

**FAEGRE BAKER DANIELS LLP**  
TARIFA B. LADDON (SBN 240419)  
*tarifa.laddon@faegrebd.com*  
11766 Wilshire Boulevard, Suite 750  
Los Angeles, CA 90025  
Telephone: 310.500.2090  
Facsimile: 310.500.2091

Attorneys for Defendants  
ZIMMER, INC., ZIMMER BIOMET  
HOLDINGS, INC., and ZIMMER BIOMET  
FEGAN, INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JENNIFER ROBERTS,  
Plaintiff,

v.

ZIMMER BIOMET, INC. f/k/a  
ZIMMER, INC., an Delaware  
Corporation; ZIMMER BIOMET  
HOLDINGS, INC., f/k/a ZIMMER  
HOLDINGS INC., a Delaware  
Corporation; ZIMMER BIOMET  
FEGAN, INC., a California  
Corporation; and DOE I.

Defendants.

Case No. 3:18-cv-03564

(Alameda County Superior Court, Case  
No. RG18902358)

**DEFENDANTS' NOTICE OF  
REMOVAL**

Complaint Filed: April 25, 2018

PLEASE TAKE NOTICE THAT Defendants, Zimmer, Inc., incorrectly identified as Zimmer Biomet, Inc.<sup>1</sup>; Zimmer Biomet Holdings, Inc.; and fraudulently joined Zimmer Biomet Fegan, Inc., remove the above-entitled case from the Superior Court of California, County of Alameda, to the United States District Court, Northern District of California. Removal is warranted under 28 U.S.C. § 1441(b) because, with regard to properly named and joined defendants, this is a diversity action over which this Court has original jurisdiction pursuant to 28 U.S.C. § 1332. The lone defendant in California, Zimmer Biomet Fegan, Inc., has been fraudulently joined, as that entity was not even in existence during the relevant time period in the lawsuit.

### **THE REMOVED CASE**

1. The plaintiff, Jennifer Roberts (“Plaintiff”) filed this case in California Superior Court, for the County of Alameda on April 25, 2018, as *Jennifer Roberts v. Zimmer Biomet, Inc., f/k/a Zimmer, Inc., Zimmer Biomet Holdings, Inc., Zimmer Biomet Fegan, Inc., and Doe I*, Case No. RG18902358 (the “State Court Action”). True and correct copies of the Summons served on each party, as well as the Complaint For Damages, are attached collectively, along with any other process or pleadings served on Defendants, as **Exhibit A**.

2. This case is a medical device product liability action concerning the implantation of a Zimmer M/L Taper total hip replacement system in Plaintiff. (Ex. A, Complaint ¶¶ 1, 57). Plaintiff alleges that the Devices were defective and caused her serious damages, including multiple subsequent, revision surgeries. (*Id.* at ¶¶ 57-60). Plaintiff asserts claims for strict products liability – unreasonably dangerous design; strict products liability – failure to warn; strict products liability – manufacturing defect; negligence; negligent misrepresentation; breach of express warranty; and breach of implied warranty. (*See generally id.* at ¶¶ 95-195.)

3. Defendants Zimmer, Inc. and Zimmer Biomet Holdings, Inc. were served

<sup>1</sup> Zimmer Biomet, Inc. is not a legal entity.

1 on May 15, 2018. Defendant Zimmer Biomet Fegan, Inc. was served on June 8, 2018.

2 **DEFENDANTS HAVE SATISFIED**  
3 **THE PROCEDURAL REQUIREMENTS FOR REMOVAL**

4 4. Venue is proper in this Court because it is the “district and division  
5 embracing the place where such action is pending.” *See* 28 U.S.C. § 1441(a).

6 5. Removal is timely, pursuant to 28 U.S.C. § 1446(b), because Defendants  
7 have filed their Notice of Removal within 30 days of receiving service. *See* Ex. A; 28  
8 U.S.C. § 1446; *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 354  
9 (1999) (holding that the 30-day clock for removal does not begin to run until service is  
10 perfected). As noted above, Zimmer, Inc. and Zimmer Biomet Holdings, Inc. were  
11 serviced on May 15, 2018, and Defendant Zimmer Biomet Fegan, Inc. was served on  
12 June 8, 2018.

