

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

|   |                            |   |                      |
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| 3 | IN RE: ZIMMER NEXGEN KNEE  | } | Docket No. 11 C 5468 |
| 4 | IMPLANT PRODUCTS LIABILITY | } |                      |
| 5 | LITIGATION,                | } |                      |
| 6 |                            | } | Chicago, Illinois    |
|   |                            | } | November 10, 2011    |
|   |                            | } | 9:31 a.m.            |

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

APPEARANCES:

|    |                     |                                                                                                                  |
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1 THE CLERK: 11 C 5468, In Re: Zimmer NexGen Knee  
2 Implant Products Liability on motions.

3 THE COURT: Good morning.

4 Can I have your appearances?

5 MR. RONCA: Jim Ronca for plaintiffs' steering  
6 committee.

7 MR. BECKER: Good morning, your Honor.

8 Tim Becker for plaintiffs, lead counsel.

9 MR. LONDON: Good morning, your Honor.

10 Michael London for plaintiffs.

11 MR. YEAGER: Good morning, your Honor.

12 Jay Yeager from Baker & Daniels for Zimmer and the  
13 other defendants.

14 MS. PIERSON: Good morning, your Honor.

15 Andrea Pierson for the defendants.

16 MR. STITCHER: Good morning, your Honor.

17 Kurt Stitcher for the defendants.

18 MS. HEITMAN: Good morning, your Honor.

19 Kate Heitman for the defendants.

20 THE COURT: Good morning.

21 I have seen your proposed agenda. This looks good.  
22 I think we can make some progress here.

23 Let me warn you that I am going to be talking a  
24 little fast because I have got a jury, but we are not  
25 starting with that case until 10:00. I think we can

1 certainly make some progress between now and 10 o'clock.  
2 Then I may have to have you come back a little bit later in  
3 the day or another day if we don't get all the way finished  
4 with the agenda.

5 Let me begin with the case management order. I  
6 know that my order, I think, crossed the -- there was an  
7 "electronic filing cross in the mail" kind of a thing,  
8 because you did, in fact, submit your joint case management  
9 order right at the same time that I began wondering why I  
10 hadn't seen it yet. So I think that matter is resolved.

11 The only comment I wanted to make about the case  
12 management order beyond the comments that were obviously  
13 hashed out the last time we were together is, with respect to  
14 the plaintiffs' counsels' time records, I do want them  
15 maintained. And I think I do want to see them on, say, an  
16 every-60-day schedule if you could submit those to me *in*  
17 *camera*.

18 I want to make sure that I am satisfied with the  
19 progress that's being made.

20 I also would just comment, I want to make sure that  
21 it's clear that I will be -- can only reimburse coach airline  
22 travel. I would make that comment.

23 MR. RONCA: What we were planning to do, your  
24 Honor, was submit a proposed order relating to those kinds of  
25 things, what could be potentially --

1 THE COURT: Great.

2 MR. RONCA: And lay it out.

3 THE COURT: That would be great.

4 MR. RONCA: You know, limitations, all those  
5 things. So --

6 THE COURT: That would be great. If you could set  
7 some parameters that I could review, I would love that.

8 And then, as long as you are in a position to do  
9 that, I would be comfortable with your obviously somewhat  
10 policing this yourselves. I do want to keep up to speed on  
11 it.

12 MR. RONCA: That's the way we have done it in other  
13 cases.

14 THE COURT: Fine.

15 MR. RONCA: Create an order so it sets parameters  
16 so everybody knows what the parameters are.

17 THE COURT: Right.

18 MR. RONCA: What kind of things might be considered  
19 potentially for common benefit, fee awards, what things would  
20 not be, things like that.

21 THE COURT: That's great.

22 The next matter on your agenda is the issue of  
23 initial disclosures. And I know there is a motion to compel  
24 that was filed, and I have seen the response. I am talking  
25 about the -- well, the plaintiffs have moved to compel

1 further initial disclosures from the defendants. And  
2 defendants have responded in part by saying that they don't  
3 have initial disclosures from even all of the plaintiffs --  
4 of any kind from all the plaintiffs yet.

5 Anything further on that?

6 MR. RONCA: It's our motion, your Honor. May I  
7 speak to it for a few moments?

8 THE COURT: Sure.

9 MR. RONCA: From the papers you could tell we were  
10 disappointed with the initial disclosure by the defendants.

11 As the defendants point out, if you follow the  
12 rules exactly, they may well have complied with the rules.

13 On the other side, the defendants are apparently  
14 disappointed with our initial disclosures. And they say they  
15 are incomplete or whatever.

16 What I would say is, of the 37 cases they say no  
17 disclosure was filed, 33 of them aren't even due as of today.  
18 They are due next Friday.

19 Of the 28 cases they say are incomplete, we believe  
20 that they are complete, that they have gotten the reference  
21 numbers on most of those. But we didn't on some give the  
22 reference numbers and the stickers which contained the  
23 reference numbers or vice versa. And the reference numbers  
24 are not required by the rules either.

25 So to some extent, they went a little bit beyond

1 the rules. To some extent, we went a little bit beyond the  
2 rules.

3 And the bottom line is that -- if I can expand  
4 since we have a short time to a larger issue that relates to  
5 sort of everything?

6 What the plaintiffs would really like to work on  
7 with the defendants and have the Court help us work on is a  
8 comprehensive discovery plan that will cover everything.

9 Instead of coming in piece by piece by piece by  
10 piece with these little discussions and putting before the  
11 Court in the form of motions upon motions upon motions upon  
12 motions, what we would like to see is a discovery plan that  
13 sets out some dates and some times and some time frames,  
14 putting the written discovery first, then followed by things  
15 like depositions, in an orderly fashion so everybody knows  
16 what's coming up.

17 And if I could be judge for a day, I would order us  
18 to get into a room at some near date face-to-face and try to  
19 hammer out some type of comprehensive discovery plan. And if  
20 there are real disputes, substantive disputes, at some point  
21 after that, whether it is the January 12th status conference  
22 or other, we lay out those points and we get a plan hammered  
23 out.

