

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

IN RE: ZIMMER NEXGEN KNEE IMPLANT PRODUCTS LIABILITY LITIGATION,	}	Docket No. 11 C 5468
	}	Chicago, Illinois October 7, 2011 9:10 a.m.

TRANSCRIPT OF PROCEEDINGS - Motion  
BEFORE THE HONORABLE REBECCA R. PALLMEYER

APPEARANCES:

For the Plaintiffs:	JOHNSON BECKER PLLC BY: MR. TIMOTHY BECKER 33 South 6th Street, Suite 4530 Minneapolis, Minnesota 55402
	FOOTE, MEYERS, MIELKE & FLOWERS, LLC BY: MR. PETER J. FLOWERS 3 North Second Street, Suite 300 St. Charles, Illinois 60174
	POGUST, BRASLOW, MILLROOD BY: MR. TOBIAS L. MILLROOD 161 Washington Street Conshohocken, Pennsylvania 19428
	ANAPOL SCHWARTZ MR. JAMES R. RONCA 1710 Spruce Street Philadelphia, Pennsylvania 19103
For the Defendants:	BAKER & DANIELS, LLP BY: MS. ANDREA R. PIERSON MR. JOSEPH H. YEAGER, JR. 300 North Meridian Street, Suite 2700 Indianapolis, Indiana 46204
	BAKER & DANIELS, LLP BY: MR. KURT E. STITCHER 311 South Wacker Drive, Suite 4400 Chicago, Illinois 60606

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Court Reporter:

FRANCES WARD, CSR, RPR, FCRR  
Official Court Reporter  
219 S. Dearborn Street, Suite 2118  
Chicago, Illinois 60604  
(312) 435-5561  
frances\_ward@ilnd.uscourts.gov

1 THE CLERK: 11 C 5468, Zimmer Nexgen Knee Implant  
2 Products Liability on a motion hearing.

3 MR. RONCA: Good morning, your Honor.

4 THE COURT: Good morning.

5 Why don't I get your appearances for the record.

6 MR. RONCA: Sure. I am Jim Ronca. I am one of the  
7 co-lead counsels of the plaintiffs' steering committee.

8 THE COURT: Right.

9 MR. MILLROOD: Tobi Millrood, co-lead counsel for  
10 the plaintiffs' steering committee.

11 MR. BECKER: Good morning, your Honor.

12 Tim Becker, co-lead counsel, plaintiffs' steering  
13 committee.

14 MR. FLOWERS: Good morning, your Honor.

15 Pete Flowers, liaison counsel.

16 THE CLERK: Hello? Is anyone there on the phone?

17 MR. SUCIU: Hello. This is Nick Suci.

18 THE COURT: I'm sorry. Say it again.

19 THE CLERK: Hello? Is someone on the phone?

20 THE COURT: We will assume -- it's a public  
21 courtroom, so whoever it is, is welcome to listen.

22 MS. PIERSON: Good morning, your Honor.

23 I am Andrea Pierson for the defendants.

24 THE COURT: Good morning.

25 MR. YEAGER: Good morning, your Honor.

1 Jay Yeager for the defendants.

2 MR. STITCHER: Good morning, your Honor.

3 Kurt Stitcher for the defendants, also.

4 THE COURT: Okay. Good morning.

5 We are here for a status and also motions that had  
6 been filed.

7 How would you like to proceed?

8 MR. RONCA: I think there are two motions that are  
9 joined for the Court's consideration today. One is the  
10 motion relating to the first case management order; and the  
11 second is a motion relating to a protective order for  
12 documents that the plaintiffs may require from the  
13 defendants.

14 We think we should proceed through those two  
15 subjects, with the Court's permission.

16 THE COURT: That's fine.

17 MR. RONCA: And really, when you look at the two  
18 motions, the most meaty issues, the most important issues  
19 relate to some common privilege or work product privilege  
20 between the members of the plaintiffs' steering committee and  
21 the protective order, whether certain devices will have -- be  
22 separated from one another so that only certain people on the  
23 plaintiffs' steering committee can look at one of these  
24 subcategories of the device and other plaintiffs' lawyers can  
25 only look at other subcategories of the device.

1           Our position, really, your Honor, is fourfold. And  
2 my colleagues will present it in detail.

3           But first, we believe, if you look at the  
4 documents, including the design rationale that the defendants  
5 attached to their motion, the common issues between all of  
6 these subcategories of the NexGen Flex replacement knee --

7           THE COURT: I am sorry. What?

8           THE CLERK: Hello. Are you on the line?

9           It asked me if I wanted to connect. I don't know.

10          THE COURT: It says "connected."

11          THE CLERK: Hello. Is someone on the line?

12          I don't know.

13          THE COURT: All right.

14          I am sorry to interrupt, Mr. Ronca.

15          MR. RONCA: That's all right.

16          First, the common issues that relate to these  
17 subcategories of this product --

18          MR. SUCIU: Hello.

19          THE CLERK: Hello.

20          MR. SUCIU: Come on in. I'm on hold.

21          THE COURT: No, you are not.

22          THE CLERK: Hello. Are you on the line?

23          THE COURT: We can hear you.

24          (Brief pause.)

25          THE COURT: You know what? If this happens

1 again -- let's do this. Why don't I ask you to go call him  
2 and tell him it seems we can hear him but he can't hear us,  
3 and this isn't going to work, for him to keep calling us.

4 Go ahead, Mr. Ronca.

5 MR. RONCA: Okay. I am going to start that one yet  
6 again.

7 THE COURT: Right.

8 MR. RONCA: Whoever is on the phone there may  
9 interrupt me again, but we will see.

10 THE CLERK: Here it is again.

11 THE COURT: All right. Hold on.

12 THE CLERK: Hello. Are you on the line? Hello.

13 THE COURT: Try clicking "connect" and see what  
14 happens.

15 THE CLERK: Hello. Are you on the line?

16 THE COURT: Okay. Why don't you go call him and  
17 tell him there is some kind of a technical problem and it's  
18 not working, and every time he calls and interrupts us, we  
19 can't hear him.

20 THE CLERK: Okay.

21 THE COURT: All right. Mr. Ronca, this will be --  
22 the third time is the charm.

23 (Laughter.)

24 MR. RONCA: We think the two main issues are all  
25 wound up in whether or not these are actually separate

1 products and need some kind of separate protection.

2 And we don't think so because the common issues  
3 among the products, even if you go by the design rationale  
4 the defendants attach as Exhibit A to their motion, show that  
5 all of the elements of these products which relate to this  
6 case are basically the same. And actually, the differences  
7 are irrelevant to our considerations for this litigation.

8 Secondly, there is no legal precedent for the type  
9 of order that the defendants are claiming.

10 Third, there is no practical precedent for the type  
11 of order that the defendants want in any mass tort  
12 multidistrict litigation. And I think we have a number of  
13 examples.

14 And finally, the defendants' position assumes that  
15 the lawyers on the plaintiffs' steering committee will  
16 somehow risk their licenses and their livelihood and the  
17 wrath of this Court by revealing some kind of trade secret  
18 documents to the outside world, when it would not benefit  
19 them in any way and when they have no evidence that any of  
20 these lawyers have ever done anything like this nor has  
21 anything like this ever been done in any mass tort MDL. And  
22 we could find no evidence of this ever happening.

23 So we don't think, from even a practical  
24 perspective, there is any danger related to allowing the  
25 plaintiffs' steering committee to operate as such.

1 But the risks on our side are immense. How would  
2 we even run a meeting if we can't talk amongst ourselves  
3 about these various subcategories of devices? It would be  
4 impossible for us to run efficiently.

5 So Mr. Millrood will talk about the elements of the  
6 case management order, one issue; and Mr. Becker will talk  
7 about the elements relating to the protective order, with the  
8 Court's permission.

9 THE COURT: That's fine.

10 MR. MILLROOD: Good morning, your Honor.

11 Tobi Millrood for the plaintiffs.

12 Your Honor, with your permission, I have a  
13 PowerPoint to walk through the disagreements that exist in  
14 CMO1. It extrapolates a little bit from our brief and lays  
15 out our positions a little bit more fully, if I may?

16 THE COURT: Sure.

17 MR. MILLROOD: Your Honor, I also -- I don't know  
18 how long we will go this morning, but I want to apologize in  
19 advance. Around 11:00 a.m. I must leave to get on a plane to  
20 get back for the Jewish holiday. And if we are still going  
21 in court, I apologize. No offense to the Court.

22 THE COURT: I certainly would hope that we are done  
23 before that.

24 MR. MILLROOD: Me, too.

25 THE COURT: That's fine.



1 MR. MILLROOD: First we got to get this working.  
2 (Brief pause.)

3 THE COURT: The PowerPoint now is displayed.

4 MR. MILLROOD: Thank you, your Honor.

5 So your Honor has seen our briefs, and I think we  
6 can limit the discussion today on the remaining  
7 disagreements.

8 I want to point out at the outset that it's highly  
9 unusual, actually, in a CMO of this type that there really  
10 are any disagreements. I have been involved in a number of  
11 MDLs, and these types of matters that are within CMO1 are  
12 routine, agreed upon, and get out the door immediately at the  
13 outset of an MDL.

14 Nevertheless, there are a number of positions that  
15 Zimmer has taken that are unusual; that go against the  
16 history of MDL litigation in mass torts; that go against the  
17 *Manual for Complex Litigation, Fourth*; and go against their  
18 own practice in prior MDLs.

19 And although this is not meant to be terribly  
20 adversarial, this CMO1, because it's relatively routine, we  
21 do have to point out that we are concerned at the outset of  
22 some of the positions that they are taking to frustrate the  
23 delay and the efficiency of this Court.

24 So there are complete disagreements that relate to  
25 the entries of appearance, direct filing, and the work

1 product privilege.

2 And as it relates to time and expense reports, some  
3 limited disagreement on whether they should be public or not,  
4 those filings of time and expense reports; how often we  
5 conduct hearings with this Court; and what are the parties'  
6 meet-and-confer obligations when it comes to motion practice?

7 I think it's very important at the outset that we  
8 be guided by the experience, not just of MDLs but of the  
9 *Manual for Complex Litigation, Fourth*. After all, it was  
10 Zimmer that suggested, and we agreed, that counsel are  
11 directed to familiarize themselves with the *Manual for*  
12 *Complex Litigation* and this order. That's agreed upon in  
13 Section 1.3 of CM01.

14 And indeed, although the *Manual for Complex*  
15 *Litigation, Fourth* is not altogether authoritative, it is  
16 instructive; it contains a panel of judges and lawyers with  
17 tremendous experience in the history of, obviously, over  
18 2000 MDLs that have put together recommendations to follow  
19 for the efficiency of an MDL court.

20 Our CM01 provisions that we suggest should be  
21 entered by this Court follow lockstep not only with prior MDL  
22 experience but also the *Manual for Complex Litigation,*  
23 *Fourth*.

24 So as to entries of appearance, it is plaintiffs'  
25 position that it would create an undue burden for the Court

1 and the parties to enter an additional appearance after the  
2 appearance that they have entered in their original  
3 complaint.

4 When a complaint makes its way into this court, the  
5 entire complaint with the parties and their counsel make its  
6 way to this court. The Court is fully aware of who the  
7 counsel is.

8 To create, in Zimmer's position, a new entry  
9 required of all counsel would theoretically, if we have a  
10 thousand to 2,000 cases as predicted in this MDL, require  
11 thousands of docket entries for an entry of appearance on  
12 every single one of these complaints once they make their way  
13 into the MDL.

14 But more importantly, the language that plaintiffs  
15 suggest, that counsel need not enter an additional  
16 appearance, is the language that's been followed by dozens of  
17 MDLs, including many of the recent ones.

18 Notice the language we said -- suggested, "Counsel  
19 who appeared in a transferor court need not enter an  
20 additional appearance before this court," is exactly the  
21 language that is followed in many of the recent MDL  
22 litigations, including some of the most recent ones like  
23 *DePuy ASR* and *DePuy Pinnacle* which preceded this MDL by only  
24 months.

25 That is the routine, and for good reason: to not

1 create unnecessary burden on this Court, the clerk, or the  
2 parties.

3 Another practice that is routine in MDL practice is  
4 direct filing. And when we say "direct filing," the  
5 plaintiff suggests that when a complaint is filed it can be  
6 filed directly before your Honor in the Northern District of  
7 Illinois and it does not need to go through the roundabout  
8 process associated with the judicial panel multidistrict  
9 litigation. We now know from the panel the kinds of cases  
10 that belong here.

11 If a case does not belong here, your Honor has the  
12 discretion and every right to send it back.

13 Over time no one will be more familiar with the  
14 substance of this litigation than your Honor. If a case  
15 comes before your Honor and it does not fit the construct  
16 that's been created by the JPML, you can send it back.  
17 Zimmer has no prejudice whatsoever in that regard. But  
18 instead, Zimmer wants to disallow direct filing and require a  
19 whole series that is intended to delay cases making their way  
20 into this court. It would require an initial filing in a  
21 transferor court, a tagalong notice to be notified to the  
22 judicial panel on multidistrict litigation, conditional  
23 transfer order briefing, potentially a JPML decision. There  
24 is no reason to clog the courts and waste economy like that.

25 And, in fact, the very same language that

1 plaintiffs put in their suggested CM01 is the rule rather  
2 than the exception in all of the most recent product mass  
3 tort MDLs.

