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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 December 12, 2011 2:08 p.m.

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

APPEARANCES:

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1 THE CLERK: 11 C 5468, Zimmer NexGen Knee Implant
2 Liability for Rule 16 conference.

3 THE COURT: Good afternoon.

4 Why don't we begin with your appearances.

5 MR. YEAGER: Your Honor, Jay Yeager from Baker &
6 Daniels.

7 MS. PIERSON: Your Honor, I am Andrea Pierson with
8 Baker & Daniels for the defendants.

9 MS. SELLERS: April Sellers from Baker & Daniels
10 for the defendants.

11 MR. OSTING: Kyle Osting from Baker & Daniels for
12 the defendants.

13 MR. STITCHER: Kurt Stitcher for the defendants,
14 your Honor.

15 THE COURT: Good afternoon.

16 MR. MILLROOD: Good afternoon, your Honor.
17 Tobi Millrood for the plaintiffs.

18 MR. BECKER: Good afternoon, your Honor.
19 Tim Becker for plaintiffs.

20 MR. RONCA: Good afternoon, your Honor.
21 Jim Ronca for plaintiffs.

22 MR. FLOWERS: Good afternoon, your Honor.
23 Pete Flowers for plaintiffs.

24 MR. LONDON: Michael London for the plaintiffs.

25 THE COURT: Good afternoon.

1 Everyone ready to proceed?

2 MR. RONCA: Yes.

3 THE COURT: Good.

4 MR. YEAGER: We have a preliminary matter I thought
5 I would like to address.

6 MR. RONCA: I think we agreed to it. I think with
7 the limited time we have, that's sort of a cart pulling the
8 horse. But if you want to go to that first --

9 THE COURT: First we are going to try to tap
10 somebody else in.

11 THE CLERK: He said he would be here.

12 Do you want me to try it?

13 THE COURT: But he is not.

14 MR. RONCA: There was a problem with some
15 subpoenas. We were going to ask the Court to enter an agreed
16 order. I didn't know if we needed to do that first since we
17 apparently have limited time.

18 THE COURT: I am happy to enter an agreed order for
19 subpoenas.

20 MR. YEAGER: Your Honor, I would like to be heard
21 on this just briefly, if I could.

22 THE COURT: So it's not agreed.

23 MR. YEAGER: I think it's agreed, but we just
24 talked about it for two minutes before. I think the Court
25 needs to hear the circumstances.

1 THE COURT: Go ahead.

2 MR. YEAGER: Your Honor, I will not take up much
3 time. I know time is short.

4 The Court is aware of the discovery sequencing
5 issues that are going on now the parties are working on.

6 THE COURT: Correct.

7 MR. YEAGER: We learned on Friday, through some
8 physicians with whom Zimmer has had some certain
9 relationships, that they had received subpoenas that have
10 been served by the plaintiffs, by members of the steering
11 committee. We had never received any notice of these
12 subpoenas.

13 I asked Mr. Ronca about it. He responded on Friday
14 that there had been some served and very straightforwardly
15 acknowledged that notice had not been given.

16 Then I learned on Sunday night from Mr. Ronca that,
17 in fact, there were 12 subpoenas served. No notice was
18 given.

19 This is, to us -- I don't want to make a mountain
20 out of a molehill, but on the other hand, it is not a trivial
21 matter. The subpoenas went to people with whom Zimmer has
22 business relationships, including John Ashcroft, the former
23 Attorney General.

24 So I think just now we have worked out an
25 arrangement whereby we will ask the Court to enter a stay of

1 enforcement of those subpoenas, asking that they be -- that
2 the recipients not respond to them for a period of 15 days
3 from today to give us time to read them, review them, and
4 reach an agreement on limiting the scope and enforcing the
5 protective order with regard to the subpoenas or coming back
6 to the Court or some other court and asking that they be
7 stayed or asking that they be --

8 MR. MILLROOD: Quashed.

9 MR. YEAGER: -- quashed.

10 So I would tender, if the Court would have it, a
11 copy of the 12 subpoenas that were served.

12 THE COURT: Sure.

13 Exactly how did this happen, that subpoenas were
14 issued without the defendants' knowledge?

15 MR. RONCA: An error by an associate at one of our
16 member firms, your Honor.

17 The responsibility ultimately falls on the
18 leadership here for not checking. When we found out about it
19 on Friday, I immediately e-mailed Mr. Yeager and said we
20 would take -- gave them a couple of options of action,
21 including withdrawing the subpoenas and notifying the
22 recipients immediately that they were not effective. We
23 would then reissue them with proper notice this morning.

24 We did communicate over the weekend. This
25 morning -- or this afternoon Jay approached me about the

1 possibility of doing this order. And we said, sure.

2 Some of the subpoenas were not served, so there
3 weren't 12 total. No documents were received. None of the
4 subpoenas were returnable until January 6th. This oversight
5 we plan to cure.

6 There was no prejudice. And we will make sure that
7 nothing like this ever happens again.

8 THE COURT: Is it the request, then, of the
9 defendants that we stay the enforcement of the subpoenas for
10 15 days beyond January 6th?

11 MR. YEAGER: No, for 15 days from today. They are
12 still not -- their return date is not until January 6th, but
13 the agreement is that they are going to be the stay, we would
14 hope, with an agreed entry from the Court so that the
15 recipients know that they are not to produce documents until
16 the return date at the very earliest.

17 And then the 15 days will give us time to consider
18 them, discuss what terms might be applied, and, if necessary,
19 move to quash them.

20 THE COURT: So by agreement, enforcement of the
21 subpoenas is stayed for 15 days.

22 MR. RONCA: And we will take the burden of
23 notifying everybody today both orally, by letter, and by
24 e-mail; and then when we get a copy of the order, by sending
25 additionally a copy of the order.

1 THE COURT: That's great.

2 All right. Then, let's take up some of the other
3 matters on the agenda.

4 I have the parties' joint proposed agenda, which
5 includes, as I understand it, the proposed case management
6 order and schedule and some disputes that I have had a chance
7 to review regarding the plaintiffs' fact sheet as well as the
8 matter of initial disclosures.

9 Why don't we -- we will take them up in that order.
10 So beginning with the proposed case management order and
11 schedule.

12 MR. RONCA: Your Honor, just a very brief history.

13 We served discovery on the defendants on
14 November 3rd. Since that time, they have moved for an
15 additional 30 days and received those additional 30 days to
16 respond. There were substantial interrogatories and requests
17 for production.

18 In response to those, we had a discussion at the
19 status conference. It was on November 10th. And then we
20 received a letter from the defendants on November 23rd
21 saying -- a pile of objections to our interrogatories and
22 requests for production and listing a list of documents that
23 the defendants might voluntarily produce.

24 We had two meet-and-confers, one on November 29th,
25 one on December 2nd, both in Chicago. The topic was

1 discussed at both places.

2 In the first meet-and-confer, we were going through
3 the interrogatories, requests for production. There is lots
4 of them. There is lots of objections. And the plaintiffs
5 proposed that perhaps a way to do it better, more efficiently
6 would be to take the list that the defendants provided, make
7 some additions to that list, and make some -- also some
8 additions to what the list is.

9 In other words, is it all of this particular
10 tranche of documents? In other words, a little bit of change
11 in the language.

12 Plaintiffs then requested that we would also get
13 responses -- in the nature of a response to requests for
14 production of documents describing what documents are in that
15 group. And then that would be done in 90 days.

16 And then another group of documents would come
17 after that because of the e-mail problems the defendants are
18 having, which consist of custodial files from the defendants.

19 Plaintiffs would then withdraw their
20 interrogatories, requests for production, and reserve the
21 right to file other more directed ones later, after we have
22 learned more about the defendants. So they would be more
23 focused and nonduplicative.

24 We thought we had at least the beginnings of an
25 agreement on that, because it's very important to our side,

1 your Honor. We think it's fundamental to this case and
2 fundamental to our ability to represent our clients that the
3 discovery plan be comprehensive, be a two-way street, and be
4 reciprocal; that we not charge ahead getting every piece of
5 information from the plaintiffs and at the same time
6 receiving little from the defendants.

7 We think this all needs to be done at the same time
8 and coordinated, because we cannot, in a case where failure
9 to warn is a principal part of the case and there is a
10 learned intermediary doctrine, take depositions of key
11 witnesses, like implanting physicians, without having all the
12 documents from the defendants.

13 And the way things are going, we have basically
14 agreed to a plaintiffs' fact sheet, which amounts to well
15 over 100 interrogatories and requests for production, which
16 cannot be objected to and which probably will be due around
17 March of 2012.

18 But at the present time, we don't have any
19 agreement on what we are going to get from the defendants.

20 Defendants wrote to us on December 9th and
21 basically told us, you can have the list that we gave you on
22 November 23rd, but we are not agreeing to documents beyond
23 that.

