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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
CIVIL ACTION 09-cv-4414-SDW

In RE: Zimmer Duron Hip Cup : TRANSCRIPT OF PROCEEDINGS  
Products Liability :  
Litigation. :  
: IN LIMINE MOTIONS  
: Pages 1 - 52

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Newark, New Jersey  
February 25, 2015

B E F O R E: HONORABLE SUSAN D. WIGENTON,  
UNITED STATES DISTRICT JUDGE

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Attorneys for MDL Plaintiffs

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Pursuant to Section 753 Title 28 United States Code, the  
following transcript is certified to be an accurate record as  
taken stenographically in the above entitled proceedings.

S/Carmen Liloia  
CARMEN LILOIA  
Certified Court Reporter  
973-477-9704

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A P P E A R A N C E S - continued

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Attorney for Defendant Zimmer

1           THE COURT: Have a seat for a second. The microphone  
2 feels so loud when I come out here. I don't get it. I just  
3 don't get it.

4           Alright, first things first. Why don't we have  
5 counsel enter your appearances. This is the matter of In Re:  
6 Zimmer Durom Hip Cup Products Liability Action. It's under  
7 civil action 09-4414.

8           And, counsel, you may proceed with your appearances.

9           MS. FLEISHMAN: Thank you, your Honor. I'm Wendy  
10 Fleishman from Lief Cabraser, Heimann & Bernstein for the MDL  
11 plaintiffs. And I'm co-liaison with Mr. Tankard. And I -- but  
12 before I introduce --

13          THE COURT: Why don't you let him -- well, why don't  
14 you let them introduce themselves.

15          MS. FLEISHMAN: I just want to introduce my colleague,  
16 Dan Leathers, who's also here with me, and I'll stop talking.

17          THE COURT: That's good.

18          Now, we'll start with the attorney that's first here.  
19 Let me just do it that way, okay?

20          MS. COLE: Your Honor, Kila Cole from Waters & Kraus  
21 on behalf of MDL Plaintiffs.

22          THE COURT: Okay.

23          And, Mr. Tankard, you've been introduced. But if you  
24 would not mind placing your appearance on the record.

25          MR. TANKARD: Of course, your Honor. George Tankard,

1 also with Waters & Kraus, counsel for plaintiff.

2 THE COURT: Okay, very well.

3 MS. TAYLOR: Good morning, your Honor. Lindsey Taylor  
4 from Carella Byrne on behalf of the MDL plaintiffs.

5 THE COURT: Okay.

6 MR. EPSTEIN: Good morning, your Honor. Adam Epstein  
7 from Mazie Slater Katz and Freeman on behalf of plaintiff Patty  
8 Jannusch.

9 THE COURT: Okay. Alright. That's it on that side?

10 MR. SMITH: Good morning. Terrence Smith, Davis  
11 Saperstein & Salomon for a few of the MDL plaintiffs.

12 THE COURT: Mr. Smith, you didn't sign in, or did you?

13 MR. SMITH: I did not, Judge. I got here fashionably  
14 late.

15 THE COURT: Okay. Alright. I'm going to write your  
16 name on the sheet.

17 What I would recommend, though, if you want a copy of  
18 the transcript, or whatever, you make sure Miss Liloia has your  
19 card or contact information so you can request that. Okay?

20 MR. SMITH: I will, Judge.

21 THE COURT: Alright. Very well.

22 Counsel.

23 MR. BADARUZZAMAN: Asim Badaruzzaman, Seeger Weiss, on  
24 behalf of some of the plaintiffs.

25 THE COURT: Now, what's your name?

1 MR. BADARUZZAMAN: First name is Asim, A-S-I-M.

2 THE COURT: You did sign in.

3 MR. DADARUZZAMAN: I did.

4 THE COURT: And there's no way I can read the last  
5 name. What is the last name?

6 MR. BADARUZZAMAN: It's Badaruzzaman.

7 THE COURT: Okay.

8 MR. BADARUZZAMAN: Thank you, your Honor.

9 THE COURT: Thank you.

10 MS. BEYEA-SCHROEDER: Good morning, your Honor. My  
11 name is Karen Beyea-Schroeder, spelled B, as in boy, E-Y-E-A,  
12 hyphen, S-C-H-R-O-E-D-E-R, on behalf of several of the  
13 plaintiffs.

14 THE COURT: Okay.

15 MR. DWECK: Good morning, your Honor. My name is  
16 Morris Dweck, D-W-E-C-K, on behalf of Rheingold & Rheingold, on  
17 behalf of Therese Bramhall.

18 THE COURT: You didn't sign it?

19 MR. DWECK: No.

20 THE COURT: Alright.

21 MR. TANNER: Your Honor, my name is Joe Tanner, law  
22 firm of Faegre Baker Daniels, on behalf of the defendants.

23 THE COURT: Alright, good morning

24 MS. BUSBY: Good morning, your Honor. Adrienne Busby,  
25 also from the law firm of Faegre Baker Daniels, on behalf of

1 defendants.

2 THE COURT: Okay.

3 MR. FANNING: Good morning, your Honor. Ed Fanning,  
4 from McCarter & English, for defendant Zimmer.

5 THE COURT: Alright. So, good morning to everyone.

6 And I know that you've been meeting regularly over a  
7 period of months, years, whichever is appropriate, with Judge  
8 Arleo, so this is my first conference with you. We're at the  
9 point, essentially, of setting trial dates, though. So that is  
10 what I'd like to do before we depart here today.

11 There are a number of motions that were filed, in  
12 limine motions. I have read each one of them and I am prepared  
13 to rule on them. I don't need oral argument on probably most,  
14 if not all of them. But there is one motion I wanted to give  
15 counsel an opportunity to be heard on. And I'm referring to  
16 your February 20th letter, which was the most recently filed  
17 document. It's document 668. It's the letter from Mr. Tanner  
18 just outlining what issues we are addressing here today, which  
19 includes the motions in limine, as well as some of these more  
20 recent motions.

21 Now, just by way of clarification, we're not  
22 addressing summary judgment motions, and I will not be hearing  
23 oral argument on summary judgment motions. So they'll be no  
24 need to set a date for that because there will not be oral  
25 arguments on the motions for summary judgment. They are not

1 fully briefed at this point but they will be fully briefed  
2 shortly.