13 6. No previous request has been made by Defendants for the relief  
14 requested herein.

15 7. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is  
16 being served on Plaintiff and a copy is being filed with the Clerk of Court for the  
17 Superior Court of the State of California for the County of Alameda.

18 8. Pursuant to 28 U.S.C. § 1446(a), copies of all process, pleadings, and  
19 orders served upon Defendants are attached as **Exhibit A**.

20 **DIVERSITY JURISDICTION EXISTS**  
21 **AMONG THE PROPERLY JOINED PARTIES**

22 9. This is a civil action that falls under the Court’s original jurisdiction  
23 under 28 U.S.C. § 1332 and is one that may be removed to this Court based on  
24 diversity of citizenship under 28 U.S.C. §§ 1441 and 1446.

25 10. Complete diversity of citizenship exists between Plaintiff and the  
26 properly joined Defendants.

27 11. State citizenship for diversity purposes requires that the individual be  
28 domiciled in that state. *Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088, 1090 (9th

1 Cir. 1983). A person's domicile is the place he or she resides with the intention to  
2 remain or to which he or she intends to return. *Kanter v. Warner-Lambert Co.*, 265  
3 F.3d 853, 857 (9th Cir. 2001). A party's residence is "prima facie" evidence of  
4 domicile. *Smith v. Simmons*, No. 1:05CV01187 (OWW), 2008 U.S. Dist. LEXIS  
5 21162, at \*22 (E.D. Cal. March 14, 2008); *State Farm Mut. Auto. Ins. Co. v. Dyer*, 19  
6 F.3d 514, 520 (10th Cir. 1994).

7 12. Per the Complaint, Plaintiff was, at all times relevant, a resident of  
8 California. (Ex. A, Complaint ¶ 8). However, a public records search confirms that  
9 Plaintiff has maintained a continuous address in Salem, Oregon from March of 2014  
10 through the present time. (See relevant portions of Accurint Report (redacted),  
11 attached as **Exhibit B**.) Thus, Plaintiff's domicile is in Oregon, and she is a citizen of  
12 Oregon. *Kanter*, 265 F.3d at 857.

13 13. For purposes of diversity of citizenship, a corporation is deemed to be a  
14 citizen of both the state of its incorporation and the state where it has its principal  
15 place of business. 28 U.S.C. § 1332(c)(1). Zimmer, Inc., incorrectly identified as  
16 Zimmer Biomet, Inc., is incorporated under the laws of the State of Delaware, with its  
17 principal place of business in Warsaw, Indiana. Thus, Zimmer, Inc. is a citizen of  
18 Delaware and Indiana for purposes of determining diversity. *Id.*

19 14. Zimmer Biomet Holdings, Inc. is incorporated under the laws of the State  
20 of Delaware, with its principal place of business in Warsaw, Indiana. Thus, Zimmer  
21 Biomet Holdings, Inc. is a citizen of Delaware and Indiana for purposes of  
22 determining diversity. *Id.*

23 15. Defendant DOE 1 is a fictitious business entity. For purposes of removal  
24 under 28 U.S.C. § 1441, the citizenship of defendants sued under fictitious names  
25 must be disregarded. 28 U.S.C. § 1441(a).

26 16. The properly joined Defendants are not, nor were they at the time of the  
27 filing, citizens of Oregon (or, for that matter, California) within the meaning of the  
28

1 Acts of Congress relating to the removal of cases.

2 17. Zimmer Biomet Fegan, Inc., is incorporated under the laws of California  
3 with its principal place of business in California. However, for the reasons discussed  
4 in the next section, Zimmer Biomet Fegan, Inc. has been fraudulently joined and,  
5 therefore, its citizenship in California cannot preclude removal on grounds of diversity  
6 jurisdiction. *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998).

