

Andrew L. Campbell  
Partner  
andrew.campbell@FaegreBD.com  
Direct +1 317 237 1011

Faegre Baker Daniels LLP  
300 North Meridian Street ▼ Suite 2700  
Indianapolis ▼ Indiana 46204-1750  
Main +1 317 237 0300  
Fax +1 317 237 1000

October 20, 2017

**VIA ECF**

The Honorable Susan D. Wigenton  
U.S. District Court  
District of New Jersey  
50 Walnut Street, Courtroom 5C  
Newark, New Jersey 07101

Re: *In re: Zimmer Durom Cup Products Liability Litigation*, MDL No.: 2158  
Case No.: 2:09-cv-04414-SDW-SCM

Dear Judge Wigenton:

In an abundance of caution, as there is no formal motion pending, Zimmer writes in response to Mr. Cal Warriner's September 20, 2017, letter enclosing a proposed Motion on Behalf of Various State Court Plaintiffs For Relief from Common Benefit Assessment (the "Motion"). Specifically, Zimmer disputes Mr. Warriner's suggestion that the claimants identified in the Motion "opted out" of and/or settled their cases at mediations conducted outside of the U.S. Durom Cup Settlement Program (the "Program"). (See Motion at ¶ 5). To the contrary, these claimants participated in mediations contemplated by, and conducted squarely within, the Program.

As you know, Zimmer and the Claimants' Liaison Counsel ("CLC") negotiated the Program and, on February 11, 2016, signed the U.S. Durom Cup Settlement Program Agreement (the "Agreement"). The Agreement provides clear direction and guidance for the resolution of Durom Cup cases and claims through registration of claimants, compensation, categorization of claims, mediation when claimants and Zimmer could not reach an agreement on categorization and award amount, and payment obligations. As a result of the Agreement, several Durom Cup cases settled prior to mediation and many more have tentatively settled during the ongoing mediation phase of the Program.

For some cases, the claimant and Zimmer could not reach a resolution after submission of only the Exhibit C - Categorization and Award Amount Form ("Exhibit C"); therefore, mediation was scheduled. Section IV of the Agreement reads that, "If, after completion of the categorization process in Section III, an Eligible Claimant and Zimmer cannot reach an agreement on categorization and award amount, the Eligible Claimant and Zimmer must participate in a mandatory mediation with the assistance of the mediators listed below." Each of the claimants in the Motion moved toward resolution of his or her

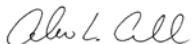
claim under of the Agreement, specifically Sections III and IV. Mr. Warriner registered each of these claims on April 29, 2016, each claimant submitted an Exhibit C, and each participated via counsel in mediation on June 5-6, 2017, with Gary Larsen, who is one of the mediators listed in the Agreement.

Thus, contrary to Mr. Warriner's suggestion, the Agreement does not provide claimants an option to "opt out" of the Program. (See Motion at ¶ 5). Mr. Warriner's claimants and Zimmer could not reach an agreement on categorization or award amount, so each agreed to participate in mediation according to the Agreement. In fact, in February of 2017, Mr. Warriner requested that his cases participate in mediation during the first mediation dates available, and confirmed his mediation dates for six unsettled claimants on May 17, 2017. On May 25, 2017, Gary Larsen sent a letter to Mr. Warriner regarding "Durom Cup Settlement Program Mediations" for claimants Palmer, Howard, Bender, Garner, DeHayes, and Ferrara. In line with the Agreement, settlement offers were generated for all six claimants during these mediations, five of which were tentatively accepted.

Further, not only is it clear that Mr. Warriner and his claimants participated in the Program, but they also consented to paying a common benefit assessment and adjudication by the MDL Court of any disputes regarding the reasonableness of the fee. Section V.C. of the Agreement reads that by participating in the Program, claimants and counsel agreed to (1) comply with Case Management Order 3: Order Establishing Common Benefit Fund ("CMO 3") and any orders entered in furtherance of CMO 3 irrespective of whether the claimant has a case pending in the MDL, state court, or is unfiled, (2) consent to the jurisdiction of the MDL Court for that purpose, and (3) permit an assessment up to 4% of each gross payment to a claimant to be withheld by Zimmer and paid into the Common Benefit Fund.

In sum, Mr. Warriner is cherry-picking the sections of the Agreement that he wishes to apply – he registered his claims, submitted Exhibit Cs, participated in mediation, and accepted Zimmer's monetary offer to settle the cases, but now disputes the applicability of other parts of the Agreement. The four claimants accepted the offers according to the Agreement, and three of the four signed settlements agreements<sup>1</sup> for the amounts agreed upon in mediation. Zimmer is concerned that if Mr. Warriner is allowed to arbitrarily select which sections of the Agreement apply to which claimants, then the integrity of the Program will be negatively affected, causing attempted renegotiation of settlement amounts, requests for refunds, withdrawal, or non-participation.

Very truly yours,



Andrew L. Campbell

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<sup>1</sup> Claimant Randall DeHayes agreed to a settlement amount, but due to an active bankruptcy petition, it must be approved by the bankruptcy trustee.