3 Now, the only other motion, as I said, that I think I  
4 really need to hear any argument on is this motion number 9,  
5 which is plaintiffs' motion for leave to permit case specific  
6 expert report of Roy Drake Bloebaum, Ph.D. And we'll sort of  
7 move through the motions thereafter.

8 There is a separate motion that was filed to exclude  
9 the testimony of Dr. Bloebaum, which is motion number 3. And  
10 so, I'll just say to counsel from a general perspective, it's  
11 not my intention to exclude any expert. I've read every motion  
12 in limine as it relates to experts. Some are to exclude, some  
13 are not to exclude, some are to limit. Many of these issues,  
14 to the extent it's necessary, can be addressed on cross  
15 examination at the time of trial. Other issues can certainly  
16 be addressed at the time of trial, depending on how evidence  
17 basically fleshes out during the course of the presentation  
18 before the jury. But I did not find and do not believe that  
19 any expert in general should be excluded entirely. There are  
20 aspects of some testimony that I understand there are some  
21 questions and challenges that will be made, and to the extent  
22 the testimony fleshes out that way, you can certainly challenge  
23 and address them at that time, at the time of trial.

24 So, with that being said, that goes to the bulk of the  
25 expert witnesses. And, as I said, that does not preclude you

1 from raising an issue that really needs to be raised as  
2 testimony comes out during the case of the trial. So I don't  
3 want anyone to think that you can't ever raise the issue. I'm  
4 just saying to you that there are a number of areas that were  
5 raised on both sides, whether the plaintiff was moving or the  
6 defense was moving, and there were areas where you didn't want  
7 witnesses to give testimony about sort of subjective things or  
8 testimony about items which they did not test. Everyone sort  
9 of concedes that, that they should not be permitted to give  
10 that type of testimony. So, we don't need to go through oral  
11 argument to flesh that out because obviously that -- those  
12 rules of evidence do not provide for that type of testimony.

13 Beyond that, if there's something that is much more  
14 specific in terms of the testimony, that's one thing and we can  
15 address that at the time of trial. But I did not feel that any  
16 expert should be excluded. Okay.

17 So, that takes me to this motion number 9, which is  
18 about getting a case specific expert report from Dr. Bloebaum.  
19 This is a very recently filed application. I have read it. So  
20 I wanted to start with plaintiffs' counsel as it relates to  
21 that. Obviously the defense takes exception to the request  
22 indicating that it is untimely and obviously on the eve of  
23 trial. So let's address that and then I want to deal with some  
24 housekeeping things as well. Okay?

25 MR. TANKARD: Thank you, your Honor.



1           THE COURT: You can just pull it towards your or come  
2 to the podium. You will not get an accurate record if Miss  
3 Liloia cannot hear you. Alright? So we will give you that  
4 forewarning. It will help her if you're at a microphone or you  
5 come to the podium. Okay.

6           So, Mr. Tankard.

7           MR. TANKARD: Yes, your Honor.

8           THE COURT: Okay, everyone is looking. Everyone else  
9 is shaking except you. Alright.

10          MR. TANKARD: Well, I want to be candid with the  
11 Court. When we were in the process of identifying our case  
12 specific experts back in the summer and fall, and of course you  
13 read -- I know you read the papers and there were various  
14 extensions and cooperation among counsel. We thought we were  
15 looking at a March trial date, which would have been the eve of  
16 trial, to use the Court's expression. Now, it's my  
17 anticipation that we will not be having a March trial date.  
18 And without getting too deep in the weeds, where at this point  
19 there is no prejudice to the defendants that can't be cured by  
20 what would be a very simple deposition. The witness has  
21 already been deposed a number of times so it would be very  
22 confined. We would make him available.

23          THE COURT: But he has not and deposed as it relates  
24 to -- obviously this is as to Christine Brady.

25          MR. TANKARD: Correct.

1           THE COURT: So he has not been deposed with regard to  
2 any report regarding the implant that has been explanted from  
3 Miss Brady.

4           MR. TANKARD: That is correct, your Honor.

5           THE COURT: Okay. So they would be entitled to at  
6 least depose him on that.

7           MR. TANKARD: Yes, your Honor.

8           THE COURT: Okay.

9           MR. TANKARD: Conceded.

10          THE COURT: Alright.

11          MR. TANKARD: And we believe that is the remedy here.

12                 And just as an aside, I know that the Court is new to  
13 these proceedings, but we've had a history of working through  
14 issues on both sides. Just by way of example, some of the case  
15 specific experts of defendants had busy schedules in December  
16 and we worked out to have those depositions slightly after what  
17 was the Court-ordered deadline. So, I certainly understand  
18 their position and then they felt the need to file the motion.  
19 But it's quite frankly our view that this is something that can  
20 be solved very simply, very easily. There's a suggestion that  
21 this might create some slippery slope and be a pattern of  
22 misbehavior on plaintiffs' and that's not the case. This an  
23 isolated example. Again, in hindsight, perhaps it could have  
24 been handled a bit differently. But we're at a point where  
25 there's critical evidence to our client and we feel compelled

1 to ask the Court to be able to present that evidence,  
2 particularly under circumstances where it can be easily -- that  
3 the situation would be easily cured.

4 THE COURT: So let me understand, Mr. Tankard, the  
5 report is done?

6 MR. TANKARD: Yes, it is done.

7 THE COURT: Right. January 12th it was done?

8 MR. TANKARD: Yes.

9 THE COURT: And that has been provided to defense  
10 counsel?

11 MR. TANKARD: Correct, your Honor.

12 THE COURT: Okay.

13 MR. TANKARD: I would mention, there is -- the same  
14 situation would apply to the other initial trial pick.

15 THE COURT: Ruttenbur.

16 MR. TANKARD: Ruttenbur. And so depending on the  
17 Court's view, of course, we would ask for similar relief.

18 THE COURT: I think that sounds like the defense's  
19 primary issue was, one, that if you wanted this, an extension  
20 could have been requested, obviously, prior to now. That seems  
21 to be a large part of it other than the prejudice aspect.

