The Honorable Steven C. Mannion
United States Magistrate Judge
U.S. District Court for the District of New
Jersey
Martin Luther King, Jr. Federal Building &
U.S. Courthouse
50 Walnut Street
Newark, NJ 07102

Re: *In re: Zimmer Durom Cup Products Liability Litigation*
Master Docket, 2:09-cv-04414-SDW-SCM (“Master Docket”);
Foscue v. Zimmer, Inc., et al., 2:12-cv-07491-SDW-SCM (“Foscue Docket”)

Dear Judges Wigenton and Mannion:

I write in response to Plaintiffs David and Teresa Foscue’s letter of November 30, 2015 [Master Docket No. 798; Foscue Docket No. 67]. Paragraph 9 of Case Management Order No. 1 is not limited to responsive pleadings or discovery. To remove any doubt, the Court’s Order Scheduling Status Conference also provides as follows: “**Motion Practice:** No motions, other than Rule 12 motions, are to be filed without leave from this Court.” (Master Docket No. 671, at ¶ 1 (emphasis in original)). Indeed, the Parties have routinely sought leave before filing motions, including the original motion regarding *Lexecon* waiver. That motion was discussed at status conferences on February 25, 2015, and June 9, 2015, and a briefing schedule was jointly proposed by Plaintiffs’ and Defendants’ Liaison Counsel on June 22, 2015 [Master Docket No. 724]. Moreover, Plaintiffs’ Liaison Counsel sought leave to file their Motion for Certification of Interlocutory Appeal regarding the Court’s *Lexecon* order [Master Docket No. 774]. The intent of Paragraph 9 has always been to address disputes with the Court prior to filing motions, and there is no reason to deviate from that provision here.

As I informed the Court in my November 30, 2015, letter [Master Docket No. 797; Foscue Docket No. 66], Plaintiffs’ and Defendants’ Liaison Counsel have had preliminary meet and confer discussions about the remand of cases, and they are working on scheduling additional discussions. Although I did speak with counsel for Plaintiffs Foscue, the process for case-specific discovery and remand should be coordinated across the litigation and not on a case-by-

The Honorable Susan D. Wigenton
The Honorable Steve C. Mannion

-2-

December 1, 2015

case basis. Accordingly, Defendants respectfully request that Plaintiffs Foscue's motion be stricken pending the completion of discussions among Liaison Counsel, and that leave not be granted to file the motion.

Sincerely,

/s/ Andrew L. Campbell

Andrew L. Campbell

cc: All counsel via ECF

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February 1, 2016

VIA ECF

The Honorable Susan D. Wigenton
United States District Judge
U.S. District Court for the District of New
Jersey
Martin Luther King, Jr. Federal Building &
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50 Walnut Street
Newark, NJ 07102

The Honorable Steven C. Mannion
United States Magistrate Judge
U.S. District Court for the District of New
Jersey
Martin Luther King, Jr. Federal Building
& U.S. Courthouse
50 Walnut Street
Newark, NJ 07102

RE: David Foscue, et al v. Zimmer, Inc., et al
U.S.D.C.N.J.
MDL Lead Case

2:12-CV-07491-SDW-SCM
2:09-CV-04414-SDW-SCM

Dear Judges Wigenton and Mannion:

We respectfully request a ruling on our clients' November 24, 2015 Motion For Suggestion of Remand [Master Docket No. 791, Foscue Docket No. 65] and offer the following:

1. March 12, 2016 will be the four-year anniversary of the filing of the Foscues' complaint in state court in Arkansas;
2. The Foscues and their counsel have made the 2600 mile round trip to New Jersey for a feckless mediation with Zimmer and within the last month I have emailed and called Zimmer counsel Stephen Bennett (to whom I was directed by plaintiffs' liaison counsel) to again attempt settlement and neither my email nor my calls have been returned;

Hon. Susan D. Wigenton;
Hon. Steven C. Mannion
February 1, 2016

Page 2

3. The Court has specifically ruled that the Foscues have not waived their right to remand;
4. The Foscues have submitted all of the documents required by Court order;
5. All of the common issue discovery in the Durom Cup cases has been completed;
6. All of the witnesses for case-specific discovery in the Foscues' case are in Arkansas;
7. We have conferred with Zimmer counsel, Mr. Andrew Campbell, and the only substantive reason put forth by Zimmer for declining remand is that Zimmer "does not want any one case to get ahead of the others" as to case-specific discovery and that the way to do that is to keep all of the cases in the MDL until case specific discovery is complete. As we have previously pointed out, this strategy by Zimmer has at least two flaws:
 - a. It presumes that the Federal Court in Arkansas is not capable of overseeing the case-specific discovery, which has not been shown;
 - b. It could result in the remand of almost 400 Zimmer cases for jury trials nationwide at the same time, with Zimmer then seeking continuances due to scheduling conflicts.
8. The delay is a real problem for the Foscues, who have lost significant income due to the implantation of the defective Zimmer Durom Cup hip replacement device into David Foscue, who is a practicing medical doctor. They are due their day in Court

Thank you for the Court's attention to this request for a ruling on the Motion For Suggestion of Remand.

Sincerely,



Paul W. Keith

PWK/ak

cc: David & Teresa Foscue
All counsel via ECF

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February 3, 2016

VIA ECF

The Honorable Susan D. Wigenton
United States District Judge
U.S. District Court for the District of New
Jersey
Martin Luther King, Jr. Federal Building &
U.S. Courthouse
50 Walnut Street
Newark, NJ 07102

The Honorable Steven C. Mannion
United States Magistrate Judge
U.S. District Court for the District of New
Jersey
Martin Luther King, Jr. Federal Building &
U.S. Courthouse
50 Walnut Street
Newark, NJ 07102

Re: *In re: Zimmer Durom Cup Products Liability Litigation*
Master Docket, 2:09-cv-04414-SDW-SCM (“Master Docket”);
Foscue v. Zimmer, Inc., et al., 2:12-cv-07491-SDW-SCM (“Foscue Docket”)

Dear Judges Wigenton and Mannion:

I write in response to Plaintiffs David and Teresa Foscue’s letter of February 1, 2016 [Master Docket No. 824; Foscue Docket No. 70]. Plaintiffs Foscue’s Motion for Suggestion of Remand [Master Docket No. 791; Foscue Docket No. 65] should not be granted for at least four reasons.

First, as I explained in my prior letters of November 25, 2015 [Master Docket No. 797; Foscue Docket No. 66], and December 1, 2015 [Master Docket No. 800; Foscue Docket No. 68], this Court has never granted Plaintiffs Foscue’s request for leave to file their Motion and, thus, the Motion is not yet ripe for decision.

Second, as discussed at the January 11, 2016, status conference, Plaintiffs’ and Defendants’ Liaison Counsel currently are finalizing a Settlement Agreement that will resolve the cases in this MDL and, thus, Plaintiffs’ Liaison Counsel and the Court agreed to table the issue of remand of any cases until a later date. (*See* 1/11/16 Trans. at 21:1-7, attached).

Third, any process for remand should be coordinated across the litigation and not on a case-by-case basis. In fact, this Court required Plaintiffs’ and Defendants’ Liaison Counsel to meet and confer about any process for remand, which they have done preliminarily but not yet completed. (*See* Order, Master Docket No. 750). Thus, remanding Plaintiffs Foscue’s individual case is not proper at this time.

The Honorable Susan D. Wigenton
The Honorable Steve C. Mannion

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February 3, 2016

Fourth, Plaintiffs' Liaison Counsel filed a Motion for Certification for Interlocutory Appeal the Court's Order on *Lexecon* Waiver [Master Docket No. 793]. In its response objecting to the Certification Motion [Master Docket No. 825], Defendants respectfully request in the alternative that if this Court grants Plaintiffs' Certification Motion that this Court also certify that portion of its Order finding that waiver did not extend to all plaintiffs in this MDL, including Plaintiffs Foscue. Accordingly, Plaintiffs Foscue's Motion is not ripe for this reason as well.