7 18. Accordingly, there is complete diversity among the parties, and removal  
8 is proper under 28 U.S.C. § 1332(a)(1).

9 **ZIMMER BIOMET FEGAN, INC.**

10 **HAS BEEN FRAUDULENTLY JOINED**

11 19. Plaintiffs' joinder of Zimmer Biomet Fegan, Inc. is fraudulent and  
12 improper, and therefore its citizenship in California should not act as a barrier for any  
13 reason to this Court's jurisdiction over this matter.

14 20. A defendant is fraudulently joined when a "plaintiff fails to state a cause  
15 of action against [the] resident defendant and the failure is obvious according to the  
16 settled rules of the state . . . ." *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339  
17 (9th Cir. 1987). A plaintiff fails to state a cause of action against a resident defendant  
18 when "there is no reasonable basis for imposing liability on the resident defendant."  
19 *See TPS Utilicom Servs. Inc. v. AT&T Corp.*, 223 F. Supp. 2d 1089, 1102 (C.D. Cal.  
20 2002).

21 21. Here, there is plainly no reasonable basis for imposing liability on the  
22 lone non-diverse defendant, Zimmer Biomet Fegan, Inc. Plaintiff premises her claims  
23 against Zimmer Biomet Fegan, Inc. on the allegation that it is "a California retailer  
24 and distributor of Defendant ZIMMER's medical devices described herein" and that at  
25 all relevant times, "ZIMMER BIOMET FEGAN, INC. was a licensed distributor of  
26 the medical devices within the state of California." (Ex. A, Complaint, ¶ 18.)  
27 Plaintiff claims that Zimmer Biomet Fegan, Inc. "affirmatively represented  
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1 to...Plaintiff JENNIFER ROBERTS” that the M/L Taper hip replacement system she  
2 received during her implant surgery “was fit for its intended use.” (*Id.*) Finally,  
3 Plaintiff claims “upon information and belief” that, “at all times relevant,” Zimmer  
4 Biomet Fegan was “a corporation organized under the laws of the State of California.”  
5 (*Id.* at ¶ 16.) These allegations are untrue.

6 22. As demonstrated by a search of the California Secretary of State’s  
7 website, Zimmer Biomet Fegan, Inc. was not created until April of 2015. (*See*  
8 **Exhibit C**, Business Search – Entity Detail for Zimmer Biomet Fegan, Inc; *see also*  
9 **Exhibit D**, Declaration of Harry Fegan, ¶ 3.) Plaintiff’s implant surgery in which she  
10 received the allegedly defective devices at issue in the case occurred on October 15,  
11 2008 – nearly 7 years before Zimmer Biomet Fegan, Inc. even existed. (Ex. A,  
12 Complaint, ¶ 57.) Moreover, Zimmer Biomet Fegan, Inc. did not and does not design,  
13 manufacture, or create the warnings or labeling for the M/L Taper hip replacement  
14 system. (Ex. E, Fegan Decl., ¶ 5.) Therefore, it is a factual impossibility that Zimmer  
15 Biomet Fegan, Inc. could have distributed the allegedly defective device at issue,  
16 communicated with Plaintiff at or near the time of her implant surgery in which she  
17 received the allegedly defective device, or otherwise had any involvement in the  
18 alleged tortious conduct purportedly causing injury to Plaintiff.

19 23. As a result, “there is no reasonable basis for imposing liability on the  
20 resident defendant,” Zimmer Biomet Fegan, Inc., and its citizenship should be  
21 disregarded in determining the existences of diversity jurisdiction. *TPS Utilicom*  
22 *Servs. Inc.*, 223 F. Supp. 2d at 1102.

23 **THE AMOUNT IN CONTROVERSY**  
24 **EXCEEDS THE JURISDICTIONAL AMOUNT**

25 24. Based on the allegations in the Complaint, the amount in controversy,  
26 exclusive of interests and costs, exceeds \$75,000, as required by 28 U.S.C. § 1332(a).