24 Our biggest concern on the plaintiffs' steering  
25 committee is that we don't feel as of this date we have any

1 commitment as to when we are going to get anything.

2 THE COURT: I call that a Rule 16 conference. And  
3 I do that in all my cases and certainly will do so here.

4 I do expect that you will meet first to develop a  
5 proposal regarding dates. And if there is a dispute about  
6 the dates, I can help you hammer that out.

7 On this initial disclosure issue, as I see it, the  
8 concerns are, on the part of the plaintiff, the defendants  
9 haven't produced much in the way of documents. Part of the  
10 reason for that, as I understand it, is the defendants are  
11 awaiting entry of a protective order as to which there is one  
12 relatively small area of dispute.

13 MR. RONCA: I think they have agreed. I think my  
14 colleagues and Mr. Yeager have agreed.

15 THE COURT: All right. In other words, you have  
16 agreed on the protective order. Oh, okay. Good. All right.

17 But the other matter is the identity of  
18 individuals with knowledge. And I just would just -- a  
19 comment that I have, I assume -- well, wait.

20 Is there a continuing dispute? You just told me  
21 you have got an agreement. Is there a continuing dispute  
22 about the question of product-specific documents?

23 MR. BECKER: I can speak to that really briefly,  
24 your Honor.

25 Mr. Yeager and I have reached an agreement on that.

1           The sole issue which we just reached agreement on  
2 was the use of documents in depositions. We went back, based  
3 on what you said at the last hearing, hammered everything  
4 out.

5           We are going to hopefully submit an order to you  
6 tomorrow. And if not tomorrow, by Monday. I just have to  
7 send okay in my e-mail back to Jay and tweak one, literally  
8 one, word. And once we get that done, you will have the  
9 order in front of you tomorrow or Monday.

10           THE COURT: Okay. So there is no longer a  
11 disagreement about this whole issue regarding  
12 product-specific identity.

13           MR. BECKER: No. We discussed that at length, and  
14 we think your order was -- or colloquy, rather, was clear.

15           THE COURT: All right. Great. Great.

16           The reason I raise that issue is, with respect to  
17 initial disclosures, I guess I would have expected, given  
18 defendants' position that these products really are  
19 different -- in fact, there was an objection, as I understand  
20 it, to the MDL process in the first place.

21           I would have expected that some of the disclosures  
22 would include identity of different individuals with respect  
23 to different products.

24           So, for example, if the products really are  
25 different, maybe the engineers are different people, and



1 maybe the people that do the marketing and promotion are  
2 different people and the like.

3 So it was a surprise to me in that regard that only  
4 six or seven names were identified and they were all  
5 generically involved in purportedly all the products.

6 So that's just a comment I would have about the  
7 initial disclosures.

8 Is there -- apart from your concern, Mr. Ronca,  
9 about getting a schedule in place, are there other concerns  
10 about the initial disclosures?

11 MR. RONCA: Our concern, your Honor, really is not  
12 so much about the specifics of initial disclosures, but  
13 disclosures of -- when are we going to be able to find out  
14 something? Can we get a commitment of a date by which we  
15 will begin to start getting documents?

16 Reviewing the documents is a big process. And  
17 there is a fair amount --

18 THE CLERK: Hello?

19 MR. RONCA: -- of negotiation and perhaps --

20 THE COURT: I am sorry.

21 (Brief interruption.)

22 MR. RONCA: This seems to happen to me every time.

23 THE COURT: It isn't you.

24 THE CLERK: Hello?

25 THE COURT: All right. Sorry.

1           MR. RONCA: What we want to set up is a parallel  
2 process where we are producing stuff to them and they are  
3 producing stuff to us. And we feel the way things have  
4 progressed by doing it piecemeal, the fact sheets for the  
5 plaintiffs and the authorizations are more advanced, and we  
6 don't feel that we know anything about when we might be  
7 expected to receive documents.

8           We have heard that we will receive documents that  
9 they are reasonably able to produce at the end of November,  
10 maybe at the beginning of December; and that the e-mails,  
11 which are very important in this litigation and are  
12 extensive, at the end of January or the beginning of  
13 February. And that's fine if that's their limitation.

14           We just want to be a little bit definitive about  
15 when we are going to see something because we can't even  
16 operate or begin to operate until we have that.

17           THE COURT: Well, let's get a proposal from the  
18 defendants. Perhaps now that the protective order matter has  
19 been resolved, we can get a schedule in place.

20           What would be your proposal about producing  
21 documents?

22           MR. YEAGER: Our proposal as to a specific  
23 schedule?

24           THE COURT: Yes.

25           MR. YEAGER: Well, we have -- actually, we talked

1 about this two days ago at some length with the plaintiffs,  
2 and Mr. Ronca proposed a kind of rough outline of what the  
3 schedule ought to be I think yesterday afternoon, and we are  
4 in a position to respond to that.

5 I can respond to the particulars as to the document  
6 disclosure right now, if that's the Court's pleasure.

7 THE COURT: Well, I guess right now I want to talk  
8 about the schedule. But if you -- you haven't had a chance  
9 to talk about the proposal you received yesterday?

10 MR. YEAGER: Well, we have talked about it a little  
11 bit, but it has many moving parts.

12 THE COURT: Yes.

13 MR. YEAGER: And it has -- there are some things in  
14 there we are probably going to want to agree with. There are  
15 some more things we are going to want to put into it. We got  
16 it yesterday afternoon. This is not a complaint. We just  
17 first talked about it on Thursday, and it was proposed to us  
18 yesterday.

19 But if the Court wants to talk about it now, we  
20 will hammer it out now in court.

21 THE COURT: You know, ordinarily I would say, yes,  
22 let's just hammer it out right now. But I am wondering,  
23 given the circumstances, whether it wouldn't make sense for  
24 you to talk again and come back in just maybe a couple of  
25 weeks.