Should the Court wish to discuss this issue in further detail, we would be pleased to schedule a telephonic status conference to do so.

Very truly yours,

/s/ Andrew L. Campbell

Andrew L. Campbell

cc: All counsel via ECF

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION 2:09-cv-4414-SDW

In Re: : TRANSCRIPT OF PROCEEDINGS
:
ZIMMER DUROM CUP LITIGATION, : H E A R I N G
:
- - - - - Pages 1 - 23

Newark, New Jersey
January 11, 2016

B E F O R E: HONORABLE SUSAN D. WIGENTON,
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

SEEGER WEISS,
BY: CHRISTOPHER SEEGER, ESQ.

- and -

JEFFREY GRAND, ESQ
Liaison Counsel for Plaintiffs

CARELLA, BYRNE, CECCHI, OLSTEIN, BRODY & AGNELLO, P.C.
BY: JAMES CECCHI, ESQ.
Liaison Counsel for Plaintiffs

Pursuant to Section 753 Title 28 United States Code, the
following transcript is certified to be an accurate record as
taken stenographically in the above entitled proceedings.

S/Carmen Liloia
CARMEN LILOIA
Certified Court Reporter
973-477-9704

1 Alright. And entry number 5 was the plaintiff's
2 proposed procedures for remanding cases to their originator
3 courts. And that's pursuant to docket entry 750. Anyone want
4 to be heard on that? I mean, in light of what's been proposed,
5 it may be an issue that's moot, quite frankly.

6 MS. FLEISHMAN: Right. I think that we should
7 readdress this at a later date, your Honor.

8 THE COURT: Alright. So we'll table it for the time
9 being.

10 MS. FLEISHMAN: And then the last one is the same.

11 THE COURT: Right.

12 MS. FLEISHMAN: Because we wanted to change, ask the
13 Court to modify the CMO, so that this mediation phase be moved
14 out and plaintiffs could then just proceed. So plaintiffs who
15 have not been able to resolve their cases to this date, and who
16 may not want to participate in this program, they can just get
17 discovery dates and move ahead and get defendant's answers and
18 motions.

19 THE COURT: Okay, that sounds fine.

20 THE COURT: Alright. Especially given what Mr.
21 Bennett and Mr. Seeger indicated, I don't have any issue with
22 that once we have the agreement.

23 Alright. Anything else we need to address?

24 MR. CECCHI: No.

25 MS. FLEISHMAN: We need another date, your Honor.

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March 19, 2016

VIA ECF

The Honorable Susan D. Wigenton
United States District Judge
U.S. District Court for the District of New Jersey
Martin Luther King, Jr. Federal Building & U.S. Courthouse
50 Walnut Street
Newark, NJ 07102

RE: David Foscue, et al v. Zimmer, Inc., et al
U.S.D.C.N.J. 2:12-CV-07491-SDW-SCM
MDL Lead Case 2:09-CV-04414-SDW-SCM

Dear Judge Wigenton:

We represent David Foscue and Teresa Foscue and we write to object to the Proposed Case Management Order submitted by Mr. Andrew Campbell on March 11, 2016 (4414 ECF 843 at pp 3,4, Page ID#s 14837, 14838).

The Zimmer proposed Order is obviously part of the “delay” prong of the “delay-deny-defend” litigation strategy of these sophisticated defendants to further put off the Foscues’ constitutional right to present their claims to a jury. The terms of that order would automatically extend the life of this already 4-year-old case for another 18 months before remand for trial can be had, all of which is not to mention what will undoubtedly be an additional a one-year wait *after* remand before a trial can be actually held on the Foscues’ claims. Indeed, for the Court to do anything other than immediately suggest remand of the Foscue’s case for trial would be to become part of the obstruction to the Foscue’s constitutional right to present their claims to

Hon. Susan Wigenton
March 19, 2016

Page 2

a jury.

Further mediation between the Foscues and Zimmer is useless and a waste of time. On May 12, 2014, the Foscues and their lawyers made the 2,600 mile round trip to New Jersey for a feckless mediation with Zimmer before then-Magistrate Arleo. There is no reason to believe that a further mediation under the proposed Zimmer order will have a different result.

It would be added that the Foscues have reviewed the “U.S. Durom Cup Settlement Program Agreement” attached to the proposed Order and see that same does not even include their damages from the failure of the device to perform as advertised. The Foscues will never agree to the Zimmer proposal before the Court.

Consequently, the Foscues object to any order that does anything other than suggest remand of their claims to the U.S. District Court for the Western District of Arkansa. This was requested in the Foscues’ Motion For Suggestion of Remand (4414 ECF 791, 7491 ECF 65) that was filed on November 24, 2015. The Foscues requested a ruling on the Motion on December 1, 2015 (4414 ECF 801, 7491 ECF 69) and again on February 1, 2016 (4414 ECF 824, 7491 ECF 70). We are at a loss to explain to the Foscues why this Court has yet to rule on these remand requests. We do, therefore, again request the Court to rule.

If the Court does anything other than grant the Foscues’ request for suggestion of remand, the Foscues would request a formal hearing in front of the Court where they may be heard by telephone.

Sincerely,

/s/ Paul W. Keith

Paul W. Keith

PWK/ak

cc: David & Teresa Foscue
All counsel via ECF

NOT FOR PUBLICATION

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

CHAMBERS OF
SUSAN D. WIGENTON
UNITED STATES DISTRICT JUDGE

MARTIN LUTHER KING COURTHOUSE
50 WALNUT ST.
NEWARK, NJ 07101
973-645-5903

April 7, 2016

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Counsel for Defendants

LETTER ORDER FILED WITH THE CLERK OF THE COURT

**Re: David Foscue, et al. v. Zimmer, Inc. et al.
Civil Action No. 12-7491 (SDW)(SCM)
Master Docket Case No. 09-4414 (SDW)(SCM)**

Counsel:

Before this Court is Plaintiffs David and Theresa Foscue's ("Plaintiffs") Motion for Suggestion of Remand. This Court having considered the parties' submissions and having reached its decision without oral argument pursuant to Federal Rule of Civil Procedure 78, and for the reasons discussed below, denies Plaintiffs' motion as premature.

DISCUSSION

A. Standard of Review

28 U.S.C. § 1407(a) governs multidistrict transfer and remand and provides that matters transferred “for the convenience of the parties and witnesses” and to “promote the just and efficient conduct of such actions” shall be remanded “at or before the conclusion of such pretrial proceedings to the district from which it was transferred . . .” 28 U.S.C. § 1407(a); *see also In re Ins. Brokerage Antitrust Litig.*, MDL Dkt. No. 1663, 2009 WL 530965, at *2 (D.N.J. Mar. 3, 2009). The party seeking remand “has the burden of establishing that such remand is warranted.” *In re Integrated Res. v. Integrated Res. Equity Corp.*, 851 F. Supp. 556, 562 (S.D.N.Y. 1994) (internal citation omitted). The Judicial Panel on Multidistrict Litigation (“Panel”) has the sole power to remand a case back to the transferor district, and is “reluctant to order remand absent a suggestion of remand from the transferee district court.” R. PRO. OF JUDICIAL PANEL ON MULTIDIST. LITIG. 10.3(a). In determining whether remand is appropriate, the transferee court considers “whether the case will benefit from further coordinated proceedings as part of the MDL,” *In re Bridgestone/Firestone, Inc. ATX, ATXII & Wilderness Tires Prods. Liab. Litig.*, 128 F. Supp. 2d 1196, 1197 (S.D. Ind. 2001), and whether the court’s “role in the case has ended.” *In re Integrated Res.*, 851 F. Supp. at 562.

