

■ WEST PALM BEACH OFFICE:

2139 PALM BEACH LAKES BLVD.  
WEST PALM BEACH, FLORIDA 33409

P.O. BOX 3626  
WEST PALM BEACH, FLORIDA 33402

(561) 686-6300  
1-800-780-8607  
1-800-220-7006 Spanish

□ TALLAHASSEE OFFICE:

THE TOWLE HOUSE  
517 NORTH CALHOUN STREET  
TALLAHASSEE, FL 32301-1231

(850) 224-7600  
1-888-549-7011

*Via ECF*

March 17, 2016

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

Re: Civil Action No. 2:09-cv-04414-DFW-SCM; *In Re: Zimmer Durom Hip Cup Products Liability Litigation*; MDL-2158

Dear Judge Wigenton;

Please accept this as not only my personal response to your Honor's March 14, 2016 Order [Doc. 844] but also a response on behalf of the nineteen Zimmer Durom clients I represent. I have carefully reviewed the Proposed CMO, Proposed Letter to State Court Judges and the Proposed Settlement Agreement. For the reasons stated below, we urge the court to reject the Proposed CMO.

At present, six of my clients have cases filed before your Honor in the MDL, six have cases filed in Florida state court and seven remain unfiled. Two of the Florida filed cases have been unsuccessfully mediated and one is currently scheduled for non-binding arbitration as a predicate to receiving a trial date. Those clients strongly oppose entry of the proposed CMO and, additionally, have no interest in the proposed settlement program.

Liaison counsel have informed me that this "settlement" was presented to your Honor by two individuals as having been a privately brokered deal that, while not mandatory, it would be made available to all. Neither was acting in any court sanctioned leadership capacity.

Between that announcement and submission of the Proposed CMO and Settlement agreement something drastically changed.

The proposed CMO mandates that all MDL plaintiffs "shall participate in the process" and if they fail to do so their case is subject to a dismissal.

ATTORNEYS AT LAW:

ROSALYN SIA BAKER-BARNES

\*F. GREGORY BARNHART

T. HARDEE BASS, III

LAURIE J. BRIGGS

\*BRIAN R. DENNEY

BRENDA S. FULMER

\*MARIANO GARCIA

\*JAMES W. GUSTAFSON, JR.

MARIA R. P. HATFIELD

ADAM S. HECHT

JACK P. HILL

KELLY HYMAN

CAMERON M. KENNEDY

WILLIAM B. KING <sup>5</sup>

MICHAEL H. KUGLER

DARRYL L. LEWIS <sup>1</sup>

PABLO PERHACS <sup>4,6</sup>

PATRICK E. QUINLAN <sup>2</sup>

EDWARD V. RICCI

ANDREA A. ROBINSON

\*JOHN SCAROLA

MATTHEW K. SCHWENCKE

CARTER W. SCOTT

\*CHRISTIAN D. SEARCY

\*JOHN A. SHIPLEY III

CHRISTOPHER K. SPEED <sup>7,8</sup>

KAREN E. TERRY

DONALD J. WARD III <sup>8</sup>

\*C. CALVIN WARRINER III

OF COUNSEL:

\*EARL L. DENNEY, JR. <sup>3</sup>

SHAREHOLDERS

\*BOARD CERTIFIED

ALSO ADMITTED

<sup>1</sup> KENTUCKY

<sup>2</sup> MARYLAND

<sup>3</sup> MISSISSIPPI

<sup>4</sup> MONTANA

<sup>5</sup> NEW JERSEY

<sup>6</sup> NEW YORK

<sup>7</sup> VIRGINIA

<sup>8</sup> WASHINGTON DC

PARALEGALS:

VIVIAN AYAN-TEJEDA

NICHOLAS F. DeBELLIS

EMILIO DIAMANTIS

RANDY M. DUFRESNE

DAVID W. GILMORE

JOHN C. HOPKINS

VINCENT L. LEONARD, JR.

