UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: ZIMMER NEXGEN KNEE IMPLANT PRODUCTS LIABILITY LITIGATION	)	MDL NO. 2272
This Document Applies to	)	Master Docket Case No. 1:11-cv-05468
Donna Carrea, No. 1:13-cv-06388	)	Honorable Rebecca Pallmeyer

REPLY IN SUPPORT OF ZIMMER'S MOTION TO COMPEL PARTICIPATION IN BELLWETHER DISCOVERY

"It's like déjà vu all over again," to quote the late Yogi Berra. *Carrea* was the last standing defense pick from the old broken trial plan after more than a dozen cases picked for bellwether consideration were abandoned by Plaintiffs' Counsel, and it is now the one remaining defense pick under the new trial plan still being negotiated by the parties. Let there be no mistake – Zimmer wants to take *Carrea* to trial, so long as it is not a *pro se* case. What Zimmer does not want is more déjà vu – *Currier, Davis, Earnheart, Womack, Millsap-Brown, Richardson, Teague, Lopez, Shoat, Subocz, Ebarb, Lawrence, Dobrzynski,* and now *Carrea* – all over again. Zimmer's defense pick – whether it is *Carrea* with new counsel or an entirely new selection – must be prepared to go to trial if it is pending and has submitted proof of loosening under CMO-8. There must be no more abandonment.

I. Abandonment of Bellwether Selections by Plaintiffs' Counsel Was Not Supposed to Happen Again.

An account of the repeated motions to dismiss or withdraw by Plaintiffs' Counsel is unnecessary, as the story is well-known and has been retold numerous times. (*See e.g.*, Doc. 1545, 1549, 1578) In response to the serial abandonment of the defense bellwether picks, the Court ultimately directed the parties to develop some mechanism to prevent this problem from happening again:

> What I am committed to is some mechanism—we have to talk about it—**some mechanism to ensure that we don't have lawyers in this awkward position that these lawyers are in, having filed cases that then get picked for bellwether treatment, and they don't even want to try them at all. There has to be a way to preclude this happening anymore. There has to be a way that lawyers are not in this position.**
>
> ****
>
> I am saying I need some mechanism. *Lone Pine* would work for me, but if you think that's too drastic, then develop an alternative protocol, and we will deal with your alternative protocol. We will find a way to make sure that plaintiffs' lawyers are not in the situation that they feel I placed them in somehow. I want a mechanism that enables them to come forward and say, we have got a group of cases here. Some are stronger than others. Some are weaker than others. **But we are prepared to go forward on all of them. We are prepared to take any of them to trial. That's what I want.**

(*See* Sept. 11, 2014 Status Conf. Trans. at 95:24-96:6, 96:12-19) (emphasis added).

The mechanism developed by the parties and approved by the Court is the screening order embodied in Case Management Order No. 8, entered on December 10, 2014. (CMO-8, Doc. 1265.) CMO-8 required all Plaintiffs to submit (1) a medical record showing evidence of loosening of an MDL component or (2) an attorney certification that Plaintiffs' Counsel has reviewed the medical records and has a reasonable and good faith basis for recommending continued prosecution of the matter within MDL-2272. (*Id.* at ¶¶ 1-2.)

On March 16, 2015, Zimmer selected *Lawrence, Ebarb,* and *Dobrzynski* (and later *Carrea* once *Dobrzynski* was dismissed*)* as bellwethers after they purportedly complied with CMO-8. Despite affirmatively submitting CMO-8 evidence to Zimmer, Plaintiffs' Counsel for all three defense picks refused to participate in the bellwether process. In the face of Zimmer's motion to compel their participation, Plaintiffs' Counsel for *Lawrence* and *Ebarb* dismissed their cases, and Plaintiffs' Counsel for *Carrea* moved to withdraw as counsel.

II. Plaintiffs' Counsel's Withdrawal in *Carrea* Must Be Considered in the Larger Context of This MDL's Bellwether Process, and No Future Motions to Withdraw or Voluntary Dismissals Should Be Granted on the Basis of Failure to Screen.

Plaintiffs' Counsel in *Carrea,* Zimmer's last remaining bellwether selection, filed a response to Zimmer's motion to compel declining to participate in bellwether discovery and filed a simultaneous motion to withdraw from the case, citing an impasse over further handling of the claim. The result is a bellwether selection with a *pro se* plaintiff. As now-Seventh Circuit Judge David Hamilton explained from the district court bench:

> When an attorney seeks to withdraw from a case and no substitute counsel have appeared, the court must consider the interests not only of the counsel but also the client, the other parties, and the court…Because of the challenges that a pro se party can pose for both the court and the opposing party, the court does not routinely grant motions to withdraw. Too often, a plaintiff's attorney will seek to withdraw from a weak case, leaving the case like an orphan on the court's and the opponent's doorstep. The court and the opponent are thus left the task of educating the pro se party about applicable law and procedure, and often about the weaknesses in his case. Typically, such education should be the responsibility of that party's original lawyer.