B. Plaintiffs’ Motion for Suggestion of Remand is Premature Given the Ongoing MDL Settlement Discussions

Plaintiffs originally filed suit in the Circuit Court of Bradley County, Arkansas on March 12, 2012. That action was removed to the Western District of Arkansas on July 18, 2012, and subsequently transferred to this Court on December 6, 2012. Plaintiffs filed the instant Motion for Suggestion of Remand on November 24, 2015.

Plaintiffs argue that all common-issue discovery and common pre-trial proceedings have concluded, and as such, remand is appropriate. However, since Plaintiffs filed their motion, Defense Counsel and Claimants’ Liaison Counsel have proposed a new process for settling all pending Durom Cup products liability cases. (Dkt. No. 843.)¹ Oral argument for that proposal is scheduled on May 4, 2016. (Dkt. No. 886.) Given the current posture of the litigation and the possibility of a new process by which existing MDL cases could be resolved by way of settlement, trial or remand, Plaintiff’s Motion for Suggestion of Remand is **DENIED AS PREMATURE**.²

¹ In objecting to the proposed settlement, Plaintiffs have stated that they “will never agree to the Zimmer proposal before the Court.” (Dkt. No. 852.) However, that proposal is not yet final, and this Court is hopeful that the final proposal will provide a meaningful means by which to resolve the cases pending before it. Therefore, remand of Plaintiffs’ case at this time would be premature.

² This Court is aware of its ruling on the *Lexecon* waiver issue, addressed in this Court’s Opinion dated September 1, 2015 which recognized Plaintiffs’ right to seek remand of their case. However, this Court retains the authority to implement an orderly and efficient process for the remand of eligible cases and remand of Plaintiffs’ claims at this time would undermine that process.

CONCLUSION

For the reasons set forth above,

IT IS on this 7th day of April, 2016,

ORDERED that Plaintiffs' Motion for Suggestion of Remand is **DENIED AS PREMATURE**.

SO ORDERED.

____/s/ /Susan D. Wigenton____

SUSAN D. WIGENTON, U.S.D.J

Orig: Clerk
cc: Parties
Steven C. Mannion, U.S.M.J.

000001

Order to be produced. Plaintiffs have also provided all materials requested by Zimmer for mediation. Mediation was held on May 12, 2014 before then-Magistrate Judge Arleo. The parties were unable to reach a settlement agreement. Zimmer has not served a Plaintiff Fact Sheet on these plaintiffs, so no Plaintiff Fact Sheet is due per the provisions of the *Order Clarifying The Third Scheduling Order*, **ECF 245**, ¶

2.b.ii.

3. Plaintiffs have complied with the Case Management Order Regarding Settlement Agreement entered on May 13, 2016, **ECF 925**, by completing the questionnaires required by the Settlement Agreement, by submitting all materials required by the Settlement Agreement, and by participating in mediation conducted by Court-Approved mediator Faustin Pipal on June 24, 2017. The mediation did not result in a settlement of the Plaintiffs' claims against any of the Zimmer Defendants.

4. The time for common issue fact discovery and for disclosure of common issue expert disclosure (established by the Court's *Case Management Order Regarding Initial Trial Setting and Pretrial Deadlines*, **ECF 227**) has run.

5. The remaining discovery and pretrial proceedings in *Foscue v. Zimmer*, are case-specific and can be handled most efficiently by the transferor court – the Western District of Arkansas.

6. “Each action [transferred to the MDL] shall be remanded by the [Multi-

District] 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: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.” 28 USCS § 1407 (emphasis in the original). Indeed, the order centralizing the Zimmer Durom Cup litigation in this Court states, “[i]n the event that the transferee judge determines that the further adjudication of certain claims or actions would better take place in the transferor district, we encourage him to suggest remand under Section 1407.” **ECF 11 at page 2.**

WHEREFORE, David Foscue and Teresa Foscue move this Court for a Suggestion of Remand to the Western District of Arkansas.

Respectfully Submitted,
DAVID FOSCUE & TERESA FOSCUE

BY: /s/ Paul W. Keith
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CERTIFICATE OF SERVICE

I, Paul W. Keith, an attorney for the Plaintiffs David Foscue and Teresa Foscue, do hereby certify that on this June 24, 2017, the foregoing pleading was filed electronically 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 Notice of Electronic Filing.

/s/ Paul W. Keith

Ark. Bar No. 94008



August 21, 2017

VIA ECF & REGULAR MAIL

Honorable Susan D. Wigenton, U.S.D.J.
U.S. District Court for the District of New Jersey
Martin Luther King, Jr. Federal Bldg. & U.S. Courthouse
50 Walnut Street
Newark, NJ 07101

Honorable Steven C. Mannion, U.S.M.J.
U.S. District Court for the District of New Jersey
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Re: *In re: Zimmer Durom Cup Products Liability Litigation*
Master Docket No. 2:10-cv-04414-SDW-SCM (Master Docket), MDL No. 2158
Foscue v. Zimmer, Inc., et al.
Civil Action No. 2:12-cv-07491-SDW-SCM (Foscue Docket)

Dear Judges Wigenton and Mannion:

We write on behalf of Defendants in response to plaintiff's August 17, 2017 letter and to respectfully object to the Motion for Suggestion of Remand [Master Docket No. 953; Foscue Docket No. 74] filed by Plaintiffs David and Teresa Foscue ("Plaintiffs"). Plaintiff's motion was filed in contravention of the Local Rules and the case management order governing this action and should be stricken from the record. Indeed, the motion plaintiff's supposedly filed was never even docketed with the court and no motion calendar was set. Moreover, this is not the first time that plaintiffs have attempted to improperly remand this case from the MDL. [Master Docket No. 791; Foscue Docket No. 65]. As this Court is well aware, the parties are continuing to mediate Durom cases pursuant to the Durom Cup Settlement Program Agreement and any motions to remand are premature and should only be considered after this process is complete.

Pursuant to Case Management Order No. 1, Paragraph 9, "[n]o motion may be filed without leave of the Court." [Master Docket No. 17; Foscue Docket No. 39]. Plaintiffs have not requested leave, nor should leave be granted. Pursuant to the Court's Order and Opinion on the issue of *Lexecon* waiver [Master Docket Nos. 750 and 751], "[c]ounsel for both parties are directed to meet and confer regarding individual plaintiffs, not represented by Waters & Kraus LLP, who wish to return to their original filing jurisdiction." Defendants' Liaison Counsel and Plaintiffs' Liaison Counsel have had preliminary meet and confer discussions about the remand of

BOSTON
HARTFORD
STAMFORD
NEW YORK
NEWARK
EAST BRUNSWICK
PHILADELPHIA
WILMINGTON
WASHINGTON, DC

August 21,, 2017
Page 2

cases, but those meet and confer efforts are not yet complete. In addition, Plaintiffs made no attempt to individually meet and confer on this issue.

Moreover, the parties are still in the process of working to resolve cases pursuant to the ongoing Durom Cup Settlement Program Agreement. As we have informed both the Court and counsel for Plaintiffs Foscue previously [Master Docket No. 797; Foscue Docket No. 66], remand should be coordinated across the litigation and not on a case-by- case basis. Accordingly, Defendants respectfully request that Plaintiffs Foscue's motion be stricken pending the completion of the Durom Cup Settlement Program Agreement, and that leave not be granted to file the motion. Should the Court grant leave to file the Motion, Defendants respectful request the opportunity to formally object.

Thank you for your consideration of this request.

Respectfully submitted,

s/ Edward J. Fanning, Jr.

Edward J. Fanning, Jr.

