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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MILLER, .
Plaintiff, .
vs. . Case No. 09-cv-04414
ZIMMER HOLDINGS, INC., . Newark, New Jersey
Defendant. . November 3, 2010
. .
. .

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE MADELINE COX ARLEO
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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25 Proceedings recorded by electronic sound recording;
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1 (Commencement of proceedings at 3:10 p.m.)

2

3 THE COURT: Hello, counsel? Hello.

4 (Counsel participating by teleconference make their
5 appearances)

6 THE COURT: Okay. This is Judge Arleo. You're on
7 the record in my courtroom in New Jersey in District Court.
8 I would thank you for the appearances, and now I will ask the
9 attorneys present in the courtroom to place their appearances
10 on the record.

11 MR. CECCHI: Good afternoon. Your Honor, James
12 Cecchi and Lindsey Taylor, Carella Byrne, liaison counsel.

13 MS. FLEISHMAN: Wendy Fleishman from Lief
14 Cabraser -- counsel, Your Honor.

15 THE COURT: Okay.

16 MR. FANNING: Good afternoon, Your Honor, Edward
17 Fanning --

18 (Noise interruption)

19 MR. TANNER: -- Baker & Daniels, defense liaison
20 counsel.

21 (Noise interruption)

22 THE COURT: Okay. Good afternoon. Everyone have a
23 seat.

24 (Noise interruption)

25 MS. FLEISHMAN: Your Honor, there's a -- in the

1 courtroom.

2 (Noise interruption)

3 THE COURT: I'm sorry.

4 MS. FLEISHMAN: Can they introduce themselves?

5 THE COURT: Absolutely.

6 (Noise interruption)

7 (Counsel make their appearances)

8 THE COURT: Okay. Thank you, gentlemen. Have a
9 seat.

10 Okay, before today's conference began, I asked to
11 speak with liaison counsel for the plaintiffs, as well as
12 coun- -- Mr. Fanning and Mr. Tanner on behalf of the
13 defendants to join me in chambers off the record to see if we
14 could reach resolution on the issue of the protective order.
15 And I am pleased to report that the attorneys appear to have
16 reached a agreement on the terms of the protective order that
17 is also satisfactory to the Court. And I will -- and I
18 will -- we'll talk about that in a minute at the appropriate
19 time.

20 I was given under cover letter of October 29th,
21 2011 -- 2010, a proposed agenda for today's status
22 conference. And on that agenda was also the issues
23 regard- -- about the confidentiality order, and we'll discuss
24 that at the appropriate time.

25 So why don't we begin by reviewing the agenda items

1 | so we can see how this case is moving forward.

2 | Just by way of very brief background, parties were
3 | before me, I believe it was on September 15th of that 2010,
4 | at which time, there was an agreement to informally pursue a
5 | mediation, with as many of the claims as possible, and I am
6 | pleased to hear that the attorneys have been working in
7 | that -- in that direction since September.

8 | So why don't we start with some of the agenda items
9 | as proposed by counsel.

10 | Okay? Number of cases filed? Mr. Tanner?

11 | MR. TANNER: Your Honor, Joe Tanner on behalf of
12 | the defendants.

13 | THE COURT: Mr. Tanner, I would just ask you to do
14 | one thing, to use the microphone because it will be easier
15 | for the lawyers on the phone to hear.

16 | MR. TANNER: There we go.

17 | THE COURT: You can move it.

18 | MR. TANNER: Hopefully everyone can hear me. Just
19 | to kind of give a status report to the Court on where we are
20 | on the number of cases that exist, and then the status of the
21 | records that have been received from the plaintiff, of those
22 | cases that existed as of October 15th in the MDL, there are
23 | 41 that remain unsettled. Since that time, there have been
24 | 12 more that are in some sort of a process of being
25 | transferred to this MDL. There are, I think, three that have

1 come within the last day or two, and there's nine more that
2 are in process.

3 THE COURT: So how many is that -- how many does
4 that make in the MDL?

5 MR. TANNER: 50- -- it'll be 53 when all of those
6 come over.

7 THE COURT: Okay.

8 MR. TANNER: We have not seen the uptick of the
9 200, 500 claims or anything like that --

10 (Noise interruption)

11 THE COURT: Okay.

12 MR. TANNER: -- cases in the MDL.

13 The -- the records collection process, I think is
14 moving along fine. It's moving along at -- at a steady pace.

15 We -- the Court, as you know, ordered plaintiffs to
16 produce by October 15th, records. The process was if we
17 didn't receive records on that date, we sent a letter out to
18 the plaintiffs' counsel immediately. Then we receive the
19 records. Within two days, sometimes three, we look at those
20 records very quickly to determine completeness. We send an
21 email out within two to three days identifying the
22 insufficiency or where -- what records we do not have.
23 That's followed up the same day with a letter sent by
24 certified mail. We also copied liaison counsel. Those go
25 directly to the representing plaintiffs' lawyers.