22 But let me hear from Zimmer's counsel.

23 MS. BUSBY: Good morning, your Honor.

24 THE COURT: Good morning.

25 MS. BUSBY: Mr. Tankard card is correct. We have a

1 long history of working things out. And with respect to Dr.  
2 Bloebaum, we did allow a late supplementation of his report at  
3 the end of last year with the agreement that we would have an  
4 opportunity to depose Dr. Bloebaum. But at no time was there  
5 any discussion about a case specific report in the Brady or the  
6 Ruttenbur cases. And, in fact, as the motions in limine  
7 describe, we had moved to exclude any future case specific  
8 opinions. And in the response, the plaintiffs responded that  
9 he would not offer case specific opinions in either of these  
10 trial picks. That was November the 13th.

11 As we got the documents, we found out that Dr.  
12 Bloebaum received the device for the first time for examination  
13 seven days before on November the 6th. So they have given him  
14 the device for examination. There are email exchanges with Dr.  
15 Bloebaum at that time saying: What's the timeline for the  
16 Brady and Ruttenbur reports? And we receive a representation  
17 from the Court that they're not going to do this. Two months  
18 later, the day before our motions are due, we get the report.

19 We disagree with Mr. Tankard's description that this  
20 is something that simply could have been handled better and  
21 quite frankly we think that they had every reason to know in  
22 the summer when these reports were due, in June, that these  
23 were going to be the two case picks. In fact, the plaintiffs  
24 selected Brady as the case pick. They had every reason to  
25 understand that case specific reports were due and in fact

1 submitted case specific reports from the orthopedic surgeon Dr.  
2 Kurt Kitziger.

3 Your Honor, we're not asking that Dr. Bloebaum not be  
4 allowed to testify at trial, but we're asking that he not be  
5 allowed to testify as to the case specific reports that came in  
6 six months late.

7 And with respect to the prejudice, your Honor, we  
8 would most certainly like to have a deposition of Dr. Bloebaum  
9 on this case specific report.

10 THE COURT: Sure.

11 MS. BUSBY: But the bigger problem is that Zimmer's  
12 experts have already done their case specific reports and been  
13 deposed. The deadline for dispositive motions has come and  
14 gone. The deadline to move to exclude case specific experts  
15 has come and gone. And all of that would need to be reset.  
16 We're conscious of the fact that we're here to talk about  
17 setting a trial date today.

18 THE COURT: Right.

19 MS. BUSBY: And that's going to throw a wrench in the  
20 works. And our position is that this is something that there  
21 are multiple moments along the timeline of the last seven  
22 months where the plaintiffs could have addressed this, and we  
23 would have, as we did with other things, done our best to work  
24 it out. But that didn't happen, and now we're at the point of  
25 saying we have to object and we have to say that we believe

1 that this is improper.

2 THE COURT: Alright, fair enough. Thank you, Miss  
3 Busby.

4 Mr. Tankard, let me ask you this. Obviously the  
5 defense raises a valid concern with respect to their reports  
6 have already been submitted in reliance on what they received,  
7 their motions -- their dispositive motions, et cetera. How do  
8 we cure that?

9 MR. TANKARD: Well, given that we're dealing with just  
10 one witness, I think it can be done fairly simply. We actually  
11 went through a similar process with other experts where they  
12 were first deposed on common issues and then we had case  
13 specific depositions where we had two separate depositions. So  
14 I think it can be done fairly discretely.

15 And in those instances, as the Court might imagine,  
16 the second depositions, the case specific depositions, were  
17 very focused and very narrowly tailored because most of the  
18 heavy lifting had been done in the prior depositions. And in  
19 this instance, not only do we have the general common issue  
20 testimony through deposition, there are also several individual  
21 cases so that the deponents' views are very well known at this  
22 point and it would be a relatively discrete exercise to take  
23 care of this.

24 THE COURT: Okay. Alright. Just for counsel's  
25 benefit, my intention is to set a trial date in May. So, I

1 don't know where that leaves you. And we're essentially in  
2 March. And I'm looking at early May. So, I don't know -- I  
3 mean, obviously to exclude Dr. Bloebaum from doing the report  
4 would be an extreme measure, given the fact that we're just  
5 setting the trial date. I can move round that if there's  
6 specific discovery that's going to be necessary or needs to be  
7 modified from the defense's perspective, but -- Miss Busby, let  
8 me hear from you.

9 MS. BUSBY: Your Honor, it's not as simple as a  
10 discrete deposition.

11 THE COURT: Right

12 MS. BUSBY: I wish it was. We have two biomedical  
13 scientists in Philadelphia.

14 THE COURT:

15 MS. BUSBY: So not only would they have to redo both  
16 of their case specific expert reports, they would each have to  
17 be deposed. They would each -- we would then --

18 THE COURT: Well, they'd have to be deposed if they  
19 choose to depose them; right?

20 MS. BUSBY: That's correct, Judge. Certainly that's  
21 correct.

22 THE COURT: They may not choose to depose them.

23 MS. BUSBY: And I think we'll be talking today how we  
24 set these trials dates. But it's my understanding that Zimmer  
25 will ask that we set them together in the event that one is

1 disposed of on summary judgment. So what we're talking about  
2 then are additional expert reports. We still haven't seen the  
3 Ruttenbur report and apparently the device has been in Dr.  
4 Bloebaum's hands for several months now.

5 THE COURT: Right.

6 MS. BUSBY: So, there's an expense issue for sure, but  
7 there's also the condensed timeframe of attempting to get all  
8 of this done, particularly with respect to a report that we  
9 haven't seen.

10 And there's prejudice as well, your Honor, that they  
11 have seen our case specific experts' reports. They have the  
12 benefit of that before submitting that report, and that's not  
13 the timeline or the staggered disclosure that was agreed upon  
14 and ordered by the Court.

15 THE COURT: Alright, I hear that argument. I don't  
16 think that is as convincing. I mean, the reality is what comes  
17 out of the particular plaintiff is what comes out. I mean,  
18 your experts reached the conclusions they reached based on  
19 something very tangible as opposed to some sort of obscure  
20 argument that they could make or some type of other issue. But  
21 it's, you know, very tangible.