GIBSON & KEITH, PLLC

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ATTORNEYS AT LAW

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August 21, 2017

The Honorable Susan D. Wigenton
United States District Judge
U.S. District Court for the
District of New Jersey
Martin Luther King, Jr. Federal
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50 Walnut Street
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The Honorable Steven C. Mannion
United States Magistrate Judge
U.S. District Court for the District of
New Jersey
Martin Luther King, Jr. Federal
Building & U.S. Courthouse
50 Walnut Street
Newark, NJ 07102

RE: David Foscue, et al v. Zimmer, Inc., et al;
U.S.D.C.N.J. 2:12-CV-07491-SDW-SCM
MDL Lead Case 2:09-CV-04414-SDW-SCM

Dear Judge Wigenton and Magistrate Judge Mannion:

Plaintiffs David Foscue and Teresa Foscue request a prompt ruling on their Motion filed on June 26, 2017, **ECF 953 (4414)**, **ECF 74(7491)**, to which no response was filed – unless one counts a letter to the Court over a month and a half after the motion was filed. This five and one half year old case needs to be tried.

Sincerely,



Paul W. Keith

PWK/lw

cc: Andrew Lorin Campbell andrew.campbell@faegrebd.com
Edward J. Fanning, Jr. efanning@mccarter.com
Jeffrey James Mortier jmortier@fbtlaw.com

Page 2

August 21, 2017

| | |
|----------------------|--|
| John Thomas Schlafer | john.schlafer@faegrebd.com |
| John Joseph Tanner | joe.tanner@faegrebd.com |
| Wendy Fleishman | wfleishman@lchb.com |

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
SUSAN D. WIGENTON
UNITED STATES DISTRICT JUDGE

MARTIN LUTHER KING COURTHOUSE
50 WALNUT ST.
NEWARK, NJ 07101
973-645-5903

September 5, 2017

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Counsel for Defendants

LETTER ORDER FILED WITH THE CLERK OF THE COURT

Re: David Foscue, et al. v. Zimmer, Inc. et al.
Civil Action No. 12-7491 (SDW)(SCM)
Master Docket Case No. 09-4414 (SDW)(SCM)

Counsel:

Before this Court is Plaintiffs David and Theresa Foscue's ("Plaintiffs") Second Motion for Suggestion of Remand (Dkt. No 74).¹ This Court having considered the parties' submissions

¹ Although Plaintiffs' request to remand was filed as a letter and does not comply with the requirements of motion practice in this district, for the purposes of this Letter Order this Court will treat the request as a motion.

and having reached its decision without oral argument pursuant to Federal Rule of Civil Procedure 78, and for the reasons discussed below, denies Plaintiffs' motion.

DISCUSSION

A. Standard of Review

28 U.S.C. § 1407(a) governs multidistrict transfer and remand and provides that matters transferred "for the convenience of the parties and witnesses" and to "promote the just and efficient conduct of such actions" shall be remanded "at or before the conclusion of such pretrial proceedings to the district from which it was transferred" 28 U.S.C. § 1407(a); *see also In re Ins. Brokerage Antitrust Litig.*, MDL Dkt. No. 1663, 2009 WL 530965, at *2 (D.N.J. Mar. 3, 2009). The party seeking remand "has the burden of establishing that such remand is warranted." *In re Integrated Res. v. Integrated Res. Equity Corp.*, 851 F. Supp. 556, 562 (S.D.N.Y. 1994) (internal citation omitted). The Judicial Panel on Multidistrict Litigation ("Panel") has the sole power to remand a case back to the transferor district, and is "reluctant to order remand absent a suggestion of remand from the transferee district court." R. PRO. OF JUDICIAL PANEL ON MULTIDIST. LITIG. 10.3(a). In determining whether remand is appropriate, the transferee court considers "whether the case will benefit from further coordinated proceedings as part of the MDL," *In re Bridgestone/Firestone, Inc. ATX, ATXII & Wilderness Tires Prods. Liab. Litig.*, 128 F. Supp. 2d 1196, 1197 (S.D. Ind. 2001), and whether the court's "role in the case has ended." *In re Integrated Res.*, 851 F. Supp. at 562.

B. Plaintiffs' Second Motion for Suggestion of Remand is Improper

Plaintiffs originally filed suit in the Circuit Court of Bradley County, Arkansas on March 12, 2012. That action was removed to the Western District of Arkansas on July 18, 2012, and subsequently transferred to this Court on December 6, 2012. Plaintiffs filed a Motion for Suggestion of Remand on November 24, 2015. (Dkt. No. 65.) On April 4, 2016, this Court denied Plaintiffs' motion as premature, given the initiation of a proposed MDL-wide settlement program. (Dkt. No. 73.) Plaintiffs subsequently participated in the settlement process, including an unsuccessful mediation session on June 24, 2017. (Dkt. No. 74 ¶ 3.) Afterwards, Plaintiffs filed the instant Second Motion for Suggestion of Remand. (Dkt. Nos. 74, 76.)

Pursuant to Case Management Order No. 1, Plaintiffs must seek leave to file any motion with this Court. (Dkt. No. 39.) With regard to motions to remand, Plaintiffs are also required to meet and confer with defense counsel before moving to remand their case. (Master Dkt. Nos. 750, 751). Plaintiffs neither sought this Court's leave, nor conferred with defense counsel, prior to filing their motion. Therefore, Plaintiffs' motion is improper and will be **DENIED**.²

² This Court is aware of its ruling on the *Lexecon* waiver issue, addressed in this Court's Opinion dated September 1, 2015 which recognized Plaintiffs' right to seek remand of their case. However, this Court retains the authority to implement an orderly and efficient process for the remand of eligible cases. In order to effectively manage the Durom Cup Settlement Program, this Court is satisfied that questions of remand should be coordinated and not handled on a case-by-case basis.

CONCLUSION

For the reasons set forth above,

IT IS on this 5th day of September, 2017,

ORDERED that Plaintiffs' Second Motion for Suggestion of Remand is **DENIED**.

SO ORDERED.

____/s/ /Susan D. Wigenton____

SUSAN D. WIGENTON, U.S.D.J

Orig: Clerk
cc: Parties
Steven C. Mannion, U.S.M.J.

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September 12, 2017

The Honorable Susan D. Wigenton
United States District Judge
U.S. District Court for the
District of New Jersey
Martin Luther King, Jr. Federal
Building & U.S. Courthouse
50 Walnut Street
Newark, NJ 07102

The Honorable Steven C. Mannion
United States Magistrate Judge
U.S. District Court for the District of
New Jersey
Martin Luther King, Jr. Federal
Building & U.S. Courthouse
50 Walnut Street
Newark, NJ 07102

RE: David Foscue, et al v. Zimmer, Inc., et al;
U.S.D.C.N.J.
MDL Lead Case

2:12-CV-07491-SDW-SCM
2:09-CV-04414-SDW-SCM

Dear Judge Wigenton and Magistrate Judge Mannion:

On September 11, 2017, the Foscues and their counsel conferred by telephone for a half hour with Zimmer counsel John Joseph Tanner and Andrew Campbell regarding remand of the Foscues' action to the Western District of Arkansas, as required by Master Dkt. No. 750, 751. The conference did not result in an agreement as to remand. The Foscues request leave to file a Motion for Suggestion of Remand.

According to counsel, Zimmer prefers to wait until the global settlement process is completed and a report of that process has been made to the court ("perhaps by the end of the year") before any cases are considered for remand. Because there remains nothing left for this Court to do in the Foscues' case, such amounts to a transparent attempt by Zimmer to deny the Foscues their day in court as long as possible.

Judge Wigenton and Magistrate Judge Mannion
September 12, 2017

Page 2

The Foscues have now mediated their case twice with Zimmer (once before then-Magistrate Judge Arleo in New Jersey in May, 2014 and again on June 23, 2017 by telephone) to no avail. Common-issue discovery has long been complete and all case-specific discovery will be in Arkansas, where the witnesses and evidence are located. When pressed on the issue of what is left for this Court decide in the Foscue case, Zimmer's counsel had no response. We invite Zimmer to articulate what substantive issues this Court needs to resolve in the Foscues' case.

