April 18, 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:

I am writing in response to the letter submitted to the Court by Chris Seeger ("Seeger") on March 31, 2016 ("March 31st Letter"). Mr. Seeger's March 31st Letter was written in response to my letter of March 21, 2016, in which I set forth the reasons why my firm and several others are opposing entry of the Case Management Order Regarding Zimmer Settlement Agreement ("Proposed CMO") currently under consideration. Mr. Seeger does not dispute that the Proposed CMO would make participation in the U.S. Durom Cup Settlement Program Agreement ("Proposed Settlement Program") mandatory for all MDL Plaintiffs. Rather, his March 31st Letter focuses on the reasons why he believes this Court can and should enter the Proposed CMO. Given the drastic consequences that would result from entry of the Proposed CMO, we feel compelled to address those arguments in advance of the hearing on May 4, 2016.

I. The Terms Of The Settlement Program Negotiated By Mr. Seeger Unambiguously Provide For An 18-Month Process.

First, Mr. Seeger argues that it is "unlikely" that the Proposed CMO would delay the litigation up to 18 months. An analysis of the pertinent terms of the Proposed CMO and Settlement Program show his assessment to be overly optimistic. Under the terms of the Proposed CMO, all discovery, with the exception of 4 cases, would be stayed "so long as the Settlement Agreement remains in effect . . . ." Proposed CMO at ¶ 3. The Proposed CMO further states that discovery can only resume in a particular case if a Plaintiff has (a)

completed the Settlement Program's categorization process; (b) completed the Settlement Program's mediation process; and (c) obtained Zimmer's consent to file something called a "Joint Notice of Unsettled Case." Proposed CMO at ¶ 4. Pursuant to the terms of the Settlement Program, a Plaintiff who does not agree with Zimmer's categorization of his or her claim cannot even request mediation until September 15, 2016. *See* Settlement Program §§ III.D and IV.B. At that point, all discovery will have been stayed for 4.5 months. Once a Plaintiff requests mediation, the terms of the Settlement Program allow Zimmer to wait until February 28, 2017 to schedule a mediation for that person. *See* Settlement Program § IV.B. At that point, all discovery will have been stayed for almost 10 months. Finally, the Settlement Program gives Zimmer until September 15, 2017 to complete mediation with a requesting Plaintiff. *See* Settlement Program § IV.B. At that point, all discovery will have been stayed for almost 18 months. Even then, the discovery stay is not automatically lifted; a Plaintiff seeking the resumption of discovery must first obtain Zimmer's consent to file a "Joint Notice of Unsettling Case." *See* CMO at ¶ 4.

While no one has a crystal ball, it is certainly not unfair to characterize the process laid out by the Settlement Program and Proposed CMO as an 18-month process. Indeed, based on the Settlement Program's actual terms, it would be inaccurate to characterize it any other way. It is also beyond dispute that the only procedural vehicle the Proposed CMO provides for lifting the discovery stay prior to the completion of this 18-month process is a "joint notice," which would necessarily involve each Plaintiff getting Zimmer's consent to resume discovery. Put another way, the Proposed CMO allows Zimmer to keep the discovery stay in place as long as it wants. Leaving aside issues of fundamental fairness, the problem with this process is that, as discussed in more detail below, it extends far beyond any ADR process and concomitant stay authorized by the Local Rules for the District Court of New Jersey ("Local Rules").

II. Mr. Seeger Fails To Acknowledge The Well-Established Limitations On The Use Of A Court's Inherent Authority.

Second, Mr. Seeger contends that this Court can use its inherent authority to enter the Proposed CMO. Mr. Seeger's citations to *Landis v. North Am. Co.*, 299 U.S. 248, 254, 57 S. Ct. 163, 165-66 (1936) and *Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068, 1077 (3d Cir. 1983) certainly support the notion that district courts possess certain inherent powers to manage their dockets,

including the ability to stay cases. However, those general points are not disputed. The issue is not whether inherent authority exists; it is whether inherent authority is broad enough to justify entry of the Proposed CMO. *Landis* and *Gold* – in contrast to the cases cited in our March 21st letter – are not particularly pertinent to that discussion.

The Third Circuit has explicitly cautioned district courts that they must exercise their inherent authority "with great restraint and caution."[1] As another circuit court put it, "Inherent authority 'is not a broad reservoir of power, ready at an imperial hand, but a limited source; an implied power squeezed from the need to make the court function.'"[2] Those admonitions are consistent with the guidance offered by the Supreme Court on the subject.[3]

Like all other types of authority, a district court's inherent authority has boundaries. "Obviously, the district court, in devising the means to control cases before it, may not exercise its inherent authority in a manner inconsistent with rule or statute. . . . This means that 'where the rules directly mandate a specific procedure *to the exclusion of others*, inherent authority is proscribed.'"[4] The Third Circuit has since quoted *G. Heileman* with approval

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[1] *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 562 (3d Cir. 1985). These instructions on the exercise of inherent authority are reflective of the fact that, in the words of the Third Circuit, a district court's inherent power is "nebulous, and its bounds . . . 'shadowy.'" *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 561 (3d Cir. 1985).

[2] *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 619 F.3d 458, (5th Cir. 2010) (quoting *FDIC v. Maxxam, Inc.*, 523 F.3d 566, 591 (5th Cir. 2008).

[3] *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S. Ct. 2123, 2132 (1991) (citation omitted) ("Because of their very potency, inherent powers must be exercised with restraint and discretion.").