4 In order to eliminate delays associated with the  
5 transfer of cases in or removed to other federal district  
6 courts to this court and to promote judicial efficiency, any  
7 plaintiff whose case would be subject to transfer to --  
8 insert the name of whatever MDL -- may file his or her case  
9 directly in the MDL proceedings.

10 That's not just our language for the Zimmer NexGen  
11 MDL; that's the language followed in many, many others.

12 What I found interesting when we concluded this  
13 briefing is that the number of orders that we put before your  
14 Honor filled up almost two binders of experience of orders  
15 from other MDLs. Zimmer could point to no MDL. I didn't see  
16 any citation to MDLs that rejected this language out of some  
17 reason for inefficiency. The fact is, this is what's  
18 recommended. This is what's followed. And this is the rule  
19 rather than the exception.

20 This brings me to, as Mr. Ronca pointed out, kind  
21 of the meat of the discussion of today for both the CM01 and  
22 the protective order, and that is the importance that allied  
23 communication amongst the plaintiffs' counsel be privileged.

24 Here is not my language, not plaintiffs' counsels'  
25 argument. This is what the *Manual for Complex Litigation*

1 said.

2 "Communications among the various allied counsel  
3 and their respective clients should not be treated as waiving  
4 work product protection or the attorney-client privilege, and  
5 a specific court order on this point may be helpful."

6 That is precisely the court order that we asked.

7 And more to the point, the manual even goes further  
8 and has a suggested form language and has a proposed sample  
9 order: "Privilege is preserved. No communication among  
10 plaintiffs' counsel or among defendants' counsel shall be  
11 taken as a waiver of any privilege or protection to which  
12 they would otherwise be entitled."

13 Zimmer asked us to file the *Manual for Complex*  
14 *Litigation*. We have done precisely that. This is the  
15 language recommended. And there is a reason.

16 The common-interest privilege is sacrosanct. It is  
17 critical that in order for us to proceed efficiently and  
18 strategically in this litigation, that the plaintiff's  
19 counsel be able to talk amongst another.

20 We know of no other way. We have never been  
21 shackled by any MDL to ever say that we can't talk with one  
22 another.

23 And to be sure, we have all been involved in MDLs  
24 that have had different products, different dosage regimens,  
25 different injuries that could easily have been pointed out by

1 the defendants, and they did. There are differences between  
2 these plaintiffs. There is differences between the dosages.  
3 But no defendant nor any court has ever said, because of  
4 those differences, somehow you can't talk amongst one  
5 another.

6 It's protected by the law; it's protected by the  
7 manual; and it's protected by the experience in these  
8 litigations.

9 It's necessary, crucial, and permitted in every MDL  
10 that I know of. Yet the defendants want to disallow it and  
11 establish some type of artificial wall where somehow we would  
12 have to close our mouths if we have different products for  
13 which we represent plaintiffs.

14 But look at what the language is in the context of  
15 all recent MDLs. And I point out most importantly the *Zimmer*  
16 *Durom Hip Cup* litigation, which is in our exhibit to our  
17 briefing. "The communication of information among and  
18 between plaintiffs' counsel and among and between defendants'  
19 counsel shall not be deemed a waiver of the attorney-client  
20 privilege or the protection afforded attorney's work  
21 product." Exactly the language that we proposed, exactly the  
22 language from the manual, exactly the language that has  
23 guided Zimmer in other litigations before.

24 Why now? Why now is Zimmer asking this Court to go  
25 somewhere that an MDL court has not gone before?

1           There is no -- all of these cases involve different  
2 injuries and different products.

3           I was on the PSC in the *Guidant* litigation. There  
4 were multiple products at issue in the *Guidant* heart device  
5 litigation. There were multiple dosages involved in the  
6 *Ortho Evra* litigation. There are multiple products, more  
7 than a dozen products in the *Kugel Mesh* litigation.

8           So the same argument could be made, but the issue  
9 and the privilege is sacrosanct.

10           Plaintiffs' counsel must be afforded to have  
11 communications with each other.

12           In order to understand why that's the case, your  
13 Honor, we thought that this would be a good time to give a  
14 little bit of background as to what it is that we want to  
15 talk with each other about and why this privilege is so  
16 important to us, to give you some brief background so when we  
17 keep talking in here about this Flex device versus that Flex  
18 device, you will understand the context of what we are  
19 describing. If I may?

20           Your Honor is probably very familiar with the knee  
21 anatomy, but this is going to be the cornerstone of a lot of  
22 the science in this litigation.

23           The knee is made up of the joint that connects the  
24 femur bone, or the thigh bone, and the tibia bone connected  
25 by the ligament -- and there are a series of ligaments:



1 anterior, medial, posterior -- and the patella, the kneecap,  
2 that protects in the front.

3 In the context of a knee replacement, there are  
4 artificial products that come in to replace the natural  
5 anatomy.

6 So in the context of the femur, the entire femur  
7 bone is not being removed. The degenerative portion or the  
8 arthritic portion is being shaved off, and a cap on the  
9 bottom of the femur is placed.

10 When we talk about the femoral component, we are  
11 talking about that rounded cap on the bottom there, on the  
12 top on the right side.

13 In the context of the tibial bone, in the  
14 replacement context, the shinbone has a tibial insert that  
15 goes in and is stemmed down to provide stability into that  
16 shinbone. And then on the top, there is a plastic surface  
17 that serves the role of cartilage. And then patellar  
18 replacement, a kneecap, is put in front.

19 For almost all intents and purposes for this  
20 litigation, the focus is going to be on the femoral  
21 components and the tibial components.

22 When a knee flexes, we call that flexion. That's  
23 our ability to bend at that joint. The standard bending for  
24 almost any human being is zero to 120 degrees. When we walk  
25 up the stairs, we bend our knee to 90 degrees; standing to

1 sitting is from about 90 to 110 degrees.

2 You can see in this depiction that 155 degrees,  
3 which is the flexion that Zimmer boasts its Flex knees, one  
4 of the subjects of this MDL, the CR-Flex and the LPS-Flex,  
5 you can see 155 degrees is a crouching position that's rarely  
6 necessary or used.

7 That will be a subject of later discussion.

8 But this concept of flexion and how much flexion is  
9 required is going to be a major issue. So when we talk about  
10 the Flex knees, we are talking about knees that Zimmer  
11 claimed could reach 155 degrees flexion.

12 THE COURT: One moment.

13 (Brief pause.)

14 THE COURT: Okay.

15 MR. MILLROOD: So as I mentioned before, we talk  
16 about a couple of components here. The femoral component,  
17 you can see in this depiction some bone has been shaved off  
18 the original femur bone, and now a steel implant, that  
19 femoral replacement, that femoral component is going to be  
20 placed onto that bone.

21 Sometimes it will be adhered with cement, and  
22 sometimes it will be adhered without cement.

23 Most of the time we are going to be talking about  
24 two particular Flex knees, the CR-Flex on the left and the  
25 LPS-Flex on the right. These are knees that Zimmer boasted

1 could obtain 155-degree flexion.

2 What does "CR" stand for?

3 The CR deals with the anatomy of the knee. When a  
4 surgeon goes in and sees that the quality of the ligament is  
5 still such that you can keep that posterior cruciate  
6 ligament, you retain the original ligament. That's why it's  
7 called a cruciate retaining. You are keeping the cruciate  
8 ligament. Okay?

9 Whereas, in the context of the LPS, now you want to  
10 stabilize the knee because the quality of the ligament is no  
11 longer such that it can be used.

12 That's why LPS stands for "legacy posterior  
13 stabilized."

14 So the CR, cruciate retaining, the posterior  
15 ligament is still there. LPS, you are taking out the  
16 ligament and now using the device to replace the stability  
17 through the LPS.

18 Zimmer, prior to the Flex devices, had a  
19 CR-standard and an LPS-standard that were intended to go to  
20 120 degrees. They improved upon that with these Flex knees,  
21 with CR-Flex and LPS-Flex. That was their goal.

22 Zimmer also believes that there is an anatomical  
23 difference between men and women such that there can be a  
24 Flex knee that's made gender specifically.

25 So you are going to also hear in this litigation

1 about the Gender Solutions Flex system. It's part of the  
2 Zimmer NexGen line, came from the same design rationale, came  
3 from the same documents submitted to the FDA.

4 And one of the reasons I am pointing this out is,  
5 in the context of the Gender Solutions knee, either the  
6 CR-Flex or the LPS-Flex can be used. When a Gender Solutions  
7 Flex knee is used, it's still either a CR-Flex or an  
8 LPS-Flex, just gender-specific.

9 The difference essentially of the actual product  
10 itself, Flex versus non-Flex, is this distance that's created  
11 that's actually widened out for this condyle. The condyle is  
12 extended a bit to allow for more flexion. Once the condyle  
13 is extended, it allows for more rollback, theoretically, to  
14 155 degrees.

15 So you can see depicted on the right what would be  
16 the standard, and then in red, what would be the extended  
17 portion of the condyle so that flexion could occur.

18 Now, when I pointed out the anatomy in the  
19 beginning, I mentioned the tibia component, the shinbone  
20 portion of the knee joint.

21 At issue in this litigation, as part of the Zimmer  
22 NexGen system, is also an option for the MIS tibial tray.

23 MIS is a traditional medical term of art that we  
24 hear all the time, "minimally invasive surgery." Lots of  
25 people go under the knife for minimally invasive surgery.

1 Zimmer actually went to the trouble of trademarking  
2 the term MIS for "minimally invasive solutions," as a  
3 marketing tag for Zimmer products, that they had a series of  
4 products that could be done in a minimally invasive way.  
5 They took a standard medical term of art and turned it into a  
6 marketing term so they could persuade surgeons that minimally  
7 invasive surgery could be used with their devices.

8 The MIS Tibia was recalled. Zimmer made a recall  
9 of the MIS Tibia.

10 It used to be that Zimmer claimed that MIS  
11 procedures -- on the left side -- that MIS procedures are  
12 less invasive -- that was the goal -- smaller incisions,  
13 reduced blood loss, less pain, and shorter hospital stays.

14 However, in April of 2010, Zimmer started notifying  
15 physicians that that was really no longer the case as it  
16 related to the MIS Tibia. In fact, they said 180 degree  
17 opposite.

18 They now said -- these are Zimmer's words, not  
19 mine -- "MIS procedures are inherently challenging and can  
20 involve reduced visibility, which may lead to difficulty with  
21 achieving proper implant alignment and cement fixation."

22 Within months, they had recalled the MIS Tibia.

23 Here is really the basic claim that the plaintiffs  
24 say is the problem. When you saw some of the tibial  
25 components that were depicted along with the LPS-Flex and the

1 CR-Flex, you noticed that there was a triangle that came down  
2 from the tibia. That triangle provides a stem that provides  
3 a good base into the shin. You can't have that triangle and  
4 get through a small incision.

5 So in order to get through that small incision, in  
6 order to maintain the MIS concept, you have to have a very  
7 small keel, or stem. That small keel does not provide the  
8 necessary stability. Loosening occurred. Ultimately the  
9 products -- many of the products failed, and Zimmer issued a  
10 recall.

11 So you will hear much about the MIS Tibia. There  
12 are already many of those cases before your Honor.

13 So Zimmer makes much to-do that we are not really  
14 allied, that we don't have identical interests.

15 What are we allied about?

16 Well, for one, we are allied about this litigation.  
17 We believe that the plaintiffs received defectively designed  
18 Zimmer knees. And together, we believe that we want to  
19 recover against Zimmer. No one has a difference among us as  
20 to that point.

21 But if there is any evidence as to why we are  
22 allied, you need to look no further than Zimmer's own Flex  
23 knee design rationale, which they attached as Exhibit A to  
24 their protective order.

25 Notice that there is no difference of description

1 between these knees when Zimmer gives its own design  
2 rationale, the rationale for how these products were built  
3 and are used.

4 The CR-Flex and LPS-Flex bearing knees represent  
5 enhancements of the highly successful NexGen CR and NexGen  
6 Legacy LPS knees. Both CR-Flex and LPS-Flex knees are  
7 designed to safely accommodate flexion up to 155 degrees.

8 The CR-Flex and LPS-Flex knees have been designed  
9 for use in all patients. There is no distinction here that's  
10 made.

11 But they go further.

12 When they actually explain the implant design in  
13 their design rationale on Page 6, they actually describe what  
14 are the common issues between the CR-Flex and the LPS-Flex,  
15 exactly the common issue that we are targeting in this  
16 litigation: flexion.

17 I have pulled out to the right, from this document,  
18 "Common design issues," according to Zimmer, "include."  
19 These common issues relate to contact area during deep  
20 flexion, like flexion up to 155 degrees; the stresses on the  
21 extensor mechanism while in deep flexion; sizing to  
22 facilitate flexion and extension gaps.

23 These are common design issues to the CR-Flex and  
24 the LPS-Flex.

25 Zimmer goes further in its design rationale to

1 describe the key aspects of the NexGen Flex fixed-bearing  
2 knees.

3 The key features of both of these knees are  
4 extended posterior femoral condyles -- which I had for you in  
5 a slide a couple before -- to increase contact area in deep  
6 flexion.

7 These are the key aspects of both of these.

8 They go on to say, "The CR-Flex and the LPS-Flex  
9 knees are appropriate for any patient who would otherwise  
10 satisfy the indications for a cruciate retaining or posterior  
11 stabilized implant design." No distinction there in Zimmer's  
12 own design rationale.

13 But this is probably the clincher, when they claim  
14 it's interchangeable, the NexGen and -- the NexGen, CR-Flex,  
15 and LPS-Flex. "Interchangeability among the components  
16 allows the surgeon to switch from the cruciate retaining  
17 design to the posterior stabilized design intraoperatively."

