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
	)	September 20, 2013
	)	9:09 a.m.

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

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THE CLERK: 11 C 5468, In Re: Zimmer NexGen Knee Implant litigation for status.

MR. BECKER: Good morning, your Honor.

Tim Becker for the PSC.

THE COURT: Good morning.

MR. FLOWERS: Good morning, your Honor.

Pete Flowers for PSC.

THE COURT: Good morning.

MR. O'NEAL: Good morning.

Jim O'Neal for Zimmer.

MS. FITERMAN: Good morning.

Amy Fiterman for Zimmer.

MR. MEYER: Good morning.

Peter Meyer for Zimmer.

THE COURT: Good morning.

We are going to put Mr. Millrood on the phone. If you just hold on for a second, he has to be patched in.

(Brief pause.)

MR. MILLROOD (telephonically): Tobi Millrood.

THE CLERK: Good morning, Mr. Millrood. We are in the courtroom on Zimmer.

MR. MILLROOD (telephonically): Good morning. Thank you for calling.

THE COURT: Good morning, Mr. Millrood.

I have before me -- your colleagues are here. And

I have before me a proposed agenda for this morning's conference, with the understanding that, of the four items on that agenda, Item 3 is being withdrawn, at least for now. Is that right?

MR. O'NEAL: That's correct, your Honor.

THE COURT: All right. So what we have, then, for this morning are three issues.

One, the dismissal of *Lopez*. Two, defendants' motion for a supplemental confidentiality order, and the PSC's motion to strike the Brian Earl declaration. And then, finally, a report on the status of discovery.

So let's begin with No. 1, the dismissal of *Lopez*, which was, as I understand it, one of defendants' case pool picks.

MR. O'NEAL: Your Honor, we have reached agreement with the PSC as to how to handle this subject to the Court's approval.

Once again, we have been plagued with this issue of defense case pool picks getting dismissed.

In this case it was the *Lopez* case, one of the defendants' two porous cases. The dismissal was advanced by the *Lopez* lawyer Douglas Plymale of the Dugan Law Firm in New Orleans, not a member of the PSC.

You may recall that Mr. Plymale was also the lawyer involved in the *Buie* case, which was dismissed for lack of

subject matter jurisdiction. And there was no response to your show cause order.

We were seeking, pursuant to the plan, to engage in case-specific discovery in the *Lopez* case. And quite recently Mr. Plymale informed us that he wished to dismiss the case with prejudice.

We have agreed to stipulate to the dismissal of the case with prejudice, not having a lot of choice in that particular matter. But we had specifically reserved the right to seek sanctions against Mr. Plymale or whatever other relief may be appropriate under Rule 41 or the local rules because of the significant time we spend on these case pool picks, analyzing them and trying to select the ones we want to select. And we have had so many instances now where the dismissals follow.

Obviously, Mr. Plymale needs to receive notice and an opportunity to be heard, in the event we move forward with the sanctions motion. So that would be discussed another day.

We did have a meet-and-confer with the plaintiffs' lawyers -- or the plaintiffs' steering committee lawyers regarding the appropriate way to handle this, and neither side is wanting to try to adjust the dates that your Honor has set forth because of this.

So the agreement that we have been -- that we have

reached, subject to your Honor's approval, is that the *Nilles* case, which is one of the plaintiffs' case pool picks -- and I believe Mr. Becker is the attorney in that case -- and whatever case the defense at some point chooses to replace the *Lopez* case would be moved out of the first round of case pool picks entirely and moved into what we anticipate will be a second round of cases, once those initial round of originally 12, now 10 cases are resolved.

Case-specific discovery on *Nilles* will be stayed. *Nilles* will no longer be in the first round of the case pool picks.

When we submit to your Honor our choices, each side's choices, for you to make the final decision on which four cases will be tried, we will do so out of a pool of 10 rather than 12 cases.

One factor, which influenced at least the defense in that consideration, is that they are two porous cases coming off the first round.

And if we look at the percentage of cases in the MDL by product category -- and I have a hand-up, which I have shared with Mr. Becker.

(Document tendered.)

MR. O'NEAL: -- we see that only 12 percent of the pool are porous cases, 66 percent are cemented, 18 are MIS.

So this seems like the best solution to this issue,

your Honor. And we are here to ask if you will bless it or have questions or want to discuss another approach.

THE COURT: So the result is that rather than choosing four cases from 12 -- the result for me, that is, is, rather than choosing four cases to try from your 12, I will be choosing four cases to try from 10.

Will there really be -- maybe not. It wouldn't be fair to say that it would be an under-representation of porous cases because there are such a relatively small number of porous cases in the first place.

MR. O'NEAL: That was our point, your Honor.

THE COURT: I think that resolution sounds fine.

MR. O'NEAL: Okay.

THE COURT: I am very, very agreeable to that.

MR. O'NEAL: And as I said, your Honor, we may be back here with Mr. Plymale at some point in the future.

THE COURT: Obviously, we don't want to have a situation where every time the defendants choose a case it ends up getting dismissed. I know that's been a concern.

All right. So are we ready, then, to move on to Point 2 on the agenda?

