

March 31, 2016

Via ECF

The Honorable Susan D. Wigenton
U.S. District Court, District of NJ
Martin Luther King, Jr. Federal Building
& U.S. Courthouse
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:

The undersigned Plaintiffs' counsel ("Undersigned Plaintiffs' Counsel") write in response to the letter to the Court by Andrew Campbell on March 28, 2016 ("Zimmer's March 28th Letter") [Doc. 885], which addressed the proposed settlement program ("Settlement Program") and case management order ("Proposed CMO") now under consideration.

There is obviously disagreement between the parties on whether the Court has the authority to require participation by non-consenting Plaintiffs in the elaborate, 18-month ADR process laid out by the Proposed CMO.¹ What is undisputed, however, is that the Plaintiffs' counsel who negotiated the Settlement Program and Proposed CMO: (a) did not negotiate that deal in any formal capacity as Plaintiffs' Liaison Counsel; and (b) did not have the express consent of other Plaintiffs' counsel to negotiate on their behalf. It also cannot be disputed at this point that over 30 Plaintiffs' attorneys representing more than half of the total number of Plaintiffs in this MDL have

¹ Zimmer's March 28th Letter only contains citations for the generic proposition that federal district courts have the authority, under certain circumstances, to enter stays and/or require mediation. No one is disputing that. The question before the Court, however, is whether *under circumstances where a majority of MDL plaintiffs are objecting* this Court has the authority to enter a stay lasting up to 18 months and require participation in a multi-stage ADR process that is far beyond what is provided for under the applicable local rules.

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formally objected to being forced to participate in the Settlement Program, while no Plaintiffs' attorneys other than the signatories to the deal have come out in favor of it.²

Undersigned Plaintiffs' Counsel stand by the objections contained within their respective letters to the Court that were filed last week, and see no point in rehashing or expanding on them until receiving further instruction from the Court.³ Rather, we write today to propose a multi-pronged approach toward moving this MDL toward resolution.

First, Plaintiffs ask that the bellwether trial setting that was recently continued from its May 10, 2016 date be reset for trial on the first available date.

Second, Plaintiffs request that the Court consider: (a) grouping multiple Plaintiffs together for all future trial dates; and (b) entering the attached Proposed Administrative Order Governing Remand of Cases ("Proposed AO"). These proposed measures are directed at the same problem. As this MDL approaches its sixth anniversary, it has never been more apparent that (a) semi-annual bellwether trials for individual plaintiffs are not going to resolve this litigation; and (b) this Court alone simply does not have the time or resources to provide trials to all the MDL Plaintiffs who want one. One way to address these problems is to group multiple plaintiffs for each trial setting, which other MDL courts have done recently. Another is to enter the Proposed AO, which is based on the successful, long-standing administrative order in place for years in the Federal Asbestos MDL based in the Eastern District of Pennsylvania. The Proposed AO would fill a glaring need in this litigation by providing a formal process for those Plaintiffs who wish to have their cases remanded to their respective transferor courts for trial.

Taken together, these proposed actions would result in meaningful progress toward resolution. Moreover, there is no reason these processes cannot run concurrently with a new round of settlement negotiations between Plaintiffs

² Undersigned Plaintiffs' Counsel will respond to the letter by Chris Seeger of March 31, 2016 [Doc. 890], in a separate letter.

³ Plaintiffs simply note that Zimmer's March 28th Letter does not effectively refute the authority and arguments set out in Plaintiffs' letter of March 21, 2016, nor does it cite to any sources indicating this Court can ignore the specific ADR provisions of the Local Rules of the District of New Jersey and order an 18-month *ad hoc* ADR process.

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and Zimmer. Indeed, the adjudication and remand of more cases is likely to promote such talks rather than discourage them.

In light of your Text Order dated March 30, 2016, Undersigned Plaintiffs' Counsel would very much like to discuss these proposals with Your Honor at the May 4, 2016 hearing. Thank you in advance for your consideration.

Respectfully,



Gibbs C. Henderson

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On Behalf of His Clients and
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cc: All Counsel