[4] *G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648, 652 (7th Cir. 1989) (quoting *Landau & Cleary, Ltd. v. Hribar Trucking, Inc.*, 867 F.2d 996, 1002 (7th Cir. 1989)) (emphasis in original). This principle is enshrined in Federal Rule of Civil Procedure 83(b), which is entitled, "**Procedure When There Is No Controlling Law**," states that in such instances, "A judge may regulate practice **in any manner consistent with** federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and **the district's local rules**." FED. R. CIV. P. 83(b) (emphasis added).

for this very point.[5] The argument that this Court can exercise its inherent authority to require participation in the Settlement Program's 18-month *ad hoc* ADR process overlooks this critical point. The Local Rules directly mandate only two types of court-ordered ADR *to the exclusion of others*: arbitration under L. Civ. R. 201.1 and a 3-month mediation process under L. Civ. R. 301.1. Those provisions therefore proscribe this Court's ability to order other types of ADR.

III. The CMOs Submitted By Mr. Seeger Are Not "Similar" To The Proposed CMO.

Third, Mr. Seeger asserts that "numerous federal courts have entered similar case management orders," and attaches two CMOs to his March 31st Letter as examples: (1) Order Regarding Registration of ASR Related Cases, *In Re: DePuy Orthopaedics, Inc. ASR Hip Implant Products Liability Litigation*, U.S. District Court, Northern District of Ohio, Western Division (entered Nov. 22, 2013) ("ASR Hip CMO"); and (2) Case Management Order No. 77, Census of Claims, *In Re: Yasmin and Yaz (Drospiernone Marketing, Sales Practices, and Products Liability Litigation*, U.S. District Court, Southern District of Illinois (entered Aug. 3, 2015) ("Yasmin CMO"). The ASR Hip CMO and Yasmin CMO dealt solely with the registration of claims in conjunction with voluntary settlement programs. Critically, neither CMO stayed all litigation during the claim registration process or required plaintiffs to participate in any form of ADR. Further, in terms of enforcement mechanisms, the ASR Hip CMO and Yasmin CMO did not explicitly threaten non-registering plaintiffs with dismissal; rather, they simply stated that non-compliant plaintiffs would be subject to a show cause hearing.[6] In short, neither of the CMOs cited by Mr. Seeger is nearly as far-reaching or draconian as the Proposed CMO.

Even if the ASR Hip CMO and Yasmin CMO *had* contained those types of provisions, Mr. Seeger's reliance on them in support his argument that *this*

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[5] *Moravian Sch. Advisory Bd. of St. Thomas v. Rawlins*, 70 F.3d 270, 287 ("Furthermore, because a federal court 'may not exercise its inherent authority in a manner inconsistent with rule or statute,' *e.g., G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648, (7th Cir. 1989), a district court's transfer of an action to territorial court . . . is inconsistent with § 1631 . . . and thus is outside of the inherent authority of the district court.")

[6] *See* ASR Hip CMO at ¶ 6; and Yasmin CMO at ¶ 7.

Court has the authority to enter a similar CMO would be misplaced. The court that entered the ASR Hip CMO was subject to the Northern District of Ohio Local Rules,[7] which grants district courts far greater authority to order *ad hoc* ADR methods and to stay litigation indefinitely while those processes play out. Specifically, Northern District of Ohio Local Rule 16.7, which is entitled, "Other ADR Procedures," expressly authorizes district courts to "recommend or facilitate the use of **any extrajudicial procedures not otherwise provided for by these Local Rules**."[8] That same rule further authorizes district courts to enter open-ended stays during the duration of those *ad hoc* ADR processes.[9] Likewise, the Southern District of Illinois Local Rules, which governed the court that entered the Yasmin CMO,[10] contain a provision giving district courts the authority, "in [their] discretion, [to] set any civil case for summary jury trial or **other alternative method of dispute resolution which the Court may deem proper**."[11]

The District of New Jersey Local Rules – unlike the local rules for the Northern District of Ohio and Southern District of Illinois – contain no grant of authority enabling district courts to impose *ad hoc* ADR procedures on parties. As discussed above, the authorized forms of ADR are limited to a 3-month mediation process and arbitration. Accordingly, the ASR Hip CMO and Yasmin CMO do not provide a basis for this Court to enter the Proposed CMO.

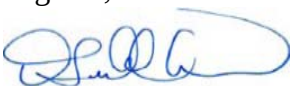
IV. Conclusion

The firms opposing the Proposed CMO have the utmost respect for the authority of this Court, and certainly do not relish being placed in a position of having to call attention to that authority's limitations. Unfortunately, that is the position where we now find ourselves. Mr. Seeger has made the determination that the Settlement Program represents a good deal for his clients; that is his call to make. Insofar as he is now asking this Court to require participation in that same deal by Plaintiffs he does not represent, however, we strongly believe that he is not only overstepping his bounds – but

[7] The cited rule, 16.7, has been in effect since August 1, 2011.
[8] N.D. Ohio L.R. 16.7 (emphasis added).
[9] *Id.* ("In the event a reference to extrajudicial procedures is made, all further court-annexed case management procedures may be stayed . . . .").
[10] The cited rule, 16.3(a), has been in effect since December 2009.
[11] S.D. Ill. L.R. 16.3 (emphasis added).

that he is also asking this Court to act beyond its authority. Consequently, we must reluctantly and respectfully disagree with Mr. Seeger on this issue and maintain our strong opposition to the Proposed CMO.

Regards,



Gibbs C. Henderson
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