This is the more complicated matter, and that's the defendants' motion for a supplemental confidentiality order and then the plaintiffs' steering committee motion to strike the Brian Earl declaration.

This is Zimmer's motion, so I will ask for Zimmer once again to make at least a brief presentation on it. I have read the briefs, but I think I would like to hear orally as well.

As I understand it, what Zimmer is asking is that a certain group of people not be automatically entitled to the documents, but instead --

MR. O'NEAL: Well, what we are asking is two things that are in dispute here. There is an existing confidentiality order, obviously.

THE COURT: Correct.

MR. O'NEAL: Zimmer is very concerned that the existing order needs a couple of modifications with the production of a subset of the documents that your Honor ordered produced and which have now been produced, although the subset has simply been shown to the other side, for the most part, yet pending the result of this motion.

THE COURT: Okay.

MR. O'NEAL: The two things we are asking for are, we have a concern over their consultant's experts seeing this because the way the orthopedics industry works, those consultants may be, very likely will be, consultants for our competitors.

And secondly -- and therefore we are proposing that, to the extent and only to the extent they wish to share

this subset of documents, the so-called special attorneys' eyes only, or SAEO, documents, with their experts, that those experts sign an agreement not to become a design consultant for one of Zimmer's competitors for a period of three years. That's one thing.

The other thing is that the way the current order reads, if our particularly sensitive documents about the new Persona product were produced without a further order, they could show them in the course of depositions to non-ex-Zimmer employees who currently work for Stryker or DePuy or any of our competitors, and they could show them to people like Dr. Scott, who used to be our design consultants -- but obviously your Honor knows from the Scott litigation, we are not in a very friendly relationship with Dr. Scott -- and show it to other design consultants who may now be consulting for someone else.

So the heart of the motion is Zimmer's concern over what they regard as one of the most important or perhaps the most important piece of intellectual property that they have right now.

We have submitted a declaration from Brian Earl, who's in charge of the Persona product, and he has indicated that it's had a great success. It's given Zimmer its first increase in market share -- they have been in business for years -- which is very difficult to achieve.

The plaintiffs speak a lot about the information that's publicly available about Persona. But it's important to note -- and it's covered in Mr. Earl's deposition, which was taken two days ago -- that Persona is not just one product that is now on the market. It is a family of product. It is a design concept. New products within the Persona family and within the design concept will be rolling out between now and 2016, is the plan.

And while there is information about the Persona products currently on the market, on the Web, and in patent applications, some of those other products we haven't even filed patent applications for. They are still highly confidential.

And while plaintiffs make hay about there being information that is publicly available, they really do not and cannot deny that that is not covering the waterfront. There is much information that is still confidential and may always be confidential. In fact, Mr. Earl testified that some of these things are not even shared with Zimmer's own consultants.

So the motion is really based on the nature of the orthopedic industry. Not only Zimmer, but all the orthopedic implant companies develop new products by working with outside design consultants, surgeons, to do that.

Our surgeons sign a ten-year noncompete in the knee

business when they work on the Zimmer product. I have one of those agreements here, and Mr. Earl was asked about it.

Now, the plaintiffs complain that Zimmer is asking that the information that goes to a plaintiffs' consultant, that that consultant sign an agreement not to consult with a competitor for three years, whether in the knee business or not.

First of all -- and they complain that our consultants are only restricted as to the knee business.

First of all, our consultants are restricted for ten years, not three years.

But secondly, our consultants have a financial interest in the success of Persona. They are being paid, subject to regulation and oversight, on the basis of the success of the product and have a direct financial interest in not sharing information with competitors.

With respect to the plaintiffs' expert, here is what we are concerned about: Dr. X. They consult with Dr. X, and they show him all the core confidential documents that we are concerned about. So he knows exactly not only how the Persona products are designed but why they are designed that way, what this doctor on the design team thought, how she talked with this doctor on the design team and they came up with a resolution of this issue.

So Dr. X knows all this.

Dr. X is working for BioMed, one of our competitors, and they are developing a knee implant. And they come up with -- they see that Persona has increased Zimmer's market share, is a highly successful product.

They sit in a room with Dr. X and say, how can we make our knee better?

Now, Dr. X, under the current agreement, is bound by a confidentiality order, and he would not be able, pursuant to that order, to take the document and share it with the other side.

But even if we assume that in good faith he doesn't do that, it's in his head. He is sitting there in the room working on the design of a directly competitive product with, in his head, all of the knowledge of the details of the design process for the product which BioMed is seeking to compete with.

We cited some cases. And it was interesting to me how two or three cases all use the same language. You can't unring that bell. That is a bell that cannot be unrung.

So whatever quibbles you are going to hear about whether the terms are the same and how accurate Mr. Earl's forecast of the financial cost to Zimmer is -- which, of course, involves considerable hypothesizing about the future -- they really cannot accurately assert that this is not a genuine concern, that you can't unring that bell.

And if a doctor has these details in the course of directly working for a competitor, there is no way that what is in his head would not be a harm to Zimmer.

Now, their concern, I'm sure -- I understand it -- is being limited in their ability to use experts because perhaps some expert of theirs that they want to use would not sign such an agreement.