24 And in terms of what we know we are going to get
25 is, we know very, very little. To date we have gotten

1 10,000 pages. In some cases the disks are not labeled. The
2 groupings of documents are not labeled. If you go through
3 the documents, they don't seem to be in any kind of order.
4 And the rules require that the documents be given in the
5 order they are kept in the ordinary course of business.

6 So, for example, on one group, we got a group of
7 field evaluations followed by a picture of a disk, followed
8 by some PowerPoint presentation about sales, followed by a
9 manufacturing brochure and a surgical techniques brochure,
10 followed by a production order. We don't even know what
11 these documents have to do with each other.

12 We have come across many custodians who are not
13 listed among the custodians that the defendants have listed
14 in those documents, including half of the design team, for
15 example, of the MIS tibial tray.

16 So what we are essentially promised is that the
17 defendants will decide what documents are relevant and give
18 them to us or we can somehow magically come up with search
19 terms that will work in their system and ask them for
20 documents that they will then provide us out of context, out
21 of the manner in which they were ordinarily kept in business,
22 and then we are supposed to be satisfied with that.

23 And with respect to the custodial files, we didn't
24 even know how much that is and when we are going to get that.

25 But they will have every single thing from the

1 plaintiffs on the original filed cases by about March 1st of
2 next year. We don't even know if we will have an e-mail by
3 March 1st of next year from the defendants.

4 Your Honor, frankly, we can't live with a plan that
5 charges ahead on the plaintiffs and wants to set deadlines
6 for plaintiffs' *Daubert* reports when we have no idea even how
7 many documents we are going to have to go through.

8 So we don't know the timeframe of the documents
9 that they supplied to us. We don't know how they were kept,
10 what's included, what's excluded. We don't know how much
11 there is to come.

12 It would be like having a truck case where there is
13 a truck crash and we ask the defendants for the CDL file and
14 the driver file and the safety file and the personnel file.
15 And they say, okay, we will give you the portions of that
16 file we think are relevant to you, and you are not allowed to
17 know about anything else. We will tell you what the
18 timeframe is for that discovery, and you are not really
19 allowed to know anything else.

20 We can't live with that. I mean, if our doctor is
21 going to be deposed and he went to the Zimmer Institute, we
22 need to know about the Zimmer Institute before that
23 deposition. We need to know what kind of things he learned
24 at the Zimmer Institute before that deposition. And that's
25 not in the cards.

1 So where we stand right now literally is, we have
2 this proposed plan. When we wrote it up, it had all these
3 listed kinds of documents. And I thought we were going to
4 negotiate that. When we got it back, those things were
5 dropped out, and it was said that they would be in Exhibit A.
6 But we didn't have any Exhibit A.

7 Then what we ultimately found out a day or two
8 later, this past Friday, was that Exhibit A consisted of
9 exactly the same documents with the limited information that
10 we were told about on November 23rd.

11 And unless ordered to do so, we can't agree to
12 that, your Honor. I mean, it's just not just fair. It's not
13 reciprocal.

14 We are perfectly willing to charge ahead, fill out
15 those plaintiffs' fact sheets, give medical authorizations
16 about our clients' medical records, work records, social
17 security records, whatever records they are asking for. But
18 we need their records. We need to be able to understand what
19 the documents are that we are getting. And we need to be
20 able to get custodial files of the important custodians
21 before we launch into depositions.

22 And until we have that agreement, the comprehensive
23 plan isn't comprehensive and is not going to work. It's
24 going to be prejudicial to the plaintiffs.

25 And we are willing to try to work something out,

1 sit down, go over the list of custodians, sit down and go
2 over types of documents until the cows come home.

3 THE COURT: Okay. When you refer to Exhibit A, you
4 are talking about the same Exhibit A I have?

5 MR. RONCA: There's two Exhibit As. There was one
6 sent in by us and one sent in by defendants.

7 THE COURT: The one I have is the one from the
8 defendants, and it has a bunch of bullet points.

9 MR. RONCA: Right. And ours has the same bullet
10 points. In fact, I have a copy of it here.

11 THE COURT: I may have that as well. I just want
12 to make sure we are talking about the same document.

13 (Document tendered.)

14 MR. RONCA: It's color-coded as to what's
15 different.

16 THE COURT: Okay. Thanks.

17 MR. RONCA: You will see it's not that much more.
18 But the stuff we are asking for is important.

19 (Brief pause.)

20 THE COURT: Right. It's very similar.

21 As you understand it, Mr. Ronca, there is an
22 objection to your additional language?

23 I understand from what you told me before that you
24 didn't get proposed Exhibit A until last week.

25 MR. RONCA: That's right. I did not know about

1 that -- the date, I believe, on the cover letter was
2 December 9th.

3 THE COURT: Okay. So that would be last Friday.
4 And that was the first that you were aware that the proposal
5 for production on the part of defendants was, in your view,
6 too limited; is that right?

7 MR. RONCA: Yes.

8 THE COURT: So what I am looking at, in terms of
9 your Exhibit A, is the same thing the defendants gave me with
10 a few additions.

11 MR. RONCA: A few additions and a few more
12 comprehensive descriptions of the same things.

13 THE COURT: Exactly. Of the same material.
14 And have defendants had a chance to look at that?

15 MR. RONCA: I sent that to them first.

16 THE COURT: Oh, that's what came first.

17 MR. RONCA: That came first.

18 THE COURT: I see.

19 So defendants have withdrawn certain things from
20 their Exhibit A.

21 MR. RONCA: The things in Defendants' Exhibit A are
22 the same things that were in the November 23rd letter
23 exactly.

24 THE COURT: Okay.

25 MR. RONCA: What I sent them on November 30th, the

1 day after our first meet-and-confer, is what's contained in
2 what I just handed up.

3 THE COURT: Let me hear from defendants on this.

4 MS. PIERSON: Thank you, your Honor.

5 When we were before you last month, we talked about
6 an orderly progression for this case. I believe that's what
7 caused the Court to suggest that we ought to have this
8 Rule 16 conference.

9 THE COURT: Correct.

10 MS. PIERSON: In response to that, we drafted a
11 comprehensive Rule 16 report, which is consistent with the
12 provisions of the manual and really leads this case from the
13 beginning, where it should be, with master pleadings, all the
14 way through things like expert disclosures, *Daubert* reports,
15 and trial. That's what the manual and Rule 16 contemplate.

16 Mr. Ronca skips to Section 4 on written discovery.
17 I don't want to pay short shrift to the sections that come
18 before that that I think are important. I am happy to
19 address those now, or if you would like to talk about the
20 Section 4 on written discovery first, we can do that as well.

21 THE COURT: We can look at each provision in the
22 proposed planning order. Mr. Ronca focused on this
23 presumably because he thinks this is the most important issue
24 that we have got. So maybe we should turn first to that, but
25 then we can back up and look at other aspects of the order.

1 MS. PIERSON: I certainly agree that it's the issue
2 that may be most in dispute.

3 THE COURT: Okay.

4 MS. PIERSON: But as we prepared the report and
5 submitted it to the Court, you can see the sections that are
6 in dispute because they are in bold, brackets, and
7 underlined.

8 And you will see the first section deals with
9 master pleadings. The parties have come to agreement on
10 master complaints and master answers and a deadline for the
11 same and a procedure.

12 There are a couple of disputes in that section,
13 Roman numeral I, regarding massive pleadings. The first
14 comes in Section C. The plaintiffs proposed that defendants
15 be limited on motions to dismiss to motions to dismiss only
16 in individual cases.

17 The defendants, of course, have a right to file a
18 global motion to dismiss if, in fact, one is warranted based
19 on the master complaint. We have reserved our right to do
20 that if it turns out that there is such a motion.

21 So that's the first disputed issue before the
22 Court.

23 MR. RONCA: The limitation, your Honor, is only for
24 the first 45 days on the global motion.

25 THE COURT: In other words, the request is that any

1 global motion to dismiss -- motion to dismiss the master
2 complaint be delayed for 45 days.

3 MR. RONCA: Be done within 45 days; and then after
4 that, not done. After that, individually. That's where the
5 dispute is. They want to be able to do that at any time.

6 MS. PIERSON: If plaintiffs' proposal leaves open
7 the possibility of both global and individual, then that
8 resolves the issue. We can work out the timing together. I
9 think there are some discrepancies in the timing of Section C
10 as we drafted it. But if that's their proposal today, then
11 certainly we can work with that.

12 THE COURT: My sense is that is their proposal.

13 MR. RONCA: That is.

14 THE COURT: We can move on.

15 MS. PIERSON: Then the next dispute comes in Roman
16 numeral II, which is on Page 3, and deals with initial
17 disclosures.