Based on comments during the telephone conference, the Foscues expect Zimmer to complain that the telephone mediation on June 23 did not satisfy their obligation under the Global Settlement Agreement to participate in mediation after the offer made by Zimmer was declined. We disagree.

The June 23 mediation was held by Mr. Faustin A. Pipal, Jr., one of the mediators approved by the Court. The Foscues paid their share of the mediator's fees. David Foscue was present in our office throughout the mediation and had authority from Teresa Foscue to settle the matter. Zimmer was not present at either mediation. While the Global Settlement Agreement approved by the Court makes each party responsible for their travel expenses, there is no requirement that the Foscues and/or their lawyers travel from Arkansas to Chicago for the mediation to satisfy their obligations under the Agreement.

David and Teresa Foscue request leave to file the attached Motion for Suggestion of Remand. Thank you for the Court's consideration.

Sincerely,

Paul W. Keith

PWK/lw

encl: as noted

cc w/encl: David & Teresa Foscue

Andrew Lorin Campbell andrew.campbell@faegrebd.com

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Judge Wigenton and Magistrate Judge Mannion
September 12, 2017

Page 3

John Joseph Tanner
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DAVID FOSCUE, et ux.,

Plaintiffs,

v.

ZIMMER, INC., et al.,

Defendants.

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Civil Action No. 12-7491 (SDW)
Master Docket No. 09-4414 (SDW)
MDL No. 2158

MOTION FOR SUGGESTION OF REMAND

Come David Foscue and Teresa Foscue, by and through their attorneys, Gibson & Keith, PLLC, and for their Motion state:

1. This action was filed in the Circuit Court of Bradley County, Arkansas on March 12, 2012 and was removed to the Western District of Arkansas on July 18, 2012 and was transferred to this Court on December 6, 2012. This is an action concerning defects in the Zimmer Durom Cup hip replacement device.

2. Common issue discovery is complete. *See* ECF 790. Case specific discovery and the remaining pretrial proceedings should be conducted in the

transferor Court (Western District of Arkansas) due to the circumstance that witnesses and evidence are located in the State of Arkansas and the trial is to be had there.

3. The Plaintiffs have completed their obligations under the Global Settlement Agreement by:

- a. Completing all Global Settlement documents and submitting all required documents;
- b. Timely requesting mediation; and
- c. Participating in mediation on June 23, 2017, which did not result in a settlement;

4. Plaintiffs have complied with their obligations under the order of this Court entered on September 1, 2015, **Master Dkt. 750, 751** by conferring with Zimmer counsel on September 11, 2017 regarding a manner by which this matter can be remanded to the Western District of Arkansas. No agreement was reached, due to the circumstance that Zimmer opposes remand.

5. Plaintiffs have complied with Case Management Order No. 1 by transmitting to liaison counsel all of the materials required by said Case Management Order to be produced. Plaintiffs have also provided all materials requested by Zimmer for mediation. Mediation was held on May 12, 2014 before then-Magistrate Judge Arleo. The parties were unable to reach a settlement agreement and settlement

remains unlikely. Zimmer has not served a Plaintiff Fact Sheet on these plaintiffs, so no Plaintiff Fact Sheet is due per the provisions of the *Order Clarifying The Third Scheduling Order*, **ECF 245, ¶ 2.b.ii.**

6. “Each action [transferred to the MDL] shall be remanded by the [Multi-District] 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: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.” 28 USCS § 1407 (emphasis in the original). There are no claims, cross-claims, counter-claims, or third-party claims to be separated by the Multi-District panel in this matter.

WHEREFORE, David Foscue and Teresa Foscue move this Court for a Suggestion of Remand to the Western District of Arkansas.

RESPECTFULLY SUBMITTED,
DAVID FOSCUE
TERESA FOSCUE

by: _____
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From: njdefiling@njd.uscourts.gov
Sent: Wednesday, September 13, 2017 12:38 PM
To: njdefiling@njd.uscourts.gov
Subject: Activity in Case 2:12-cv-07491-SDW-SCM Foscue et al v. Zimmer, Inc. et al Order

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U.S. District Court

District of New Jersey [LIVE]

Notice of Electronic Filing

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Case Name: Foscue et al v. Zimmer, Inc. et al

Case Number: [2:12-cv-07491-SDW-SCM](#)

Filer:

Document Number: 79(No document attached)

Docket Text:

MDL TEXT ORDER: Counsel for Plaintiff's request, filed on 9/12/17 [D.E. 957 in MDL Docket No. 09-4414], for leave to file a Motion for Suggestion of Remand is hereby denied for the same reasons set forth in footnote 2 in this Court's Order dated 9/5/17 [D.E. 956 in MDL Docket No. 09-4414]. So Ordered by Judge Susan D. Wigenton on 09/13/17. (SDW)

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**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 BRIEF IN OPPOSITION
TO PLAINTIFF BRENT E. RHOADS' MOTION TO REDUCE
COMMON BENEFIT FUND ASSESSMENT**

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COME NOW Plaintiffs' Liaison Counsel, by and through the undersigned, and submit this Brief in Support of their Opposition to Plaintiff Brent E. Rhoads Motion to Reduce Common Benefit Fund Assessment.

I. INTRODUCTION

The position taken by Plaintiff Brent E. Rhoads ("Moving Plaintiff") in his Motion to Reduce Common Benefit Fund Assessment ("Motion to Reduce") is not only insulting to Plaintiffs' Liaison Counsel, who has expended thousands of hours and millions of dollars working these Durom Cup cases up from scratch; it is also wholly oblivious to the larger context that allowed Moving Plaintiff, through minimal effort, to obtain the settlement he was able to obtain. Moving Plaintiff's settlement would not have been possible without the hard work and financial resources of Plaintiffs' Liaison Counsel. Put simply, now that Moving Plaintiff has financially benefitted from that hard work, he should be required to pay his fair share for the massive outlays of labor and capital that Plaintiffs' Liaison Counsel essentially "fronted" him. Any other outcome would be fundamentally inequitable.

II. BACKGROUND

A. 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 | <u>212.00</u> |
| Documents Reviewed | <u>524.09</u> |
| Attorney and Staff hours | <u>3,906.25.</u> |

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 in February and May of 2016, and another trial in California state court in October 2015. 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.

Moving Plaintiff 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 Mr. Rhoads, reach settlement. To suggest otherwise is to pretend Mr. Rhoads’ case existed in a vacuum, rather than as part of a federal multi-district litigation.

If Moving Plaintiff’s 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 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.

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

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.

Moving Plaintiff 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, Moving Plaintiff 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, Mr. Rhoads included.

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

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 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 from 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 deny Plaintiff Michael Brent E. Rhoads’ Motion to Reduce Common Benefit Fund Assessment. Allowing MDL plaintiffs to benefit from intensive efforts of this MDL’s Plaintiffs’ Liaison Counsel without shouldering their fair share of the cost would not only undermine the purpose of the Common Benefit Fund, but also undermine the purpose of establishing lead counsel in multidistrict litigation.

DATED: November 23, 2015.

Respectfully submitted,

WATERS & KRAUS, LLP

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Co-Liason Counsel for Plaintiffs

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 23rd day of November, 2015.