1 MR. YEAGER: That would be fine.

2 THE COURT: I don't know. Let's think about that.  
3 I would like, ideally, for there to be at least some  
4 agreement with -- the disagreements to be crystallized, in  
5 the way they have been with respect to some of the papers I  
6 already have.

7 Do you want to talk, Mr. Yeager, about the  
8 documents themselves?

9 MR. YEAGER: Yes, if I could.

10 THE COURT: Sure.

11 MR. YEAGER: Much of this, perhaps all of this, was  
12 in a letter that I sent I think a week or two ago to  
13 Mr. Ronca.

14 The documents, aside from the divisions among the  
15 buckets for product-specific, which we have already talked  
16 about and I think we have now got a procedure in place for  
17 that.

18 THE COURT: Good. Good.

19 MR. YEAGER: So now we have the question -- and we  
20 will see how it works, but both sides have, I think,  
21 implementing what the Court's rulings are, and hopefully that  
22 will work for everyone.

23 So how do we get the documents out to the other  
24 side?

25 In connection with the initial disclosures, as the

1 Court may be aware, the initial disclosure rule does not  
2 require the disclosure of actual documents.

3 THE COURT: Correct.

4 MR. YEAGER: We nonetheless produced certain  
5 documents that were available. We are producing more today.  
6 And once we get the protective order entered, we will produce  
7 substantially more.

8 Now, these are documents that are documents that I  
9 think of as documents we can go out and put our hands on,  
10 literally or electronically, that we can identify, things  
11 like 510-Ks; government regulatory approval files, some of  
12 which are confidential; design files, all of which are  
13 confidential; and other types of files. We can go find those  
14 at Zimmer. We don't have to do some massive electronic  
15 search to get those.

16 And package inserts, surgical techniques, design  
17 criteria, these are things that are kept by product and that  
18 we can put our hands on, we have put our hands on. We have  
19 produced some. And as we get our protective order in place,  
20 we will be producing a lot more.

21 THE COURT: Okay.

22 MR. YEAGER: Those are very important documents in  
23 the case to both sides, and they will be out, I think,  
24 probably -- well, many of them are out now. I hate to make a  
25 promise in this case because so many things hit bumps in the

1 road. But I would think by next week we will be producing  
2 the confidential documents, once the order is entered.

3 We do have to do the marking according to the final  
4 order, so that may take a couple days.

5 THE COURT: Right.

6 MR. YEAGER: The second group of documents, then,  
7 is -- we have received -- and Ms. Pierson was going to talk  
8 about this at some length, but we have received some document  
9 requests last week from the plaintiffs that are quite  
10 extensive, enormous document requests. Depending upon how  
11 you count, there are hundreds or maybe even thousands of  
12 document requests in there.

13 We have already talked about having a  
14 meet-and-confer. There has already been some back-and-forth  
15 on this. I think that process is actually going along about  
16 the right way. And perhaps we will leave today with some  
17 agreement exactly as to how that process and when that  
18 process will play out. There is going to have to be a  
19 substantial meet-and-confer.

20 I think, at the end of the day -- and one of the  
21 things I am going to say in the meet-and-confer is, we are  
22 going to give you all these documents we can identify that we  
23 can put our hands on. It does not make sense for the rules  
24 to require Zimmer to have an army of lawyers now go out and  
25 review, in addition to that, a million or two million or

1 three million -- we don't know the number yet -- of documents  
2 in order to respond to each of your hundreds of requests for  
3 production.

4 What makes sense and what we propose that might  
5 serve the plaintiffs' interests as well -- I can't speak for  
6 them on this, but this has worked in other cases with very  
7 large numbers of documents, is -- we are in the middle of and  
8 getting toward the end of first phase of collecting documents  
9 from identified custodians, putting them -- indexing them in  
10 a database, which we can then search by keywords.

11 It takes a lot to get to that point, but we are  
12 about to that point with the first batch of documents,  
13 basically all the electronic documents from the identified  
14 custodians except for e-mails. We have technological problem  
15 with the e-mails, which I will get to.

16 So that stuff ought to be done, as I told  
17 Mr. Ronca, by the end of this month.

18 And what I am going to propose to him is that --  
19 and what I have proposed to him is that, as part of our  
20 meet-and-confer, we see if we can find a process and engage  
21 in a process in which the plaintiffs give us some search  
22 terms or a combination of search terms. We go do the  
23 searches on the database and figure out whether they have  
24 produced -- those search terms turn up with a million  
25 documents or 500,000 documents or 10,000 documents. And

1 going back and forth in that, get to a number of documents  
2 from one or more searches that would be responsive to what  
3 they are really looking for.

4 I don't know if ultimately we are going to get to  
5 agreement on that or not. That is the procedure I think  
6 makes sense.

7 We will be able to start that at the end of this  
8 month with regard to all the non-e-mail electronic documents,  
9 as I mentioned.

10 The e-mail issue is that Zimmer, for the past few  
11 months, is in the process of moving from what they call one  
12 e-mail archive system to a new e-mail archive system. This  
13 was misleading or confusing to me when I heard the term  
14 "archive" because I thought that meant old e-mails. They  
15 tell me that means all their e-mails. This is how they save  
16 their e-mails.

17 The existing system is something called iLumen,  
18 which has proven in past cases very difficult to use for  
19 discovery purposes. It just doesn't have the capabilities,  
20 and it takes forever to search. It takes weeks to search it.

21 Once they get everything migrated into the new  
22 system, which is called Source 1, it will be, we are promised  
23 by their vendor, terrific. And we will be able to do the  
24 same kind of searches that I have described with regard to  
25 the non-e-mail documents.



1           So we have talked about rolling out our documents.  
2 We are doing that already. And I think this is another phase  
3 of rolling out documents, where we are going to have search  
4 capability in November as to most of the electronic documents  
5 and in January as to the rest.

6           So that's the very short version of where we are  
7 with the electronic document discovery. And I don't know if  
8 the Court had another question beyond that.