18 You probably noticed, Judge, that that's the last
19 agenda item on today's agenda.

20 THE COURT: Yes.

21 MS. PIERSON: I don't know if we will get to that
22 or not today given the limited time.

23 THE COURT: I am happy to turn to that right now.

24 MS. PIERSON: Thank you.

25 Mr. Yeager may address that issue as well. But in

1 the case management plan, you may recall that you ordered the
2 plaintiffs to serve initial disclosures, including catalogue
3 and log information for their products, by October 28th. We
4 have learned of certain deficiencies in the responses of the
5 plaintiffs. That's what Mr. Yeager was prepared to address.

6 As it relates to the case management plan, though,
7 we have proposed that for cases that were transferred to the
8 MDL after the Court's order, that plaintiffs submit initial
9 disclosures within 30 days of transfer of the case.

10 Plaintiffs object to the continuation of initial
11 disclosures. As I understand their argument, it is that once
12 you have fact sheets, they are no longer necessary.

13 MR. RONCA: Your Honor, we made our arguments on
14 this point --

15 MS. PIERSON: If I can finish?

16 MR. RONCA: -- as opposed to Andrea.

17 THE COURT: I will allow counsel to finish.

18 Go ahead.

19 MS. PIERSON: Thank you, your Honor.

20 The Court will notice that in Section E we have
21 included a section that would allow the parties to reach
22 agreement and the Court to decide later to forego initial
23 disclosures should that become necessary.

24 However, defendants are not agreeable to doing that
25 right now for a couple of reasons.

1 First, it's critical that we receive this
2 information about witnesses and product identification early
3 on in the cases. And the parties' proposed Case Management
4 Order No. 2 gives the plaintiffs 90 days to return plaintiff
5 fact sheets. Absent initial disclosures, we would not get
6 that information for 90 days.

7 We need that information to be able to review the
8 cases to determine if they even belong in the MDL in the
9 first place.

10 Zimmer also requires that information early because
11 we have reporting obligations to the Food and Drug
12 Administration.

13 And third, unless we have that information early on
14 in the case, we can't gather things like device history
15 records, which are the manufacturing records for each
16 plaintiff's individual product. This is one of the sets of
17 records that plaintiffs have been clamoring for, for some
18 time.

19 So absent the information that comes in an initial
20 disclosure early on in the case, within 90 days of transfer,
21 we can't fulfill any of those three objectives.

22 Then, lastly, obviously Rule 26 entitles defendants
23 and plaintiffs to receive initial disclosures from either
24 side.

25 MR. RONCA: May I, your Honor?

1 THE COURT: Sure.

2 MR. RONCA: First of all, your order didn't say
3 anything about what was to be in the Rule 26 disclosures.
4 There was some colloquy about that at the status conference
5 in October. But it is not part of the order, to my
6 recollection. So that's not exactly right.

7 Secondly, in terms of initial disclosures, not just
8 the plaintiffs but all parties were instructed to give
9 initial disclosures. I don't hear the defendants saying that
10 they are going to give an initial disclosure to every
11 plaintiff of the particular witnesses that are involved in
12 their case within 30 days of the case being transferred.

13 Thirdly, defendants are regularly opposing
14 transfers in cases they don't think apply.

15 Fourthly, plaintiffs are supposed to plead
16 information sufficient to make out their case. And the
17 defendants will have all or most of this information anyway.
18 It's just an additional step that the plaintiffs are going to
19 have to do when, in fact, just 60 days after that the
20 defendants will have every piece of information they could
21 possibly need through the use of a fact sheet.

22 They will have a short form complaint, if we follow
23 what we are doing in here, and they will have medical
24 authorizations, which will enable them to get anything that
25 they want.

1 So this preliminary step is just additional
2 busywork for the plaintiffs. The defendant is taking no
3 burden on themselves to search around when they get a
4 plaintiff's name and see what they can find about that
5 plaintiff or that plaintiff's doctor and give us a Rule 26
6 disclosure.

7 In these mass cases, Rule 26 is not as necessary
8 because of the quick and nonobjectionable discovery through
9 the fact sheets. That's what makes it more efficient. And
10 we are just adding another layer of things to do, which add
11 little to the case.

12 They have got 78 cases that they have had initial
13 disclosures on that they can investigate right now. But we
14 think a fact sheet within 90 days covers everything.

15 MS. PIERSON: And to be clear, your Honor, we may
16 have initial disclosures on something like 70 cases, but we
17 also have incomplete or no disclosures on close to an equal
18 number of cases.

19 And we wouldn't propose this process if we weren't
20 prepared for it to be mutual, obviously. Rule 26
21 contemplates that it will be mutual, and we are prepared to
22 live by that as well.

23 One solution to this would be to shorten the period
24 of time for plaintiff fact sheets. If those were returned in
25 30 or 45 days, then the need for initial disclosures would be

1 lessened.

2 THE COURT: You are talking about 30 or 45 days
3 from the transferee cases.

4 MS. PIERSON: From the transfer of the case to the
5 submission of the plaintiff's fact sheet.

6 MR. LONDON: Your Honor, may I be heard? Michael
7 London.

8 I was, for the MDLs, the primary negotiator for the
9 plaintiffs on the plaintiff fact sheet, including CMO 2,
10 which is before you.

11 THE COURT: Right.

12 MR. LONDON: There was -- and we are not going into
13 it now unless the Court has days -- a lot of give and take on
14 the CMO 2, including the 90-day provision for plaintiff fact
15 sheets to be tendered.

16 So the argument now that the fact sheets be
17 tendered shorter than 90 days, frankly, I think goes against
18 a lot of other agreements, give-and-take, that both sides
19 have had.

20 With respect to the automatic disclosure
21 requirements, I just wanted to -- as the primary negotiator,
22 I felt that ultimately the automatic disclosure
23 requirements -- which, frankly, do not provide all that
24 much -- would be wrapped into the initial plaintiff fact
25 sheet, which is due, whatever it might be due, 75 or 90 days,

1 depending on the filing date.

2 In fact, one of the -- the authorizations are also
3 tied to the PFS, not the automatic disclosure.

4 So truthfully, they will be getting that which is
5 provided in the complaint, perhaps a spouse's name, the
6 treating doctors, and no authorization. Of course, a
7 statement of damages.

8 My experience in these mass tort cases is that
9 automatic disclosures are usually done once until a plaintiff
10 fact sheet comes out.

11 In fact, even to talk a little bit further about
12 the history and genesis of the PFS, early on we discussed
13 what's called profile form, a short form PFS, which is done
14 in some cases. Both of us agreed, let's just focus on this
15 big document.

16 But, for example, that was just done in Judge Katz
17 in the *DePuy* litigation. And what it does, it was a one-form
18 page. Frankly, I think it caused more work for both sides.
19 And then there was, of course, a one-page defense fact sheet
20 that gave them that core information.

21 We both agreed, let's just focus on the main PFS.

22 So through this history, it was my understanding --
23 and perhaps wrong -- that the automatic disclosure, once this
24 CMO 2 is so ordered by your Honor, would just go away.

25 So I just wanted to add that perspective as the

1 negotiator in this process.

2 And then, of course, with the proposed shortening
3 of the time for the PFS, which I believe we still had
4 agreement.

5 MS. PIERSON: To the extent that that's what the
6 plaintiffs believe, that was certainly never articulated as
7 part of the compromise on proposed CMO 2.

8 At the end of the day, though, your Honor, the
9 bottom line is, we need information regarding the implanting
10 and explanting surgeons, plaintiffs, plaintiff's spouse,
11 product identifying information, and a statement of damages.

12 What form that takes, if it's an initial disclosure
13 or a PFS, doesn't make a huge amount of difference. But what
14 does matter is the time within which we receive that.

15 THE COURT: What information does the short form
16 complaint include?

17 MR. YEAGER: We don't know yet, your Honor. We
18 haven't seen it yet.

19 THE COURT: At a minimum, it's going to say the
20 name of the plaintiff. We could ask that the short form
21 complaint identify the patient's implanting and explanting
22 surgeon, if any.

23 MS. PIERSON: It could. And if that were required
24 in the short form complaint --

25 THE COURT: The plaintiffs' spouse, I don't see

1 that as problematic.

2 And 90 days, it seems to me, works for the
3 plaintiff fact sheet.

4 MS. PIERSON: The key information that would need
5 to be included in the short form complaint for us, your
6 Honor, is what you have just articulated, but also the
7 catalogue and lot numbers for the components that were
8 implanted in the plaintiff and are alleged to have failed.

9 THE COURT: And are we sure that the plaintiffs are
10 going to have that information?

11 MS. PIERSON: They absolutely should. Mr. Ronca
12 has assured us that they typically do before they file the
13 complaint.