/s/ Gibbs C. Henderson

Gibbs C. Henderson

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

| | | |
|-----------------------|---|----------------------------------|
| ----- | : | |
| DAVID FOSCUE, et al., | : | Honorable Madeline Cox Arleo |
| | : | |
| Plaintiffs, | : | Civil Action No. 12-7491 (SDW) |
| | : | Master Docket No. 09-4414 (SDW) |
| v. | : | MDL No. 2158 |
| | : | |
| ZIMMER, INC., et al., | : | REPORT AND RECOMMENDATION |
| | : | |
| Defendants. | : | |
| ----- | : | |

THIS MATTER having come before the Court upon the motion of plaintiffs, David Foscue and Teresa Foscue (“plaintiffs”) to remand the pending action, (Docket Entry 5), upon notice to defendants, defendants Zimmer; Zimmer Holdings; Zimmer U.S., Inc.; Ervin Associates d/b/a as Zimmer Solutions, LLC; Arkansas Surgical Hospital, LLC; Dr. William Hefley; Jerry Conyer; and Bowen Hefley Rhodes Stewart Orthopedics, P.A. d/b/a Martin Bowen Hefley Orthopedics Orthosurgeons; and the Court having considered the papers submitted in support of and in opposition to the remand motion and having heard the argument of the parties, and for the reasons set forth on the record on March 25, 2013, and for good cause shown;

IT IS on this 26th day of March 2013,

RECOMMENDED THAT plaintiffs’ motion to remand this action to the state Circuit Court of Arkansas (Bradley County), (Docket Entry 5), be **DENIED**; and it is further

RECOMMENDED THAT the Amended Complaint be **DISMISSED WITH PREJUDICE** against defendants Ervin Associates d/b/a as Zimmer Solutions, LLC; Arkansas Surgical Hospital, LLC; Dr. William Hefley; Jerry Conyer; and Bowen Hefley Rhodes Stewart Orthopedics, P.A. d/b/a Martin Bowen Hefley Orthopedics Orthosurgeons.

The parties have fourteen (14) days from the date hereof to file objections.

s/Madeline Cox Arleo

MADELINE COX ARLEO

United States Magistrate Judge

cc: Hon. Susan D. Wigenton, U.S.D.J.
Clerk of the Court
All Parties
File

NOT FOR PUBLICATION

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

DAVID FOSCUE, et al.,

Plaintiffs,

v.

ZIMMER, INC., et al.,

Defendants.

Civil Action No. 12-7491 (SDW)
Master Docket No. 09-4414
MDL No. 2158

OPINION

September 3, 2013

WIGENTON, District Judge.

Before this Court is the Report and Recommendation (“R&R”) of Magistrate Judge Madeline Cox Arleo (“Magistrate Judge Arleo”) filed March 26, 2013 regarding the matter of David Foscue, et al. (“Plaintiffs”) versus defendants Zimmer, Inc., et al. (“Defendants”) recommending the following: 1) denying Plaintiffs’ motion to remand this action to the state Circuit Court of Arkansas (“Motion to Remand”); 2) dismissing with prejudice the Amended Complaint against defendants Ervin Associates d/b/a as Zimmer Solutions, LLC; Arkansas Surgical Hospital, LLC; Dr. William Hefley; Jerry Conyer (“Conyer”); and Bowen Hefley Rhodes Stewart Orthopedics, P.A. d/b/a Martin Bowen Hefley Orthopedics Orthosurgeons.

This matter was removed to this district pursuant to 28 U.S.C. §§ 1441 and 1446, with this Court having jurisdiction over this action pursuant to 28 U.S.C. § 1332(a). This matter is decided without oral argument pursuant to Federal Rule of Civil Procedure 78.

BACKGROUND

This Court writes primarily for the parties, and thus, only a brief discussion of the procedural and factual background is provided. The R&R stems from the medical device products liability action before this Court regarding the Durom Acetabular Component (the “Durom Cup”). (*See* Am. Compl.) Plaintiffs allege that on March 18, 2009, the Durom Cup was surgically implanted in plaintiff David Foscue at the Arkansas Surgical Hospital during hip replacement surgery, and as a result, he suffered injuries. (Am. Compl. ¶¶ 18-19.)

On June 21, 2012, Plaintiffs’ Amended Complaint was filed, including claims of negligence, strict liability, breach of implied warranty of merchantability, breach of implied warranty of fitness for purpose, and violation of the Arkansas Deceptive Trade Practices Act (“ADTPA”). On July 18, 2012, Defendants removed this matter from the Circuit Court of Bradley County, Arkansas to this Court. (Dkt. Nos. 1-3.)

On July 24, 2012, Plaintiffs filed the Motion to Remand this matter to state court in Arkansas. (Dkt. No. 5.) On July 25, 2012, a motion to dismiss defendant Conyer was filed. (Dkt. No. 8.) On July 30, 2012, opposition to the motion to dismiss was filed, and on August 9, 2012, a reply was filed. (Dkt. No. 20, 25.) Also, on August 9, 2012, opposition to the motion to remand was filed, and on August 17, 2012, Plaintiffs replied. (Dkt. Nos. 26, 30.) On March 25, 2013, oral argument was held before Magistrate Judge Arleo, and on March 26, 2013 the R&R was filed. (Dkt. No. 53.) On April 9, 2013, Plaintiffs filed objections to the R&R. (Dkt. Nos. 55, 56.) On April 19, 2013, Defendants filed a response to the objections to the R&R. (Dkt. No. 59.) On April 19, 2013, Plaintiffs filed a reply to the response to the objections to the R&R. (Dkt. No. 60.)

LEGAL STANDARD

The Federal Magistrates Act provides two separate standards of judicial review: (1) “de novo” for magistrate resolution of dispositive matters, and (2) “clearly erroneous or contrary to law” for magistrate resolution of nondispositive matters. *See* 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); D.N.J. Civ. R. 72.1(a); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986). After being presented with a magistrate judge’s report and recommendation in a dispositive matter, the district court must conduct a de novo review of the findings and issue an order as it sees fit. *See* 28 U.S.C. § 636(b)(1)(C).

DISCUSSION

The removing defendant has the burden to avoid remand by demonstrating that the non-diverse party was fraudulently joined. *See In re Briscoe*, 448 F.3d 201, 217 (3d Cir. 2006). For this assessment the district court is to assume as true all factual allegations of plaintiff’s complaint. *See id.*

Here, Plaintiffs claim the facts in the Amended Complaint state a cause of action for damages against Conyer, a sales representative. (Pls.’ Br. for Remand 4) Plaintiffs object to the dismissal of the non-diverse defendant Conyer, arguing that Magistrate Judge Arleo erred in finding that “the allegations [of the Plaintiffs’ Amended Complaint] are silent with respect to Mr. Conyer’s specific personal involvement with the sale of the product to Mr. Foscue as a consumer.” (*Id.* 2.) Additionally, Plaintiffs assert that Zimmer’s counsel (who is also counsel for Conyer) did not dispute the allegation of Conyer’s involvement, but rather, Zimmer counsel only offered speculation about Conyer’s involvement in this matter. (*Id.*) As a result, Plaintiffs believe that the allegations of Plaintiffs’ Amended Complaint are not silent regarding Conyer’s

violations of the ADTPA or the Arkansas law of product liability, and do state possible causes of action against Conyer. (*Id.* 5.)

In opposition, Defendants assert that Magistrate Judge Arleo correctly found that there was no reasonable basis in law or fact supporting Plaintiffs' claims against Conyer. (*See* Defs.' Opp'n Br. to Remand 2.) Defendants assert that Conyer had no personal contact with plaintiff David Foscue, was not involved in Foscue's March 18, 2009 surgery or the manufacture or design of the Durom Cup, nor has evidence of such contact been provided. (*Id.* 3-4.)

Further, Defendants argue that Plaintiffs have no reasonable basis for product liability and warranty claims against Conyer because he is not the seller or supplier of the product at issue, although Conyer allegedly may have been involved in the sale and distribution of the Durom Cup. Additionally, Defendants assert that Plaintiffs have no reasonable basis for their negligence claim because Conyer owed no duty to Plaintiffs.