18 Here is the absurdity of Zimmer's suggestion.

19 Under Zimmer's suggestion, a plaintiff lawyer who  
20 represents a plaintiff with only an LPS-Flex device -- has no  
21 other clients, doesn't have a CR-Flex, doesn't have an MIS  
22 Tibia -- could not share information and could not discuss  
23 information with that other lawyer who represents the  
24 CR-Flex.

25 So we move forward in this litigation and we go



1 into the deposition of a witness that's involved in that very  
2 design rationale. We want to talk to the people who put  
3 together that design rationale and go further among some of  
4 those pages, that we believe that these designs were  
5 relatively identical.

6 Under Zimmer's rationale, the way we would have to  
7 do it is, a plaintiff lawyer would come in first and examine  
8 on the LPS-Flex. However, because that plaintiff lawyer only  
9 had an LPS-Flex case, he would then have to leave the room.  
10 And then for the questioning for CR-Flex, under their theory,  
11 that lawyer would have to leave the room while questioning  
12 comes on CR-Flex, even if this witness was involved in both  
13 of those.

14 That lawyer, if he only had CR-Flex clients, would  
15 then have to leave the room while the Gender Solutions lawyer  
16 then comes in to ask the next series of questions. And that  
17 lawyer would have to leave the room while the plaintiff's  
18 lawyer examining on the MIS Tibia asks questions.

19 In the meantime, none of those lawyers getting  
20 ready for this witness would be able to talk amongst one  
21 another, would be able to share documents, even if those  
22 documents spoke to the products, like the design rationale  
23 talks about both the CR-Flex and the LPS-Flex.

24 So what is unique about this?

25 It's Zimmer's request. There is no case law that

1 supports them.

2 And, your Honor, I invite -- I don't know if your  
3 Honor had a chance. Zimmer cited one case from this district  
4 court. And I am glad they did because it's instructive. I  
5 am curious why they did because it does not support their  
6 position. It is the *Pampered Chef v. Alexanian*. It was an  
7 opinion issued by Magistrate Judge Cole in September of 2010  
8 at 737 F.Supp.2d 958.

9 In the *Pampered Chef* case, the Pampered Chef is a  
10 local business here that has catering, and they had a number  
11 of sales representatives that worked for them.

12 Several of those sales representatives left and  
13 started up a new company. They had an original agreement  
14 with the Pampered Chef that included a noncompete. So the  
15 Pampered Chef sued these former sales representatives.

16 The Pampered Chef went to go depose these  
17 individuals, including a nonparty but a former sales  
18 representative that was not named as a defendant.

19 When they went to depose that woman, she engaged  
20 her own lawyer. And when they got ready for that deposition,  
21 she and her lawyer met with the named defendants' lawyer.  
22 They had a conversation.

23 During the deposition, the Pampered Chef said,  
24 could you tell us what happened during that conversation?

25 At that point the lawyer for the plaintiff invoked

1 the common interest privilege. The Pampered Chef moved  
2 forward after the deposition and said, you have got -- there  
3 is no common-interest privilege here. They are going to have  
4 to answer the questions.

5 Judge Cole addressed this issue in a very  
6 well-written opinion that addresses the history of not just  
7 attorney-client privilege but the common-interest privilege.  
8 And in maintaining that the privilege exists, Judge Cole  
9 wrote that no identity of interest is required, citing to  
10 Seventh Circuit law and other law from other circuits.

11 In fact, the common-interest rule has been extended  
12 in a wide range of circumstances, frequently those involving  
13 civil codefendants, companies individually summoned before  
14 grand juries, potential coparties to prospective litigation.  
15 You don't even have to be in litigation yet. Plaintiffs  
16 filing separate actions in different states.

17 Zimmer makes much of the fact that while it's  
18 possible that we could be adverse, maybe somehow the lawyer  
19 representing the CR-Flex client won't want the LPS-Flex  
20 client to win. Maybe, therefore, the positions are adverse.  
21 That very same issue was raised in the *Pampered Chef*. The  
22 plaintiff, which would be Zimmer in this case raising the  
23 same point -- the plaintiff contends that the parties to the  
24 agreement might one day become adversaries. And so they  
25 might.

1           But as Judge Cardozo wrote famously in another  
2 context, such a calculus of possibilities is beyond the  
3 science of the chancery.

4           Of course there might be a future adversarial  
5 nature. And when that occurs, the common-interest privilege  
6 provides that the common-interest privilege no longer lasts  
7 once you actually are adversaries. But the mere potential  
8 that you would be adversaries is not a reason to extend the  
9 doctrine.

10           This district court follows the common-interest  
11 privilege. This circuit follows the common-interest  
12 privilege.

13           And if your Honor would like a copy of the *Pampered*  
14 *Chef* opinion, I have it here.

15           THE COURT: I am familiar with it.

16           Did you want to spend a moment on the limited  
17 disagreement areas --

18           MR. MILLROOD: I do.

19           THE COURT: -- as well?

20           Why don't we take a short recess here, though,  
21 because I have a criminal matter that -- Mr. Bachu, you are  
22 ready?

23           MR. BACHU: Yes, Judge.

24           THE COURT: We will take a short recess on your  
25 case. And if you want to get up and stretch, you are welcome

1 to do that.

2 MR. YEAGER: Should we clear away our things?

3 THE COURT: No, that's not necessary. I don't  
4 think it will be a long status.

5 (A recess was taken at 9:48 a.m. to 9:52 a.m.)F/j

6 MR. MILLROOD: May I proceed, your Honor?

7 THE COURT: Sure.

8 MR. MILLROOD: So on the final few limited areas of  
9 disagreement, first, as to Section 7 on our --

10 THE COURT: Compensation?

11 MR. MILLROOD: Yeah, our general agreement there,  
12 essentially the plaintiffs believe it's very, very important  
13 that when we file our time and expense, that our work product  
14 not be revealed. And that's why the manual calls for, and  
15 our position is, that either -- the documentation of time and  
16 expense is either filed with the lead counsel, maintained for  
17 the Court's *in camera* inspection, or filed under seal.

18 Zimmer's position is that we should publicly file  
19 all of our time and expense reports, although they exempt  
20 themselves from that requirement, and they essentially are  
21 asking us to reveal our strategies.

22 The requirement in the manual is that when we  
23 document our time and expense, it has to be sufficient so  
24 that we can be compensated. It has to be sufficiently  
25 detailed to lay out exactly what we were doing. Who were we

1 with? What was it about?

2 When you do that and you file them publicly, it  
3 reveals strategy to Zimmer. We shouldn't have to do that.

4 And importantly, if you look at the manual, the  
5 manual contemplates the very same suggestion that we take.

6 This is their form order for filing of time and  
7 expense. It's either with lead counsel or under seal with  
8 the clerk. That's what we recommend.

9 In terms of regularity of hearings, it's a small  
10 point but still an important one, that we believe that it's  
11 important to keep this litigation on track by meeting monthly  
12 with your Honor.

13 There will be many issues that will come up,  
14 especially in the first year of the litigation. It's  
15 standard in MDL practice. It helps to regulate our briefing  
16 of these issues. It helps to regulate where we are going,  
17 and it keeps our MDL on pace.

18 Zimmer's position is just unspecified, some type of  
19 periodic one. We all agree we need to meet with the Court.  
20 Our only suggestion is, let's at least have it as a monthly  
21 issue. And if the Court says we don't need to meet this  
22 month, or the parties say that, that's fine.

23 Importantly, the *Manual for Complex Litigation*  
24 agrees with the plaintiffs' position, is that it will be a  
25 scheduled time. "The Court will convene a status conference

1 in this litigation every" -- whatever that regular time is.

2 That's the recommended practice in the manual under  
3 "Status Conferences" in their form order in Section 40.21.

4 Finally, on the motions and the meet-and-confer  
5 obligation. Plaintiffs find it to be very useful to have  
6 meet-and-confer to reduce the disputes between the parties  
7 and reduce the amount of time that the Court has to take up  
8 these issues.

9 And it should not just be limited to discovery  
10 motions. All of us have been involved in cases where *Daubert*  
11 issues have been limited, where motion for summary judgment  
12 issues have been limited. We have been able to strike  
13 claims, agree upon claims, take down certain positions that  
14 an expert will take, limit the testimony of an expert through  
15 meet-and-confer.

16 Zimmer has explicitly told us they don't want to do  
17 that. They don't want to have to reveal their strategy of  
18 what kind of motion they want to file. They essentially want  
19 to surprise us with the motion they want to file, and  
20 therefore limit it only to discovery motions. That's their  
21 position.

22 But it's not what's recommended by the *Manual for*  
23 *Complex Litigation, Fourth*.

24 Motions for meet and confer. "Counsel are directed  
25 to meet and confer before filing a motion in any motion

1 filed." That's the language that's suggested to avoid  
2 unnecessary litigation concerning motions.

3 The positions that we take in CM01 are necessary  
4 for the plaintiffs' lawyer to properly strategize this case,  
5 and necessary for this Court to avoid delay and conserve  
6 economy.

7 Thank you, your Honor.

8 THE COURT: Thank you.

9 Response from the defendants?

10 MS. PIERSON: Thank you, your Honor.

11 MR. MILLROOD: I will get out of your way, Andrea.

12 MS. PIERSON: Take your time.

13 Good morning.

14 THE COURT: Good morning.

15 MS. PIERSON: Your Honor, just a couple of words at  
16 the outset in response to some things that Mr. Millrood said.

17 Zimmer's desire, with respect to Case Management  
18 Order No. 1 is to assist this Court in establishing an  
19 orderly process for the conduct of the proceedings, "orderly"  
20 being the keyword there.

21 The rules contemplate a certain order as to things,  
22 and we have agreed with plaintiffs' counsel on the things  
23 where we believe we can legitimately help to move the process  
24 along. Where we have legitimate disputes, we have brought  
25 those to the Court's attention. I certainly hope that the



1 Court isn't offended by the fact that we might not always  
2 agree with the things that the plaintiff suggests.

3 Mr. Millrood is correct in saying that this is an  
4 unusual MDL. It is the only MDL that we are able to find in  
5 all of our research that involves seven different components.

6 And to be clear when we say that, Judge, we are  
7 talking about six components that are used to treat a  
8 diseased femur, one component that's used to treat a diseased  
9 tibia. And my colleague Jay Yeager will explain to you  
10 later, when we are talking about the protective order, some  
11 of the similarities and differences between those products in  
12 great detail.

13 But it's important to remember that the plaintiffs  
14 elected and asked the JPML to consolidate into this one  
15 proceeding cases that involve seven different components.

16 For all of these agreed orders that are stacked up  
17 in front of your Honor, there are two important points to  
18 remember. None of those involved MDLs where there were two,  
19 three, four, five, six, seven components. And second, all of  
20 those orders are agreed uncontested orders.

21 They are not instances when a court was asked to  
22 consider issues like direct filing or appearances or the  
23 joint prosecution privilege, to consider the law and to make  
24 decisions. I think that's important, your Honor.

25 One thing I should correct. There are two MDL

1 agreed orders that are contained within these binders that  
2 involve MDLs on which there were two products. That's the  
3 *Denture Cream MDL and the DePuy MDL*. But none of these  
4 include MDLs where we are talking about many components, like  
5 we are in this MDL, where there's significant product  
6 differences.

7 I also want to correct a couple of things that  
8 Mr. Millrood said in referring to his PowerPoint that,  
9 frankly, your Honor, are just false. I don't want this  
10 hearing to go further or this process to go further without  
11 correcting misstatements that are clearly made.

12 First, it is blatantly false to suggest that the  
13 femoral components that are at issue in this MDL were  
14 designed to give patients 155 degrees of flexion. When  
15 Mr. Millrood says that Zimmer boasts that we could create  
16 155 degrees of flexion, that is just wrong.

17 As this Court will learn, the femoral components  
18 described as Flex that are at issue in this MDL were designed  
19 to safely accommodate patient flexion above 120 degrees.

20 We have no more ability to create a product that  
21 gives a patient 155 degrees of flexion than does any  
22 manufacturer. Frankly, it's not possible. There are  
23 patients who have anatomical restrictions -- namely,  
24 weight -- that can prevent them from ever achieving  
25 120 degrees of flexion regardless of what product is

1 implanted.

2           There are some patients, though, who have great  
3 flexion before their surgery, and after their surgery again  
4 will have great flexion with the right product.

5           As Mr. Yeager will explain and as you will learn as  
6 this MDL progresses, Judge, particularly when we get to the  
7 position papers and discussing the science, which we look  
8 forward to, you will learn that Zimmer identified that there  
9 was a need to design a product that allowed those patients  
10 who could achieve high flexion to do so safely, to do so  
11 without damaging the components that had been implanted.

12           So it's false for Mr. Millrood to suggest that  
13 somehow we boasted that we had a product that made patients  
14 155 degrees of flexion or somehow practically bionic. That's  
15 not what we claimed, and that's not what our marketing  
16 materials suggest.

17           Your Honor, Mr. Millrood also referred and showed  
18 pictures to you of the Gender Solutions Natural-Knee. I want  
19 to be clear with you that the JPML's transfer order included  
20 only NexGen Flex products. It did not include any  
21 Natural-Knee products. The Natural-Knee is a whole different  
22 design than the NexGen knee. There are no components in this  
23 MDL before the Court that are of Natural-Knee design.