14 In order to identify their case as one of the
15 components that's at issue in the MDL, they need what are
16 called the peel-and-sticks. They are stickers that are
17 contained usually on the operative report or in the medical
18 records that identify the catalogue and log number.

19 THE COURT: Those would have that information.

20 MS. PIERSON: Yes.

21 MR. RONCA: Your Honor, in a lot of cases you can
22 get peel-and-sticks in time. And in some cases, the
23 hospitals don't have them for whatever reason. It's not the
24 plaintiffs' fault.

25 In some cases you have a statute of limitations

1 issue. You need to file quickly before you have the
2 peel-and-sticks.

3 THE COURT: Right.

4 MR. RONCA: So it's not every circumstance that the
5 peel-and-sticks just fall into our hands. Sometimes we have
6 to dig hard to find them, and it's not always that simple.

7 THE COURT: You would pretty readily have the name
8 of the plaintiff, the name of the plaintiff's spouse. You
9 would pretty readily have the identity of any hospital in
10 which surgery was done.

11 MR. RONCA: Yes.

12 THE COURT: And likely the names of the surgeons.

13 MR. RONCA: Yes.

14 THE COURT: That material will be produced. And I
15 will suggest that the peel-and-stick, the catalogue and lot
16 number information be provided as soon as is reasonably
17 practicable but no later than the PFS.

18 MR. RONCA: The plaintiff fact sheet.

19 THE COURT: Correct.

20 All right. What other issues do we have on the
21 case management order?

22 MS. PIERSON: Your Honor, then, that takes us to
23 Section 4 on written discovery.

24 THE COURT: Right.

25 MS. PIERSON: There are some issues after that,

1 that are smaller than the discovery issues, but I will take
2 them in turn unless your Honor has another preference.

3 THE COURT: In turn is fine.

4 MS. PIERSON: As it relates to written discovery,
5 Mr. Ronca gave, I think, his interpretation of what happened
6 with respect to the process for written discovery. We
7 obviously have a different understanding of that process.

8 It began when the plaintiffs served the defendants
9 with interrogatories and requests for production. There were
10 more than 500 interrogatories, including subparts. There
11 were more than 200 requests for production. They spanned
12 15 years of time. They encompassed all of the defendants in
13 this case, many of whom have no relation to the design or
14 manufacturer of the product. And they related to a wide
15 range of components, many of which we believe are not part of
16 this MDL.

17 Based on receipt of those, the defendants sent a
18 comprehensive letter to the plaintiffs on the 23rd of
19 November and explained in that letter how we proposed to
20 address what seemed to be a very large divide between the
21 parties on how discovery would be conducted.

22 The proposal included the identification of
23 32 categories of documents that are core documents in these
24 cases, and they were ones that Zimmer could identify and
25 produce within a fairly short window of time. Ninety days is

1 the period of time that ultimately came to be discussed.

2 We then met with the plaintiffs on the 29th of
3 November. And after some back-and-forth, the plaintiffs
4 suggested as a compromise that we produce the 32 categories
5 of documents, that in turn they would withdraw all of the
6 interrogatories and the requests for production, and that the
7 parties would come to agreement later about what kind of
8 additional description they needed about the categories.

9 Rightfully so, the list, as you can see from our
10 proposed Exhibit A, includes things like 510-Ks. And
11 Mr. Ronca's point was, we want to understand what that
12 includes.

13 That was the compromise that was discussed. The
14 meet-and-confer ended.

15 Following the conference, the parties generally
16 agreed to this concept. And then the plaintiffs proposed
17 nine additional categories of documents. The number itself
18 doesn't seem outrageous, but the problem is the context of
19 those additional documents.

20 And you can see the new categories, your Honor.
21 They pick up on -- I think it's the third page of the
22 Plaintiffs' Exhibit A. There is a category that says,
23 "Agreements and 1099s With Surgeons." Right after that
24 category are the new things that the plaintiffs proposed
25 following our meet-and-confer.

1 And you can also see that in the plaintiffs'
2 proposed Exhibit A, there are some redlines and comments
3 about expanding categories of the above 32. That was all new
4 information for the defendants.

5 THE COURT: Except that some of the -- there is
6 some expansion, but there is some limitations as well.

7 For example, if you look at Paragraph 6 of
8 Plaintiff's Exhibit A, the plaintiffs say, "unless this
9 matter is covered by production required by the defendant
10 fact sheet."

11 MS. PIERSON: Certainly none of us want
12 duplication. They don't want us to produce things twice, and
13 we don't want to produce them twice.

14 The problem, from our perspective, with the new
15 categories of documents, first, it's contrary to what we
16 understood the parties' agreement to be at the
17 meet-and-confer.

18 But setting that aside for the moment, these
19 categories of documents that we identified -- and really the
20 whole point of the compromise was for the plaintiffs to get
21 the core documents that educate them about Zimmer terminology
22 and the basics of these devices so that then after they
23 receive these documents, they could formulate narrowly
24 tailored and specific discovery requests. And that's why
25 they withdrew the hundreds of requests and interrogatories

1 previously served.

2 THE COURT: Is it your position that all the
3 materials on defendants' proposed Exhibit A have been
4 produced?

5 MS. PIERSON: No, they haven't, although some of
6 them have already. Following our October conference, we
7 immediately produced, for example, the 510-K and regulatory
8 documents related to all of these products. And we are
9 committed to continuing to produce the things that are on
10 this list of 32 things. We haven't stopped our effort.

11 THE COURT: And you are committed to producing them
12 by when?

13 MS. PIERSON: The date in the proposed case
14 management plan is 90 days from the entry of the plan, and we
15 can do so within that time. We intend to do it on a rolling
16 production. So as we receive and review this information, we
17 have been providing it to the plaintiffs. To date, we have
18 produced about 10,000 pages of documents, which include all
19 of the regulatory, many of the marketing documents, the
20 design history files, really the things most core and
21 fundamental to the products.

22 THE COURT: Mr. Ronca, why are you so concerned
23 that what they are producing is going to be so inadequate
24 to -- as compared to what your clients are required to
25 produce?

1 MR. RONCA: Because, your Honor, they keep saying
2 "the core documents," but it's their interpretation of what
3 the core is.

4 There is an end document, let's say, that there was
5 a testing regimen done on a new design, and it had to do with
6 a particular failure. It's important for us to have the end
7 result.

8 But it's also important for us to have the agendas
9 from the meetings that occurred, the e-mails between the
10 people involved to see if -- as I suggested at the last
11 hearing, there can be studies and then there can be studies.
12 There can be studies that reach a result. And then *post hoc*
13 or after the fact, they get a different result if they didn't
14 like the first result.

15 If we only get the *post hoc* results and we don't
16 get the preliminaries, we never find out that, in fact, they
17 had different findings at an earlier time. And we have seen
18 this repeatedly in other cases. So we asked for this stuff.

19 In addition, they decide, oh, this is the 510-K.
20 Is it everything? Are they going to say in writing before
21 the Court, this is everything that has to do with the 510-Ks?

22 Are they going to describe each of these
23 categories? which they have not done. Give us the scope in
24 time and in content of what's there. Tell us what they took
25 out, if anything. Tell us the manner in which the documents

1 were kept.

2 Or are they going to decide, these are the core
3 things that you really need, adversaries. And we will give
4 these to you and you should be happy, without even
5 mentioning, yet have I heard, a thing about the custodians
6 and the custodial files, which, frankly, your Honor, is where
7 most of these cases are made.

8 We are still operating in the dark. We have
9 10,000 pages of documents in a case that should have millions
10 of pages. And they are, as far as we can tell, selected,
11 because there doesn't seem to be any rhyme or reason as to
12 why certain documents are grouped together within what we
13 have gotten.

14 MS. PIERSON: Your Honor, if I may address that
15 last point for a second?

16 MR. RONCA: One other thing, your Honor. I am
17 sorry.

18 Andrea was not at the meeting on the 29th. So
19 regarding what happened there, I am sitting with my
20 colleagues, and we thought we all had agreed to present the
21 list the defendants had provided plus a few more items. And
22 also we were going to talk about the custodians.

23 I remember specifically saying, well, you have come
24 up with 33 names and we have come up with 80 names. We are
25 going to go through the documents you give us to see if there

1 are any other names. And at some point, I presume that we
2 will come to an agreement on which custodians you are going
3 to give us between the names you have given us and the names
4 that we have, and we will work that out.

5 I haven't heard word one about that.

6 THE COURT: That meeting happened when?

7 MS. PIERSON: It occurred on the 29th of November.

8 MR. RONCA: 29th.

9 MS. PIERSON: And my colleague Ms. Sellers was
10 there, which is why she is here today, you Honor, in case
11 there is any question about what occurred at the meeting.