Burns v. General Motors Corp., 1:06-cv-00499-DFH-WTL, 2007 WL 4438622, at *1-2 (S.D. Ind. Nov. 30, 2007) (emphasis added). This is especially true in the context of an MDL, where it is simply unrealistic to expect a *pro se* plaintiff to effectively prosecute her own case – let alone a bellwether - and coordinate with the Court and the other parties within the MDL.

The Carreas have consented to the withdrawal of counsel, and they are now seeking new counsel. The reasons for the withdrawal of counsel are unknown because Zimmer does not know what was said in the *ex parte* filing in support of the motion to withdraw. The important question, however, is not *what* was said or done by Plaintiffs' Counsel; the important question is *when*.

- *When* did Plaintiffs' Counsel make a reasonable inquiry of the merits of Mrs. Carrea's claim against Zimmer?[1]

- *When* did Plaintiffs' Counsel examine the medical records submitted with Plaintiff's Fact Sheet?[2]

- *When* did Plaintiffs' Counsel, a member of the Plaintiffs' Steering Committee, follow the Court's admonition in 2013 to review the case for merit?[3]

- *When* did Plaintiffs' Counsel evaluate the plaintiff's medical records as required by CMO-8?[4]

Like all of the defense picks that went before it, there can be little doubt that the answer to these questions of *When* is the same: *When* the case was picked as a bellwether.

Zimmer is prepared to move forward with *Carrea* as its defense pick under the new trial plan if the *pro se* plaintiffs find new counsel as directed by the Court. If not, Zimmer will be prepared to make a new defense pick consistent with the agreement reached by the parties and approved by the Court at the September 3rd status conference. Zimmer's selection of a case, however, cannot be the trigger for when the Plaintiffs' Counsel finally evaluates the merits of the case to determine if there is a willingness to take the case to trial. Trial certification post-bellwether selection is not working. All cases that have submitted purported compliance with CMO-8 should be deemed certified for trial if still pending by a date selected by the Court. Also, after that date, the Court should deny any future motions to voluntarily dismiss or withdraw as counsel if they are based on a failure to screen by Plaintiffs' Counsel. Finally, sanctions should be leveled against any Plaintiffs' Counsel who evades the letter and spirit of CMO-8 by submitting proof of loosening of an MDL component for cases they have no intention of taking to trial.

---

1 *See* Rule 11. Plaintiffs' Counsel signed the Short Form Complaint on August 2, 2013.

2 *See* CMO-2. In 2013, Plaintiffs' Counsel submitted the Plaintiff Fact Sheet and medical records in 2013.

3 The Court ordered Plaintiffs' Counsel to screen their inventory by self-policing in early 2013. The Court was clear: [I]t's not going to happen again that you're going to propose cases that they're going to withdraw because they are going to evaluate the pool." (March 15, 2013 Status Conf. Trans., 15:12-14).

4 *See* CMO-8, providing Plaintiffs' Counsel until February 15, 2015 to submit evidence of loosening of an MDL component.

Dated: October 6, 2015

Respectfully submitted,

FAEGRE BAKER DANIELS LLP

/s/ J. Stephen Bennett

J. Stephen Bennett (Ill. State Bar #6226615)
Abigail M. Butler (Ind. State Bar #22295-02)
Peter A. Meyer (Ind. State Bar # 27968-53)
110 West Berry Street, Suite 2400
Fort Wayne, Indiana 46802-2322
Telephone: (260) 424-8000
Fax: (260) 460-1700
Email: stephen.bennett@faegrebd.com
Email: abigail.butler@faegrebd.com
Email: peter.meyer@faegrebd.com

Andrea Roberts Pierson (Ind. State Bar #18435-49-A)
300 North Meridian Street, Suite 2700
Indianapolis, Indiana 46204
Telephone: (317) 237-0300
Fax: (317) 237-1000
Email: andrea.pierson@faegrebd.com

James A. O'Neal (Minn. State Bar #8248X)
Bruce Jones (Minn. State Bar #179553)
Amy R. Fiterman (Minn. State Bar #285493)
90 South Seventh Street, Suite 2200
Minneapolis, Minnesota 55402
Telephone: (612) 766-7000
Fax: (612) 766-1600
Email: james.oneal@faegrebd.com
bruce.jones@faegrebd.com
amy.fiterman@faegrebd.com

Lead counsel for Zimmer, Inc.

CERTIFICATE OF SERVICE

I certify that on October 6, 2015 a copy of the foregoing **REPLY IN SUPPORT OF ZIMMER'S MOTION TO COMPEL PARTICIPATION IN BELLWETHER DISCOVERY** was filed electronically. Parties may access this filing through the Court's electronic records system. An as-filed copy is being sent via First-Class, United States Mail to Plaintiffs as follows:

Donna and Leo Carrea
3185 Woodfield Court
Yorktown Heights, NY 10598

/s/ J. Stephen Bennett