22 But, let me understand, because in terms of setting a  
23 trial date, what does that do for us, Mr. Tankard? Because, I  
24 mean, in fairness, they are -- they don't have the Ruttenbur  
25 report at all at this point. So, even just talking about the



1 Brady report, which has been submitted, and the request for  
2 obviously the opportunity to depose Dr. Bloebaum and also  
3 obviously to modify their expert reports, which they should be  
4 given the opportunity to do. You don't disagree with that,  
5 right?

6 MR. TANKARD: No, your Honor.

7 THE COURT: Okay. So, what do we need to do? Because  
8 it may take more time than is available to set -- to get these  
9 things done before we set a trial date in May.

10 MS. COLE: May I speak, your Honor?

11 THE COURT: Sure.

12 MS. COLE: I would say --

13 THE COURT: You got to turn to microphone, I think.

14 MS. COLE: I apologize.

15 THE COURT: That's okay.

16 MS. COLE: This is the first time I've heard, maybe  
17 it's been said and I haven't focused on it, that they wanted to  
18 set both trials at the same time.

19 THE COURT: I didn't know that either.

20 MS. COLE: Yeah, me neither. As far as Brady goes, a  
21 May trial date, since they've had the report since, you know,  
22 almost -- over a month at this point, six weeks, you know,  
23 we're willing to give them Bloebaum. We're willing to let  
24 their experts review a report, you know, make changes to their  
25 reports, you know, we're willing to do all that. I just don't

1 think Ruttenbur should come into it because it seems like that  
2 it's, you know, it's unnecessary to speed her up just so that  
3 they have a backup trial date in May on the off chance that  
4 this Court is going to grant summary judgment to Brady. We  
5 would ask for a second later trial date for Ruttenbur to allow  
6 us time to do the case specifics.

7 THE COURT: So, the initial request was Brady in March  
8 and Ruttenbur in May; right? It was like sort of a --

9 MS. COLE: Yes, Judge.

10 THE COURT: One- to two-month split between the two.  
11 And I appreciate you guys being very concerned about my  
12 calendar that if one falls apart we'll have something ready to  
13 go. But I promise you, I have other cases. So, there's no  
14 need to be concerned about it from that perspective.

15 Alright. So, let's understand this. They can -- the  
16 report will be permitted, but the defense will have the  
17 opportunity to do what you need to do obviously to, one, depose  
18 Dr. Bloebaum. And counsel for plaintiffs has indicated they  
19 will make sure he is available for those purposes. And to the  
20 extent the defense needs to modify or prepare amended or  
21 supplemental expert reports, they'll have the opportunity to do  
22 that too. Judge Arleo has spoken very highly of your ability  
23 to meet and confer and work very cordially so I'm sure you'll  
24 do that. If you need the Court's input in terms of setting a  
25 schedule to get those things done, I'm happy to do that. But I

1 hope and trust that you'll be able to do that, so we can move  
2 towards this trial date. Okay.

3 Miss Busby

4 MS. BUSBY: Thank you, your Honor.

5 May we ask if there's an estimated delivery date for  
6 the Ruttenbur report?

7 MS. COLE: You may ask that, but I don't have an  
8 answer.

9 MS. BUSBY: Can we talk about that later?

10 MS. COLE: I will get you an answer.

11 MS. BUSBY: I appreciate that. Thank you.

12 THE COURT: Let me ask this. And I'll ask you, Mr.  
13 Tankard, what's the estimated amount of time you anticipate the  
14 trial will take for Brady?

15 MR. TANKARD: Your Honor, as referenced in the papers,  
16 we've been through this exercise in Illinois and I'm advised  
17 that was three and a half weeks; is that right?

18 MR. TANNER: It was three weeks. So three to four  
19 weeks I would think is a good estimate. I don't think it would  
20 take more than that.

21 THE COURT: Okay. I wrote down two, I guess I was  
22 very hopeful.

23 MR. TANNER: That I do think might be tight, given the  
24 trial that we just had in Illinois.

25 THE COURT: Okay.

1           Alright. I'll tell you the trial date I'm looking at,  
2           counsel, just so you're aware. We'll still get back into some  
3           of these motions, but just so everybody -- I'm looking at  
4           selecting a jury on May 6th, which is a Wednesday, and  
5           basically starting right then. I was going to push off  
6           starting, but we would select on the 6th, and proceed from  
7           there, which takes you into Memorial Day, but -- or into the  
8           first week of June. So, that's my plan. That's my -- that  
9           works for my schedule, for the benefit of counsel.

10           MS. COLE: Your Honor, may I ask a question?

11           THE COURT: Sure.

12           MS. COLE: Just for our information, do you have a  
13           typical dead day during trial? Do you handle other dockets  
14           during trial, those kind of details?

15           THE COURT: I do a bunch of different things. And I  
16           sort of feel out how the case is moving. Because we're going  
17           to be going into a holiday, I will probably not have a dead  
18           day, in all honesty. But, I've done modified trial days like  
19           9:30 to 2:30 or 3 o'clock, where you don't take lunch. I do a  
20           bunch of different things. So I'm open to sort of, you know,  
21           molding that as we need to.

22           At this point, I wouldn't want to tell you we'll have  
23           a dead day. Obviously we're going to have Memorial Day, that's  
24           going to fall right in there, probably that Friday before we'll  
25           probably not meet. Then I've got some other things on the

1 calendar that I know I'm going to have to -- we're going to  
2 have to suspend trial, for example, the 14th. I know that I  
3 have another commitment I have to attend. So it's going to be,  
4 you know, I can give counsel a heads up on that, certainly, as  
5 the time approaches.

6 MS. COLE: Thank you, Judge.

7 THE COURT: Okay.

8 MR. TANNER: Judge, if I can just --

9 THE COURT: Yes.

10 MR. TANNER: Can I have an open discussion here with  
11 counsel, and we're the ones that's been pushing for a trial  
12 date so we appreciate the May trial date.