But it's a question of balancing of the harms. They can use any expert they want as long as -- without the signing of this agreement, as long as they don't show them the SAEO documents when they haven't agreed not to compete for three years.

There are experts who may not have any interest in doing that. And Mr. Ronca -- we understand from Mr. Ronca, I believe, that they have got one expert who is working for a competitor and others who are not.

So in the question of balancing of harms, what we are asking the Court to do in this order is to recognize a legitimate interest of Zimmer without unduly prejudicing or limiting plaintiffs' ability to put their case together.

We met and conferred about this and asked for something that would respond to Zimmer's interest, as discussed, the unringing of the bell problem, and we haven't heard anything. There has really been nothing other than that the existing order protects us, and I hope I have

explained to you why Zimmer does not believe that it sufficiently does in this instance.

THE COURT: You have explained the concerns.

Let me ask a question. Your expectation or hope is that the Persona products are going to -- some of which have already hit the market, will continue to be rolled out until, say, 2016.

MR. O'NEAL: Yes.

THE COURT: Let's just arbitrarily say February 2016.

Couldn't, at a minimum, the restrictions that you want to impose on these consultants be lifted as of the date of the release of any product that would disclose that secret?

In other words, everybody recognizes that when something is patented or even when a patent application is on file, the secret is more or less out.

You are talking about material that is not yet the subject of a patent and is at the trade secret stage.

And I am wondering if ultimately all of that stuff isn't going to be, in order for it to be useful in a product, available for review and consideration by one of your competitors anyway.

In other words, I wonder whether we couldn't, at a minimum, make the three years subject to the understanding

that the release of any Persona product that reveals particular secrets eliminates the need for those experts to have their hands tied?

MR. O'NEAL: I think that has an appeal. On the other hand, there are complexities.

The definition of, what is a Persona product? Do the instruments apply? What if Zimmer has put out a product but doesn't know if it's going to put out more Persona products? What if Persona is not fully on the market until ten years from now?

There are a lot of complexities associated with it that would have to be discussed and negotiated.

But I will say that we are very willing to discuss and negotiate something that would provide some form of protection against an expert having in his head our most confidential information when he is working for a competitor.

THE COURT: And I understand the difficulty between what's in somebody's head, on the one hand, and what's on the drawing board and what's actually operational and not yet operational but planned and disclosed.

I think I should hear from plaintiffs' counsel on this.

MR. O'NEAL: Let me just say one other thing, which is that Mr. Becker is going to be handing up, I believe -- at least he gave us with an indication he is handing up a memo

of meeting notes of an Alta Natural Cruciate meeting August 28 and 29.

This kind of give-and-take and very detailed discussion of it, this is the kind of document that would never become public because it's just not something that goes in the patent application.

Secondly, it may be confusing to the judge. Mr. Becker has a hand-up relating to Mr. Earl's deposition. We have one, too, which I will hand up now, if it's all right.

THE COURT: Sure.

(Document tendered.)

MR. O'NEAL: And I just wanted to note, Mr. Earl was deposed only two days ago, so neither side had a lot of time to analyze this. But our PowerPoint contains exact quotes from the deposition with cites to the final version of the deposition. I have a copy here. And I believe Mr. Becker intends to file the final version of the transcript under seal.

I will say that Mr. Becker's handout contains not exact quotes. And in my experience, when lawyers on either side characterize testimony rather than quoting it, inevitably wishful thinking about the characterization of the testimony comes in. I believe you will find that in that hand-up.

And secondly, the pages that are cited -- and this is just so the Court avoids confusion. The pages cited in Mr. Becker's hand-up are from the rough draft, understandably, since the deposition was only two days ago. Ours are from the final version.

I tried to crosscheck Mr. Becker's hand-up against the transcript, but I couldn't really do it because we just got it, but mainly because I don't have the rough draft. I have the final.

So I haven't had a chance to check the accuracy except in an impressionistic way. But the Court will have to recognize that the transcript cites in ours are from the final version and in Mr. Becker's is from the rough draft, which could cause some confusion if you go back to try and check things.

THE COURT: All right.

MR. O'NEAL: Thank you.

MR. BECKER: Good morning, your Honor. Good to see you.

THE COURT: Good morning, Mr. Becker.

MR. BECKER: May I approach?

THE COURT: Sure.

MR. BECKER: Let me just start with the veracity of my reporting.

I agree that sometimes, in the exuberance of a

post-deposition, particularly a good one, like which occurred with Mr. Earl, one can remember things as they did not occur. But fortunately for us, we had a copy of the rough draft.

I have handed the Court three things.

One is a copy of the rough draft with tabs to the actual citations from the presentation I am going to give. The second is the actual presentation. And the third is the document Mr. O'Neal referenced.

What I would note, your Honor, is that he is absolutely correct, that we did not have the benefit of the actual final transcript. We have tried to file it under seal. I have had some difficulty with the ECF system on that.

So what I intend to do over the weekend is juxtapose these citations from the rough to the actual so that you have it.

THE COURT: Okay.

MR. BECKER: But in conferring with counsel this morning, my understanding is that the quotes are not of any substantive differences.