9           THE COURT: What I understand, then, is that you  
10 expect to be producing certain confidential documents by --  
11 probably by the end of next week, because we will have this  
12 protective order entered on Monday; and substantial  
13 production of non-e-mail documents by the end of this month.

14           MR. YEAGER: Well, we will have them in this  
15 database and we can do a search process. We may be able to  
16 start producing -- I think it depends on the result of the  
17 meet-and-confer, frankly.

18           We have got all these document requests that we are  
19 going to have to respond to. And to the extent we are going  
20 to go down that kind of traditional track, which I think  
21 needs to be modified for a case like this, we may have to  
22 start producing documents.

23           Hopefully we are going to reach agreement where the  
24 plaintiffs will decide that they would prefer to have this  
25 text search capability to go in and have us download

1 documents on them, based on their own searches from our --

2 THE COURT: I am going to assume they are going to  
3 want documents and text search capabilities.

4 MR. YEAGER: I am sorry?

5 THE COURT: I would assume that they are going to  
6 want the documents and text search capability.

7 Maybe they would -- if what you are suggesting is  
8 you could give them the electronic versions of the discovery  
9 so they can then search it, that sounds fine.

10 MR. YEAGER: What I am suggesting is, all the  
11 documents we can put our hands on, that we can go locate,  
12 because we know where they are -- design files, manufacturing  
13 files --

14 THE COURT: Right, right, right.

15 MR. YEAGER: Yes, they get those. They are getting  
16 them already. They have started to get them. As the  
17 protective order goes in, they will get those.

18 With regard to the other documents that are out  
19 there in undifferentiated electronic files, that has to be  
20 searched, and those documents have to be reviewed to be  
21 produced.

22 So you could do this: If you went the straight,  
23 traditional method that's applicable in a more normal  
24 lawsuit -- we have the request for production; we have a  
25 meet-and-confer; we resolve disputes; the Court rules on

1 whatever it has to review; then we know what we have to  
2 produce; and then we have our lawyers go review all the  
3 documents and figure out which documents apply to  
4 which request.

5 THE COURT: Sure.

6 MR. YEAGER: I would suggest -- and I am going to  
7 suggest to my colleagues on the plaintiffs' side -- that  
8 applying that process, when we have hundreds or thousands of  
9 requests for production and perhaps millions of documents --  
10 we don't know the number yet -- does not make sense. That's  
11 inherently unduly burdensome. And there is a better way to  
12 do it because we have electronic search capability.

13 So that as to those things beyond the things we can  
14 put our hands on, that we would have to really engage in an  
15 enormous investment of the time of armies and lawyers, I am  
16 going to propose that we short-circuit this, at least as to  
17 the things we can agree on.

18 THE COURT: You know what? I am going to give you  
19 a chance to have that conference and talk about it.

20 I suspect that what the plaintiffs are going to  
21 want to say is, give us everything and we will do our own  
22 word searches.

23 And maybe the easy thing, then, would be, instead  
24 of doing a search for this and that, as you point out, the  
25 more traditional discovery approach, you just pull out any

1 privileged information and provide everything else. I don't  
2 know. Let them do their own, you know, wading through the  
3 water.

4 MR. YEAGER: We may be able to work something out  
5 along those lines. That may be part of the discussion.

6 THE COURT: All right.

7 MR. YEAGER: Would the Court like me to address in  
8 any more -- the motion that plaintiffs have on our initial  
9 disclosures, which we briefed to the Court? I know the Court  
10 has probably read all that.

11 THE COURT: Not right at this moment.

12 But, Mr. Ronca, did you want to say something right  
13 now?

14 MR. RONCA: I just wanted to say that the  
15 difficulty with that is, in order to understand the lingo, so  
16 to speak, in order to do a correct word search, we need a  
17 tremendous amount of documents so we can figure out how they  
18 use their words so we can search intelligently. That's the  
19 first thing.

20 The second thing is, searching like that produces  
21 things out of context. We need custodial files for  
22 custodians in the context in which they kept them, not a  
23 random context from some kind of global or Boolean search.

24 So getting documents in December without the  
25 e-mails that relate to those documents until February, we

1 can't ever put those documents into any kind of context as to  
2 how they were developed or what the thinking was behind them.

3 And if the documents are produced in a database  
4 that we can't see, we could ask for search terms and then  
5 they could determine which of those documents meet our search  
6 terms and then send them to us, we don't know what we have  
7 got, and we don't know if they are in the correct context,  
8 because the computer's only responding to a logical search  
9 and it may not capture everything.

10 The way the rules read is that documents should be  
11 given over in the manner in which they are kept in their  
12 business, not in some random act.

13 Now, we may be able to work something out. I'm not  
14 excluding that. But the way it's being proposed does not  
15 work for us, unless there is something I'm missing. And it's  
16 similar to what the Court is suggesting.

17 MR. YEAGER: Well, I would say this: If that's  
18 where we end up after our discussion, then we will just go  
19 back, object to their discovery in the traditional way, meet  
20 and confer, have the Court decide, and then we will go fight  
21 through every request. That's the alternative, is the  
22 traditional way.

23 THE COURT: That might be the alternative. There  
24 may be some third alternative. I haven't given up on the  
25 idea that you can work something out other than what you,

1 Mr. Yeager, perceive to be very cumbersome.

2 And again, I guess I'm assuming that Zimmer itself,  
3 the Zimmer entities themselves, maintain a lot of their  
4 records electronically. And that's the way they are  
5 maintained in the ordinary course of business. So production  
6 of those by way of imaging or the like might be relatively  
7 straightforward without going through some cumbersome and  
8 time-consuming individual document-by-document review  
9 process. It might be simply possible to say, here are the  
10 documents maintained by engineer X over whatever period. We  
11 have cleansed it of privilege. Have at it.

12 MR. YEAGER: For example, all the documents held by  
13 this person that used the term "flex" would be one example.

14 THE COURT: Or what about, all the documents used  
15 by this person in connection with this product?

16 I mean, I don't know that it makes sense to do  
17 the -- I guess I am skeptical that this proposal you are  
18 making, that you would ask the plaintiff for word search  
19 terms and then produce documents in response to that, will be  
20 effective.