12 THE COURT: When were the 10,000 pages delivered?

13 MS. PIERSON: They have been delivered on a rolling
14 production since we were together in about October. We
15 started very early and have continued our production as we
16 have received information.

17 MR. RONCA: We got a few thousand on the 7th. We
18 got a few thousand, I believe, on December 3rd. And the
19 remainder, roughly 3500, had come in November.

20 We were told we would get a substantial production
21 by November 30th. In fact, it's in your minute note.

22 THE COURT: Right.

23 MR. RONCA: And I don't think 5,000 or 7,000 pages
24 in this case is a substantial production unless I don't
25 understand the meaning of "substantial."

1 MS. PIERSON: Your Honor, the issue before the
2 Court today is, what's our plan? Where do we go from here in
3 terms of discovery?

4 And I don't want to get bogged down on this notion
5 of how we have produced things or have we produced enough
6 things, because the reality is we had no obligation to
7 produce anything at all until our deadline to respond to
8 plaintiffs' response to production. We have done so
9 voluntarily. We think it's in the best interest of this
10 case. And we will continue to do so with respect to these
11 32 categories.

12 Of the nine categories that Mr. Ronca has added,
13 some of these things we can't produce at all. Some of them
14 are not discoverable. Some of them can't be produced within
15 90 days but could be produced within a greater period of
16 time.

17 So we have -- I think we are at a crossroads. We
18 have a couple of choices. I mean, one is to go back to the
19 plaintiffs' original discovery requests, their
20 interrogatories and requests for production. They are as
21 extensive, as I just mentioned, in the hundreds. They will
22 be subject to motion practice, and we will be talking about
23 their scope and breadth.

24 We think that's a last resort and don't think it's
25 in the best interest of either party to do that.

1 The second, and I think more appropriate
2 compromise, is the parties, after this conference, work
3 toward compromise on Exhibit A. If the Court were to give
4 the parties a couple of weeks to negotiate the scope of
5 Exhibit A and then let the Court decide any differences after
6 that, we think we would be able to reach a compromise.

7 In the meantime, we are going to continue the
8 rolling production that we have been doing for the last few
9 months.

10 THE COURT: My preference would be -- I am torn on
11 this because I know that the longer it takes to resolve this,
12 the longer the case is pending, and every week is expensive.

13 But I guess my preference would be, given that --
14 in fairness to both sides, the 10,000 documents that have
15 been produced so far, even if we characterize them as
16 technically not due for another 60 days or whatever it might
17 be, is relatively minimal, given the scope of the case and
18 what's likely to be produced in the end.

19 It may be that in order to determine whether the
20 production that's happening is artificially limited or
21 somehow cleansed or contrived to withhold materials, it may
22 be that a 30(b)(6) witness is going to be necessary. I just
23 don't know enough about it.

24 I guess my preference would be that we wait to
25 resolve this dispute until at least another wave of

1 production has happened, because, again, I think 10,000 is
2 pretty minimal.

3 I am confident that even the defendants will
4 recognize that, even under their scenario or even under their
5 Exhibit A, many, many more documents would have to be
6 produced before -- within the 90-day period at the least, and
7 at best, perhaps, everything that the plaintiffs are asking
8 for. I really don't know.

9 When would you anticipate the next wave of
10 production would occur?

11 MS. PIERSON: I don't know, your Honor, because we
12 are in the process of gathering these documents. I know that
13 we are committed to producing the 32 categories within 90
14 days' time.

15 I don't know when the next wave will be within that
16 90 days, but certainly it will be before that window of time.

17 We are in the process of gathering many of these.
18 It's just difficult to the estimate how long it will be
19 before there is another substantial production.

20 THE COURT: All of us here are getting together
21 again in January.

22 MS. PIERSON: That's correct.

23 THE COURT: So would there be a wave of production
24 between now and then?

25 MS. SELLERS: Your Honor, is it okay if I speak

1 from right here?

2 THE COURT: Sure. But keep your voice up so my
3 reporter can get it.

4 MS. SELLERS: Thank you.

5 Your Honor, I think we can make a good faith effort
6 to gather and produce documents by then.

7 I think it's important to note that these
8 categories were proposed by us in late November in order to
9 manage these enormous discovery requests that we've been
10 served with.

11 THE COURT: I remember the background of this.

12 MS. SELLERS: We haven't been sitting on these
13 categories.

14 THE COURT: And I am not suggesting you are. I
15 would like to get a resolution of what sounds like this
16 bubbling, serious discovery dispute. And I also think it
17 might be premature if, by all reports, the production has
18 only begun.

19 MS. SELLERS: Your Honor, my colleague can probably
20 speak to this even more, but those 32 categories are
21 something that -- it's not a small undertaking. I don't want
22 to mislead the Court and suggest that we can just churn this
23 stuff out, that it's some sort of standard production that
24 Zimmer also does. It is not.

25 It's a uni -- what we consider truly a universe

1 that then the plaintiffs understandably would want to test us
2 on with further discovery, which I think we can all
3 completely understand.

4 But it is not a 30-day production. It's a very --
5 during our meet-and-confer counsel, I know, asked me how long
6 we thought -- how long we thought it would take and how much
7 we thought there would be. I said, I don't know. But I
8 think I said two or three months, is my best recollection.
9 It was a guess.

10 As I stand here today, it's still a bit of a guess
11 for all that stuff. But it is not, I think -- I just want to
12 make that clear on the record.

13 MS. PIERSON: Just one additional point, your
14 Honor, following up on what Ms. Sellers said.

15 Given the age of the documents the plaintiffs are
16 requesting, just so you know how difficult this is, some of
17 these documents are kept on the old microfiche cards that
18 require someone to sit down at a reader and review the
19 microfiche to identify the documents.

20 I think in January we will have produced additional
21 documents. However, it's unlikely to be 10,000 more pages of
22 documents by the time we meet again together on the 12th.

23 Now, the Court scheduled a conference again in
24 March. By mid-March we should be in a much better position
25 and closer, if not completed, in terms of producing these

1 32 categories.

2 THE COURT: But I would like the January session to
3 be somewhat fruitful on this discovery problem as well. And
4 that won't happen unless there has been more than
5 10,000 documents produced.

6 I am not exactly sure how best to address this, but
7 I'm going to direct that there be some further substantial
8 production within 30 days. Exactly how that works out, I
9 don't know, but I would certainly recommend that it would be
10 material that's going to be of particular use to the
11 plaintiffs. Otherwise, we will be having the same discussion
12 that we are having right now.

13 MS. PIERSON: Understood, your Honor. I don't want
14 us to be in a position where we are coming to you at the
15 January conference and arguing about what a "substantial
16 production" means. It's susceptible to multiple
17 interpretations.

18 What I can commit to doing between now and January
19 is continuing to negotiate with Mr. Ronca about the
20 categories of documents that he proposes to add and the time
21 within which we may be able to gather those documents that
22 are not objectionable.

23 We are working as hard as we can as fast as we can.

24 We will also be hampered a bit because the doors of
25 Zimmer close for seven to ten days between the holidays. We

1 won't be able to have people in there physically gathering
2 documents during that period of time.

3 If the Court were so inclined, on Section 4(d) of
4 the plan and the sections that follow, we would propose that
5 the parties get back together to talk about the additional
6 categories of Exhibit A and to talk about the things that
7 Mr. Ronca and his colleagues have asked for in Section D in
8 terms of what type of description will be provided for the
9 documents for what period of time.

10 I don't hear either side giving up on the process
11 of negotiating Exhibit A, but I do think we need more time to
12 do so.

13 THE COURT: Mr. Ronca, anything you want to add?

14 MR. RONCA: Your Honor, first off, this is the most
15 critical element of this order for the plaintiffs because
16 this is how we make our case. This is our investigation of
17 the other side.

18 And the plan all along by the defense is that they
19 want everything from the plaintiffs before they give us
20 substantially everything that they have. And I am requesting
21 the Court not let that happen, that the discovery be
22 reciprocal in that we will produce and they produce.

23 I have yet to hear a word about the custodial files
24 or e-mails from the defense in this courtroom today, which
25 are the most important thing.

1 The last thing we heard was that they are having
2 trouble with the e-mails and they don't know exactly when
3 they will be able to produce them. And we proposed maybe
4 they have until June 1st to start producing them. But we
5 don't even have any idea -- I challenge the defendants to
6 state today that they will work with us to come to an
7 agreement on custodians, and they will provide us the
8 complete custodial files, including their personal computers,
9 their work computers, and their documents that they keep
10 around their desks.

11 I challenge the defendants to give us any idea in
12 detail in these next 30 days.

13 If they can't produce the documents, what is
14 contained in those tranches of documents that they listed?
15 Is it everything? because we suspect that it is not, based
16 upon our review on what they have given us so far, which we
17 did review.