ROBERT W. PITCHER

CHRIS R. RODGERS

KATHLEEN SIMON

STEVE M. SMITH

BONNIE S. STARK

WALTER A. STEIN



The Honorable Susan D. Wigenton  
March 17, 2016  
Page 2

The Settlement Agreement then provides that a lawyer representing any Plaintiff who enrolls in the program must enroll every client that lawyer represents, regardless of the client's wishes and regardless of where their case is filed or even if it is unfiled.

Reading the Proposed CMO together with the Settlement Agreement, every lawyer who represents one MDL filed Plaintiff must enroll every client they represent into the settlement program. That would include Plaintiffs who have absolutely no interest in participating in the settlement and state court Plaintiffs who are complete strangers to the MDL.

In addition, the Settlement Agreement further provides that the enrollment of a single Plaintiff in the Settlement Program obligates every client that lawyer represents, no matter where their case is filed (including unfiled cases), to pay a common benefit assessment. This is true regardless of whether those clients with state court cases are preparing their own cases for trial, including the development of their own experts, and not using the MDL's work product. If that same state court plaintiff rejects an award determination, returns to state court, self-funds and tries his own case, he still owes an MDL common benefit assessment despite having never received any common benefit assistance.

The settlement program that was announced to the court is far from what is being proposed in the Proposed CMO and Settlement Agreement. It is anything but voluntary. To the contrary, it becomes mandatory for every plaintiff who is represented by counsel if that lawyer has a single filed MDL case. That is not only manifestly unfair, it is likely no legal basis exists for the court to enter such an order.

In addition, it should be brought to the court's attention that, as proposed, the Proposed CMO and Settlement Agreement create serious, irreconcilable conflicts of interest for any lawyer who represents at least one client who wishes to enroll in the settlement program and one who does not.

By enrolling a single desirous client, the lawyer submits all of his objecting clients to the jurisdiction of the settlement program as well as a new tax or common benefit assessment for state court Plaintiffs. The only way to solve that conflict is to withdraw from one or the other's case leaving that client abandoned by the lawyer they chose. For those lawyers with a number of clients who are desirous and a number who object, that could mean withdrawing from numerous cases.

If by some chance one gets past the above conflict and a lawyer ends up representing a group of clients enrolled in the settlement program, it gets worse after final award determinations are announced. The Proposed Settlement Agreement allows Zimmer to refuse payment to *every single* qualified, accepting claimant a lawyer represents if less



The Honorable Susan D. Wigenton  
March 17, 2016  
Page 3

than 90% of that lawyer's clients accept their award determinations. This again creates an irreconcilable conflict for counsel. How do you advise a client whether to accept or reject an award if you know that client's decision to opt out may result in all of his clients' awards being rejected? It would be extremely hard to endorse opting out if one knew that meant the balance of his desirous qualifying clients would be rejected.

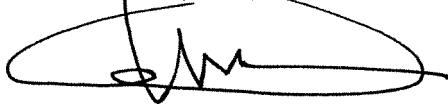
Finally, by adopting the Proposed CMO the court would be not only staying further proceedings in the MDL, it would also be attempting to stay state court actions as well.

A simple example illustrates how manifestly unfair that would be to many Plaintiffs with state court filed cases. One of my clients was previously represented by a lawyer who attempted, over four years ago, to convince him to accept a settlement that exceeded the amount he would now receive in the Proposed Settlement Agreement. The client rejected the offer, discharged that lawyer and hired the undersigned. His case was filed in state court in 2012, discovery has been conducted, experts retained, he has obtained and lost one trial date and is scheduled for non-binding arbitration as a predicate to again being granted a new trial date.

Staying his case after so much time has passed and so much work has been done would not reflect well on our justice system. This is especially true when he has already rejected a settlement offer that exceeds what he would receive in this program.

In summary, the undersigned, both for himself and his clients, urges the court to reject the Proposed CMO, refuse to enter a stay or entertain any settlement process that is mandatory and potentially creates irreconcilable conflicts for lawyers who either willingly or unwillingly participate.

Yours very truly,



C. CALVIN WARRINER, III  
CCW/slv  
cc: All counsel via ECF