21 I am not going to rule it out. I think you should  
22 talk with one another, because I think we have to get  
23 together again pretty soon anyway to develop our schedule.  
24 And that, too, I want you to talk about first.

25 Is there -- I know that you have something further

1 to say about the initial disclosures, but I know that a  
2 couple of other things that I definitely want to cover today  
3 would be the master complaint-and-answer process and also  
4 this motion for leave to file position statements and  
5 schedule a presentation. I would like to talk about those  
6 matters for sure.

7 Have you made any decisions about the master  
8 complaint-and-answer issue?

9 MR. YEAGER: I don't think that there has been. I  
10 think initially it was proposed. It kind of -- it was not --  
11 that was not picked up off the table for a while. We have  
12 repropose it recently, and I don't think there is a  
13 conclusion on it.

14 Ms. Pierson is able to speak to that, if you would  
15 like to address that now.

16 THE COURT: Okay.

17 MS. PIERSON: Thank you, your Honor.

18 Mr. Yeager is correct. We started talking about  
19 the process of a master complaint-and-answer probably in  
20 September or so with plaintiffs.

21 Initially, the plaintiffs proposed it. We were  
22 prepared to talk about it. It became part of a case  
23 management order that was never presented to your Honor and  
24 entered. And then the ball just sort of got dropped.

25 We put it on the agenda today for, really, two

1 reasons.

2 One is to request that the Court enter a schedule  
3 for conferring and presenting motions to the Court with  
4 respect to master complaints and answers. The Rule 16  
5 conference that you mentioned, that may address that issue  
6 exactly.

7 The second reason that we put it on the agenda was  
8 to determine if the Court has any preferences with respect to  
9 master complaints and answers. We are certainly aware that  
10 the manual contemplates using them. It contemplates an  
11 orderly progression of the case, including consolidated  
12 answers, filing and briefing on motions to dismiss, fact  
13 discovery, and the like.

14 THE COURT: I do think having a master  
15 complaint-and-answer process in this case would be useful.

16 I think you are probably aware there were -- I  
17 think this has already happened. There were a couple of  
18 cases that we found in our district after you people called  
19 to our attention the fact that we should have -- something we  
20 should have known all along, which was that there are several  
21 MDL tagalong cases in our district that hadn't been  
22 reassigned. I think that's all happened now.

23 But a couple of them were *pro se* litigants. Here,  
24 too, we want some kind of coordination. I don't want a lot  
25 of outliers with various claims.



1           So I guess I would prefer a master complaint, even  
2 if it's broken down by product in some fashion, and then get  
3 some kind of a master response to that.

4           Is that something the plaintiffs have considered or  
5 are in a position to do?

6           MR. RONCA: Your Honor, we actually brought it up  
7 initially because we viewed the most efficient way to do it  
8 was to have direct filing. Then we would have a master  
9 complaint or uniformity of everything that came through.

10           The Court advised us that they didn't -- the Court  
11 didn't think that it was the most efficient way and ruled  
12 that there would be no direct filing. And at that point --

13           THE COURT: No direct filing, but that doesn't mean  
14 there wouldn't be a master complaint.

15           MR. RONCA: Understood. Understood, your Honor.

16           But the evidence -- it becomes like an additional  
17 step in the process, because the complaint has already been  
18 filed, the case has gone through the process of transfer, and  
19 it comes in here.

20           Would the plaintiffs then be required to file yet  
21 another complaint once it got in here?

22           THE COURT: No. They would -- my anticipation  
23 would be, you file a master complaint -- you know, it's not  
24 unusual at all to have multiple complaints, even in a single  
25 case. But I would assume that you would file a master

1 complaint.

2 And then as tagalong actions come in that are filed  
3 post now, those -- lawyers in those cases can be asked  
4 whether they are willing to adopt the master complaint, and  
5 if not, what additional concerns or allegations they may  
6 have.

7 MR. LONDON: Your Honor, Michael London. I woke up  
8 with a terrible cold today.

9 THE COURT: Sorry.

10 MR. LONDON: So I apologize for my singing voice  
11 sounding like this.

12 With respect to master complaints, some  
13 litigations, they should have been used; and in some  
14 litigations, they should not have been used.

15 And traditionally, the way I understand that it  
16 works would be, the master complaint would be filed in this  
17 court in which a master answer would then be --

18 THE COURT: Sure.

19 MR. LONDON: Then there is, in a sense, direct  
20 filing by an adoption, by a reference complaint --

21 THE COURT: Exactly.

22 MR. LONDON: -- that's in this courthouse.

23 If, by chance, the local lawyer decides to file in  
24 his or her home district -- the Eastern District of New York,  
25 I will say -- that case comes here, and that's not part of

1 the master complaint.

2 THE COURT: Correct.

3 MR. LONDON: However, liaison counsel and the lead  
4 counsel here do their darnedest to make sure every plaintiff  
5 lawyers knows, hey, this is an easy procedure.

6 THE COURT: Just check --

7 MR. LONDON: It's a check box.

8 THE COURT: Check a box.

9 MR. LONDON: Check a box, check a box. They then  
10 have a short-form answer, which is basically --

11 THE COURT: Check a box.

12 MR. LONDON: -- check a box, check a box, check a  
13 box.

14 THE COURT: Yes.

15 MR. LONDON: So, yes, it is direct filing because  
16 that short-form complaint or adoption by reference is really  
17 filed directly here.

18 All venue rights are preserved. So there is  
19 usually a caveat in the case that the venue issues will be  
20 decided at a future time, because under Lexicon you might  
21 not --

22 THE COURT: Correct.

23 MR. LONDON: So even though it's filed here, that  
24 New York plaintiff may go back to New York or he may argue  
25 about Indianapolis.

1 THE COURT: I don't see the direction the parties  
2 file initially their cases in a court having venue as  
3 inconsistent with the consolidated complaint process. I  
4 don't think those are inconsistent.