13 THE COURT: Sure.

14 MR. TANNER: We do have another jury trial scheduled  
15 to start in Los Angeles in mid May.

16 THE COURT: Okay.

17 MR. TANNER: And then two more in July. And I'm not  
18 sure, I haven't talked to our experts and our witnesses. They  
19 haven't talked to their expert. May concerns me from a  
20 scheduling standpoint with people in Los Angeles and New  
21 Jersey, et cetera. I worry about that. We haven't talked to  
22 them, I don't know what that is.

23 THE COURT: Because the problem with that, and I  
24 appreciate what you're saying. I know you guys have been  
25 working things pretty much on about three different tracks, so

1 I know you've been very busy. The concern there though is that  
2 if we don't have May, then what do we -- and we don't have  
3 July, obviously.

4 MR. TANNER: Yes. Well, our hope was -- we thought  
5 your calendar would be more crowded. And our hope was like  
6 September and then November, something like that.

7 THE COURT: Oh. Look, oh.

8 MR. TANNER: Because you would have the May ones, the  
9 July ones. One of the cases starts July 7th, the other is July  
10 20th, and will end mid August, you know. Beginning of  
11 September would fit nicely with our witnesses, because these  
12 are surgeons and --

13 THE COURT: Sure.

14 MR. TANNER: Scientists, and it's really hard to get  
15 on their schedules. I don't know if that's better for you guys  
16 or you care one way or the other.

17 MS. COLE: We want a May trial date.

18 THE COURT: Shocking.

19 MR. TANNER: Shocking.

20 THE COURT: Plaintiffs never want a trial date.

21 THE COURT: Well, my goal was to do Brady in May and  
22 do Ruttenbur in September.

23 MR. TANNER: Okay.

24 THE COURT: That was -- you know. I mean, I have not  
25 looked at the summary judgment motions or anything like that,

1 so I have no idea whether that's a plausible likelihood that  
2 anything would be granted, or whatever. I have no idea. But  
3 that was just my general perspective.

4 As I pass September, my calendar is really crowded.

5 MR. TANNER: Fair enough. I guess what we would ask  
6 there maybe some scheduling -- this person can't be here when  
7 he would normally testify, and we may have to work through  
8 those issues as we come upon --

9 THE COURT: That's fine. That's absolutely fine. I  
10 mean, we can always take witnesses out of turn. Now, for  
11 everybody that doesn't know, that's Judge Mannion and his law  
12 clerk Davita. And they have come because I wanted Judge  
13 Mannion to at least have an opportunity -- obviously you worked  
14 with Judge Arleo for quite a while, and Judge Mannion is being  
15 baptized by fire, so he might as well be baptized here in  
16 person with you. So, so just for your benefit, Judge Mannion,  
17 we are trying to kind of do trial dates now cause that also --  
18 the trial date dictates the final pretrial conference as well  
19 which would be with Judge Mannion, so I wanted to sort of get  
20 into that a little bit.

21 But as it stands, Mr. Tanner, right? Tankard and  
22 Tanner, what are the odds?

23 MR. TANNER: We're a tag team.

24 THE COURT: Yeah, Mr. Tanner. So, at this point  
25 obviously you have to confer with your experts and see what

1 their situation is. Okay.

2 And same thing for plaintiffs' counsel, you're going  
3 to have to work out the whole Bloebaum aspect and the discovery  
4 as it relates to him, or deposition, and that sort of thing.

5 Alright. So, we're anticipating -- I'm going to  
6 anticipate -- I'm going to say four weeks on the out -- long  
7 side, just so we have a real realistic perspective to give to  
8 the jury. Okay?

9 Alright. So, the only other issue for the moment I  
10 wanted to address was this issue of -- this motion number 8.  
11 And it's the plaintiffs' renewed and amended motion for  
12 sanctions related to Zimmer's spoliation of evidence. And I  
13 have read that motion. I know that that was a motion that was  
14 filed previously. It is now renewed. Based on what I have  
15 seen filed, there was a position set forth that the plaintiffs  
16 feel like you've been handicapped because obviously you don't  
17 have enough of these implants, or the actual devices, to have  
18 them tested. And refresh my memory, because I read these  
19 motions probably several weeks ago, refresh my memory, Mr.  
20 Tankard or Miss Cole, as to what you actually got. You got,  
21 what, four or two?

22 MS. COLE: No, Judge, we got two.

23 THE COURT: Two.

24 MR. TANNER: Originally, and Zimmer's knowledge of how  
25 many they have has evolved over time.



1 THE COURT: Okay.

2 MS. COLE: Originally, when we were in front of Judge  
3 Arleo early last spring, Zimmer said: We have five of these  
4 devices, and we object to plaintiffs doing any destructive  
5 testing because that would be so unfairly prejudicial to all of  
6 the plaintiffs out there because there's only five. Judge  
7 Arleo ruled that we were allowed to do destructive testing on  
8 two devices.

9 Following that hearing, Zimmer was suppose to have  
10 provided, in April, a letter explaining where the rest of the  
11 devices were. Instead of doing that, they provided a letter  
12 where they said: Hey, we found ten more devices. At no point  
13 in time did Zimmer ever say: Hey, you're allowed to do  
14 destructive testing on more than two devices. They did allow  
15 us the opportunity to inspect some of these devices. But in  
16 their response to the pending motion, they have said that  
17 they've allowed us, you know, unfettered access to these 30  
18 devices, and it's simply not true. We have a court order  
19 allowing us to test two devices, and that's all we've ever had.

20 THE COURT: Okay. So let me ask you this, at this  
21 juncture is it your intention or desire to test more, or  
22 destructively test more, I should say?

23 MS. COLE: Well, yes or no. I mean, I think that, in  
24 reading the Grimes motion to exclude and our response on  
25 Grimes, you see how we've been handicapped and how we've been

1 hindered.