24           Mr. Millrood also referred to a Zimmer recall of an  
25 MIS Tibia, and he purports to say that Zimmer recalled this

1 product because we learned somehow that minimally invasive  
2 surgery did not have the benefits that we originally thought  
3 that it did.

4 Again, Mr. Yeager will talk with you in a moment on  
5 the protective order about the change in package instructions  
6 that relate to the MIS Tibia. But to be clear, the MIS  
7 surgical procedure is not included as a cause of action or  
8 any claims related to that before this Court in the MDL. And  
9 there is no recall related to an MIS procedure.

10 So let's turn to Case Management Order No. 1, your  
11 Honor, and specifically beginning with Paragraph 3.1 in  
12 appearances.

13 Mr. Millrood misstates our position, and I want to  
14 be sure that our position is clear. Zimmer's proposal is  
15 that attorneys who intend to participate in the MDL  
16 proceedings before this Court should file an appearance  
17 that's consistent with this court's local rules. Local  
18 counsel or other attorneys who will not actively participate  
19 in the MDL need not file an additional appearance.

20 As this MDL progresses, the Court must have  
21 certainty that participating counsel know and will adhere to  
22 the orders of this court and to the local rules.

23 In addition, your Honor, this industry is extremely  
24 competitive. And in a few minutes the Court will hear  
25 argument on the protective order, and will be able to see the

1 highly sensitive subject matter that we are dealing with.

2 Requiring parties to appear will ensure that the  
3 Court has jurisdiction to enforce the terms of any order it  
4 enters, especially the protective order, as the parties  
5 participate in discovery.

6 Requiring appearances also conveys to those lawyers  
7 the seriousness of adherence to the protective order and the  
8 orders of this court.

9 The plaintiffs' proposed Paragraph 3.1 increases  
10 the likelihood of confusion by this Court and Zimmer,  
11 frankly, as to who the participating plaintiffs' counsel are  
12 and which plaintiffs' counsel will have access to Zimmer's  
13 confidential documents.

14 I want to remind you that in plaintiffs' protective  
15 order, they proposed that all of Zimmer's confidential  
16 documents should be available for review by all counsel of  
17 record. When you combine that with the request as to  
18 appearances, your Honor, that means when Mr. Millrood  
19 suggests to you that there will be 1,000 or 2,000 cases and  
20 there will be multiple law firms who are appearing in each of  
21 those cases, we are talking about access to literally  
22 thousands and thousands of attorneys and their staff.

23 Zimmer's suggestion is that the Court require the  
24 parties who are actively participating in the MDL to appear  
25 before your Honor so that your Honor can clearly convey to

1 those attorneys the seriousness of its orders, particularly  
2 the protective order, and so that your Honor has the ability  
3 to enforce those orders.

4 Again, Mr. Millrood refers to the binder of MDL  
5 orders. I just say again, your Honor, those are all agreed  
6 orders. They weren't contested, and none of those courts  
7 addressed the issue that you are addressing, an MDL that  
8 involves seven different components and many different  
9 confidential documents.

10 With respect to Paragraph 4 on "Direct Filing,"  
11 your Honor, the JPML has established specific guidelines for  
12 filing a transfer of matters subject to the MDL. Rules 7.1  
13 and 7.2 as well as Section 1407 make clear that Zimmer has a  
14 right to object to the transfer of a matter to the MDL. We  
15 have the right to have that heard by the panel, and we have a  
16 right to have our objection decided by the panel.

17 The Northern District of Illinois is not the proper  
18 venue for the vast majority of cases pursuant to  
19 Section 1391. In fact, there are two courts in particular  
20 who have considered and decided this exact issue. These  
21 decisions were not cited in our brief, your Honor. If I may,  
22 I will approach and give you a copy.

23 THE COURT: Sure. That's fine.

24 (Documents tendered.)

25 MS. PIERSON: Your Honor, these are the *Norplant*

1 and --

2 MR. RONCA: Your Honor, might we know what the  
3 cases are?

4 THE COURT: Sure.

5 MS. PIERSON: These are the *Norplant* and *Prempro*  
6 decisions where two courts considered this issue of direct  
7 filing. Both courts concluded that under 1440(a) cases must  
8 be filed in the correct venue initially and then transferred  
9 to the MDL.

10 Both courts acknowledge that the plaintiffs tried  
11 to bypass the statutorily conferred process of 1440(a) and  
12 could not do so.

13 And both courts acknowledged that while the matters  
14 may come back to the MDL via transfer pursuant to 1407, the  
15 matters still were required to be filed in the correct venue.

16 Plaintiffs cite a number of MDL decisions that they  
17 claim support direct filing. Again, what they are citing are  
18 these agreed orders that I mentioned earlier.

19 In none of those cases did the court consider  
20 whether one party could force the other to give up its right  
21 to object to transfer before the MDL as afforded by federal  
22 statute.

23 Equally unpersuasive is their argument as it  
24 relates to judicial economy. We can talk about whether an  
25 objection to transfer is considered by the panel before

1 transfer to the MDL, or we can talk about whether the  
2 objection is considered on the back end in the remand  
3 process.

4           Either way, it's the same analysis that's going on.  
5 On the front end, if plaintiffs' suggestion is permitted,  
6 your Honor will face not only a number of motions to dismiss  
7 related to venue, but your Honor will also face a variety of  
8 briefing related to remand that happens at the end.

9           In particular, as it relates to judicial economy --  
10 and I think this is an important point -- the result of  
11 plaintiffs' suggestion as to direct filing is that this Court  
12 and your staff will deal with the countless paperwork that  
13 comes along with these transfer issues.

14           And we have some personal experience with this,  
15 your Honor. When we -- when Mr. Millrood referred earlier to  
16 the *Durom* MDL, it is correct to say that, on behalf of  
17 Zimmer, we initially agreed to direct filing in that case.  
18 And the parties submitted a joint order to the court.

19           However, just a few months later, in December of  
20 2010, the judge in that case issued an order actually holding  
21 that the parties could not directly file, finding that the  
22 administrative burden on his court was simply too great.

23           The bottom line is this, your Honor: There are two  
24 problems with direct filing, one is legal and one is  
25 practical.



1           Legally, there is no venue here under Section 1391  
2 for any case with a defendant not resident in Illinois.  
3 That's most of our cases. So under 1406, those cases have to  
4 be transferred or dismissed. Even for cases with solely  
5 Illinois defendants, Zimmer would seek *forum non conveniens*  
6 transfer under 1404.

7           The JPML rules also support our right to have  
8 transfer considered by the panel and the decision made at  
9 that level.

10           This all, of course, leads to the practical problem  
11 of this Court sorting out all of these issues related to --  
12 in addition to its other MDL burdens. This really is a panel  
13 issue under Section 1407.

14           Your Honor, as it relates to Paragraph 12.2 on the  
15 joint prosecution privilege or common-interest privilege, I  
16 would turn to that issue now.

17           I want to be clear that Zimmer -- about Zimmer's  
18 position on this issue. Plaintiffs' proposed language in  
19 Case Management Order No. 1, that prematurely gives  
20 plaintiffs a blanket protection for all communications  
21 between all counsel of record -- and remember, they are  
22 telling us here there will be thousands of counsel of  
23 record -- for any topic or work product.

24           The Seventh Circuit decision in *Steinman* and in  
25 *Pampered Chef* make clear that while there is some joint

1 prosecution or common-interest privilege, it's not an  
2 unfettered privilege.

3 Your Honor mentioned that she is familiar with  
4 *Pampered Chef*. We have a copy as well. There are a couple  
5 of important things that I would point out as it relates to  
6 *Pampered Chef*.

7 The court there explained that there are two  
8 elements to determining whether there is a common-interest or  
9 joint prosecution privilege with respect to communications.

10 First, the parties must have identical, not merely  
11 similar, legal interests in the subject matter of the  
12 communication. And I am quoting here when I say that,  
13 "identical, not merely similar, legal interests in the  
14 subject matter of the communication."

15 Second, the communication must be made in  
16 furtherance of an ongoing common enterprise.

17 Now, as the *Pampered Chef* and *Steinman* courts made  
18 clear, the privilege should be limited in its application and  
19 should be used in limited circumstances. Those are their  
20 terms, not mine.

21 The plaintiffs have not yet proven, and we know  
22 they don't have in all cases or all communications, identical  
23 legal interests. We are not saying that they won't have  
24 identical legal interests in some communications. Of course  
25 they will. But to say preemptively that all of their

1 communications between these thousands of lawyers on all  
2 topics, when we are talking about cases involving seven  
3 different components, that all of those are identical doesn't  
4 make sense, particularly at this stage in the litigation.  
5 And we know that's not true. And I will give you a couple of  
6 examples.

7 THE COURT: You know, I have to interrupt here for  
8 a moment --

9 MS. PIERSON: Sure.

10 THE COURT: -- because this entire dispute strikes  
11 me as premature.

12 Of course the lawyers are going to talk to each  
13 other. Of course they are going to talk to each other  
14 outside the deposition room.

15 I don't know that the request that Zimmer is making  
16 here requires what plaintiffs have suggested, which is that  
17 lawyers have to move out and move in of depositions at  
18 critical times.

19 I understood that what we are talking about with  
20 respect to 12.2 is whether the communications between the  
21 lawyers are privileged, not whether they can sit in a  
22 deposition at the same time and hear the same questions and  
23 answers asked.

24 I am puzzled, however, as to why it would be that  
25 Zimmer will need at any point discovery of what counsels'

1 communications might be.

2 At least in the short-term or at least in the most  
3 direct way, what's relevant in this case is what the  
4 engineering shows about these components; what happens; how  
5 they failed, if they failed; whether the plaintiffs were  
6 injured in the same or similar ways; how severe the injuries  
7 were and the like.

8 What lawyers may have said to one another about  
9 what happened in a deposition or the like or even what they  
10 may have said to each other about what they have discovered  
11 in discovery, it seems to me isn't of central relevance  
12 either to me nor should it be to defense counsel.

13 I am just not at all sure why this 12.2 issue is so  
14 troublesome at this time. It seems to me that later we could  
15 argue about whether any particular comment made by one lawyer  
16 to another is privileged, and only if there is some reason  
17 Zimmer needs it, which this is all completely hypothetical at  
18 this point.

19 So I guess I am just not at all sure why I need to  
20 spend a lot of time thinking about whether the products are  
21 the same or different, whether the injuries are the same or  
22 different, whether or not this case is unique in MDLs  
23 generally, until and if there is some communication that's  
24 actually sought by the defendant and withheld by plaintiff.

25 MS. PIERSON: Your Honor, we agree --

1 THE COURT: This may be a comment borne out of lack  
2 of information about this case, but I am having trouble  
3 understanding the significance of the issue right now.

4 MS. PIERSON: We agree in all respects. And that  
5 was our point and why we wouldn't agree to the inclusion of  
6 this section. We believe the issue is, frankly, premature.

7 And your Honor may be exactly right, that we won't  
8 have standing at a later point in time to say to this Court,  
9 "Compel plaintiffs to disclose certain communications."

10 You may be right. But we are not willing to waive  
11 our right to make that challenge now, particularly when we  
12 don't know what the communications are. We don't even have  
13 product identification information in these cases yet, even  
14 though they have been pending for some four months.

15 THE COURT: I am, again, still trying to imagine,  
16 even when there are communications, what imaginable need  
17 Zimmer is going to have for them.

18 Obviously, any court order can be -- is subject to  
19 revision or exceptions when an appropriate motion is made.  
20 Maybe I simply adopt the language that's expected and  
21 standard in MDL litigation with some language absent a  
22 challenge or subject to any further litigation motion  
23 practice. I don't know that that's a particular problem.

24 MS. PIERSON: Let me give you one example, which we  
25 mention in our papers, where we believe this issue could come

1 up, your Honor.

2 There is one key witness in this proceeding that  
3 you will see referred to in virtually every complaint that's  
4 been filed in these matters, and that's Dr. Richard Berger.  
5 The plaintiffs repeatedly cite a speech that Dr. Berger gave  
6 in 2010 where he was critical of a single component. That's  
7 the CR-Flex porous component.

8 Yet, despite the fact that we are talking about  
9 tibial components, femoral components -- six different  
10 femoral components -- all of the plaintiffs point to  
11 Dr. Berger and say he gave this one speech that's critical of  
12 the CR-Flex and he says he had a bad outcome with that.

13 We know, as we explained in the last hearing, that  
14 Dr. Berger continues to use the CR-Flex precoded device. And  
15 we know he uses a variety of other devices, all of which are  
16 at issue or many of which are at issue in this MDL  
17 proceeding.

18 The plaintiffs won't have identical legal interests  
19 as it relates to communicating with Dr. Berger. And if they  
20 have communicated with Dr. Berger, we have a right to ask  
21 about that in his deposition. We have a right to compel  
22 those communications or to move this Court to compel them to  
23 find out whether this witness has been influenced, what  
24 communications he has had and how.

25 THE COURT: Well, then maybe what we ought to do is

1 simply recognize in the order that the issue regarding  
2 communications with Dr. Berger will generate -- may generate  
3 additional orders.

4 I don't know that this problem with Dr. Berger,  
5 which I will assume for purposes of this discussion is a very  
6 significant one, means that we should somehow jettison the  
7 standard practice which allows for some communication between  
8 counsel that's privileged with the understanding that if  
9 anybody needs it, it's not likely to be the defendants.

10 MS. PIERSON: We are certainly not asking this  
11 Court to jettison it as a general rule. What we are asking  
12 is to not be compelled to waive our right to challenge it as  
13 to some communications where there is not an identical legal  
14 interest.