5 Now, if they want to file some kind of a  
6 streamlined version in their home districts and then  
7 ultimately adopt this one, I think there has to be a simple  
8 way to do that.

9 MR. LONDON: Some folks do. For example, in  
10 litigations that did not have the master complaints, for  
11 example, Judge Herndon's *Yaz* case; Judge Katz's *Ortho Evra*  
12 case. I think Judge Katz learned it in the second MDL case.  
13 I think she already has it.

14 People did start using essentially a form --

15 THE COURT: A form complaint.

16 MR. LONDON: Plaintiff lawyers shared a form  
17 complaint. We knew it passed muster under 12(b). And it was  
18 just an answer. And many defendants have a form answer  
19 because it helps them as well. They don't have to scour  
20 through. They know Paragraphs 42, 43, and 44 address the  
21 plaintiffs' injuries.

22 So there are those two ways.

23 The concern we have is that this becomes a vehicle.  
24 And we would share the master complaint. They can look at  
25 it. And they can have a master answer.

1           And if that's a process that they are willing to  
2 undergo, we can talk about it. We would be open to that. I  
3 think that's where it is.

4           MS. PIERSON: That most certainly is a process that  
5 we are interested in.

6           Our conversations on this topic really broke down,  
7 your Honor, in the last couple of weeks because plaintiffs  
8 asked that Zimmer waive its right to file any kind of motion  
9 to dismiss with respect to any aspect of the master  
10 complaint.

11           We were unwilling to waive that in advance without  
12 having seen the master answer.

13           These are all issues that can be hammered out.

14           THE COURT: I think you should negotiate the  
15 process of a master complaint and answer.

16           And, by the way, that does not preclude -- I mean,  
17 I would obviously prefer that you submit your proposed  
18 complaint to them, and they say, yes, we are not going to  
19 challenge this on 12(b)(6) grounds.

20           But if you can't reach an agreement, then file your  
21 complaint, let them file their 12(b)(6), and I will rule.

22           But obviously preferable is to say, here is the  
23 master complaint. Following individuals have the following  
24 knees installed. They went wrong. They suffered damages. I  
25 think that probably satisfies 12(b)(6).

1 Defendants answer to that complaint, recognizing  
2 that we have got some myriad circumstances for various  
3 parties.

4 But I think that would be a good deal more  
5 straightforward than having individual -- all the individual  
6 complaints, which ultimately may or may not include or not  
7 include some detail that could potentially be litigated down  
8 the road.

9 MR. LONDON: We just don't want to get mired into a  
10 12(b)(6) process when, in fact, we know they have answered  
11 many of these complaints.

12 THE COURT: I would hope that you won't, and I have  
13 no reason to believe that you will. If it happens, it  
14 happens.

15 I guess the one other thing that I definitely want  
16 to talk about right now, recognizing we are going to have to  
17 set a date for this Rule 16 conference, is, I do want to talk  
18 about the position statements and presentations.

19 I don't know whether there is a disagreement on  
20 that or not. I understood that we had talked about it. It  
21 sounds as though the defendants think it's a good idea, and  
22 plaintiffs have decided it isn't?

23 MR. YEAGER: That's what it sounds like to us. We  
24 think it's what we talked about two hearings ago and we ought  
25 to do it.

1           THE COURT: Let me tell you why I really -- I  
2 really think you will have a better judge if the judge  
3 understands the technology. Not perfectly. I am not an  
4 engineer. But I am not math averse. I am not science  
5 averse. I like this stuff. I would like to learn about it.  
6 I think it will really help me.

7           So I would like to have -- even if we -- some kind  
8 of a presentation. For that matter, if you want -- if there  
9 is a concern that the plaintiffs aren't ready because they  
10 haven't had enough discovery and the like, we could do it in  
11 stages.

12           But I would like at least some kind of generic  
13 presentation about how these knees work, how they are  
14 installed, what happens, what they are made of, how they  
15 move, how they do or do not improve your life, et cetera.

16           MR. RONCA: Your Honor, we don't have any problem  
17 with that. I suggested it at the first hearing.

18           THE COURT: Yes, I recall this.

19           MR. RONCA: The problem that we have is, Zimmer, in  
20 their motion -- no prejudice because they said this -- but  
21 from our point of view, said, we want to basically prove to  
22 you that these are good products.

23           That's not what we think the position paper should  
24 be about at this stage. It should be about explaining the  
25 science --

1 THE COURT: Right.

2 MR. RONCA: -- how the knees work, what the  
3 revisions mean, et cetera, et cetera, but not about, it's a  
4 great product, because they have all the data and they can  
5 pick and choose what to present. And we don't have it and we  
6 can't challenge it. So we are in the dark. We can't even  
7 ask any questions about whatever they decide to produce.

8 So if it's only about the science of how they work  
9 and how they are put in and that kind of explanation, that's  
10 one thing.

11 If they are about proving either our case or their  
12 case -- that we say, it's a terrible product; they say, it's  
13 a great product -- we are at a huge deficit.

14 THE COURT: Correct.

15 MR. RONCA: We are hugely prejudiced.

16 THE COURT: I am sympathetic to that. I understand  
17 that you are not in a position right now to talk about  
18 defects. You need discovery. You have some ideas. You have  
19 some allegations. You need a lot more discovery.

20 I am really thinking about the much more generic,  
21 kind of the airplane view of all this, that -- tell me about  
22 the circumstances that give rise to a need for artificial  
23 knees. Maybe tell me about how -- you know, the first person  
24 that ever created an artificial knee. Maybe show me a few  
25 different artificial knees on a screen. Talk a little bit



1 about the surgery. Talk a little bit about the before and  
2 after.

3 I recognize that there are disputes about these  
4 products and whether they met particular standards and  
5 whether they have flaws. And I would think that we are going  
6 to veer away from those disputed areas and do much more of,  
7 again, kind of broad, general outlines about the technology.