1 Within -- if we don't hear from them within a week,
2 we send a follow-up email. And then if we do hear back and
3 they tell us they'll produce it by a certain date, if we
4 haven't gotten those within two weeks, we send another email.
5 So we have quite a volume of paper going back and forth, but
6 it's all designed to make sure the communication stays in
7 line, and people know what we're missing, what we don't have,
8 what we do have.

9 As far as the status of the program, of the 53
10 cases, we received all of the records that the CMO lists are
11 to be produced in one of those cases. In seven of the cases,
12 we've received no records. And then in the rest of the
13 cases, we've received some records along a long spectrum. It
14 may be a couple of records, very few, which doesn't give us
15 much to go on, to we have everything except some x-rays and
16 some physical therapy records, something like that.

17 So that's kind of where we are. We understand
18 from --

19 THE COURT: Let me stop you for a minute. Out of
20 the 53 cases, how many do you have complete records?

21 MR. TANNER: One.

22 THE COURT: One. And how many do you have
23 substantially complete? Could you make that guesstimate?

24 MR. TANNER: Maybe 26.

25 THE COURT: Okay.

1 MR. TANNER: And that's kind of a moving target
2 because for instance, it -- we may have a record that says
3 they had a revision surgery and a doctor says looks good.

4 Now, if they've had more pain or they've had lost
5 wages claims, that type of thing, we don't have those
6 records, we will need those. If they tell us, hey, it's been
7 fine since then, then we have enough.

8 So it kind of depends on the plaintiff to tell us
9 when we have everything by which we can evaluate the claim.

10 THE COURT: Okay.

11 MR. TANNER: And -- and for the record, we do
12 understand this takes time, and we're dealing with getting
13 records, and the plaintiffs have been, I think, working
14 forward and getting that done. We're just not quite there
15 yet.

16 THE COURT: Wendy?

17 MS. FLEISHMAN: As I told the Court earlier, we're
18 actually working with plaintiffs' counsel to help them get
19 the records, working with -- we'll send out another letter,
20 follow up from the Court's conference to tell them exactly if
21 they don't have records or if there are no physical therapy
22 or no lost wage claim or no site claim, that to please just
23 advise counsel so that they will then be -- be constituted as
24 substantial records.

25 THE COURT: Okay.

1 MS. FLEISHMAN: So we can move it on.

2 THE COURT: And do you have a sense of when you'll
3 be in position to go forward with the mediations based on --
4 based on the records you've received?

5 MS. FLEISHMAN: We're hopeful that we're going to
6 have -- that all the records will be to defense counsel for
7 the cases that are filed within the next two to three weeks.
8 So that -- that is on target with the Court's orders.

9 THE COURT: Okay.

10 MR. TANNER: And just to kind of come full circle,
11 we have mediators that we are trying to hold as long as we
12 can, blocks of time -- obviously they want to release them
13 when they can -- for the weeks of November 11, December 6th,
14 December 12th, and then into the first three weeks in
15 January. Given where we are on the records -- and Wendy and
16 Jim and we can discuss it in more detail, but given where we
17 are, I'm inclined that we may have to release that -- that
18 November 30 week. But if we can try and hold and see where
19 we are in a week, and maybe we can get them scheduled, some
20 of them scheduled even as second or third week of December
21 before we have the holidays, and then do the rest in January
22 or early February, something like that.

23 THE COURT: Okay. Where's our agenda? Let me see.
24 Why don't we discuss for the benefit of those in the room,
25 what we agreed on with respect to the confidentiality order.

1 MR. TANNER: Do you want me to address that,
2 Your Honor?

3 As I understand it, the issue was on whether the
4 documents that are produced subject to the confidentiality
5 order could be distributed to plaintiffs who have cases
6 outside of the MDL, whether it be state court or -- I guess
7 it would be state court, or those that are contemplating
8 cases. And I think the way this would be revised is that
9 those -- that anyone who gets a record, first of all, has to
10 have a case filed. And second, the plaintiffs and their
11 attorneys have to agree to the terms of this Court's
12 confidentiality order. They have to submit to the
13 jurisdiction of this Court with respect to enforcement of the
14 confidentiality and interpretation of the confidentiality
15 order. Again, they have to have an actual filed case. Then
16 they have to obtain a protective order in their jurisdiction
17 by their court that's acceptable to the defendants or -- or
18 the MDL version, and they can obtain the record after that
19 and we'll get a list of who gets those records.