15 THE COURT: I don't think there is any waiver.

16 MS. PIERSON: Just one other example, your Honor.

17 We have talked about the fact that the tibial  
18 component and femoral component, they are completely  
19 different components. They are used to treat completely  
20 different bones. They have a wholly different design. There  
21 is nothing that is similar about those components.

22 The plaintiffs' counsel in those matters don't have  
23 an identical legal interest in many, many, many types of  
24 communications.

25 The *Steinman* decision in particular warns of --

1 it's not enough to say, "The enemy of my enemy is my friend."  
2 That doesn't create the common interest sufficient to rise to  
3 the level of the privilege.

4 So just because tibial component plaintiffs have  
5 sued Zimmer and femoral component plaintiffs have sued  
6 Zimmer, that's not enough to establish any identity of legal  
7 interest.

8 THE COURT: All right. So what communications  
9 between tibial injury lawyers and femoral injury lawyers are  
10 you anticipating will be made that Zimmer expects it will  
11 need in order to proceed with this litigation?

12 MS. PIERSON: Good question.

13 I don't know currently, your Honor, because we  
14 haven't gotten to that point. Back to your point, it's  
15 entirely premature.

16 But let's say that there is some information that  
17 the plaintiffs have that relates to CR-Flex components or  
18 LPS-Flex components. We are entitled to discover that  
19 information and communications that are related to that  
20 information. That information is not relevant when we talk  
21 about tibial components.

22 I mean, I realize we are certainly crossing over  
23 here issues related to both the protective order and the  
24 privilege issue.

25 We can't anticipate today what communications the



1 plaintiffs might make in the future that would not be subject  
2 to the common-interest privilege.

3 Again, our desire is to not prematurely afford a  
4 blanket waiver as to all of those communications until we  
5 know what they are.

6 THE COURT: Right. I am still puzzled as to how  
7 it's going to be useful to you to know what they are. What's  
8 the discovery?

9 You depose a lawyer. What did you say to some  
10 other lawyer?

11 None of it's useful to what's important to this  
12 litigation. I mean, we are talking about the kind of -- I  
13 think generally we would be talking about the kinds of  
14 communications that would go on in your law firm. In  
15 general, there is no reason for there to be discovery of the  
16 matter.

17 You are right that -- or I am assuming that you are  
18 right that there are differences between the strategies that  
19 the lawyers are going to have vis-à-vis particular components  
20 or that the injuries are different or, for example, one will  
21 want to argue that a particular kind of failure was at issue  
22 and the other one will argue that, no, it wasn't that  
23 failure. It was a different kind of failure that was at  
24 issue.

25 But their communications with one another about

1 those issues, it seems to me, don't really advance the ball  
2 from Zimmer's perspective in any event.

3 I think we should adopt the standard language of  
4 the manual, with the understanding that should there be a  
5 reason to conclude that the interests of the plaintiffs'  
6 lawyers are no longer aligned, (a), and that their  
7 communications are likely to lead to discoverable and  
8 relevant evidence -- which is, in my view, a big "if" -- we  
9 can take that up down the road when it happens.

10 MS. PIERSON: Those caveats aren't contained in the  
11 currently proposed language, your Honor. And certainly they  
12 will give us more --

13 THE COURT: Why don't we --

14 MS. PIERSON: No doubt about that.

15 THE COURT: Why don't we draft some language of  
16 that nature. And I think that you could talk and agree among  
17 yourselves about that language and then submit it to me.

18 I guess I am fearful that we are going to spend a  
19 lot of time discussing this issue, which I think is (a)  
20 premature, and perhaps will never arise. I don't think  
21 that's a wise use of your time or mine.

22 Maybe we can talk about the other three issues, the  
23 limited disagreement issues: compensation, time and expense  
24 records, hearings and discovery motions.

25 MS. PIERSON: Sure. Just briefly, your Honor,

1 because these are smaller areas of dispute.

2 First, Paragraph 7 as it relates to public filing  
3 of expense records, just a couple of points there.

4 Section 40.23 of the manual gives the Court the  
5 option of requiring these to be filed under seal. It is  
6 optional. It is in brackets.

7 Zimmer's position is, the manual leaves open the  
8 option to file publicly, as it common with fee applications.  
9 Particularly, we see this in bankruptcy proceedings, but we  
10 see it in many other kinds of proceedings where fee  
11 applications are completely public.

12 This Court has the flexibility to order filing  
13 under seal, to order it publicly, or to order some hybrid of  
14 all that.

15 And the point of filing these fee applications is  
16 that plaintiffs intend to seek a common benefit fund, which  
17 ultimately settlements from the defendants will fund.

18 The defendants should have some visibility into the  
19 time and number of counsel claiming entitlement to the fund.  
20 If we have some objection as to that, it's far better for  
21 this Court to hear it up front as opposed to later on when we  
22 are dealing with months and months of filing of fees  
23 collectively.

24 THE COURT: You know, I am sorry to interrupt.

25 I really disagree. I have had numerous fee

1 disputes. It's sad but true. But there are many, many  
2 cases, thanks, I think, to our local Rule 54.3, where the  
3 disputes go away before they have to get to the Court.

4 If we have what I think would be monthly or  
5 periodic disputes as these fee and expense records are filed,  
6 I will be devoting a huge amount of time to disputes that,  
7 again, may never bubble up. I am happy to reserve that agony  
8 to the end of the proceeding.

9 In the meantime, I do think it's very cumbersome  
10 for counsel to be filing time and expense records with the  
11 Court on a monthly or semiperiodic basis. I am confident  
12 defendants wouldn't want to do the same thing. I realize  
13 there would be no need for them to do that because they are  
14 not seeking recovery from a common fund.

15 But our local rules do contemplate an exchange of  
16 information about fees because to the extent that somebody  
17 argues that Party A spent way too much time on it, it's only  
18 fair for Party B to explain how much time they spent -- or it  
19 spent on the same litigation.

20 So given that I am assuming that the defendants  
21 don't want to engage in the same process, I think we should  
22 adopt the standard, which is, as I understand it, submission  
23 either under seal or to lead counsel.

24 MS. PIERSON: Just one -- to follow up on one point  
25 that your Honor made.

1           The issue for us is not the timing of the filing of  
2 the fee applications but rather that defendants have some  
3 visibility as to those. Whether it happens at the beginning,  
4 whether it happens at the end, whether it happens monthly or  
5 not, the point is not the timing from our perspective.

6           To the extent that plaintiffs seek compensation  
7 from a common benefit fund, defendants ought to have the  
8 ability to review what they are claiming and the right to  
9 challenge it.

10           The *Guidant* decision that we cite in our papers  
11 gives a good example.

12           THE COURT: Is that the dispute? Are we talking  
13 about whether or not a fee petition would be filed under seal  
14 ultimately versus -- I understood you were talking about  
15 records being filed as we go.

16           MR. MILLROOD: Correct, your Honor. That is -- the  
17 latter is the issue.

18           MS. PIERSON: Maybe this is a fundamental  
19 misunderstanding between the two sides.

20           THE COURT: It's an nondispute. Fee petitions are  
21 indeed filed in the public record. Regular records  
22 concerning the time and expense that parties are incurring  
23 are ordinarily not in the public record as we go. So perhaps  
24 we can just agree on that.

25           MS. PIERSON: To be clear, our request is that the

1 time and expense records be publicly available. What I meant  
2 to say is that the timing is not the issue from our  
3 perspective.

4 THE COURT: At what point, though?

5 MS. PIERSON: Well, if they are filed monthly, our  
6 request in our papers is that they be publicly disclosed  
7 monthly. As your Honor said, that creates some difficulty.

8 THE COURT: In other words, then, you would be  
9 making objections monthly?

10 MS. PIERSON: Without seeing the time and expenses,  
11 we don't know. Certainly whatever procedure the Court  
12 orders, we would follow.

13 THE COURT: I don't see any reason for us to be  
14 engaged in fee disputes on a monthly basis. I think we  
15 should adopt the ordinary standard, which is that these  
16 records are filed under seal or with lead counsel.

17 Certainly, should plaintiffs' counsel seek a fee  
18 award in this court, they will be filing a fee petition, and  
19 it will be a matter of public record.

20 But I will not be ruling on fee objections or  
21 expense objections on a repeated basis. So however we want  
22 to work that out.

23 MS. PIERSON: Your Honor, if I can briefly address  
24 Paragraph 9.2 on hearings and Paragraph 11 on discovery and  
25 motions?

1 THE COURT: That's fine.

2 MS. PIERSON: The issue on hearings is really  
3 small. Plaintiffs want this Court to obligate itself to hold  
4 monthly status conferences. We suggest use of the word  
5 "periodic" so the Court can decide at what interval to have  
6 them and isn't bound by monthly. But whatever your Honor's  
7 preference is, is fine with us.

8 THE COURT: I was going to suggest every six weeks.

9 MS. PIERSON: With respect to Paragraph 11.1, this  
10 is a somewhat larger issue.

11 The entire Section 11 is dedicated to the practice  
12 of discovery. But your Honor will note that plaintiffs'  
13 suggestion for 11.1 is not limited to discovery.

14 Plaintiffs ask this Court to compel Zimmer to meet  
15 and confer before the filing of any motion. And our point is  
16 simple. Zimmer should not be obligated to meet and confer to  
17 disclose its work product and strategies before filing things  
18 like *Daubert* motions, motions for summary judgment, motions  
19 to dismiss.

20 There is nothing that prevents plaintiffs from  
21 picking up the phone and calling and conferring with us after  
22 those motions are filed. But we ought not have to  
23 preemptively reveal our strategies, theories, and conclusions  
24 about holes that may exist in the plaintiffs' case before we  
25 file our motion. It creates an unfair tactical advantage for

1 the plaintiffs if that language is included. And certainly  
2 it's contrary to the local rules of this court, which require  
3 us to confer before discovery motions, which we are happy to  
4 do.

5 THE COURT: I will just comment with respect to  
6 this dispute. I don't see how it creates a tactical  
7 advantage for either side if both sides are subject to the  
8 same requirement, because presumably there might be *Daubert*  
9 motions the plaintiffs want to file that would generate some  
10 kind of tactical concern on defendants' part.

11 That said, I am happy to sustain your objection, at  
12 least in this regard. I will limit the disclosure to all  
13 motions other than dispositive -- motions to dismiss, motions  
14 for summary judgment, and I will include *Daubert* motions as  
15 motions as to which you don't need to meet and confer.

16 We do have something like a seven-day notice  
17 provision right now. So presumably -- if I haven't done that  
18 already, I certainly will so that presumably once a motion is  
19 filed, the other side is certainly welcome to advise their  
20 opponent there won't be any objection.

21 I think there might be some utility to having a  
22 meet-and-confer about other motions as well, but I am not  
23 going to require you to do that for anything -- for your  
24 dispositive motions and your *Daubert* motions.

25 MS. PIERSON: Thank you, your Honor.



1 THE COURT: All right.

2 Just to back up for a second.

3 So I think here is where we are: Hearings every  
4 six weeks. I will give you some dates in just a moment.

5 Discovery motions, the motions issue would be to  
6 meet and confer with respect to all motions other than  
7 *Daubert* motions, motions to dismiss, and motions for summary  
8 judgment.

9 With respect to communication among the parties, it  
10 seems to me that issue is premature. I do expect counsel --  
11 that presumptively counsel's communications are privileged.  
12 But there is no waiver. And certainly defendant is welcome  
13 to seek the Court's intervention with respect to  
14 communications and if there are arguments as to whether  
15 particular communications should not be covered by that  
16 protection.

17 With respect to the issues of entry of appearance  
18 and direct filing, on those issues, I am a little bit  
19 uncertain, and let me explain why.

20 I understood the plaintiffs' position on entry of  
21 appearances to be that if a lawyer has entered his or her  
22 appearance in another court and the case is then transferred  
23 to this court, that appearance stands. If that's the  
24 understanding, I think those lawyers who filed appearances in  
25 other courts would be subject to this court's jurisdiction

1 vis-à-vis enforcement of, say, protective orders and the  
2 like.

3 I am going to investigate that and explore that  
4 because I want to make sure I am right about that. I think  
5 defendants are correct that certainly these lawyers have to  
6 understand that they are under the Court's direction and  
7 supervision. And if they are going to participate -- if they  
8 want, for example, to get e-filing notices, I think they have  
9 to have an appearance on file for that to happen.

10 I don't think it's necessary for lawyers to come in  
11 and be admonished by me. I don't do that in standard  
12 practice. I think lawyers understand their obligations. If  
13 they file an appearance in the court or if they participate  
14 in any way, they are subject to this Court's direction and  
15 orders.

16 The final matter is the issue of direct filing. I  
17 would assume that cases could be directly filed here. And  
18 then, if there is an objection to venue -- and by that I mean  
19 venue in what would ordinarily be the transferor court --  
20 those objections could be asserted either in the transferor  
21 court or before the MDL, if that's appropriate. I don't  
22 think there is any waiver of the defendants' right to make  
23 those objections.

24 But I want to examine that because I do recognize  
25 that this is relatively unusual, at least in terms of numbers

1 of cases that are going to be filed, and I want to make sure  
2 that whatever procedure I adopt is most fair not only to my  
3 court -- my own clerk staff but also to the process generally  
4 and to the parties in this case. So I am going to reserve on  
5 that one issue.

6 I know we need to talk about the protective order,  
7 but let me give you dates right now since we are talking  
8 about this issue about hearings, the Rule 9.2.