8 I guess I can't be any more specific than that  
9 other than recognizing that the plaintiffs are not in a  
10 position to put on experts right now about what went wrong.  
11 It's way too soon for that.

12 MR. YEAGER: Judge, I understand the Court's  
13 comment, and we will take that to heart.

14 If I could just respond a little bit?

15 These plaintiffs filed lawsuits against us claiming  
16 defects.

17 THE COURT: Sure.

18 MR. YEAGER: They have caused us to defend these  
19 cases at great expense. We think they are just completely  
20 wrong about it.

21 The suggestion that was originally made was a  
22 suggestion -- and the MCL, I think, uses the same term --  
23 position papers.

24 Of course, the science has to be discussed. But  
25 also, unless the Court tells me that it doesn't want to hear

1 it, I think that perhaps the Court might want to hear what  
2 our position is with regard to the claims as we understand  
3 them.

4 And respectfully, I think that the plaintiffs ought  
5 to be required to tell us what their position is, because,  
6 frankly, we have heard some different things, and we think  
7 that they ought to have to take some position.

8 I am not coming to the Court with confidential  
9 information. The paper that we have prepared or that we are  
10 preparing relies on publicly available information that the  
11 defendant's experts would -- the plaintiffs' experts would  
12 have complete access to as well.

13 This is not a mini summary judgment, as was  
14 suggested. It's not that.

15 THE COURT: If what you are relying on is public  
16 information, I think that's fair.

17 And, by the way, their positions are going to be  
18 presented in the master complaint, to the extent they haven't  
19 been already. I mean, we do have a general idea what their  
20 claims are already.

21 Why don't we talk about a date for that episode.

22 Let's also talk about a date for our Rule 16  
23 conference that I would hope would be within about 14 days,  
24 maybe a little bit longer than that.

25 And then let's talk about this issue of improperly

1       venued cases.

2               Beginning with the first thing -- or the latest  
3 thing first, can I find a date in January for this  
4 presentation?

5               MR. YEAGER: Sure.

6               THE COURT: I think we have already got a status  
7 date of -- is it the 12th?

8               MR. RONCA: Yes.

9               THE COURT: Let me see what else I have that day,  
10 because that might be a good day for us to do this, if you  
11 could be ready then.

12              You know what? That day would be great. That day  
13 would be great.

14              MR. YEAGER: How long should we plan for, for each  
15 side's presentation, your Honor?

16              THE COURT: I am thinking we should set aside a  
17 couple of hours, so you each get an hour, maybe a little bit  
18 more.

19              MR. YEAGER: Okay.

20              THE COURT: I will set aside three hours. An hour  
21 and a half, that will give you time to respond to one  
22 another, if you wish to, or ask questions.

23              MR. YEAGER: I take it from the Court's comment  
24 that the Court prefers to have this presentation rather than  
25 a written position paper submission?

1 THE COURT: I prefer a very brief written  
2 presentation and a more comprehensive demonstration.

3 MR. YEAGER: When would the Court like the briefer  
4 written presentation?

5 THE COURT: If you get it to me a week ahead, I'll  
6 certainly read it.

7 MR. YEAGER: Okay.

8 MR. RONCA: Your Honor, if I understand, only  
9 public documents, which means no affidavits from --

10 THE COURT: That's right. No experts.

11 MR. RONCA: -- from their internal people, who are  
12 all experts on a lot of this stuff.

13 THE COURT: Well, I think what Mr. Yeager said is,  
14 he is going to be relying on publicly available information  
15 for this. And that's what I am anticipating.

16 Remember, I am an -- I have two real knees. I  
17 don't know anything about this. I really want the bird's-eye  
18 view. I want to know more about this whole process.

19 I will tell you right now, I have always wondered,  
20 how is it that you could replace a joint and have less pain?  
21 because I thought pain came from nerves and not bones. So  
22 you will tell me all that. That's the kind of information I  
23 want.

24 MR. RONCA: That's not a problem.

25 THE COURT: All right. What about our Rule 16

1 conference, at which we will develop a further schedule  
2 regarding, potentially, these master pleadings and also a  
3 really comprehensive discovery schedule?

4 MR. YEAGER: We talked about -- I think we were  
5 talking about dates in two weeks, the last I saw.

6 THE COURT: That's great. If you have time to get  
7 together and hammer out your agreements and disagreements  
8 between now and then, that would be great.

9 MR. YEAGER: Do you know where we are on dates?

10 MS. PIERSON: We haven't agreed to dates to meet  
11 and confer yet, but we can do that within the next couple of  
12 weeks, which means we ought to be in a position to have a  
13 Rule 16 conference in December, if the Court is available.

14 THE COURT: How about December 2nd?

15 MR. BECKER: Your Honor, that's the day after the  
16 JPML hearing. So I don't know that -- I mean, people will be  
17 traveling from Savannah, Georgia. I think the JPML hearing  
18 is on the 1st.

19 THE COURT: Oh, it is?

20 MR. BECKER: Yeah.

21 THE COURT: I suppose I should know that.

22 All right. I know I am in -- I am at the Ninth  
23 Circuit on the 5th and 6th.

24 What about -- what do we have on the 8th and 9th?  
25 I know the 8th is pretty busy already. The 8th is pretty

1 busy already.

2 The 9th is a possibility, if we were to do it the  
3 9th of December in the afternoon. That's a Friday.

4 Do you mind traveling on a Friday afternoon?

5 MR. YEAGER: No. That would be fine with us.

6 THE COURT: 2 o'clock? Is that all right?

7 MR. BECKER: Not to be entirely burdensome, but  
8 there is a major symposium that is held for both plaintiffs  
9 and defense counsel that many of the lawyers at this table  
10 will be involved in on the 8th and 9th, in Louisiana.

11 THE COURT: The 8th and 9th?

12 MR. BECKER: Yes.

13 I mean, if we could do earlier that week, your  
14 Honor, the 5th, 6th, or 7th?

15 I think you just said you were in California.

16 THE COURT: I am in California on the 5th and 6th.

17 I'm actually -- I think I am flying back on the  
18 7th, but I don't know what time I am here. That's the  
19 trouble.