1           25. It is apparent from the face of the Complaint that the amount in  
2 controversy in this case exceeds \$75,000. A defendant can establish the amount in  
3 controversy by the allegations in a complaint, or by setting forth facts in the notice of  
4 removal that demonstrate the amount in controversy exceeds \$75,000. *Conrad*  
5 *Assocs. v. Hartford Acc. & Indem. Co.*, 994 F. Supp. 1196 (N.D. Cal. 1998); *Gaus v.*  
6 *Miles, Inc.*, 980 F.2d 564, 576 (9th Cir. 1992). A lengthy list of damages claimed in  
7 the complaint may establish the amount in controversy exceeds \$75,000. *White v. FCI*  
8 *USA, Inc.*, 319 F.3d 672, 675 (5th Cir. 2003).

9           26. The face of the Complaint establishes that Plaintiff seeks damages well in  
10 excess of \$75,000. Plaintiff alleges that, as a result of the implantation of the Zimmer  
11 M/L Taper hip replacement system, she experienced an adverse local tissue response  
12 and metallosis, which resulted first in an initial revision surgery to remove the  
13 components, recurrent dislocations of her hip after the initial revision surgery, and  
14 then a subsequent revision surgery to place a constrained liner. (Ex. A, Complaint  
15 ¶¶ 57-59). Since then, Plaintiff alleges that she has suffered “persistent infection  
16 requiring additional revision surgeries involving incision and drainage; changing of  
17 constrained liners; placement of antibiotic beads and placement of a wound VAC.”  
18 (*Id.* at ¶ 60.) As a result of these alleged multiple revision surgeries, adverse  
19 reactions, and infections, Plaintiff alleges that she “has suffered and continues to  
20 suffer both injuries and damages, including, but not limited to: present and future  
21 physical and mental pain and suffering; physical disability, and past, present and  
22 future, medical, hospital, rehabilitative and pharmaceutical expenses, and other related  
23 damages.” (*See, e.g., id.* at ¶ 71.) She further alleges damages for “cost of medical  
24 care, rehabilitation, lost income, permanent instability and loss of balance, immobility,  
25 and pain and suffering....” (*See id.* at ¶¶ 114, 183.)

26           27. In addition, costs of the suit may be considered when determining if the  
27 amount in controversy exceeds \$75,000 for purposes of establishing diversity  
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jurisdiction. *Bell v. Preferred Life Assur. Soc.*, 320 U.S. 238, 240 (1943). And a reasonable inference of a potential punitive damages award may also be considered in determining the amount in controversy. *Id.* Plaintiff accuses Defendants of “reckless” conduct, alleging they “risked the lives of consumers and users of their products, including Plaintiff, with knowledge of the safety and efficacy problems and suppressed this knowledge from the general public” and that they “made conscious decisions not to redesign, re-label, warn or inform the unsuspecting consuming public,” which Plaintiff alleges “warrants an award of punitive damages.” (Ex. A, Complaint, ¶ 169.) Further, Plaintiff seeks an award of costs stemming from the lawsuit. (*Id.* at Prayer For Relief, p. 32.)

28. Accordingly, although Defendants deny that Plaintiff is entitled to any recovery, Plaintiff’s allegations demonstrate that Plaintiff seeks damages that exceed the requisite amount in controversy for purposes of diversity jurisdiction under 28 U.S.C. § 1332(a).

WHEREFORE, Defendants, Zimmer, Inc., Zimmer Biomet Holdings, Inc., and fraudulently joined Zimmer Biomet Fegan, Inc., respectfully remove the action now pending against them in the Superior Court of the State of California, County of Alameda, to this Honorable Court, and request this Court retain jurisdiction for all further proceedings.

Dated: June 14, 2018

**FAEGRE BAKER DANIELS LLP**

By: /s/ Tarifa B. Laddon  
 TARIFA B. LADDON  
 Attorneys for Defendants ZIMMER,  
 INC., ZIMMER BIOMET  
 HOLDINGS, INC., and ZIMMER  
 BIOMET FEGAN, INC.