18 And we are not asking for anything other than
19 essentially taking our request for production of documents
20 and reducing it down into 39 bunches, and asking them, tell
21 us what's in those bunches, including the 32 that you
22 suggested yourselves. And also, tell us what's not in those
23 bunches.

24 MS. PIERSON: Your Honor, what I just proposed was
25 that the parties talk about Section D on Page 5 and 6, which

1 addresses that exact issue: What do the custodial files
2 include?

3 As this Court is well aware, the Seventh Circuit
4 has a pilot program that relates directly to ESI. There will
5 be disputes about things like whether someone's personal PDA
6 should be searched for the things that plaintiffs request or
7 not.

8 But we have had zero conversations about that
9 topic, because on the 29th the plaintiffs proposed a
10 particular compromise that we accepted, and we went down that
11 path.

12 And honestly, this portrayal of disparity, frankly,
13 just isn't true. We have been gathering documents and
14 producing them steadily since this MDL started, and we don't
15 even have a medical authorization from any plaintiff in this
16 case.

17 So we are willing to work cooperatively with the
18 plaintiffs, but it truly does have to be cooperative.

19 THE COURT: First, Mr. Ronca, I want to assure you
20 that we are not going to have nonreciprocal discovery.
21 Discovery is going to go forward from both sides
22 simultaneously.

23 In fact, as I understand it, the defendants have
24 begun producing documents already, albeit a small number and
25 unsatisfactory to the plaintiffs. But nothing about the

1 record suggests that the defendants are going to stonewall
2 until all of the plaintiffs have produced documents.

3 And if that is their unspoken position, the Court
4 is going to overrule that objection. That's not the way we
5 will produce. We will proceed with production on both sides.

6 If there is a question in anybody's mind about what
7 material is and is not in these categories, whether we
8 categorize it as 32 or 44, whatever number it may be, that's
9 a matter for you to discuss with one another or potentially
10 get a document manager to be deposed, to answer questions
11 about what is in what category.

12 I would certainly expect that that effort, even if
13 the production doesn't all happen, but the effort to identify
14 what is going to be in these categories of documents, that
15 that should happen. Even if we limit it to the defendants,
16 that should happen between now and our January meeting, in
17 addition to some additional substantial production.

18 MS. PIERSON: And the plan provides for that, your
19 Honor. We talked about 30(b)(6) depositions and it provides
20 for that exact issue.

21 THE COURT: Let's take up the issues regarding -- I
22 think it's plaintiff fact sheets that we need to discuss.

23 MS. PIERSON: Thank you.

24 THE COURT: What I understand is that, apart from
25 the issue of tax returns, the chief disputes are dates for

1 submission of this material, the medical authorizations, and
2 a dispute about when a motion needs to be filed for dismissal
3 of the case with prejudice.

4 MS. PIERSON: That's correct, your Honor.

5 We move the Court to approve the PFS and CMO 2.
6 There are -- I think now there are three issues that we have
7 narrowed it down to.

8 The plaintiffs refiled on Friday. I will take the
9 issues in the order that the plaintiffs suggested.

10 The first relates to Section 8, Question 2 on lost
11 wages for plaintiffs claiming economic damages.

12 THE COURT: Right.

13 MS. PIERSON: From our perspective, it's central to
14 the question of damages. We are entitled to discover that
15 information under the *O'Shay* decision of the Seventh Circuit.
16 It asks the plaintiffs to give us the total amount of lost
17 wages and, if they can, to describe how they calculated it.

18 The plaintiffs' argument, as I understand it, is
19 that that's subject to an expert report, the way in which
20 lost wages are calculated. Our submission is that we are
21 entitled to that information to better understand their
22 damages.

23 THE COURT: I think we could do something that's
24 somewhere between what the defendants are asking for and what
25 the plaintiffs, I believe, are proposing.

1 For the plaintiffs to prepare a calculation of
2 their lost wages right now does seem premature for all kinds
3 of reasons. There is the issue of potential mitigation. Who
4 knows what's going to happen in the future. These cases
5 aren't being tried right now.

6 There is the matter of some kind of an actuarial
7 analysis. There is reducing things to present value.

8 Time marches on. It's just this kind of question
9 at this level of granular detail that the defendants are
10 asking for is premature, on the one hand.

11 On the other hand, the plaintiffs could be asked,
12 have you suffered lost wages?

13 Yes.

14 If so, how are they measured?

15 And then to say, until my knee surgery, I was
16 earning \$35,000 a year. I have been unable to work at all
17 since then.

18 Or, until my knee surgery, I worked in the
19 following capacity. Now I am limited to the following
20 capacity, a reduction in wages of about 40 percent.

21 A general statement like that is certainly
22 satisfactory. It puts the defendants in the position to know
23 what they are looking at in terms of damages. It allows the
24 plaintiffs to focus on their losses in a simple and
25 easy-to-explain way and move on without, again, granular

1 detail that will be out of date the second it's put together.

2 MS. PIERSON: That works for us, your Honor.

3 THE COURT: All right. That's what the Court's
4 ruling will be.

5 MR. LONDON: Thank you, your Honor.

6 MS. PIERSON: The second issue relates to
7 Section 8, Question 4. Are we okay on that one now, or do
8 you still want to talk about it?

9 MR. LONDON: Your Honor, Ms. Pierson made a
10 proposal on this by BlackBerry to me, which I didn't look at.
11 I turned it off, so I didn't see it. She had told it to me
12 on a washroom break. So I am going to confer with my
13 colleagues on a proposal that she made on the insurance
14 issue. I think it's basically to address our concern that
15 plaintiffs do not know how much their insurers provided. And
16 we wanted to avoid the approximation issue.

17 I didn't really jot down the language that Andrea
18 gave me, but I think we can hopefully work this one out.

19 MS. PIERSON: The proposed compromise, your Honor,
20 what we really want to know is, what's the amount of the
21 plaintiffs' medical expenses?

22 I think it eliminates the plaintiffs' concern if we
23 drop out the insurance part of it. But we are certainly
24 entitled to know the amount of medical expenses at issue.

25 MR. LONDON: Section 3, Question 1 provides --

1 THE COURT: Provides for that.

2 MR. LONDON: We know that's an enormous part of the
3 claim for damages, just speculating what the hospital
4 charged, which might be 10,000 per surgery; what Aetna pays:
5 5,000. I don't even know what my doctors charge.

6 So I think if we remove the speculation, we can
7 come to some sort of understanding on that.

8 THE COURT: All right.

9 MS. PIERSON: The third issue deals with
10 Section 10, Question 3 for loss of consortium plaintiffs.

11 Question 3 asks loss of consortium plaintiffs,
12 essentially, tell us what your claim is. The plaintiffs
13 object, as I understand it, that they think that information
14 is highly personal.

15 Obviously, what we are interested to know is, does
16 a loss of consortium plaintiff contend that they have become
17 the sole caregiver for the plaintiff?

18 Does it mean that the loss of consortium plaintiff
19 had to quit their job to take care of the plaintiff?

20 We want to know the essence of that particular
21 plaintiff's claim.

22 MR. LONDON: Your Honor, our position on this is,
23 it's certainly relevant to the case, a consortium claim.
24 However, in plaintiffs' action but for one other Zimmer
25 plaintiff action in the *Durom Hip Cup* litigation, which was a

1 settlement litigation in New Jersey, the consortium questions
2 were not in the PFS.

3 I have through these negotiations agreed to some
4 questions. But truly the question about society,
5 companionship, those consortium questions are quite
6 sensitive. I, frankly, don't know how somebody is going to
7 put pen to paper and write about society, companionship,
8 services in paper.

9 And, frankly, the PFS is not in lieu of a
10 deposition when we ultimately get to bellwethers. So they
11 are going to talk to folks about those questions. I just say
12 it's better left at the deposition.

13 THE COURT: I do as well. I think what you could
14 do to get some basic information is to say, do you have a
15 loss of consortium claim? Yes or no.

16 If so, does it include a claim for a loss of
17 income?

18 So, in other words, if somebody did lose a job
19 because he or she had to become a care provider and for that
20 reason would be seeking that amount of damages from Zimmer,
21 Zimmer would be aware. In this case, maybe a loss of two
22 incomes versus one. I think that's the most we should
23 require in the plaintiff fact sheet.

24 MS. PIERSON: Is it okay to ask the follow-up
25 question that you mentioned earlier, how are they measured?

1 since it is the same type of damages we were talking about
2 earlier.

3 THE COURT: Sure.

4 MS. PIERSON: Okay.

5 Last substantive point on the fact sheet is the
6 production of tax returns. We briefed this issue in the
7 brief that we submitted to the Court. Under the *Kamphausen*
8 decision and several other decisions of this circuit, tax
9 returns are completely discoverable.