20 MR. BECKER: Could we do the following week, your  
21 Honor?

22 THE COURT: Sure. Let's look at early the  
23 following week.

24 MR. BECKER: The 12th or 11th or 13th -- 12th.

25 MS. PIERSON: 12th or 13th are good.

1 THE COURT: Let's say 2 o'clock on the 12th.

2 All right. So we have got a date for the slide  
3 show, let's call it. We have also got a date for the Rule 16  
4 conference.

5 Could we talk about -- just for a moment about  
6 improperly venued cases?

7 MS. PIERSON: Yes, your Honor.

8 One thing, just back on the conference on the 12th,  
9 one of the issues on the agenda is this motion with respect  
10 to authorizations and a fact sheet procedure and presenting  
11 disputes related to fact sheets. The 12th would be a good  
12 day to address fact sheet disputes, too, if that's -- if your  
13 Honor has time.

14 THE COURT: That would be great.

15 MS. PIERSON: And to sort of short-circuit things  
16 on the authorizations, I would suggest -- in CMO 1 cordoned  
17 off for today, the parties have agreed that the Court can  
18 decide things like this issue of authorizations on the  
19 papers.

20 We filed a motion with respect to the authorization  
21 we asked the Court's approval for. Plaintiff opposed it late  
22 yesterday. We would like a little bit of time to reply to  
23 that. But then we are satisfied if the Court addresses the  
24 authorization issue just on the papers alone.

25 THE COURT: That would be great.

1           So you are going to submit a reply in support of  
2 your position on authorizations.

3           MS. PIERSON: Yes.

4           THE COURT: And how much time do you want?

5           MS. PIERSON: Five days is fine, your Honor.

6           THE COURT: That's great. We will say end of next  
7 week.

8           MS. PIERSON: And then, if we could just present to  
9 your Honor before the hearing or the conference on the 12th  
10 whatever remaining disputes are on the fact sheets, if there  
11 are any, then perhaps that issue could be heard on the 12th.

12           THE COURT: That's exactly what I would plan.

13           MR. RONCA: December 12th.

14           THE COURT: December 12th.

15           MR. RONCA: Rather than January.

16           THE COURT: Yes, they are both on the 12th.

17           But December 12th is the Rule 16 conference, which  
18 is a big schedule -- planning meeting for scheduling.

19           And the 12th of January is more of an "introduction  
20 to the technology" episode.

21           MS. PIERSON: That's perfect.

22           THE COURT: All right.

23           MS. PIERSON: On the venue issue, your Honor, just  
24 briefly.

25           THE COURT: Yes.



1 MS. PIERSON: There is really nothing for the Court  
2 to decide on that issue, but we want to bring to your  
3 attention an issue that we think ultimately will be before  
4 you.

5 There are currently pending in the MDL about  
6 20 cases that were improperly venued under 1391 and 1406  
7 before they were transferred into the MDL. And  
8 unfortunately, they just got swept up into the MDL before  
9 there was an opportunity for Zimmer to file a motion to  
10 dismiss or transfer.

11 Since the last conference, about 14 additional  
12 matters have been filed that have not yet been transferred to  
13 the MDL but are subject to conditional transfer orders.  
14 Those matters have been filed by attorneys. They are also  
15 improperly venued. They are in the home state of the  
16 plaintiff's attorney. It's not the home state of Zimmer.  
17 It's not the home state of the plaintiff. And it's not where  
18 some of the defendants do business.

19 So we have filed motions to dismiss or transfer in  
20 those jurisdictions.

21 We have also objected to the conditional transfer  
22 order and explained to the panel we have got this issue that  
23 they are improperly venued from the outset.

24 THE COURT: Right.

25 MS. PIERSON: We are aware of about 15 other cases

1 that are coming down the pike that we have not yet been  
2 served in that have the same issue. So we have been -- we  
3 have been and will be talking with the plaintiffs about how  
4 best to address that, but wanted the Court to be aware that  
5 there are some fairly significant venue issues with respect  
6 to about somewhere between 30 and 50 cases.

7 THE COURT: Well, I am hoping, obviously, you will  
8 be able to resolve it to some degree by agreement. But  
9 otherwise, the transferor courts or I will decide venue. I  
10 can decide whether venue is proper in another venue as well  
11 as this one.

12 MS. PIERSON: Okay. If necessary, we will just tee  
13 that issue up with the cases that are currently pending  
14 before your Honor, then.

15 THE COURT: Sure.

16 MS. PIERSON: Thank you.

17 THE COURT: All right. Thanks. I am sorry I don't  
18 have more time for you today, but I think we have made some  
19 progress, and I appreciate your -- your submissions have been  
20 great.

21 That's CMO 1 is definitely going to be entered. I  
22 am sorry that we kind of crossed paths on that.

23 MR. RONCA: One other thing, your Honor, just real  
24 fast.

25 Whenever we do take -- and we like have a

1 transcript and some things are done on the transcript, the  
2 only ones who know about it, unless they get a copy of the  
3 transcript, are us. And there isn't like general notice. We  
4 talked about this with Jay.

5 When we have an order, I think we have to try to  
6 ask the Court to actually enter an order so we can be sure  
7 that -- because cases keep flowing in -- everybody knows  
8 about it. I can't keep the e-mail addresses up fast enough  
9 to keep everybody notified on the plaintiffs' side.

10 THE COURT: I normally enter an order the same day.  
11 The last one, it just took me a while. But I always intend  
12 to enter an order in every day's session.

13 And you are also -- I will make sure that our  
14 transcripts get posted as well.

15 MR. RONCA: Great. Thank you very much.

16 MR. YEAGER: Thank you, Judge.

17 THE COURT: All right. Thanks.

18 (An adjournment was taken at 10:17 a.m.)

19 \* \* \* \* \*

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

22 /s/ Frances Ward  
23 Official Court Reporter  
24 F/j

November 12, 2011.

25