2 THE COURT: But they've indicated they will not  
3 obviously attack that aspect they he only tested a certain  
4 number or --

5 MS. COLE: The problem is, I've now been through trial  
6 with them. And that is true, they didn't stand up at trial and  
7 say that he only had samples as of two. But instead, they  
8 criticized the bone quality of the cadavers that were used, the  
9 fit in those cadavers that he chose. He chose the cadavers of  
10 elderly, geriatric patients as opposed to fireman. This is a  
11 fireman's hip and it should have been in a fireman. And all of  
12 that was --

13 THE COURT: Wouldn't that do that anyway?

14 MS. COLE: Well, we had multiple sized cups, we could  
15 have gotten better representative cadavers. And you would not  
16 believed how we looked for cadavers for six months. It was a  
17 shocking process that I was involved in. And after six months  
18 of looking at cadavers, we came up with three cadavers for each  
19 sized cup. We were paying the cadaver companies to x-ray the  
20 cadavers so that Dr. Grimes could measure them to try to see if  
21 they fit. Obviously, we were paying people who have no x-ray  
22 skill or, you know, practice. And so we had the six cadavers  
23 show up. We thought we were going to have three that fit each  
24 cup. Turns out we had only one cadaver that would fit one cup  
25 and one cadaver that we thought was going to fit the second

1 cup. And as the testing showed, it didn't really. It should  
2 have been one size smaller.

3 THE COURT: Okay.

4 MS. COLE: So, you know, even when they say that we're  
5 not going to criticize, it's true. They never said: There  
6 were only two cups. You know, they never said that. But  
7 multiple times during the trial they, in my opinion, crossed  
8 the line on criticizing other elements of the testing which was  
9 dictated by the cups.

10 To answer your original question, you know, at this  
11 late stage in the game, we couldn't go back --

12 THE COURT: Right.

13 MS. COLE: And redo the destructive testing without  
14 seriously hindering all of the cases and postponing everything  
15 and blowing up all of these trial dates. The only remedy that  
16 exists at this point is to be able to tell the jury that they  
17 destroyed the cups and we only have two. It was a basic  
18 misrepresentation of the facts and the records that that jury  
19 in Illinois got through the entire trial without understanding  
20 that we'd only had two cups to test and that we were limited by  
21 the destruction of Zimmer, I feel. You know, there was just  
22 this big elephant in the room that the jury never got to hear.

23 Now, counsel has represented to this Court in their  
24 motion that Judge Lopinot found that it wasn't relevant.  
25 That's not at all true. Judge Lopinot found it was more

1 prejudicial than probative. He used the term "explosive". I  
2 was the one who every time I thought they crossed the time, had  
3 to go back up to Judge Lopinot and ask again: Can we now talk  
4 about the destruction? And he got very cemented in his belief  
5 that it was prejudicial and he never moved off of that point.

6 But as far as its relevancy and its admissibility, I  
7 think it's highly relevant, highly probative, and I think that  
8 Judge Lopinot was off on saying the prejudice outweighed it.  
9 We need to be able to tell this jury what happened.

10 THE COURT: Okay.

11 Mr. Tanner.

12 MR. TANNER: It sounds like an appeal of Judge  
13 Lopinot's order and the defense verdict that was found in  
14 Illinois. And if they had that --

15 THE COURT: Is that what happened? I was curious  
16 nobody told us what happened in the trial.

17 MR. TANNER: It was a defense verdict.

18 No evidence was destroyed here, your Honor. They have  
19 the cups that were implanted into their patients. They have  
20 the records. They have thousands and thousands and thousands  
21 of documents. Zimmer kept cups, but it had no duty to keep  
22 some uncertain amount of cups and guess what the plaintiffs  
23 might need.

24 Here's the basic facts, your Honor. They have the  
25 Brady and Ruttenbur cups. That is the true evidence. We have

1 30 cups. We had five sterile in their box cups. We had 26  
2 others. We gave them two of them, pursuant to Judge Arleo's  
3 order, and a work out with them that they said: Give us two.  
4 And we did. One of them they didn't even use, they turned back  
5 to us. But there's 30 cups at availability and they only used  
6 two. And to my knowledge, they've never asked for more.  
7 Unused cups in our inventory or our marketing samples are  
8 simply not evidence. It's like saying, we have GM crash and  
9 the car involved in the crash is evidence, but GM's inventory  
10 is not evidence. And there's no cases that say it's evidence.  
11 It's the actual product that was involved and caused the injury  
12 and they have those.

13 We did stop manufacturing this cup in 2010. They  
14 asked us in 2010, that was Mrs. Brady's case, she knew about  
15 her case back in 2008. They asked for cups, we were making  
16 them, we could have provided them. They didn't. In 2011, they  
17 asked for four sample cups. We have 30. They tabled that  
18 request, but it was only for four.

19 And back in September of 2013, then they asked for a  
20 bunch more cups in a later -- in a different action that we're  
21 sharing on discovery on. But by then cups had been destroyed  
22 in the ordinary course of business as Zimmer's entitled to.  
23 There was no suppression of evidence. And the cases, as I'm  
24 sure you noted in the briefing, say destroying things in the  
25 ordinary course of business is not suppression of evidence.

1 They waited until three years after we stopped making it, five  
2 years after they knew they had a claim, and then said: You  
3 should have guessed how many to save. And we think that's  
4 fundamentally unfair. It was tried in St. Clair County and  
5 Judge Lopinot said: No, I'm not going to let you go there.

6 As far as the prejudice, Dr. Grimes testified, or did  
7 testing in 2009 and 2011, and he used explanted cups, cups that  
8 came out of other patients. He didn't need new cups to do  
9 that. He did other experiments using samples. He didn't need  
10 sterile cups. He put these cups in cadavers. He doesn't need  
11 sterile cups to put them in cadavers. And he insists to this  
12 days his tests were all valid no matter how many cups he has.  
13 So he believes the number didn't matter. And we just said:  
14 Let's eliminate any fight about this and we won't raise, as you  
15 mentioned, we won't raise the fact that there was only two cups  
16 used.

17 Now, the truth of the matter, as we tried to put in  
18 our briefing is, no matter how many cups he did, he used, his  
19 testing was invalid. He could have put 20 of them in and the  
20 test was still invalid. And that was the argument we had in  
21 front of Judge Arleo when we said: Judge, you shouldn't let  
22 them use these cups. We have five pristine sterile cups  
23 because the testing they're proposing to do is invalid. The  
24 methodology they propose is not going to show anything. Judge  
25 Arleo said: No, give them two cups. And we gave them two

1 cups, and we think their experiments bore out what we say.