10 Plaintiff proposes that our discovery be limited to
11 the W-2s. We believe that's not sufficient for a couple of
12 reasons, your Honor.

13 The first is that the W-2s will only show lost
14 wages. It will only show lost employer-paid wages.
15 Certainly there is more to a plaintiff's lost wages claim
16 than that. The tax returns include nonwage income, and it's
17 critical that we have that.

18 Second, the tax returns show things that are likely
19 to lead to good discoverable, admissible evidence, including
20 whether the plaintiff received social security, whether they
21 received disability payments.

22 In the instance of itemized returns, there can be
23 valuable information about the plaintiff's activities, their
24 travel, and things that they were engaged in, all of which go
25 to the heart of these cases.

1 THE COURT: Here, too, I think it's pretty granular
2 at this stage. And I am not sure it's necessary.

3 What I would suggest here is that beyond the W-2s,
4 that plaintiffs be asked, are you claiming any loss of -- did
5 you receive any nonwage income, including but not limited to
6 social security disability?

7 And I think they could easily provide that
8 information. People are aware of what they are getting from
9 social security. And they can say what that is without
10 providing tax returns, which really imposes a burden that I
11 am not sure is worth it at this stage in light of the burden
12 it would impose not only on the plaintiffs but on the
13 defendants themselves to review these things, much of which
14 is not relevant.

15 And it is extremely intrusive. And the problem of
16 redacting, for example, social security numbers and other
17 personal information, I am not sure it's worth it at this
18 stage.

19 I will require that the W-2s be produced, that the
20 plaintiffs are asked to explain whether they received any
21 nonwage income. That would, of course, include not only
22 social security and disability, but if they have a small
23 business, for example, that would be nonwage income that they
24 would have to disclose.

25 MS. PIERSON: Thank you, your Honor.

1 THE COURT: All right. And then the only thing we
2 have left, at least immediately left, is the timing issues.

3 MS. PIERSON: That's right. Just by way of a
4 little bit of history, your Honor, the first issue is
5 authorizations and when they should be returned in pending
6 cases.

7 THE COURT: Right.

8 MS. PIERSON: We have been negotiating
9 authorization since September. The plaintiffs have been
10 collecting medical records on their own for months. We know
11 that because they have given us peel-and-sticks in some cases
12 with their initial disclosures.

13 The Court ordered on -- we had a good faith dispute
14 about the content of the authorization. This Court ruled on
15 that on November 22nd. The same day we sent the plaintiffs
16 the final authorization and asked for them to begin the
17 process of gathering authorizations and asked when we could
18 expect to receive those back.

19 Several weeks went by with no response or kind of
20 being tossed back and forth between plaintiffs' counsel as to
21 who would make the decision. Ultimately, we met with
22 Mr. Ronca on the 2nd of December and sort of said, we got to
23 have the authorizations. We are six months into these cases.
24 It will take us four months to gather medical records. We
25 need them.

1 Thirty days from that conference was December 2nd.
2 He said that wouldn't work because of the holidays. And we
3 believed we reached a tentative agreement to produce the
4 authorizations by January 6th.

5 We learned a week or ten days later that they
6 wanted January 13th. It's only a week's difference, we
7 concede. But the problem, your Honor, is that you approved
8 this authorization on November 22nd. We are entitled to
9 begin the process of collecting medical records. Plaintiffs
10 have already gathered their clients' medical records in many
11 cases. And certainly we need to begin that process. It will
12 take us four months.

13 THE COURT: We will make it January 11th.

14 What's next?

15 MS. PIERSON: Two other small issues, your Honor.
16 Completing the PFS and pending matters, how soon the PFS
17 should be completed. Zimmer has suggested 30 days.
18 Plaintiffs are at 75 days.

19 We offered as a concession, when we were previously
20 talking about other shortened deadlines, that as a concession
21 we would agree to 60 days. Since we did not reach agreement
22 on those other things, the proposal before the Court is
23 30 days and 75 days.

24 The only thing I would remind your Honor is that,
25 given the Court's previous ruling, the bulk of the

1 information that we need in order to report to the FDA, to
2 gather device history records, and to screen these cases, we
3 really need that from the PFS.

4 MR. LONDON: Your Honor, if I may just be heard on
5 this one?

6 First of all, I am surprised to hear the defendants
7 go back to 30 days for the plaintiffs' fact sheet to be due
8 in cases already before the Court. It's not an agreed-upon
9 form. So this has not been sent out to our clients yet.
10 And, frankly, the position was 60 days. We came back with 75
11 days.

12 So to retract to other positions, frankly -- I
13 think Andrea and I have gotten to know each other quite a bit
14 over the last few months. So to say, first of all, I was
15 ever nonresponsive, I talk to you more than my wife.

16 But it's 75 days, your Honor, not 30 days, as we
17 understood it.

18 Secondly, assuming we were even to get this
19 document out, that it's ordered today or tomorrow, send this
20 out to our client, and Zimmer itself shuts down for seven to
21 ten days -- this is not easy discovery for our clients to
22 fill out. It takes days. It's not a few hours. Many times
23 they have to go over this with us on the phone. This is
24 extensive. And, frankly, that's why we asked for 75 days.

25 In response, the defendants asked for 120 days for

1 the PFS. I could have negotiated and said 15. They wanted
2 120 days to provide the defense fact sheet. If that's what
3 they want, I take them at face value and assume that's what
4 they want.

5 THE COURT: I will make it 75 days.

6 Let's move on.

7 MS. PIERSON: Last issue on this point, your Honor,
8 is timing to convert dismissals without prejudice to
9 dismissals with prejudice.

10 THE COURT: Right. I have a proposal there as
11 well.

12 MS. PIERSON: Good.

13 THE COURT: What I generally do -- and my deputy
14 could explain this -- is, when we dismiss a case without
15 prejudice, we ourselves set a date. And we say, absent a
16 motion for reinstatement having been filed within X period of
17 time, the case will automatically be dismissed with
18 prejudice, so that no effort need be made on anybody's part,
19 on the part of counsel.

20 You don't have to keep track of it, file motions,
21 make arguments, get -- spur some obligation on the part of
22 plaintiffs' counsel that they otherwise wouldn't have.

23 And I generally make it -- in a case like this, I
24 would probably make it a relatively long date. I would
25 probably say, the case is dismissed with prejudice today. I

1 will give you 90 days' leave to reinstate.

2 You lawyers have enough to do. You don't need to
3 do a thing. My deputy is very good at keeping track of it.
4 Around that time, she will give me a little note, "Nothing
5 has been filed." We then enter a "dismissal with prejudice"
6 order, and that's the end of it.

7 MS. PIERSON: That's fine with us, your Honor.

8 THE COURT: All right.

9 MS. PIERSON: That's all the issues on the PFS.
10 There's just a couple of things.

11 Your Honor, if you are inclined, as I think I
12 understood from your earlier comments, to have the parties
13 continue to discuss Section 4 of the case management plan, if
14 the Court could enter a minute entry as to some of the
15 deadlines that the Court has articulated today and the
16 parties have agreed to so that those things can move forward,
17 it would be helpful.

18 THE COURT: I will definitely do that. I will
19 definitely do that. I will have a transcript Fran is working
20 on now.

21 MS. PIERSON: One that I would point out to you is
22 that the parties have agreed that the master complaint in
23 short form will be filed by January 2nd.

24 The plaintiffs will present that to defendants in
25 advance. We will try and negotiate through any issues, but

1 that it will be filed by January 2nd.

2 Defendants, of course, will respond to that by
3 February 16th.

4 THE COURT: Great.

5 MR. RONCA: I suspect the Court is closed on
6 January 2nd, your Honor.

7 THE COURT: That's right. But you can file it
8 electronically or wait until the 3rd.

9 MR. RONCA: Can we do the 3rd?

10 THE COURT: Sure.

11 And 2-16 for a response.

12 MS. PIERSON: 2-16 for a response.

13 I think the other things we can continue to
14 negotiate and submit a better draft to the Court for its
15 consideration.

16 MR. LONDON: Your Honor, just one point before we
17 get off the plaintiff fact sheet.

18 In light of the Court's rulings today, Ms. Pierson
19 and I will submit an agreed-upon fact sheet by the end of the
20 week.

21 THE COURT: Great.

22 MR. LONDON: Because it does need to be so ordered
23 because it goes to CMO and it's Exhibit A, and, et cetera, et
24 cetera.