In the *Hobbs* case, the Eastern District of Arkansas Court noted that Arkansas does not hold salespersons liable for "repetition, in good faith, of a statement authorized by [employers]" or what amounts to the tort of negligent misrepresentation. *See Hobbs v. Wyeth, Inc.*, 2004 WL 6005569 *7 (E.D. Ark. July 13, 2004). Further, the *Hobbs* Court noted, that under a similar theory for individual liability,

[a]doption of a rule of this sort would impose upon virtually every salesperson, whether for a pharmaceutical company or other manufacturer, an independent duty to discover and warn consumers of danger in the products they promote . . . Imposing a duty on sales representatives to independently verify the safety of each product they market for their employers is nothing short of absurd.

Hobbs, 2004 WL 6005569 *6-7.

Here, Plaintiffs do not allege that Conyer was involved in the manufacturing or design of the device. (*See* Am. Compl.) Plaintiffs allege: “On information and belief, Defendant Jerry Conyer is an Arkansas resident . . . and at all relevant times was involved in the promotion, distribution, supply, sale, and/or offering for sale of the hip replacement medical device at issue in the case.” (*See* Am. Compl. ¶ 7.) However, Plaintiffs do not point to any specific actions taken by Conyer with respect to plaintiff David Foscue or his surgery or specific representations allegedly made by Conyer directly to David Foscue. (*See generally* Am. Compl.)

As Magistrate Judge Arleo noted, there are no bad faith allegations or allegations of direct promoting or selling of the device by Conyer to David Foscue. (Hr’g. Tr. 14:9-16.) The deceptive trade practice claim, as well as the products liability, negligence, and breach of warranty claims cannot be maintained against Conyer because Conyer is not a seller or manufacturer of the Durom Cup and was not personally involved in the events of the injury.¹ Conyer was not involved with David Foscue’s surgery, and there is no evidence that he made any representations directly to Plaintiffs. As such, Plaintiffs’ general allegations as set forth in the Amended Complaint are not sufficient to keep Conyer in this case with individual liability.

CONCLUSION

For the reasons set forth above, this Court will **ADOPT** the R&R. Plaintiffs’ Motion to Remand will be **DENIED** and the Amended Complaint against defendants Ervin Associates d/b/a as Zimmer Solutions, LLC; Arkansas Surgical Hospital, LLC; Dr. William Hefley; Conyer; and Bowen Hefley Rhodes Stewart Orthopedics, P.A. d/b/a Martin Bowen Hefley Orthopedics Orthosurgeons will be **DISMISSED**.

¹ Under Arkansas law, an individual may be sued when it is shown that an individual employee of a corporation is personally involved in the events surrounding an injury. *See Bayird v. Floyd*, 344 S.W.3d 80, 84-85 (Ark. 2009).

s/ Susan D. Wigenton, U.S.D.J.

Orig: Clerk
cc: Parties
Magistrate Judge Arleo

Courtesy Copy

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

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|-----------------------|---|---------------------------------|
| _____ | : | |
| 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. | : | |
| _____ | : | |

**PLAINTIFFS FOSCUE OBJECTION
TO WAIVER OF THEIR RIGHTS TO REMAND
THEIR CLAIMS FOR TRIAL
AND
MOTION FOR CLARIFICATION REGARDING ALLEGED WAIVER
OF LEXECON VENUE RIGHTS**

Today it has come to the attention of personal counsel for Plaintiffs David Foscue and Teresa Foscue that Defendants are contending that by virtue of the Case Management Order (Doc. #538 in 2:09-cv-04414-SDW-MCA) filed on October 3, 2014, that “all” Plaintiffs in the MDL, including Plaintiffs David Foscue and Teresa Foscue have waived their right to have remand of their claims against Defendants for trial.

First, liaison counsel had no authority to make such a waiver in behalf of Plaintiffs David Foscue and Teresa Foscue.

Second, according to filings made yesterday by liaison counsel, they did not agree to the entry of an Order waiving the remand rights of “all” Plaintiffs, but only as to two bellwether case

Plaintiffs.

Third, personal counsel of record for Plaintiffs David Foscue and Teresa Foscue were never contacted or consulted by liaison counsel for either side of this matter about giving a waiver of the rights of their clients to remand of their claims for trial, nor were they aware of any provision in any pleading or Court Order purporting to do such.

Fourth, the above-cited Case Management Order should be clarified and amended to make it clear that Plaintiffs David Foscue and Teresa Foscue have not waived their right to have remand of their claims for trial.

Fifth, any attempted waiver of the rights of David Foscue and Teresa Foscue to remand of their claims for trial would be in derogation of their due process rights under the 14th Amendment to the United States Constitution, including the right to approve and authorize any waiver of their rights to remand their claims herein for trial.

Sixth, for the reasons set forth herein, as well as those recited in the Brief of liaison counsel filed yesterday (Doc. #731 in 2:09-cv-04414-SDW-MCA), the cited Case Management Order should be clarified and amended to make it clear that Plaintiffs David Foscue and Teresa Foscue have not waived their right to have remand of their claims for trial.

WHEREFORE, the premises considered, the Plaintiffs David Foscue and Teresa Foscue pray that their objection be sustained and that the cited Case Management Order be clarified and amended to make it clear that they have not waived their right to remand to the U.S. District Court for the Western District of Arkansas for trial on their claims against the Defendants, and that they have all other proper relief.

Respectfully Submitted,

DAVID FOSCUE & TERESA FOSCUE

BY: /s/ Paul W. Keith
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GIBSON & KEITH, PLLC
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CERTIFICATE OF SERVICE

I, Paul W. Keith, an attorney for the Plaintiffs David Foscue and Teresa Foscue, do hereby certify that on this June 30, 2015, the foregoing pleading was filed electronically 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 Notice of Electronic Filing.

/s/ Paul W. Keith

NOT FOR PUBLICATION

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

IN RE: ZIMMER DUROM HIP CUP
PRODUCTS LIABILITY LITIGATION

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:
:
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Civil Action No. 09-4414

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:
MDL 2158

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ORDER

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September 1, 2015
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WIGENTON, District Judge.

Before this Court are the following motions:

Motion for Clarification Regarding Alleged Waiver of *Lexecon* Venue Rights¹ filed by Plaintiffs' Liaison Counsel, Waters & Kraus, LLP (Dkt. No. 731); and the

Motion to Amend/Correct Order² - Foscue Plaintiffs Objection to Waiver of Their Rights to Remand Their Claims for Trial and Motion for Clarification Regarding Alleged Waiver of *Lexecon* Venue Rights ("Motion to Amend/Correct") filed by plaintiffs David Foscue and Teresa Foscue ("Foscue Plaintiffs") (Dkt. No. 732.)

For the reasons set forth in this Court's Opinion dated September 1, 2015, the Foscue Plaintiffs' Motion to Amend/Correct is **GRANTED** and the *Lexecon* waiver applies to all of the

¹ "*Lexecon* Venue Rights" refers to a landmark case, *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) ("*Lexecon*"), in which the Supreme Court held that an MDL transferee court could not transfer an MDL member case to itself for trial pursuant to 28 U.S.C. § 1404(a) without the consent of the parties. Thereafter, the waiver of such rights was referred to as a *Lexecon* waiver.

² This Order refers to a Joint Case Management Order re: MDL Trials that was signed by then Magistrate Judge Madeline C. Arleo (now District Judge Arleo) on October 2, 2014. (Dkt. No. 538.)

plaintiffs retained by Water & Kraus, LLP. Counsel for both parties are directed to meet and confer regarding individual plaintiffs, not represented by Water & Kraus, LLP, who wish to return to their original filing jurisdiction.

SO ORDERED.

s/ Susan D. Wigenton, U.S.D.J.