2 So we would submit that what they're requesting is  
3 very -- is subject to a very high burden. It's very unique,  
4 it's very prejudicial. And to some extent, they're in this  
5 predicament because of not asking for cups earlier, or only  
6 asking for four cups. Zimmer didn't do anything wrong here,  
7 your Honor, and the law supports us on that. Thank you.

8 THE COURT: Alright, very well. My thought is exactly  
9 that, I don't believe an adverse inference or a spoliation  
10 charge should be given. There's nothing that's been presented  
11 in the written arguments that would suggest that there was some  
12 type of intentional misconduct or some intention on the part of  
13 Zimmer to destroy these cups, basically to handicap plaintiffs  
14 in any way. And it's the essential concession by Zimmer that  
15 they will not attack the fact that only two cups were tested or  
16 that some minimal number of cups were tested, I think goes to  
17 the heart of the issue in terms of what was there. To give the  
18 inference or the spoliation of evidence charge to the jury is  
19 very extreme. It's one of those things I -- obviously you  
20 continue to raise it during the course of trial, Miss Cole, in  
21 the Illinois matter. I'm not suggesting you can't do that  
22 here, depending on how evidence comes out. At this point,  
23 though, I do not believe there's a basis to give a spoliation  
24 of evidence charge based on what's in front of the Court.  
25 There is a clear indication that evidence was presented and

1 provided, and there's no indication that there was some  
2 intentional destruction, or some intentional misleading, or  
3 somehow hiding of evidence on the part of Zimmer. So I don't  
4 think that it's appropriate at this juncture. And, once again,  
5 as with a lot of these in limine motions, as the evidence comes  
6 out during the course of trial, we may have to revisit some  
7 issues and certainly many of the other decisions will stand.  
8 So, I wanted to hear counsel as it related to that.

9 Okay. And just for clarification purposes, on that  
10 motion number 6, the plaintiffs' motion to exclude testimony of  
11 Kevin Ong, Ph.D. and Judd Day, Ph.D. From my reading, it  
12 indicated that there was no issue as to Dr. Day. There was  
13 also an issue as to Ong.

14 MR. TANKARD: I think that's correct.

15 MR. TANNER: That's correct, Judge.

16 THE COURT: Okay. So, as I said, I'm not excluding  
17 the experts, but that one was stipulated to, so I just wanted  
18 to make sure that the record accurately reflected that that was  
19 a stipulation as related to Judd Day, Ph.D.

20 Alright. So, before I move from the motions, counsel,  
21 is there anything that I have overlooked or that you'd like to  
22 address that I have not addressed? We're going to move into  
23 some other areas.

24 MS. COLE: No, Judge.

25 THE COURT: Okay. Defense is good? Okay.



1           Alright. Now, I wanted to go back to your -- the  
2 agenda you laid out. And why don't you fill me in on the  
3 status of the litigation and the number of cases pending in the  
4 MDL.

5           MR. TANNER: I'll do that, your Honor.

6           THE COURT: Alright, Mr. Tanner.

7           MR. TANNER: Judge Arleo always liked to have a report  
8 to kind of always know what was going on so we thought you  
9 might as well.

10          THE COURT: Absolutely.

11          MR. TANNER: She always wanted us to start with how  
12 the settlements were coming, so I can report on that.

13          THE COURT: Okay.

14          MR. TANNER: We had, since the Durom cup cases began,  
15 1,627 settlements of Durom cup hips. Forty of them has been  
16 since our last conference with Judge Arleo.

17          THE COURT: Okay.

18          MR. TANNER: Our mediations are 91 percent success  
19 rate. Mediations. And I know Miss Fleishman asked about  
20 up-coming mediations, we have seven set in March coming up to  
21 settle those cases.

22          As far as the MDL, there have been 574 cases  
23 transferred to the MDL. Two hundred twenty have been  
24 dismissed. So that leaves presently 354. Fifteen of those are  
25 not Durom cups, so they should be leaving soon, hopefully.

1 THE COURT: Okay.

2 MR. TANNER: And three of those have been settled in  
3 principle, so that leaves 336 is our count of, in essence,  
4 cases that are still waiting to either be resolved or trial.

5 THE COURT: So let me understand it. After we do the  
6 bellwether trials, as it relates to the other cases in the MDL,  
7 what happens to them? Like if they don't settle, they don't  
8 resolve.

9 MR. TANNER: Sure. Sure. They'll be put in line for  
10 trial. The system that we've set up, as you probably well know  
11 is, liaison counsel and defense counsel pick eight cases.

12 THE COURT: Okay.

13 MR. TANNER: Each pick four. We did plaintiff  
14 discovery on those. The depositions of the plaintiffs. The  
15 depositions of their surgeons. Health care providers, those  
16 types of things, so we can get an assessment of those cases and  
17 kind of do the work that's necessary to get those ready. Each  
18 side selected one case and then Judge Arleo selected Brady to  
19 go first, Ruttenbur to go second. Brady was their pick,  
20 Ruttenbur was our pick.

21 THE COURT: Right.

22 MR. TANNER: And then a schedule was set by which  
23 specific expert discovery in each of those cases would be set,  
24 both case specific discovery, I should say, and expert case  
25 specific discovery as opposed to the common issue discovery.

1           Common issue discovery for all the Durom cases in the  
2 MDL is over and the experts have all been deposed and that's  
3 all over. It's just case specific. Brady and Ruttenbur are  
4 lined up. After those cases, or in the middle of when we're  
5 trying those cases, we would anticipate this Court would ask us  
6 to submit the next two from the list that we've already worked  
7 up. And then the next two would go. And then the next two.  
8 And then at some point your Honor probably say: Okay, we got  
9 those eight, and we're still trying them, so let's get the next  
10 eight together.

11           THE COURT: So they never go back to their home  
12 districts?

13           MR. TANNER: I'm sorry?

14           THE COURT: I said, they never go back to --

15           MR. TANNER: No, we waived Lexecon, so they'll be  
16 tried here.

17           THE COURT: So we're the lucky ones, huh?

18           MR. TANNER: You are.

19           THE COURT: Alright, see, Miss Fleishman is saying  
20 "time out".

21           MS. FLEISHMAN: Time out.

22           THE COURT: She gave the T.

23           MS. FLEISHMAN: Your Honor can at any point decide  
24 that you have conducted, since you only conducted the pretrial  
25 discovery, in the common issues and at that point your Honor

1 can at any time send those cases back to their transferrers.