9 Today is October 7th. So assuming that we are  
10 going to meet approximately every six weeks, I would suggest  
11 the next date would be Friday, November 18th.

12 I am going to propose some dates here. My deputy  
13 is not in the courtroom, and she will have to confirm them as  
14 well, but I would assume that our next date would be on  
15 January 13th. I realize that's a little longer than six  
16 weeks, but to meet over the holidays would be difficult.

17 And then another one, say, on February 24th of  
18 2012.

19 Another meeting on April 13th, 2012.

20 And maybe another meeting -- these are  
21 approximately every six or maybe seven weeks, in some  
22 instances -- June 1st.

23 And July 13th. I won't -- I think setting them out  
24 about six or seven months out is probably all we need.

25 Now, again, I think this -- it does make sense for

1 us to say that this would be dates on which we will  
2 presumably hear motions. If there is a need for a motion to  
3 be heard in the interim periods, that's fine. Just notice  
4 them. Give one another about a week's notice so that you can  
5 make reasonable arrangements. But wherever possible, I would  
6 hope that we would have our motions heard on these dates.

7           There may be months or times, weeks when no real  
8 need -- there is no real need for you to be here. And if you  
9 agree to that and let me know, that's fine. Or there may be  
10 a need for me to change the date for some reason. Obviously,  
11 I will do my best to give you as much advance notice of that  
12 as I can. I realize that people have travel arrangements  
13 they need to make.

14           But ordinarily I would think that we would start at  
15 9:30 on those mornings and that you should set aside an hour,  
16 an hour and a half to make sure that we can cover everything.  
17 Sometimes we can do everything in less time, sometimes it may  
18 not be necessary to meet at all, and sometimes it will take  
19 more time.

20           Can we talk about this protective order issue?

21           MR. BECKER: Absolutely, your Honor.

22           Tim Becker on behalf of plaintiffs.

23           Your Honor, just one housekeeping matter. And I  
24 don't think I need to be at every single one of these status  
25 conferences, but I do have a vacation planned with my wife on

1 the 13th of January, over that weekend. If we could meet on  
2 the 12th, if that's --

3 THE COURT: The 12th is fine.

4 MR. BECKER: I think that -- I am going to talk to  
5 you about three issues with respect to the protective order.  
6 They are document sharing, internal redaction, and some  
7 deposition practices.

8 We have been going at it now about 90 minutes, and  
9 frankly, I think that many of the issues that were discussed  
10 with respect to CMO No. 1 have, if not direct, certainly  
11 indirect application to what we are going to talk about here.  
12 So I am going to try and shortcut a lot of this.

13 At one point the Court asked a question to defense  
14 counsel about, you know, some of this sounds sort of  
15 hypothetical. And I think the Court's observation was  
16 correct.

17 As lawyers, we get mired in the minutia of, well,  
18 what if this potential theoretical possibility if we go left,  
19 right, and center happens? And certainly we are paid to do  
20 that, and it's our job.

21 But in the context of what the Court's evaluation  
22 of these issues is, I think if we start from, what is a  
23 30,000-foot view of what's happening with the protective  
24 order, we can see that a lot of these issues are largely  
25 irrelevant and pose no real threat to the defendants.

1 First, there will be a protective order issued in  
2 this case. That protective order will apply to every single  
3 lawyer who not only notes an appearance in this case but is  
4 also counsel of record in any other case that's transferred  
5 to this MDL.

6 As a result of that protective order and the entry  
7 of that protective order, this Court, as it observed, has  
8 contempt power over every single one of those lawyers, their  
9 staff, and anybody else that works for them.

10 So now the defendants come and say, well, maybe  
11 that's not enough. And if there were any example in any MDL  
12 over the past 25 years where there were disclosure --  
13 inadvertent, massive, or otherwise -- of systematic violation  
14 of protective orders by plaintiffs' lawyers who represent  
15 clients in the MDL, they may have a point. But there is  
16 none.

17 And that's because the lawyers who represent the  
18 plaintiffs understand not only does the Court have contempt  
19 power over them, but in addition, that they have an ethical  
20 obligation and an obligation to the Court to safeguard the  
21 defendants' material.

22 So when you look at this from a 30,000-foot view,  
23 we are arguing about a hypothetical that will largely and  
24 likely never exist; that is, that some document somewhere  
25 along the way gets in the hands of Zimmer's disclosure

1 because the lawyers at this table let it out the door.

2 With that background in mind, I would largely rest  
3 on what we put into the brief, but I want to identify one  
4 practical concern and then one major substantive concern with  
5 respect to this document-sharing issue.

6 The practical concern is simply this: It will, if  
7 we are required to -- if the Court opts to allow the  
8 defendants to have confidential designations on a product or  
9 component-by-component basis, lead to chaos. And here is  
10 why: The only people who are allowed to have complete and  
11 total access to the documents are lead counsel and liaison  
12 counsel.

13 As it currently stands, there is only two firms  
14 that have access under the defendants' version or have all  
15 four, five, six, seven, however you cut it -- we have a  
16 disagreement on how many products are actually in play --  
17 that have access to those or have one of those type of cases  
18 on file.

19 Let's assume, for the sake of argument, the Court  
20 requires that you have product-by-product designations. What  
21 that means is this: Lead counsel, in running this case, will  
22 have to have separate communications with only the lawyers  
23 who have access to those documents.

24 So let's say we have a strategy session where we  
25 are talking about an issue in the case. First we will have

1 to have the strategy session with respect to the CR-Flex,  
2 then we will discontinue that call. Then we will go on to  
3 the next call where we invite the LPS lawyers to come on.  
4 Then we go on to the next call where we invite the  
5 gender-specific lawyers to come on.

6 The likelihood of one of us inadvertently violating  
7 that order because somebody doesn't get off the phone or  
8 because we think we are talking to someone who has an  
9 LPS-Flex when they have a CR-Flex is almost a certainty.

10 When -- and the real issue is, do you even need that when you  
11 already have the blanket protection that says any disclosure  
12 of a Zimmer document is a violation of the protective order?

13 So from a practical standpoint, it creates an  
14 extremely chaotic system, one I have never seen before in an  
15 MDL, that requires the lead counsel in the case to bifurcate  
16 each and every discussion by product type. And that has  
17 simply never, in the practice of MDLs, occurred.

18 So let's talk about the two substantive issues.

19 Defense counsel told you that there were no other  
20 cases involving MDLs that involve multiple products. I would  
21 encourage you to read the section where we discuss this, but  
22 I want to highlight just a couple.

23 In the *Medtronic* and *Guidant* case, you had multiple  
24 products, single defendant cases.

25 In the PPA and ephedra cases, you had multiple



1 defendants. You had five, six, seven defendants who  
2 manufactured products with PPA and ephedra in them, all of  
3 whom were allowed access to each other's documents, despite  
4 the fact they were competitors.

5 And most importantly, in the welding rods case --  
6 and this is where the defendant is just simply wrong -- you  
7 had seven to eight defendants, maybe more, who manufactured  
8 dozens, if not hundreds, of different types of welding  
9 consumables, welding consumables ranging from rods that you  
10 put into a welding gun to huge sheet metal, welding-type  
11 consumables.

12 Each of those had their own equivalent of the  
13 secret formula for Coca-Cola. Each of those.

14 The only limitation that Judge O'Malley put on the  
15 disclosure of that information was with respect to the  
16 absolute formula that went into designing the particular  
17 welding consumable. Every other document was fair game for  
18 every single lawyer on the PSC and the competitors of each  
19 other. So Lincoln Electric got a look at it. Airco got a  
20 look at each other's documents. The court had no problem  
21 with that because all of it was governed by a protective  
22 order.

23 And even in the case of the secret formula, the  
24 court said, I am not going to restrict lead counsels' hands  
25 in artificially limiting who they may show the document to.

1 And this passage is cited in our brief.

2 Judge O'Malley specifically said, if lead counsel  
3 need to show formula information to members on the PSC, they  
4 are free to do it. Why? Because I have the power to  
5 sanction lawyers who violate my order.

6 But even if all that was not enough for you, in the  
7 Durom cup litigation, Zimmer -- I was not involved in that  
8 litigation, and it's not clear from the record. But my  
9 understanding in talking to my colleagues is that Zimmer  
10 contested entry of that protective order.

11 The court in that protective order not only  
12 rejected Zimmer's proposition that documents be limited but  
13 allowed every single lawyer across the country, whether they  
14 be in state court or federal court, to have access to their  
15 documents, provided that those lawyers agreed to be bound by  
16 the protective order.

17 Why? Because the protective order safeguards  
18 Zimmer. Everything beyond that is a mere hypothetical.

19 And if you look at the cases that they cite, they  
20 come to the same exact conclusion. They involve instances  
21 where a defendant had actually stolen data from the plaintiff  
22 who was seeking the protective order, or where the defendant  
23 had -- or where the plaintiffs' lawyers had disseminated  
24 documents to third parties and those documents weren't  
25 protected by a protective order.

1           The one theme that runs throughout all the cases  
2 that they cite is that there was an avenue for the  
3 plaintiffs' lawyers or the defendant to get at documents that  
4 were not within the scope of a protective order. And the  
5 court said in that instance, we may limit the production.

6           But where there is a protective order, that in and  
7 of itself is enough. That's the same thing here.

8           There is not going to be a massive disclosure of  
9 different product types. And if you bifurcated those types  
10 of products into buckets, into seven buckets or three buckets  
11 or ten buckets, all it will do is create the very  
12 inefficiencies the Court warned us about at the very first  
13 status conference.

14           Our job as lead counsel is to compile lawyers on  
15 the PSC who we think will help us with the prosecution in  
16 this case. That requires they have access to these  
17 documents.

18           The second substantive issue I wanted to talk  
19 about, your Honor, is simply this: Both the *Manual for*  
20 *Complex Litigation* and cases within this jurisdiction,  
21 specifically the *Trading Technology Industries* cases, both of  
22 those cases -- both of those authorities support our  
23 position.

24           The *Manual for Complex Litigation* specifically  
25 says, "The parties agree that any discovery materials

1 produced in this litigation be used in all actions" -- in all  
2 actions -- "encompassed by this MDL and in any other actions  
3 brought by or on behalf of any other" -- insert product  
4 name/user -- "who agrees to be bound by the terms of this  
5 order."

6 This is the precise language that was adopted in  
7 the Durom cup litigation which this defendant is intimately  
8 familiar with.

9 The Trading Tech case was a case within this  
10 district that involved a patent prosecution. It had  
11 12 competitors -- or 10, I can't remember the exact number --  
12 who came in and said, we cannot afford to show our secret and  
13 sensitive documents to each other. And the court, in a  
14 lengthy explanation of this, largely said, hogwash. As long  
15 as we have a protective order that allows me, as the court,  
16 to supervise the production of this material, your complaints  
17 are merely hypothetical.

18 Specifically I direct you to the cite, Jones cite  
19 is 2011 Westlaw 547769F star 7 where the court said, "These  
20 cases have been consolidated precisely because there is a  
21 substantial overlap among the cases. Limiting the access by  
22 defendants to documents designated as confidential by other  
23 defendants would impair these efficiencies and is unnecessary  
24 in light of the safeguards the protective order will  
25 contain."

1           The bottom line is this with respect to the  
2 protective order: If one exists, it governs our conduct. In  
3 every other MDL that I have been involved in and that I am  
4 aware of, that was enough. And I think it ought to be enough  
5 here.

6           Let me turn my attention really briefly to the  
7 internal redaction issue.

8           It's been in vogue of late in MDLs for defendants  
9 to produce relevant documents with internal redaction for  
10 what they deem to be irrelevant. There is a practical  
11 problem associated with that, which is, if you get a document  
12 with a bunch of redactions in between paragraphs, or if you  
13 get sentences redacted, it utterly destroys the context of  
14 the document.

15           Beyond that, the legal basis for denying their  
16 claim here is that Rule 34 simply allows this. It allows  
17 production of documents. There is nothing in the rule that  
18 allows any of this type of internal redaction to go on.

19           And, in fact, the rule goes on to say you can  
20 produce documents to defendants in one of two ways. The main  
21 way is in the usual course of business. These documents are  
22 not redacted in the usual course of business. The defendants  
23 will invariably produce documents in this case in that way.  
24 Because of the fact they are going to produce them in the  
25 usual course of business, they don't have the right to redact

1       them.

2                 Now, I would direct your attention to two cases.

3                 The first is the *Beverage Distributors v. Miller*  
4 *Brewing* case; and the second is the *Orion Power* case. Those  
5 cases set out a three-part test which you look at to  
6 determine whether or not you should allow internal redaction  
7 because they are, admittedly, cases that go both ways.

8                 The first is, is the -- the first thing they note  
9 is, redaction is the exception not the rule. The second,  
10 they say that is so because it's unnecessary and disruptive  
11 to litigation. And the third is, they say it places a  
12 tremendous burden on the court. If any of those three things  
13 occurred, don't allow the internal redaction.

14                 Well, let's take a look at what will happen here.  
15 There will literally be millions of pages of documents  
16 produced. As the *Orion Power* court observed, allowing this  
17 type of internal redaction does nothing but provide fertile  
18 ground for a discovery dispute. They called the whole theory  
19 novel and said all this will do, in a case that has massive  
20 amounts of documents produced, is make it end up on your  
21 doorstep and your staff's doorstep or a special master's  
22 doorstep that we will then have to pay for, who will then  
23 have to go through the painstaking task of reviewing every  
24 internal redaction to see whether or not they are relevant.