With respect to the document I handed to the Court, the stars on the document, or the tabs, are what I am going to refer to orally during the presentation.

THE COURT: Okay.

MR. BECKER: So here is where Mr. O'Neal and I

agree. There are basically two issues in this motion.

The first is, what documents can you show the experts?

And then the second is, what documents can you show former consultants and former employees?

I am going to take those in reverse order because I think they are a little bit easier to do.

At the outset, let's start with some general observations.

Number one, this argument now, by my count, is the third time that defendants have made it. Twice before they have lost.

The current protective order under Paragraph 4 contains explicit provisions on how you deal not only with confidential documents in a deposition, but also how you deal with confidential documents with respect to the expert.

It is important to know, we, as a PSC, have sent experts documents. And throughout the two and a half years of this case -- or two years of this case, there is not even the faintest whiff of any violation of confidentiality or that those experts have gone to the respective manufacturers that they have worked for and said, intentionally or just because it was in their head, I have a new idea. None of that has occurred. None.

And I think you have to keep that in mind when you

juxtapose it against what the defendants are actually asking for.

Second, there is not one case in the whole of American jurisprudence that I have been able to find, that the defense has been able to find that endorses the rationale that a plaintiff's expert can be subjected to a noncompete. If it existed, one of us would have found it and told you about it.

Their opening brief cites exactly zero cases. The cases they come back with are essentially cases which are posttrial, where the courts are commenting, I can't just give an instruction here. You have said something that I can't erase from the jury's memory. You have said something inappropriate in court that you can't take back and a curative instruction can resolve.

And that is true. When you put something in a person's head, they can't forget it.

But keep in mind, what do the experts have in their head in this case? They have all the design schematics for the predicate products that led to the Persona. They have all of the minute notes related to the development of those products.

They have access to the actual publicly filed patents on those products.

If they had the intention to go out and violate

your order -- which, by the way, the defendants are implicitly saying you would be powerless to enforce. If they had the intention of doing that, they are armed with the very material the defendant comes in today and says, we are very worried. You need to give us additional help.

And what evidence does the defendant offer you that that has occurred? Nothing.

So I think we have to keep that in mind as we go through this motion.

Now, with respect to former employees and consultants, here is our concern: The way that the protective order is written, as supplied by the defendants, says this: No former employee, no former consultant has automatic access to a document.

What does that mean? That means this: I can't walk into a deposition -- let me give you a real-life example.

I took last week the deposition of Mr. Campbell. He was a brand manager on a number of products at Zimmer. About two months ago I took the deposition of Tracy Haught Phillips. She was the brand manager on a Gender Solutions knee.

What this means is that if I wanted to use one of those SAEO documents and Mr. Campbell or Ms. Phillips was the author of that document, I cannot show that to them.

If I want to show the document I have just handed you to one of the very consultants who attended and participated in that meeting, I am precluded from doing it without giving Zimmer notice of it first.

Zimmer says, no, no, no. We will be reasonable.

Well, number one, this whole debate came about, you will recall, because Zimmer classified our search for these documents as nothing more than rummaging through the forest.

We clearly have a divide in how we think about this case.

And whether they are acting in good faith or bad faith or somewhere in between, it's not fair that the plaintiff should have to go to them and say, I would like to show your former employee, who you are likely to represent, these 20 documents so you can prepare them on it in advance of the deposition.

That is the ultimate remedy that they are looking for. And that's simply just not fair, particularly when the people we are showing those documents to are either the authors of the document, received the document, or were in the meeting that the document chronicles.

So their retort to that is, well, what about Dr. Scott? To me, this is really tilting at windmills and much ado about nothing.

Again, we can seek solace in the protective order.

The protective order says you may not show a document to somebody, a witness, unless they have knowledge of the subject matter.

Zimmer's position throughout this case has been that Dr. Scott has no knowledge of the Persona documents.

So let's look at how this would practically roll out in a deposition.

I am deposing Dr. Scott. I hand him one of these special documents. Zimmer makes an objection. We either resolve that document or resolve that challenge. We get on the phone with you, or we, as plaintiffs' lawyers, face potentially violating the protective order.

Now, I can tell you in practice, having worked with Mr. Ronca and Mr. Flowers and Mr. Millrood, we wouldn't take that chance. If we thought there were documents that would even get us close to violating the protective order, we would certainly either approach the Court and/or defendants before we showed the witness that document.

So the likelihood of Dr. Scott, which is the only example they give, suddenly having access to these 22,000 pages is slim to none.

So the first problem we have with their order is that there is nothing in it that puts any restraint in terms of what we can show former Zimmer employees and former consultants.

The problem with that is that there are a lot of them. About half of the witnesses who have been deposed to date by the company are, in fact, former Zimmer employees.

Of the four witnesses I have taken in the last two weeks and in the next three, three of those four no longer work for Zimmer. I would potentially have to call Zimmer up with every one of those depositions and say, I am going to think about using these twenty documents to examine the witness who wrote the very document.

That makes absolutely no sense.

Our second concern is really the impact of what they are asking for with respect to the experts. What they are basically saying is this: We want a global prohibition for three years on all products with any of the major manufacturing companies.