Orig: Clerk
cc: Steven C. Mannion, U.S.M.J.
Parties

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

DAVID FOSCUE, ET UX

PLAINTIFFS

vs.

NO. 1:12-cv-1083-SOH

ZIMMER , INC., ET AL

DEFENDANTS

MOTION TO REMAND

Come the Plaintiffs, David Foscue and Teresa Foscue, his wife, by and through their attorneys, Gibson & Keith, PLLC, and Haley, Claycomb, Roper & Anderson, PLLC, and for their motion state:

1. This is a product liability action based on negligence, design defect, strict liability, failure to warn, and breach of warranty, and for violations of the Arkansas Deceptive Trade Practices Act relative to a defective hip replacement device installed in the body of Plaintiff David Foscue on or about March 18, 2009, at the Arkansas Surgical Hospital.

2. Certain of the Defendants (herein collectively referred to as “Zimmer”) filed a Notice of Removal asserting fraudulent joinder of non-diverse Defendants.

3. The Plaintiffs have viable causes of action against the non-diverse Defendants which they are entitled to pursue, thereby making their joinder in no way fraudulent.

4. This case should be summarily remanded to State Court for further proceedings on the Plaintiffs’ complaint.

5. Attached hereto and incorporated herein by reference are Exhibits A through O which are submitted in support of this motion to remand.

6. Concurrently with the filing of this motion to remand, Plaintiffs are filing their Memorandum Brief in support hereof, which brief is incorporated herein by reference.

WHEREFORE, Plaintiffs pray that their foregoing Motion To Remand be granted; and that they have and recover their attorneys fees, costs and all other proper relief.

Respectfully submitted,

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By: /s/ **Paul W. Keith**
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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System which will send notification of such filing to the following:

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Paul W. Keith 94008

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

DAVID FOSCUE, ET UX

PLAINTIFFS

vs.

NO. 1:12-CV-1083-SOH

ZIMMER , INC., ET AL

DEFENDANTS

**MOTION FOR EXPEDITED RULING ON
PLAINTIFFS' MOTION TO REMAND**

For their Motion, Plaintiffs state:

1. Ripe for decision by this Court is the Plaintiffs' Motion To Remand, **ECF 5**, which turns entirely on questions that are wholly dependent on the law of the State of Arkansas.
2. Pending before the United States Judicial Panel on MultiDistrict Litigation is Plaintiff's motion to vacate a Conditional Transfer Order (CTO) for this cause to be transferred to the District of New Jersey in MDL No. 2158. That motion will be taken up and decided shortly.
3. While this Court does have jurisdiction to decide the Plaintiffs' Motion To Remand at this time, if the CTO becomes final before a decision is announced by this Court, jurisdiction will be lost to the District Court of New Jersey and that court will then have to delve into Arkansas law to decide the Plaintiffs' Motion To Remand.
4. This Court is already well familiar with Arkansas law and in a better position to decide the Motion To Remand.
5. Judicial economy will be furthered by this Court taking up the Plaintiffs' Motion To Remand in prompt fashion and before this case is whisked away to New Jersey.

6. Plaintiffs pray that this Court take up their Motion For Remand on an expedited basis.

Respectfully submitted,

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By: /s/ **Paul W. Keith**

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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System which will send notification of such filing to the following:

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Lynn Pruitt
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Adria Conklin
aconklin@mwlaw.com

/s/ **Paul W. Keith**

Paul W. Keith Ark. Bar No. 94008

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION**

**DAVID FOSCUE and
TERESA FOSCUE, his wife**

PLAINTIFFS

v.

CASE NO. 1:12-cv-01083-SOH

**ZIMMER, INC. and
ZIMMER HOLDINGS, INC. and
ZIMMER US, INC. and
ZIMMER SOLUTIONS, and
JERRY CONYER, and
ARKANSAS SURGICAL HOSPITAL, LLC and
WILLIAM F. HEFLEY, JR., and
BOWEN HEFLEY RHODES STEWART
ORTHOPEDICS, P.A., dba MARTIN BOWEN
HEFLEY ORTHOPEDICS ORTHOSURGEONS, and
JOHN DOES NO. 1, 2, 3, 4, 5, AD INFINITUM**

DEFENDANTS

**REQUEST FOR ORAL ARGUMENT ON
PLAINTIFFS' MOTION TO REMAND AND
REMOVING DEFENDANTS' RESPONSE IN OPPOSITION**

Defendants Zimmer Inc., Zimmer Holdings, Inc., and Zimmer US, Inc. (collectively, the "Removing Defendants"), by through their attorneys Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., file this Request for Oral Argument, and state:

1. On July 18, 2012, Defendants Zimmer, Inc., Zimmer Holdings, Inc., and Zimmer US, Inc. removed the above-captioned action from Arkansas state court to this court based on federal diversity jurisdiction.
2. On July 24, 2012, Plaintiffs filed their Motion to Remand this action to state court.
3. On July 27, 2012, The United States Judicial Panel on Multidistrict Litigation filed its Conditional Transfer Order (CTO-29), conditionally transferring this case to the United

States District Court for New Jersey. If transferred, this case would be included in the MDL styled *In re: Zimmer Durom Hip Cup Products Liability Litigation*, MDL No. 2158.

4. On August 9, 2012, Removing Defendants filed their Response in Opposition to Plaintiffs' Motion to Remand.

5. On August 17, 2012, Plaintiffs filed their Reply to Removing Defendants' Opposition to Remand.

6. On August 28, 2012, Plaintiffs filed a Motion in this court to Expedite Ruling on Plaintiff's Motion to Remand.

7. The Removing Defendants understand that the Judicial Panel on Multidistrict Litigation will determine whether to transfer this case to the MDL on or about September 20, 2012; transfer would occur approximately 10 days later. Once transferred, the MDL would take up consideration of the issues raised by Plaintiffs' Motion to Remand and Removing Defendants' Opposition.

8. If this court entertains Plaintiffs' Motion to Expedite Ruling before a transfer decision is made in the MDL, the Removing Defendants hereby respectfully request that this court provide an opportunity for oral argument on the issues raised by Plaintiffs' Motion to Remand and Removing Defendants' Opposition.

WHEREFORE, for the reasons stated herein, the Removing Defendants respectfully request that this Request for Oral Hearing on the issues raised in Plaintiffs' Motion to Remand and Removing Defendants' Opposition be granted, and for all other relief to which they are entitled.

Respectfully submitted,

/s/ Lyn P. Pruitt

Ark. Bar No. 84121

Adria W. Conklin

Ark. Bar No. 2011019

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aconklin@mwlaw.com

Certificate of Service

I hereby certify that on the 6th day of September, 2012, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to the following:

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/s/ Lyn P. Pruitt

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

DAVID FOSCUE, ET UX

PLAINTIFFS

vs.

NO. 1:12-CV-1083-SOH

ZIMMER , INC., ET AL

DEFENDANTS

**PLAINTIFFS' RESPONSE TO ZIMMER DEFENDANTS'
REQUEST FOR ORAL ARGUMENT ON
PLAINTIFFS' MOTION TO REMAND AND
REMOVING DEFENDANTS' RESPONSE IN OPPOSITION**

Zimmer's belated request for oral argument is a blatant attempt to delay a decision by this Court on Plaintiffs' motion to remand.¹ Same should be ignored, and the fully briefed remand issue should be taken up and decided without further ado.

Respectfully submitted,

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¹ Zimmer's delay motive in this matter is illustrated by its allegation that the Judicial Panel on Multidistrict Litigation will determine whether to transfer this case to the MDL in New Jersey on or about September 20, 2012, as neither the MDL Panel's Hearing Order for September 20, 2012, **Exh. A**, nor the docket for MDL No. 2158, **Exh. B.**, reflect this case as being up for consideration on September 20, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System which will send notification of such filing to the following:

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