25                 What's more important -- and this is the common

1 thread that runs through all of this -- what both those  
2 courts say is that, at the end of the day, none of this is  
3 real. It's all a hypothetical, because once you are bound by  
4 a protective order, learning about something that may not be  
5 relevant within the context of an otherwise -- within the  
6 context of an otherwise relevant document is simply an  
7 exercise in a hypothetical disclosure of information.

8 So these courts say repeatedly, over and over and  
9 over again, there is absolutely no justification to have  
10 internal redaction. That will be important as the case goes  
11 on.

12 The only case that they cite that provides any  
13 circuit authority is the *CSC Holdings v. Redis* case. And  
14 the reason why that case went a different direction was  
15 because Redis was charged with criminal prosecution of  
16 stealing CSC Holdings' proprietary trade data. Well, that's  
17 clearly an exception.

18 And even in that context, the Seventh Circuit said  
19 the better approach would be to allow the lawyers to review  
20 the documents in their totality on an AEO basis.

21 Let me talk about the final issue, and that is  
22 simply the, who can see what document in a deposition.

23 Our proposition here is really simple. The debate  
24 rests over whether or not you can show a document to a person  
25 who is not identified on the document. So Mr. Smith is being

1       deposed, and there is a document written by Mr. Jones. And  
2       we want to show Mr. Smith this document. Their limitation in  
3       this is with respect to, you may show Mr. Smith that document  
4       if he knows about the subject matter of the document.

5                 Two thoughts on that, your Honor.

6                 One, all that will do is lead to a debate about  
7       whether or not this person actually has knowledge of the  
8       subject matter. And, frankly, the absence of knowledge of  
9       the subject matter may be the very reason that we are showing  
10      him the document.

11                And the second sort of -- the second issue that's  
12      relevant in the context of this issue is this: In the  
13      *Sizemore* case, which was one of the leading cases or first  
14      cases that was filed, these defendants represented by this  
15      law firm engaged to the exact language we are proposing. Why  
16      it was good in that case and not here, I don't know. But  
17      this is the exact language in a contested motion practice  
18      that they proposed to the court we use.

19                So our view would be, we accept the language. We  
20      allow plaintiffs' attorneys on the PSC access to all of the  
21      confidential documents, and that we don't allow for internal  
22      redaction.

23                Thank you, your Honor.

24                THE COURT: Thank you.

25                Response?



1 MR. YEAGER: Thank you, your Honor.

2 I know we have been talking for a while, and I  
3 don't want to be repetitive. I wonder if the Court could  
4 give any guidance about how long it would like to hear from  
5 me? I could talk for about 15 or 20 minutes and cover  
6 things. But if the Court believes it's heard enough about  
7 the product differences, I can shorten that as well.

8 THE COURT: I think if you could -- I know one of  
9 the lawyers needs to leave in about ten minutes. If you can  
10 keep your comments to about ten minutes, that would be great.

11 MR. YEAGER: Well, let me just abbreviate a couple  
12 things.

13 MS. PIERSON: I am sorry to interrupt, but given  
14 that it's Mr. Millrood who has to leave and the PowerPoint  
15 was his, your Honor, we just want to move the PowerPoint be  
16 made a part of the record since it was part of what was  
17 considered today.

18 THE COURT: Absolutely. That's fine.

19 MR. MILLROOD: I appreciate that, your Honor.

20 THE COURT: That's great.

21 MR. YEAGER: And I will try to go through this in  
22 ten minutes, your Honor, but this is obviously an important  
23 issue in this case, and I want to make sure we have time to  
24 talk about it sufficiently.

25 THE COURT: Sure.

1 MR. YEAGER: I will streamline the discussion about  
2 --

3 THE COURT: Just do your best. That's fine.

4 MR. YEAGER: I will streamline the discussion of  
5 the product differences. I know the Court has heard  
6 something about that, but I would like to comment about that  
7 briefly because that obviously is a key with regard to the  
8 cross-product discovery issue.

9 Let's be clear, first, about what we are saying and  
10 what we are not saying, because I think there has been a  
11 little bit of a straw man issue with the plaintiffs'  
12 characterization of what we are saying.

13 We are not saying these products are different in  
14 every way. They are not different in every way. The 510-Ks  
15 prove that, of course.

16 But neither are they similar in every way. They  
17 are like a lot of things in the world. They are similar in  
18 some ways. They are different in other ways.

19 Here are some examples. The first difference --  
20 and this is a very fundamental and visible difference, is --  
21 we have heard about femoral components, which I will talk  
22 about in a moment. And they look like this (indicating).  
23 You have seen some pictures of this.

24 And then tibial components. This is not the  
25 precise tibial component that's at issue (indicating) --

1 well, in fact, it is. It turns out that it is. But as the  
2 Court has heard, this goes on the top of a tibia. This is  
3 not a Flex component per se. It's a NexGen component. There  
4 is a pad that goes on top. And then these Flex components --  
5 the Flex comes from the femoral component -- fit on top of  
6 that pad.

7 It is not at all clear to us, and I don't think  
8 it's been explained why the tibial component cases, which  
9 have a different regulatory history and different background,  
10 are in this case with the femoral component. So that's the  
11 first level of difference between the tibias and the femoral  
12 components.

13 Second level of difference is within the femoral  
14 components. And the Court has seen photographs and slides.  
15 And I have got a couple of posters to put up here.

16 The main differences are three. We have -- you  
17 have heard CR and LPS, depending on whether a certain  
18 ligament is retained or sacrificed.

19 The LPS has a little cam across -- these are called  
20 the condyles, these fingers that come out that bear the  
21 weight (indicating).

22 THE COURT: Okay.

23 MR. YEAGER: This little cam across the fingers is  
24 how you tell an LPS. Obviously, the mechanics in the knee  
25 are very fundamentally different if that ligament is taken

1 out and you have to have a mechanical replacement. The  
2 forces are different, and the science is different. That's  
3 the difference between the LPS and the CR-Flex.

4 The CR-Flex does not have that cam in the middle  
5 because the ligament is still there (indicating).

6 Second, there is the matter of fixation. Some are  
7 cemented, some are press fit and then they grow in.

8 THE COURT: Right.

9 MR. YEAGER: That's the porous -- there is a porous  
10 material on the inside where the bone can grow in, or  
11 sometimes they are called precoats, where there is a  
12 precoating that the cement then is used with.

13 THE COURT: Okay.

14 MR. YEAGER: So that's the second level.

15 And the third is gender. There are designs the  
16 Court has heard about.

17 If I could use a small board that I have --

18 THE COURT: Okay.

19 MR. YEAGER: -- to demonstrate this?

20 This comes from one of the attachments. I think --  
21 just in light of time, I think I will just hold it, if that's  
22 all right.

23 THE COURT: Sure.

24 MR. YEAGER: This comes from one of the attachments  
25 to our papers. It explains the -- I am sorry. It does

1 not come from one of the attachments. It comes from a  
2 document that's publicly available.

3 This just talks about the difference between the  
4 these basic versions that I have just showed and the  
5 gender-specific versions.

6 THE COURT: Okay.

7 MR. YEAGER: The primary difference is, there are  
8 anatomical differences in the male and the female knee.  
9 Zimmer did a tremendous amount of work to sort out what those  
10 are. It's not just one is bigger and one is smaller. They  
11 are shaped differently and the force distribution is  
12 different.

13 I think the most important part to kind of  
14 visualize is this. This is the footprint of the male versus  
15 the female version.

16 THE COURT: Okay.

17 MR. YEAGER: We can see that it's not simply one is  
18 bigger than the other. In fact, the female version is  
19 outside the male version in some places. Again, the  
20 distribution of forces will be different.

21 There are those three levels of difference among  
22 the femoral components.

23 THE COURT: All right. I think -- I am assuming  
24 that these products have some significant differences.

25 MR. YEAGER: Okay.

1 THE COURT: I need to know how that maps onto this  
2 dispute.

3 MR. YEAGER: Okay. What we are saying with regard  
4 to this dispute is that we need a procedure in place that  
5 protects everyone's interests. The plaintiffs have interest  
6 in getting the information they need to make their case.

7 We are not saying and we have not said that they  
8 can't get all the information that is relevant to a product  
9 that is at issue.

10 There are going to be other -- this is a CR-Flex.  
11 There are going to be some CR non-Flex documents that are  
12 relevant to the CR-Flex because it was a predicate. Of  
13 course they can have those. And then across the Flex  
14 products, there are some similarities across the Flex  
15 products.

16 We were not saying, well, you can only get -- if  
17 you are a CR-Flex plaintiff, you can only get a CR-Flex  
18 component -- or document. We're not saying that. There will  
19 be other documents that will be relevant. And, of course,  
20 they are entitled to those.

21 What we have to figure out is, what is a procedure  
22 that gives them this access but also at the same time  
23 protects Zimmer's interest?

24 And we think the procedure that we have offered the  
25 Court does that, because what it does is allows us, Zimmer,

1 to make the first cut at this, to identify documents that are  
2 produced by what document -- by what product they relate to.  
3 And that's obviously something we know because they are our  
4 products.

5 Every one of the be products, regardless of what  
6 component it relates to, will be available to lead counsel  
7 and to liaison counsel. And if they think we have overly  
8 narrowly designated, they will tell us and we will either  
9 agree or come back here.

10 So we are not saying you can only have documents  
11 that bear the name of this particular component. We will  
12 absolutely share beyond that where that information is  
13 relevant. And that's what the 510-Ks show.

14 The 510-Ks -- and I won't take the Court's time  
15 with this -- they do not say, as has been said to the Court  
16 in the briefing, they do not say that these components are  
17 identical, although that's what you're being told. Not  
18 correct. They say they are identical except for certain  
19 specific things.

20 So that is the way that we think the order ought to  
21 work, so that they are protected and we are protected.

22 Now, what is our interest? And if I could have  
23 just a moment to talk about our interest because I think our  
24 interest, Zimmer's interest, in this --

25 THE COURT: Actually, I may be able to save you

1 some time here because my inclination on this issue is to  
2 proceed in the way that the defendants have proposed, at  
3 least with respect to disclosure of documents.

4 And by that I mean, they all are available to lead  
5 counsel. Defendants in the first instance can say which are  
6 relevant to what. Lead counsel can then tell me if the  
7 defendants have been overly restrictive. And if that happens  
8 once too often, I am perfectly willing to say we are going to  
9 go back to a more liberal disclosure requirement.

10 In other words, I guess until I see that there is a  
11 problem, I am not going to assume that one will bubble up.

12 Lead counsel does have access to all of them. And  
13 lead counsel may not want to go through the effort that would  
14 otherwise be required, but I can hear about that down the  
15 road.

16 If it looks to counsel as though this is much too  
17 restrictive, I am sure they will tell me about it. And I am  
18 happy at that point to consider whether the needs that -- the  
19 competitive needs that Zimmer have require that restriction  
20 or whether the protective order that shields disclosure by  
21 any of these lawyers to the outside world should adequately  
22 protect Zimmer.

23 MR. YEAGER: And if the Court believes that Zimmer  
24 is being unreasonable in its designations, and we will bring  
25 the things to you, I am sure the Court will tell us and that



1 will guide us. We appreciate that.

2 THE COURT: I think that's fine.

3 There are a couple of other matters, though, right?

4 MR. YEAGER: The internal redaction. Here is the  
5 internal redaction issue. I don't think it's going to be a  
6 huge issue. I don't think there will be a bunch of documents  
7 that will have internal redactions. That's one of the issues  
8 in the case, is whether it's going to create a burden. I  
9 think if it creates a burden, we will come back here.

10 I think that, for example, however, it could be  
11 very important. Again, we have got potentially -- and I am  
12 not exaggerating -- thousands of people with access to this  
13 information.

14 THE COURT: Not if they start with lead counsel.

15 MR. YEAGER: Well, but if it's a confidential  
16 document that's not product specific, which many of our  
17 documents will not be -- for example, board minutes. Let's  
18 say there were board minutes, and there were ten things on  
19 the agenda, and one of them is NexGen. Well, they are  
20 entitled to see that, perhaps, assuming it's otherwise  
21 discoverable.

22 Zimmer -- perhaps the Court will understand this --  
23 does not want 3,000 plaintiffs' lawyers fishing around in its  
24 board documents on things that are not relevant to their  
25 case. So in circumstances like that, we ought to be able to

1 redact.

2 We don't produce documents that are not relevant.  
3 Why should we produce parts of documents that are not  
4 relevant? unless necessary for context. If they are  
5 necessary for context, we will come back to that.

6 But if the board talked about five subjects on one  
7 day and three of them don't have anything to do with NexGen,  
8 we shouldn't have to disclose that.

9 THE COURT: I guess the problem is that plaintiffs  
10 will say that what defendants think is relevant may not be  
11 the same thing that plaintiffs think is relevant.

12 My concern about redaction is the enormous amount  
13 of effort that it requires, that it probably shouldn't be  
14 necessary at all.

15 I know the defendant is going to say, well, that's  
16 effort that the defendant itself is happy to take on. But I  
17 do anticipate a lot of disputes arising out of that, and I am  
18 not sure how necessary any of them are.

19 Remember that if there are things in the board  
20 minutes that have -- well, that have nothing to do with this  
21 case, plaintiffs won't have any interest in them. So what  
22 about some kind of a procedure in which maybe a committee of  
23 the plaintiffs' lawyers are invited to compare redacted with  
24 unredacted, and if they see immediately there is no real  
25 problem with the redactions --

1 MR. YEAGER: We could agree to that. Certainly  
2 lead counsel, all of lead counsel and liaison counsel could  
3 see the unredacted. And if they thought it was relevant,  
4 then we could deal with it.