The first question is -- we will get to the end and say, why do they really want that? But I think in evaluating that question, you have to actually look at what does Zimmer do with itself, its own employees, and its other consultants? And that's where this chart comes into play.

There's about five or six paragraphs in Mr. Earl's deposition -- or rather, declaration that are of import to this motion.

The first is Paragraph 7 where he testifies Zimmer requires its consultants to sign tenure noncompetes. And

that is, in fact, true.

But what that declaration doesn't say is the following:

Number one, Zimmer employees are only required to sign 18-month noncompetes. And that is limited to the products that they worked on or have knowledge of.

Nothing in Mr. Earl's declaration says that. And there is no ban, according to Mr. Earl, on working for a competitor with a different product.

Number two, at least three, three of the Alta consultants, the Persona consultants, the very people who had access to this information in their head that Zimmer is worried about, now work for Zimmer competitors or simultaneously work for Zimmer competitors.

On Page 22 through 26 of the rough draft, Mr. Earl conceded that Dr. Hoffman, Dr. Walker, and Dr. Freiberg work for Stryker and BioMed, two of Zimmer's biggest competitors. And yet they impose no restriction on them with the exception of the disclosure of knees. They express no concern with respect to the information somehow subtly leaking out or unintentionally leaking out.

In fact, Zimmer is so laissez faire about this, Mr. Earl, the author of this declaration, didn't even know that these doctors worked for Zimmer competitors.

Number three, in his deposition Mr. Earl conceded

that the restrictions imposed upon the PSC's experts are greater than what they do for their consultants or themselves.

Mr. Ronca asked him on Page 42 of the rough at Lines 5 through 15:

"Okay. And did those -- if those restrictions encompassed more than just knee arthroplasty, would you agree that those restrictions would be broader than the conflict of interest duties you put on your own outside surgeon consultants?

"A. I would.

"Q. And do you think it's fair that your own consultants can consult on other products but plaintiffs' experts would not be able if Zimmer wins this motion?"

And there is a series of objections.

Mr. Earl ends his answer by saying, "The ability not to consult" -- this is a quote -- "consult on any orthopedic area after reviewing these documents does not -- does not make sense to me."

Yet that is what he and his lawyers are proposing that you do.

When you are evaluating this, you have to look at it against what Zimmer is doing. Zimmer understands it is not imposing these type of restrictions on its employees, on its hired consultants, or on anybody that it works with.

In fact, people who are on the very design team they are concerned about are now working with simultaneously or for Zimmer competitors.

In Paragraph 8 of his declaration, he says that plaintiffs' experts have been or hope to be employed in the design development roles by Zimmer competitors. And that makes it problematic for Zimmer.

In his deposition at Page 22 he conceded that Zimmer doesn't monitor its own consultant activity.

On Page 13 he conceded that Zimmer doesn't track prior employees.

And in Page 16 through 18 he conceded that it limits its nondisclosure agreements to the products that the consultants worked on, not the entire product line.

In Paragraph 9 he takes the position that all -- and he used the word "all" -- of the SAEO documents relating to the design -- he goes on to say are confidential.

Well, we took his deposition and we asked him about that. And it turns out that that is simply not true.

Specifically on Page 59 he conceded that large segments -- I'm sorry. On Page 62, Lines 18 through 22, he conceded that large segments of the SAEO production, of these 22,000 pages, in fact, are not super secret.

Specifically he said, starting at Line 18, "Is it possible that some of the things in the boxes are now in the

public domain because the product has been launched and patents have been applied for?

"A. It is possible."

So he understands that these documents are now in the public domain. He understands that people have access to them and availability to them publicly.

He knows that the consultants can go out and get them and, as the Court alluded to, that the secret is now out.

But worse than that, he conceded in his deposition that he did not even review any of the 22,000 documents to consider which were so secret they should be subject to this extra protection versus those that were not.

On Page 60 he says, in response to the following question: "Have you reviewed those documents?

"A. I reviewed a table of contents of the documents. I have not individually reviewed each page or, actually, any of the pages in those boxes."

On Page 61 he says, "Is it fair to say that you have never examined even one of the documents in those boxes?"

And in response to an objection, or following that, he responds, "I have not reviewed documents in those boxes."

On Page 95 he says, "Okay. Now "-- in response to the following question: "Now getting to the bigger picture,

do you know, out of all the patent applications' public information, whether any of those documents in that box" -- he was holding a separate box -- "or the 11 boxes have now been exposed to the public because the patent applications were filed?

"A. I do not.

"So before you did your declaration, where you said those documents need to remain super secret and nobody can review any of them without agreeing to never consult for another company for three years, you don't know if some of those documents that are in there are now public information?

"A. That is correct.

"Q. But nevertheless, you took a declaration that every one of those documents is so secret that before any expert could look at them they would have to agree to forego any compensation for working with Zimmer competitors for three years?

"A. If my declaration states that every one of those documents is equally potentially damaging if it were to be leaked to a competitor, that certainly was not my intent. There is a gradation in my opinion.

"Q. In order to figure out that gradation, you would have to go through each document?

"A. There would need to be a review process."