25 THE COURT: Correct. Yes.

1 MR. LONDON: With respect to the master complaint,
2 your Honor, and the short form, I wanted to perhaps just
3 raise something to your Honor. And I do know that the Court
4 would not suggest direct filing in this district. But it did
5 come to -- for me to reconsider the direct filing, and, in
6 fact, a lot of the revenue that the district can gain. By
7 way of example, the Southern District of Illinois,
8 Judge Herndon, who now has approximately 10,000 direct
9 filings before him.

10 I just -- I think in light of the adoption, because
11 you will get -- it's the funding, which I think is an
12 important issue.

13 The second is the complaint when it comes over, it
14 will still have to go back if it's ultimately remanded and
15 Lexecon isn't addressed.

16 So the short form complaint doesn't really do much
17 procedurally. It does, of course, give you a master
18 complaint vehicle by which to strike a few global causes of
19 action. But a case from the Eastern District of
20 Pennsylvania, for example, coming here with all of its causes
21 of action, it's consumer fraud from Pennsylvania, and then
22 simply doing a checkbox here, I think, in many respects,
23 doesn't accomplish truly what the benefits of a short form
24 direct filing here that's adopting a master that's here,
25 because, one, you will get the funding --

1 THE COURT: I was assuming you could file a short
2 form complaint in another district with an indication that
3 it's going to be transferred.

4 MR. LONDON: No, your Honor. With all due respect,
5 I don't believe you can do that because there is no
6 indication --

7 THE COURT: Well, then maybe I do need to rethink
8 this. Let me think about that and check with Judge Herndon.

9 MS. PIERSON: If we can at least get the master
10 complaint by January 2nd, that would help us.

11 THE COURT: That's for sure. Yes, regardless.

12 MR. LONDON: Just so we are clear, Judge Herndon
13 has direct filing.

14 THE COURT: I know.

15 MR. LONDON: He has not done the master complaint.

16 THE COURT: I understood that's what you were
17 talking about.

18 MS. PIERSON: Your Honor, just a couple of other
19 deadlines to be clear about for your minute entry.

20 On the initial disclosure issue that we talked
21 about earlier, we have sent to Mr. Ronca a list of the cases
22 in which no initial disclosure has been submitted or
23 incomplete information has been submitted.

24 If we could get an entry from the Court directing
25 that a newly filed case's initial disclosures are served

1 within 30 days, and some deadline by which plaintiffs must
2 supplement the initial disclosures for pending cases to the
3 extent that there is incomplete information or submit them
4 where none has been provided at all, if that could be done
5 by, say, the 11th, the earlier date that the Court mentioned,
6 that would work.

7 MR. RONCA: Your Honor, this goes back to the
8 argument about, we are going to be doing the fact sheets; do
9 we really need the initial disclosures as an additional thing
10 to do?

11 THE COURT: I thought we addressed that we didn't.

12 MS. PIERSON: I am sorry. I didn't understand that
13 that was the Court's ruling. This Court ordered on the 28th
14 that plaintiffs submit initial disclosures.

15 THE COURT: Yes.

16 MS. PIERSON: We are missing them for half the
17 cases or information that should have been included for half
18 the cases.

19 I can't pull manufacturing records until I have
20 that information. I can't report to the FDA without that.

21 THE COURT: Okay. Then, perhaps I had a
22 misunderstanding.

23 But you know what? I have got a jury waiting. I
24 am feeling a little awkward about this.

25 If you want to wait for a while until the end of

1 the day, I am happy to continue. Otherwise, if you want to
2 submit something in writing on this.

3 I am feeling really awkward about keeping them
4 waiting for so long.

5 MS. PIERSON: Why don't I submit something in
6 writing on the initial disclosures.

7 The last thing, your Honor, the interrogatories and
8 requests for production are hanging out there. The current
9 deadline is January 4th. If the Court could order any
10 responses stayed or deem them withdrawn so that we can
11 negotiate Exhibit A?

12 THE COURT: I will deem them withdrawn without
13 prejudice.

14 Okay. Now, on the 26(a), the initial disclosures,
15 maybe what we were talking about before was just some
16 specifics about the initial disclosures, for which I think
17 it's appropriate to waive that until later.

18 You are saying that for half the plaintiffs initial
19 disclosures were made and for half they weren't.

20 MR. RONCA: That's not 100 percent accurate.

21 MS. PIERSON: Rough figure. We sent Mr. Ronca a
22 detailed list. We have listed the cases, what information is
23 missing, cases in which no initial disclosure was ever
24 served. We filed a --

25 MR. RONCA: Your Honor, I got that about a week

1 ago.

2 MS. PIERSON: -- motion to compel.

3 MR. RONCA: Okay? Out of all these cases, no names
4 of lawyers or anything, required me to probably look them up
5 and call all the lawyers, I guess, instead of notifying the
6 lawyers themselves that you haven't submitted your
7 disclosure.

8 In the list of things that was the PSE's
9 responsibility to do in CMO 1, that's not included. They are
10 supposed to give notice to the people they have the complaint
11 with, the individual lawyers of those cases.

12 Secondly, we disagree with a lot of the claims that
13 these things were either incomplete or not done. And we had
14 a back-and-forth about that the last time. And when we were
15 here on November 10th, I said to the Court, they had 33 cases
16 they claim aren't done yet, which weren't even due yet. And
17 this is a similar thing.

18 But that's an individual case issue, number one.

19 Number two, I don't think the order was clear about
20 cases filed after the order as to when anything -- if
21 anything --

22 THE COURT: I am sure it wasn't. I am sure it
23 wasn't.

24 MR. RONCA: And --

25 MS. PIERSON: Just one point of clarification. Of

1 the vast majority of these --

2 MR. RONCA: I didn't interrupt you.

3 MS. PIERSON: I don't think that's accurate.

4 The vast majority of the cases where information is
5 missing, the plaintiffs are represented by members of the
6 PSE.

7 MR. RONCA: Take the dispute up with the
8 individuals. Don't send me a letter and say, go out and
9 police it, because that would be included in the duties that
10 the Court gave us. These are individual things.

11 But, again, I don't think the order is clear that
12 they are even due. So --

13 THE COURT: Well, I think what counsel is asking us
14 for is a date when they will be due.

15 MR. RONCA: We believe, your Honor, as we said
16 before, that it's just an additional piece of busywork and
17 that the information will be supplied.

18 You talk about putting it in the short form
19 complaint --

20 THE COURT: -- in the short form complaint.

21 The Rule 26 disclosures I think should be made
22 within 30 days after the filing.

23 MR. RONCA: After the filing or the transfer?

24 THE COURT: The transfer, I mean. The filing in
25 this court, the transfer.

1 MR. RONCA: And we should file a Rule 26?

2 THE COURT: I am sorry. I thought we were talking
3 about a 26(a)(1). Maybe I was wrong.

4 MS. PIERSON: We are. And when you addressed this
5 issue back in October, your Honor, you directed -- from the
6 bench directed the plaintiffs to provide the catalogue and
7 lot information.

8 The distinction that Jim is drawing now is that he
9 wants to give us names of witnesses and exhibits without the
10 catalogue and lot number. And that won't work. That's the
11 most critical piece of information in this case.

12 THE COURT: Okay. But I thought in some cases the
13 plaintiffs didn't have the catalogue and lot number. Is that
14 what they do have?

15 MS. PIERSON: They have not produced it. As soon
16 as they gather the plaintiffs' medical records or if they
17 have the plan, it's right there.

18 MR. RONCA: It's not that simple.

19 And Rule 26 does not require that. That's an
20 additional requirement that they are asking for.

21 MS. PIERSON: We will be unable to produce any
22 documents relevant to the plaintiffs' case. We can't produce
23 the manufacturing records. We can't respond to PFSes or even
24 begin that process without the catalogue and lot.

25 MR. RONCA: They don't have to respond --

1 MS. PIERSON: Not to mention that we have to report
2 to the FDA with this information.

3 MR. RONCA: They don't have to respond for 120 days
4 until after they get the PFS, which is what we were willing
5 to agree to. And they had to have 120 days.

6 So giving the plaintiffs an additional
7 responsibility that Rule 26 does not require when they are
8 also required to give over that information -- they are
9 giving medical authorizations in 30 days, PFS in 90 days.
10 Now we are going to do an initial disclosure and a short form
11 complaint when there is no direct filing. That's four
12 filings by the plaintiffs.

13 A lot of it -- we talked about not duplicating on
14 the four defendants. Much of it's duplication and --

15 THE COURT: I am requiring 26(a)(1) disclosures
16 30 days after the transfer. And I don't think 26(a)(1) calls
17 for catalogue and lot numbers. All right.

18 MS. PIERSON: Thank you, your Honor.

19 THE COURT: Thank you. I will see you in January.

20 (An adjournment was taken at 3:23 p.m.)

21 * * * * *

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

24 /s/ Frances Ward
25 Official Court Reporter
F/j

December 21, 2011.