5 If I could just follow up on one of the Court's  
6 comments?

7 The plaintiffs' bar generally obviously has an  
8 interest in digging into whatever they can dig into within a  
9 pharmaceutical company or medical device company. So there  
10 is some antagonism more generally in the parties' interest.

11 So to give Zimmer information -- let's say there  
12 was an internal issue at Zimmer and it's reflected in the  
13 board minutes -- this is a hypothetical I am making up -- it  
14 might lead a lot of plaintiffs' lawyers who happen to get it,  
15 even though it was completely unrelated to this case, to make  
16 something of it when it was a confidential issue and should  
17 never have been disclosed.

18 I don't think they should be able to use this case  
19 to backdoor themselves into things like that, that are  
20 confidential within an adversary company.

21 THE COURT: Fair enough. I am wondering whether we  
22 couldn't adopt some procedure in which completely unredacted  
23 versions are provided to some smaller group of plaintiffs'  
24 attorneys, and then they can let us know if they have  
25 objections to particular redactions.

1           There, too, if it turns out that I am looking at  
2 redactions every six weeks, I will probably want to revisit  
3 the whole problem. But I guess I think that that initially  
4 is a proposal that could work.

5           MR. BECKER: Your Honor, I don't mean to take up  
6 your time. Can I just be heard since we are going back and  
7 forth on this?

8           THE COURT: Sure.

9           MR. BECKER: Here's our practical concern with all  
10 these issues. If this was a case that involved a couple  
11 hundred thousand pages, that would be one thing.

12           But this is a case what will literally involve  
13 millions and millions of pages of production. While the four  
14 law firms who sit here at lead counsel and liaison counsels'  
15 table are prepared to execute their duties, the reason we ask  
16 you for a 16-, 19-member plaintiffs' steering committee is  
17 because we need the help to go through that many documents.

18           So now what will happen is, we are artificially  
19 winnowing down the manpower and resources we have.

20           THE COURT: All right. Then let's expand the  
21 group. I mean, 19 is one thing; 500 is another.

22           MR. BECKER: The people who are going to be doing  
23 the document production in this case -- and maybe this is the  
24 disconnect that I did not explain -- both for  
25 product-specific designation and for redacted material are

1 the plaintiffs' steering committee. We are not going to  
2 invite lawyers from around the country who are not members of  
3 the plaintiffs' steering committee to review documents.

4 THE COURT: So, in other words, in the first  
5 instance, they are only going to the 19.

6 MR. BECKER: That's correct. And that's why --

7 THE COURT: That's the disagreement.

8 MR. YEAGER: That's not what their order says.

9 THE COURT: I'm sorry?

10 MR. YEAGER: That's not what their order says.

11 Their order says anybody can have it.

12 MR. BECKER: We will so stipulate.

13 THE COURT: All right. Let's go to the proposal  
14 that plaintiff is now making that apparently defendant didn't  
15 understand or wasn't communicated. It's limited to the  
16 steering committee. We don't need to worry about redactions.

17 And then, finally, the issue of deposition access.

18 MR. YEAGER: We just don't think -- we think there  
19 should not be a back door through which any of these  
20 documents can just go out into a broader distribution to  
21 any witness. These witnesses are going to be industry people  
22 in a lot of circumstances. If they have knowledge of the  
23 subject matter, it's legitimate. If they don't, these  
24 documents that are highly confidential should not be spread  
25 among deposition witnesses who don't have prior knowledge of

1 the subject matter. They don't need to be and it's a  
2 needless further expansion of the number of people who are  
3 going to see trade secrets that Zimmer has invested millions  
4 of dollars in developing and protecting.

5 THE COURT: I think I agree. And why -- what leads  
6 to the conclusion that that would happen?

7 MR. YEAGER: Well, because the version of the  
8 protective order that the plaintiffs propose would allow any  
9 document, regardless of its confidential nature, to be shown  
10 to any witness.

11 And we think it should only be shown -- they should  
12 only be shown to witnesses who know about the subject matter  
13 of that document.

14 MR. BECKER: Your Honor, this is more than a  
15 hypothetical. This is actually happening.

16 In the context of a deposition where you are either  
17 doing a trial deposition or you are doing a preservation  
18 deposition, you get a document that the parties disagree  
19 about whether or not this particular or that particular  
20 witness has the, quote, subject matter knowledge of it.  
21 Sometimes we show documents to people who don't have any  
22 knowledge of a subject to underscore a position they are  
23 making in the deposition.

24 Doctor comes in and says, well, I think this is a  
25 fantastic product, and I have prescribed it or used it for

1 10,000 people. We then show internal company records to that  
2 doctor who then says, well, had I known about this, I would  
3 have never used it. That goes to our case.

4 But under their protective order, we are precluded  
5 from using that.

6 And what's more, we would go one step further. I  
7 thought this was in the protective order itself. We will  
8 require third parties to sign the protective order before we  
9 take the deposition if we think we are going to use  
10 confidential documents. And that satisfies their concern.

11 MR. YEAGER: Well, that is in the order. It  
12 doesn't satisfy my concern.

13 THE COURT: I think the hypothetical that you are  
14 describing -- the doctor says, I think this is a fantastic  
15 product.

16 Now you show the doctor some documents that would  
17 cast a shadow over that assertion. That, to my way of  
18 thinking, is a document about which that person has some  
19 knowledge.

20 So I understand defendant says they don't.

21 MR. BECKER: That's the very point of what I am  
22 trying to avoid by this. So what will happen then, if they  
23 say, well, wait a minute. This is an internal company  
24 document. Why are you showing it to this doctor?

25 Well, now we stop the deposition. We have to call

1 you or we have to call the special master, or worse, we have  
2 to incur the expense to have the special master sit at the  
3 table and rule on all this, when all we have to do is have  
4 the witness sign the protective order and their interests are  
5 protected. That's all we are proposing, so we avoid these  
6 fights.

7 And if it didn't happen in case after case after  
8 case, it wouldn't be a big deal to us.

9 MR. YEAGER: Here is why it doesn't protect our  
10 interest. It doesn't protect our interest because these  
11 doctors are our customers.

12 And the plaintiffs want to put our customers, who  
13 select our products, in a witness chair and make a case  
14 against us out of cherry-picking our own documents to those  
15 doctors in a deposition.

16 If they want to ask them about what the doctors  
17 know about, of course they can ask them about that.

18 And if they want to ask them if you heard X, Y, and  
19 Z, would that change your mind? That's legitimate.

20 But to put internal documents in front of them  
21 which hurts us even further --

22 THE COURT: But the problem with saying, if you had  
23 known X, Y, and Z, would that have changed your mind? is, the  
24 X, Y, and Z might not be the exact same words that are in the  
25 document.



1           So later on when somebody moves for summary  
2 judgment or asks at trial, isn't it true that you didn't know  
3 X, Y, and Z?

4           Well, wait a minute. That's not what our document  
5 says.

6           That seems to me to be not nearly as effective as  
7 to allow the witness to look at documents.

8           And the fact that they are your customers isn't, on  
9 its face, troublesome. The customer might very well be  
10 interested in knowing something about the product that is  
11 revealed in the documents.

12           MR. YEAGER: Judge, if the Court -- I understand  
13 the Court's comment. So if the Court's pleasure is that we  
14 agree that subject matter means, as the Court has described  
15 it, that doctor has knowledge of the subject matter and  
16 therefore can see a document on the same subject matter, I  
17 can live with that.

18           THE COURT: That would be my direction. But I  
19 don't want to find myself conducting hearings about the  
20 matter, because when I say "subject matter," it would be this  
21 particular product. So that's what he knows about.

22           MR. YEAGER: Okay.

23           THE COURT: So then, documents about that product  
24 would be something that he is entitled to see.

25           MR. YEAGER: We will come up with some language

1 that says that, your Honor.

2 THE COURT: All right.

3 MR. YEAGER: Before we leave, we have gone back and  
4 forth a little bit. I don't want to leave the Court without  
5 understanding clearly and maybe asking for one bit of  
6 indulgence on the question of --

7 MR. MILLROOD: Excuse me, your Honor. I apologize.  
8 I am leaving.

9 THE COURT: Have a good holiday.

10 MR. YEAGER: Have a good trip.

11 -- of how broad the distribution should be of the  
12 cross-product document.

13 We started out with lead counsel and liaison  
14 counsel. The objection was made, that's not enough people to  
15 review them. Then the suggestion was made, expand it to the  
16 19-person, I think it is, joint prosecution group.

17 I would ask the Court to consider something less  
18 than that many, because still, when you get to that many  
19 folks -- we are talking about 20 to 25 law firms -- that's a  
20 lot of people to see highly sensitive information.

21 And no offense to these folks, these are people who  
22 are not friends of Zimmer.

23 THE COURT: To be honest with you, I think that's  
24 really -- we are relitigating an issue we decided the last  
25 time, whether or not the steering committee should be as

1 large as it is.

2 I am sensitive to Zimmer's concerns about the size  
3 of the steering committee. I recognize that there are some  
4 downsides to that size and its scope.

5 But I think under these circumstances where it  
6 sounds as though there really is a genuine possibility that  
7 we will have hundreds of cases, that 19 lawyers is not too  
8 many -- or 19 law firms.

9 MR. YEAGER: Nineteen law firms.

10 Perhaps I would test the Court's patience if I  
11 suggested some smaller part of the joint prosecution group?

12 THE COURT: How do we decide how much smaller?

13 MR. YEAGER: They could choose half.

14 MR. BECKER: Your Honor, we have asked repeatedly,  
15 how many pages are in play?

16 Again, I go back to the notion, if it's 100,000,  
17 that's one thing. In the *DePuy* litigation, of which I am a  
18 member, they produced almost, what, 10, 14 million?

19 MR. RONCA: Twenty million.

20 MR. BECKER: Twenty million pages with one product.  
21 It's one product.

22 How is it possible for four law firms, even though  
23 we think we are pretty good at what we do, to get through  
24 that many pages?

25 The reason we asked you for a steering committee

1 this large was so that we could properly and efficiently  
2 prosecute this case.

3 If there is anything remotely similar to what was  
4 produced in that one-product case to a case they are claiming  
5 has seven products, we are going to be looking at 20, 30,  
6 40 million pages of documents.

7 THE COURT: Unless and until I see some abuse, I  
8 think it's appropriate to allow the full steering committee  
9 access.

10 MR. YEAGER: Thank you, your Honor.

11 We had -- I don't know if the case management CMO2  
12 issues are before the Court. There is one issue that I  
13 think -- if the Court wants to take up the whole matter, of  
14 course, that's fine. But one matter, I think, probably ought  
15 to be decided before we leave today; and that is, the timing  
16 of initial disclosures by way of fact sheets or otherwise.  
17 We have gone back and forth on that.

18 We are now many months into this case. We don't  
19 even know what the products are because we don't have the  
20 product ID information from the plaintiffs. And they are  
21 entitled to some information from us, too.

22 THE COURT: We do need to have the initial  
23 disclosures. I would think -- I would suggest no more than  
24 21 days from now.

25 MR. YEAGER: Okay.

1 MR. RONCA: Your Honor, 21 days, Rule 26  
2 disclosures coming from them to us and us to them?

3 THE COURT: Correct.

4 MR. RONCA: So product ID. But you are going to  
5 identify all your custodians in 21 days?

6 MR. YEAGER: As with every initial disclosure, we  
7 will give you every bit of information we have that is  
8 responsive to the rule. And it will be supplemented as we go  
9 along.

10 In a company of many, many thousands of employees,  
11 do we know every custodian yet? No. But we know many of  
12 them, and we will share that, as we have told them.

13 MR. RONCA: What we had offered, your Honor, was,  
14 we would give them the product ID information. That's what  
15 we proposed.

16 They want the list of every doctor, every potential  
17 witness that might appear in this case. And they are saying  
18 to us, we will give you what we know in 21 days.

19 MR. YEAGER: We will give you what we know, and you  
20 should give us what you know.

21 THE COURT: Twenty-one days we will have  
22 disclosures. And if you are unsatisfied, I am sure you will  
23 let me know that.

24 MR. RONCA: One other thing, if I may?

25 THE COURT: Sure.

1 MR. RONCA: I don't want to be a pain.

2 November 18th, I am on vacation, already planned  
3 and paid for.

4 THE COURT: Let's do it a different day. Let's  
5 actually do it a little bit sooner.

6 MR. RONCA: Thank you.

7 THE COURT: Can I suggest maybe November 10th?

8 Actually, you know what? That's probably not great  
9 for me. No, I think it will work. November 10th -- we will  
10 say 9:30 -- instead of the 18th. And I will give these dates  
11 to my deputy.

12 One of the things I want to talk with you about  
13 when we get together in November, I do think it's appropriate  
14 to have -- we will have on our court's Web page a link to  
15 this case. And I will put things like the case management  
16 orders on there. You should advise me about what other  
17 information you think belongs on that Web site when we get it  
18 set up. I will probably get it set up relatively soon.

19 All right. Thank you.

20 MR. RONCA: Thank you, your Honor.

21 MR. BECKER: Thank you, your Honor.

22 (An adjournment was taken at 11:14 a.m.)  
23  
24  
25

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

\* \* \* \* \*

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Frances Ward October 21, 2011.  
Official Court Reporter  
F/j