Okay. So what's Mr. Earl saying here? He is

saying the following: Some attorneys at Kirkland & Ellis years before marked these 22,000 pages as Special Attorneys' Eyes Only in the middle of a patent lawsuit where Dr. Scott was claiming he was a patentholder, was claiming he was entitled to royalties stemming from the development of the Persona knee.

When it came to this case two years later, Mr. Earl took those documents and simply said, all of them are super secret, despite the fact I have no idea if any of them or how many of them or which ones of them were actually put in the public domain.

THE COURT: I want to interrupt for a moment.

Are you telling me that the SAEO designation for these documents was attached in a different lawsuit?

MR. BECKER: Yes. Yes. I am telling you that, your Honor, and specifically in the Scott litigation, which was a patent litigation and an arbitration for royalties.

THE COURT: I don't want to jump too quickly to the conclusion here, but I am not signing an order that expands this SAEO designation from another litigation willy-nilly on this one.

Nor am I imposing on plaintiffs' experts restrictions that Zimmer didn't choose to impose on its own employees. You could always get your own employees to sign a noncompete for three years, et cetera. If that didn't

happen, it's not fair to impose it on plaintiffs' consultants.

MR. O'NEAL: Judge, I think I need to remind you the context of this.

When we argued before -- these are the Scott litigation documents.

THE COURT: I understand. And I understand it's Zimmer's position that the Scott litigation documents are a sideshow anyway. I understand that, that the whole Scott issue is a sideshow.

MR. O'NEAL: Can I address some of the things Mr. Becker said --

THE COURT: Sure.

MR. O'NEAL: -- which are flatly incorrect?

THE COURT: Okay. Flatly incorrect quotes or what?

MR. O'NEAL: The quotes are not flatly incorrect, but to say that Mr. Earl did not review any of these documents is flatly incorrect. I was involved in the process by which we did this.

There are -- out of the Scott documents, there were approximately 481,000 pages of documents.

THE COURT: Okay.

MR. O'NEAL: Of those, in the Scott litigation 22,748 were designated as SAEO documents.

THE COURT: Okay.

MR. O'NEAL: Those documents have all been shown to the plaintiffs, the PSC, and the remaining 460-some-thousand have all been produced.

THE COURT: Right.

MR. O'NEAL: Mr. Earl reviewed 2,889 pages at our request as sampling. And the way that the sampling was reached was, he identified categories of documents which were of particular concern. And the 2,889 pages were our best effort to have him review those pages which were of most particular concern.

Second, when we attempted repeatedly to meet and confer on this issue to get some sort of recognition that Zimmer has a legitimate interest here, give us something to protect us here -- we said, if you think any of these documents are in the public domain or are not super secret, talk to us. We will do that. But we get nothing. There is not a single concession to try to protect this unringing of the bell point.

Next, with respect to whether it's unfair that the situation of Zimmer's consultants and employees are different than this, I believe and submit that is a total *non sequitur*, because the position of Zimmer employees and consultants is entirely different than the position of plaintiffs' experts.

First, employees have certain well-established principles about the limitations on noncompetes that you can

impose on them.

With employees you are not just talking about whether they can or cannot accept one litigation project. You are talking about their whole life and their whole livelihood. And that there is express case law, in which I am no expert, on limitations on how much of a noncompete you can ask for.

Second, employees and our consultants have a financial interest on our side, not on the other side.

So those are not comparable situations.

THE COURT: Not former employees.

MR. O'NEAL: What?

THE COURT: You are right. The law does not permit noncompete agreements that restrict employment in such a way as to render someone unable to support himself.

But former employees of Zimmer and former experts who once worked with Zimmer won't have any particular financial allegiance to Zimmer that I know of, number one.

Number two, one would expect Zimmer's own employees and staff to have greater familiarity and understanding of the information that this bell might unring to the point where one would expect Zimmer to be even more concerned about somebody who worked in the area and helped develop the products than it is with respect to somebody who's looking at documents in connection with litigation for the first time.

MR. O'NEAL: You understand that those people, we do have concerns about, but the law restricts our ability to impede their method of making a living. Therefore, we impose upon them -- I forget what the term is. I think Mr. Becker said 18-month noncompetes because we can do that under the law.

With respect to the issue of our consultants, they have noncompetes effectively for ten years.

Now, Mr. Becker has complained it's not fair that their noncompete is for the knee business; whereas, we are seeking a noncompete more general than that for working for competitors.

Well, again, I reject this notion that it makes any sense to compare two situations which are wholly different.

But if your Honor were to say, well, I am not going to restrict them from other competitors in general, but I will restrict them in the knee business, that would be a significant improvement over the situation as it exists now.

THE COURT: And would be protection that you don't have by virtue of the existing protective order.

MR. O'NEAL: That's correct.

THE COURT: You know, I obviously am looking -- you took a deposition -- what? -- a couple of days ago. I have got a transcript before me that I understand is a rough, but it's pretty well marked up. I probably need to take a look

at this.

But in the meantime, I think -- and I will set a relatively short date because I know you need some resolution on this in connection with ongoing discovery.