20 I think I've reflected everything we've discussed.
21 Oh -- and subject to us communicating this issue with our
22 clients and raising issue --

23 THE COURT: That's right.

24 MR. TANNER: -- next few days if that -- if that is
25 an issue, but we do, because these are sensitive documents,

1 the company, we need to run this by our client.

2 MS. FLEISHMAN: That's right, Your Honor.

3 THE COURT: Okay. And just -- the long and short
4 of it is that you wanted to -- for those in state court who
5 are not formally part of the MDL, you -- those lawyers will
6 not be entitled to documents until such time as a acceptable
7 protective order is in place in the state court proceeding.
8 And I should note that that is consistent with some recent
9 case law that has -- that was provided to me informally in
10 chambers. And although we didn't have formal argument on it,
11 I was pleased to hear that there was an agreement because it
12 seemed to be the logical way to proceed.

13 Does anyone want to be heard on that issue? Okay.

14 Let's talk about -- we talked a little bit about
15 the mediation process, and that we -- it's more likely that
16 mediation will begin in December rather than November. I
17 understand that there is a counsel in the courtroom that
18 would like to be heard on the mediators?

19 MR. SMITH: I am, Judge.

20 THE COURT: State your name for the record, please.

21 MR. SMITH: Terence Smith, Davis Saperstein &
22 Salomon.

23 Judge, I have two cases filed that were originally
24 filed in Middlesex County and transferred to Federal Court.

25 THE COURT: Welcome to Federal Court.

1 MR. SMITH: Thank you. Can you hear me over there?

2 THE COURT: Yes, I can.

3 MR. SMITH: Okay.

4 THE COURT: Thank you.

5 MR. SMITH: The mediators proposed by defendants,
6 as I understand it, are from areas of the country outside New
7 Jersey. For purposes of my cases, I would propose that the
8 Court accept through some process a mediator who was
9 experienced with the law as it exists here in New Jersey and
10 is familiar with the basic realities of case value and issues
11 as they apply here in New Jersey rather than some -- some
12 other state. And I'm prepared to offer suggestions, if
13 that's what the Court would like.

14 THE COURT: Well, here's what I -- I -- this issue
15 was raised with me in chambers. And both the plaintiffs and
16 defendants are on board that they would certainly consider
17 discussing with you a New Jersey mediator. And they're open
18 to that, having the New Jersey cases -- your cases
19 specifically, mediated with a New Jersey mediator. And I
20 also offered the services of our court mediation program.
21 There are number of good retired state and federal judges
22 that would be excellent choices at a reduced rate.

23 So what I think would be a better choice in the
24 first instance is meet with Mr. Cecchi, Ms. Fleishman, and of
25 course, with Mr. Tanner and talk about names. If you're at

1 an impasse, you can always come back to me, and we'll -- I'll
2 give you my suggestions. But it is -- it is a completely
3 acceptable and appropriate idea. And I -- and I welcome you
4 to discuss it with counsel.

5 MR. SMITH: Okay. Thank you, Judge.

6 THE COURT: Thank you. Okay.

7 MR. TANNER: Your Honor, if I could just --

8 THE COURT: Sure.

9 MR. TANNER: -- one footnote on that, although I'm
10 happy to adhere to Mr. Smith's request, I'm fearful this
11 program could break down if every plaintiff's lawyer wants
12 his specific mediator --

13 THE COURT: I hear you and let me just -- and --
14 and here's why I offered that accommodation was in large
15 part -- in large measure because it's a New Jersey case. Or
16 certainly here for the MDL purposes.

17 But I can assure the plaintiffs' counsel that
18 liaison counsel's on top of it. They have done their
19 research. They have told me in chambers that they are
20 comfortable with the mediators selected. One a med- -- they
21 come from all different parts of the country. They're not
22 from Indianapolis. They are not employees of the defendants.
23 They are -- at least one is JAMS mediator in California.
24 There's another -- another mediator proposed from Florida and
25 one from North Carolina. So there is some geographic

1 | diversity to the selection.

2 | And more importantly, the potential mediators have
3 | been vetted by liaison counsel. And I have every confidence
4 | that they will -- they would not approve anyone who they did
5 | not believe could be fair. And that's really the standard
6 | for mediators is fairness and the ability to bring parties
7 | together. And those two criteria have been met.

8 | And remember, mediation, is a voluntary process.
9 | So if for whatever reason after the first wave and there's no
10 | settlements and the feedback that I receive from lawyers --
11 | and I welcome feedback -- is that these mediators were not
12 | very useful and they were counterproductive and it was a
13 | waste of my time, I will certainly take that into
14 | consideration in moving forward, and I will not hesitate to
15 | pull a mediator and put a different one in if they're not
16 | acceptable.