But in the meantime, I think you should talk about whether there is some way of carving this into an order that's more agreeable on both sides, or at least less disagreeable on both sides.

MR. O'NEAL: We would welcome that, your Honor, because we believe we have a legitimate interest. We've met with no offer of how we can account for that.

THE COURT: Am I right that the reason that the 22,000 documents aren't being reviewed one by one is that your view is they don't have to do with this case, so there is no reason to look at them unless and until the plaintiffs say, "We need them"?

MR. O'NEAL: No, that's not quite correct, your Honor.

For one thing, if you will remember -- and I actually have the transcript cites from the last hearing -- I was careful on May 31 when we argued this to say, I am not going to say each and every one of these documents has no relevance here. And your Honor pointed out that Ms. Fiterman's e-mail said it and so forth.

So there are documents.

But, first of all, the motion before was because we had engaged in a lengthy and expensive process, and we felt this was end-running it and that the vast majority of the documents are not relevant.

I will remind the Court that on May 31st, Mr. Becker ended the hearing by saying, Audrey Beckman, one of our main witnesses, is going to be deposed. I need these SAEO documents. It's so critical.

So she finally was deposed this week. He had the SAEO documents, and he used, I believe, two of them, a total of about four pages out of 481,000 documents that were produced from the Scott litigation, 22,000 of which are SAEO.

I think that's fairly representative of the amount of relevant wheat with all of the chaff around it.

So I just don't want to be accused of having said all of these documents are irrelevant, but I do say they are a tiny pimple in this case.

THE COURT: That really cuts both ways, doesn't it?

MR. O'NEAL: What do you mean?

THE COURT: Well, in the sense that somebody looking at four pieces of paper at a deposition that is a small, tiny subset of this massive group, and that person who looked at those four pieces of paper is now barred?

MR. O'NEAL: I understand that that's true, but I don't know that it's going to be the four pieces of paper at

all times.

And also, it's not in a deposition for the plaintiffs' experts. For the plaintiffs' experts, they can just ship all the documents to them.

MR. BECKER: Your Honor, just a couple of things.

First of all, notwithstanding Mr. O'Neal's getting exercise, we've appeared now in front of this Court for going on two years. This Court is familiar with what the plaintiff steering committee does. And you know how we have met and conferred on issue after issue after issue.

You know how we are not the type of lawyers who draw proverbial lines in the sand out of the gate and don't work for a compromise. In fact, just the exact opposite.

So you have to put that into perspective with what he is telling you.

So let's start with where he ended.

Of the 22,000 pages that they marked as Special Attorneys' Eyes Only, which is where the bulk of the good documents are, we don't have them. They have not produced them to us. They are not in our custody and control. They are sitting in the offices of Faegre Baker Daniels in Indianapolis.

Now, we had an opportunity to review them in Washington, D.C., and in Minneapolis. But assessing documents in two and a half days or three days of review is a

heck of a lot different than being able to have partners and associates comb through the documents in detail.

The other thing he is not telling you is this: Prior to this motion, Faegre Baker Daniels was taking the position those documents couldn't be produced electronically, even for filing with the court.

So we haven't had a way to load them into our document system and look at them. Yet despite that, from our notes we found documents that were relevant, one of which I have handed to you.

And here is why we have a concern about this issue: In the Special Attorneys' Eyes Only document from a meeting of consultants dated Saturday, August 29th, 2009, Dr. Bob Booth comments on the following.

Now, mind you, Mr. Earl has testified these documents are basically transcripts. Somebody from Zimmer is sitting there typing as the consultants talk trying to get a sense of what they are saying so they can go back and review it later.

Sorry. I had to finally give in to age.

"We then discussed the significant A/P" -- that's anterior-posterior -- "position mismatch between CR and PS." That's cruciate retaining and the posterior stabilizing.

"Todd Johnson" -- who's a long-term Zimmer employee -- "showed floral movies of his Ph.D. work" -- by

the way, that he developed at or about the time the CR-Flex was coming online -- "with significant paradoxical motion on the CR-Flex and significant cam position, post interaction, and extension/heel strike of the PS.

"The consultants were surprised and realized that the actual articulations are really not occurring in the way they were envisioned by the designers."

The designers went on to note on the next page, "Dr. Noble said that 155 degrees is rubbish."

Now, mind you, these notes are being taken in realtime. "130 gets about 95 percent satisfaction."

"Dr. Burton said as long as you allow 135 degrees before you get posterior bone on poly lip" -- which is a bad thing -- "that's plenty."

"General agreement that 155 is a bogus target, considering that very, very few patients ever get there and that it puts limits on the design toward generating normal functions at ROM angles in adult in activities of daily living." That's ADL.

So what's the impact of what Zimmer is asking for?

They don't want us to show this document (indicating) and others like it to our experts. And I can understand that. They want to make it harder for us to show these to our experts. And I can understand that.

Why? Because these documents prove what we are

saying. Help us demonstrate, in Zimmer's consultant's own words, the very design defects that we are talking about. And this document is not alone.

So what is the impact of the very noncompete that they are asking for? It is not that we will not retain our experts. We need experts to get by Rule 702. We need experts to survive *Daubert*. It is that we won't be able to show them this document. So therefore, they won't be able to opine on this document.

And that, at the end of the day, is what Zimmer is looking for.

How do we know that? Because when you look at the very harm that Zimmer is talking about -- and I would encourage the Court to review this -- when asked what the damages were to Zimmer from giving these documents to experts who were going to then at some point unintentionally violate the protective order, Mr. Earl agreed with Mr. Ronca's characterization that his assessment of damages amounted to nothing more than a hunch, than a hunch. That's at Page 141, Line 24, through 142, Line 14.

These aren't my words. I am not making those words up. I am not culling them out or remembering them differently. It is a direct question and a direct answer.

Now, if you are going to come in and shut down the plaintiffs from using the experts they want to prove their

case, you better darn well be able to prove that the harm you are alleging amounts to more than a hunch.

More important, in connection with when this harm would occur, Mr. Earl conceded that it would take approximately two years for a competitor to get the documents, dissect them, go through the 510(k) clearance process and then put the product to market. That's on Page 129, Line 24, through 130, Line 18.

So what does that mean practically? You order that we win today from the bench and they lose.

I then get the documents from them this afternoon and ship all of them to our experts, who immediately review them and run to their other consulting companies and say, you are not going to believe the idea I came up with.

If that were to occur -- which, of course, it would never occur that way -- the earliest, according to Mr. Earl, that any harm would come upon Zimmer is September of 2015, about five or six months before this product is entirely rolled out.

And if you go through how litigation works in real life, you will have to rule; they will have to produce the documents; we will need associates and partners to review them. We will then give the documents we think are important to the experts in consultation with them.

When you look at it in real life, by the time the

experts could cause any mischief, according to Mr. Earl, to Zimmer, this product is entirely on the market.

And knowing all that -- none of which, by the way, was in his declaration. Knowing all that, Zimmer says, we want to impose, absent a single case saying that any court has ever done this, a restriction upon the plaintiffs' experts that amounts to a noncompete. That is an unprecedented result based upon the sliver of proof that Zimmer offers you about harm to their company.

So I think, you know, the plaintiffs' lawyers have demonstrated we are acting in good faith. We have reviewed millions of pages, none of which have slipped out. We have consulted with our experts. There is a detailed protective order in this case. We are mindful of it. We do everything we can to comply with it.

This is nothing about, at the end of the day, other than stopping us from working with experts, or worse, getting a preview of who our experts are. And that's not fair. It's not right. And the motion ought to be denied.

MR. O'NEAL: Again, I think you will need to read the deposition in both hand-ups.

THE COURT: I do intend to do that. I think probably what I should do is set a date for a ruling on this or else simply issue a ruling in writing.

Do we have a date in November right now, or is our

next date not until December? I saw a note that the December meeting may not be necessary.

MR. BECKER: Well, we were thinking, Judge, that -- we typically have been doing these the third Friday of every month.

THE COURT: Correct.

MR. BECKER: That particular Friday, because the holidays are late this year, falls on the 20th.

THE COURT: That might not be great.

Do we have a date -- we are assuming we are getting together in November, though.

MR. BECKER: What I would suggest is that the third week is the 15th.

THE COURT: Wait. I just lost a whole month. What about October?

MR. BECKER: The 18th of October would be our traditional meeting date and the 15th of November.

THE COURT: All right. I think we have you -- we do have you down for the 18th.

I would hope I will be able to rule before the 18th of October, but certainly no later than that. I think it will be well before that. I think it would be by the end of the first week in October, I should be able to do a ruling on this.

And I think what that leaves us with for today's

agenda is just the report on discovery, correct?

MR. BECKER: I think that's right, Judge.

THE COURT: All right. We can take that up.

MS. FITERMAN: May I approach, your Honor?

THE COURT: Sure.

(Document tendered.)

MS. FITERMAN: Your Honor, I have just handed you a copy of the most recent update on document production since our last status conference in June. It's in the same format that you are used to seeing it.

Production is continuing. We are up to 9.7 million pages to date.

Just with regard to depositions, plaintiff depositions in the case pool picks have started. We are getting depositions scheduled and soon to be taken for many of the distributors and reps. We are looking into scheduling doctors. All of that is moving along. And company witness depositions are continuing.

So we are on -- we are in good shape with regard to our deadlines for the case-specific discovery in the case pool picks.

I have nothing else unless you have any other questions.

THE COURT: No. That's great. I appreciate this. It's the rolling kind of report that I am accustomed to

seeing.

MS. FITERMAN: Okay.

THE COURT: All right. I think that leaves us with, then, this issue that we have tabled because you may be able to work it out, and the issue of the supplemental confidentiality order, which I intend to rule on promptly.

In the meantime, if you make some progress on working it out on your own, I hope you will let me know.

MR. BECKER: We will, your Honor.

THE COURT: All right. Thanks, everyone.

MR. MILLROOD (telephonically): Thank you, your Honor.

THE COURT: Have a safe travel.

Thank you, Mr. Millrood.

(An adjournment was taken at 10:11 a.m.)

* * * * *

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

/s/ Frances Ward October 8, 2013.
Official Court Reporter
F/j