17 | So I say that as a word of -- of assurance before
18 | you begin the mediation process. I oversee the mediation
19 | program here in the District of New Jersey, and I'm always
20 | very interested in the feedback of all lawyers as to the
21 | skill of a mediator.

22 | So I -- I suggest that you approach and do your own
23 | research. If for whatever reason, your particular case, you
24 | don't believe that the mediator would -- could -- would be a
25 | fit for your client and it would be waste of time, et cetera,

1 et cetera, raise it with Mr. Cecchi, Ms. Fleishman,
2 Mr. Tanner, and we'll see if they can -- we could find a way
3 to keep everyone happy with the mediators. Okay?

4 So noted. Okay?

5 Let's talk about the master docket issues. I think
6 my law clerk reported on those before we began. And we're
7 trying to resolve those issues. And we should have a
8 resolution within the next couple of weeks to see if we can
9 follow the model used by Judge Martini in this District in
10 the In re Human Tissue cases. It's going to be one master
11 docket for ease of filing for all parties.

12 Okay. I think we also had a direct filing order.
13 Do we need any discussion on that? It's -- I think it's
14 labeled as Case Management Order Number 2.

15 MR. TANNER: Your Honor, it's been agreed to.

16 THE COURT: Okay. It's agreed to. Anyone need to
17 be heard on that? Because I'm prepared to sign it today?

18 Okay. That'll be filed and docketed today.

19 Okay. Finally, I see the -- and benefit order is
20 still under discussion? Anything need to be commented on on
21 that score? Okay.

22 MS. FLEISHMAN: No, Your Honor, we're going to both
23 finish circulating it among plaintiffs' counsel and then send
24 it to the defense as well for them to look at, even though
25 they don't have a dog in that fight. And then submit it to

1 the Court.

2 THE COURT: Okay. Last issue is when we should
3 meet again. Have you talked -- thought an appropriate time
4 for us to meet? Two months? Three months? January?

5 MS. FLEISHMAN: December, Your Honor, if it's -- if
6 it's possible, I -- we request that we come back in December.
7 If counsel from Indiana doesn't want to come in, I'm sure we
8 could do it by telephone conference, but I'd like to just
9 report back to the Court since we have tight deadlines.

10 THE COURT: Remind me what the deadlines are?

11 MS. FLEISHMAN: Well, we want to get all the
12 records to the defense in two weeks. They want to review
13 them, and then we want to set up these mediations to move
14 forward. So I'd like to report back where we are -- where we
15 are in that process.

16 THE COURT: Do it by phone?

17 MS. FLEISHMAN: By phone is great.

18 MR. TANNER: That's fine, Your Honor.

19 THE COURT: Newark -- Newark airport can be a
20 little dicey in December. So I'm happy to do it by phone.

21 MS. FLEISHMAN: So mid-December?

22 THE COURT: Okay. Let me just go on my calendar.
23 The week of the 12th? Actually a week of -- beginning
24 December -- Monday, December 13th?

25 MS. FLEISHMAN: Let's do it December 13.

1 THE COURT: Does that date work? Is that too soon?

2 It's fine with me.

3 DEFENSE COUNSEL: That should be fine, Your Honor.

4 THE COURT: December 13th at 2 o'clock? Could we
5 have a call -- can someone arrange for a call-in number, and
6 we'll take turns? Plaintiff -- for the first time?

7 MS. FLEISHMAN: I actually arranged it for today,
8 so --

9 THE COURT: Excellent.

10 MS. FLEISHMAN: -- the defense turn.

11 DEFENSE COUNSEL: We'd be happy to do that.

12 THE COURT: Okay. So why don't we take turns? You
13 want Ms. Fleishman will do it the first time and then we can
14 do it -- we'll take turns and issue -- your call.

15 DEFENSE COUNSEL: So this one we'll do.

16 THE COURT: Yes. We'll do the next -- the
17 December 13th at 2 p.m. Okay?

18 DEFENSE COUNSEL: December 13, 2 o'clock.

19 THE COURT: If you could be -- that's a Monday, so
20 if you could be kind enough by Friday to send me another
21 joint status letter with an agenda, that would be greatly
22 appreciated. Or if there's any other problems I should know
23 about?

24 Anything else? Okay. Thanks for coming in. Have
25 a great day. I will see you in December.

1 MR. TANNER: Judge, what I understand is that will
2 be totally by telephone.

3 THE COURT: Totally by telephone.

4 MR. TANNER: Everybody will be by telephone.

5 THE COURT: Everybody will be by phone. Thank you.

6 UNIDENTIFIED SPEAKERS: Thank you, Judge.

7 (Conclusion of proceedings at 3:30 p.m.)

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Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 19 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

s/ *Sara L. Kern*

November 5, 2010

Signature of Approved Transcriber

Date

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