2 THE COURT: Okay.

3 MS. FLEISHMAN: It does not, even though counsel has  
4 waived Lexecon, it doesn't mean that all the cases  
5 automatically get tried in the transferee court.

6 THE COURT: Okay.

7 MS. FLEISHMAN: So I don't think that's what the MDL  
8 power laws say. We can certainly brief it, but that's my  
9 understanding.

10 THE COURT: Okay. Because I was curious about that.

11 MS. FLEISHMAN: And number two, the other time out was  
12 that we do not agree that all the common issues have been  
13 resolved. Some discovery has been done.

14 THE COURT: Right.

15 MS. FLEISHMAN: The common discovery has been done for  
16 this set, there are additional issues which is in our agenda  
17 that we wanted.

18 THE COURT: The metalosis, those different things.

19 MS. FLEISHMAN: Which defendants say there is no  
20 metalosis, plaintiffs say in fact there is.

21 THE COURT: Okay.

22 MS. FLEISHMAN: But we need to address that and that  
23 is a common issue.

24 THE COURT: But no discovery has been done on that?

25 Okay.

1 MS. FLEISHMAN: No, because that didn't come up in the  
2 eight bellwether selected cases. So it wasn't, that wasn't an  
3 issue. And the first time it really was raised before her  
4 Honor Judge Arleo was at the last conference before her when we  
5 raised it in connection with the Sherry Thompson case.

6 THE COURT: I see.

7 MS. FLEISHMAN: And she said: Well then, you have to  
8 go back and get expert reports and do that discovery. And  
9 that's where we left it.

10 THE COURT: Okay.

11 MS. FLEISHMAN: And counsel at that point said: Well,  
12 no, we can't. And then we --

13 THE COURT: Here we are.

14 MS. FLEISHMAN: It's in your Honor's lap.

15 MS. COLE: And, Judge, I just want to state for the  
16 record that liaison plaintiffs' counsel has only waived Lexecon  
17 for Brady and Ruttenbur, we have not waived it for all of the  
18 cases. I think that's something that has to be done on a  
19 case-by-case basis and in coordination with the actual  
20 plaintiffs' counsel that represents the individual plaintiffs.

21 THE COURT: Wow, okay.

22 MR. TANNER: And we respectfully disagree, and I guess  
23 that will be a briefing that we'll have.

24 THE COURT: Because that's a big disagreement.

25 MR. TANNER: Yeah, we think that it has been. And I

1 could address whenever you want the metalosis issue raised.

2 THE COURT: Right. Because I didn't know anything  
3 about the metalosis until obviously it was set forth in the  
4 agenda. And what I was going to recommend is, as it relates to  
5 that, Judge Mannion will more than likely address if there are  
6 issues that relate to that in terms of discovery, that he can  
7 certainly -- he'll set a conferencing.

8 MR. TANNER: And our simple position on that, your  
9 Honor, is these MDL cases were formed by the JPML to address  
10 all of the defect that the device was defectively designed or  
11 manufactured and Zimmer failed to warn. And that includes  
12 metalosis, loosening, all sorts of cases. But they're all  
13 here.

14 THE COURT: Okay.

15 MR. TANNER: And discovery has occurred on all of  
16 that. They don't get to reopen common issue discovery now.  
17 They have experts that have talked about metalosis issue,  
18 common issue experts.

19 THE COURT: Okay.

20 MR. TANNER: That's done. We're not reopening  
21 discovery again.

22 THE COURT: Alright. So from your perspective,  
23 metalosis is already addressed.

24 MR. TANNER: Yeah, it's in the MDL.

25 MS. FLEISHMAN: We disagree.

1 THE COURT: Shocking.

2 MS. FLEISHMAN: Right. And we'll raise it before your  
3 Honor, before his Honor, whatever the Court wants.

4 THE COURT: Right. Okay.

5 MS. FLEISHMAN: And we can brief the other issue too.

6 THE COURT: No, I think we'll need to. It's not all  
7 urgent. It's not something we have to do now. There obviously  
8 is a breakdown as to exactly what, you know, is suppose to take  
9 place, whether we're trying 300 cases, or we're trying eight  
10 cases, so.

11 MS. FLEISHMAN: Well, if your Honor pleases, we could  
12 do it for the next status conference. Because all of the  
13 people whose cases, of the three hundred something cases that  
14 are pending before your Honor now.

15 THE COURT: Sure.

16 MS. FLEISHMAN: Would like to know the answer to that.  
17 Some of them have been pending for quite a long time.

18 THE COURT: Sure. I have no problem with that. I  
19 think it makes sense. Obviously there are different views on  
20 exactly what is suppose to take place here as part of the MDL  
21 versus what goes back to the transferrer districts. Okay.

22 Alright, so I think I addressed everything on this  
23 agenda, or did I not? I know we still have to tighten up the  
24 trial aspect.

25 But, there are -- there were -- there was the not

1 fully briefed motions. There was -- I'm not talking about the  
2 summary judgment motions, but I'm specifically talking about  
3 that motion number 3, plaintiffs' motion to amend the case  
4 management order number 3 to require contribution by state  
5 court plaintiffs to the Common Benefit Fund. There was also  
6 another motion that one particular plaintiff filed and it's  
7 here somewhere, but one particular plaintiff filed a motion to  
8 decrease their amount or the percentage of what they're suppose  
9 to contribute to the Common Benefit Fund.

10 MR. SMITH: Good morning, Judge. Terrence Smith from  
11 Davis Saperstein. I filed two motions on behalf of two of our  
12 recently-settled clients yesterday, I think.

13 THE COURT: Yesterday, is that what you said?

14 MR. SMITH: I think so. We was based it on motions  
15 that had been filed in earlier Durom cases that we resolved a  
16 couple years back. And the facts were basically the same.  
17 We've settled them on our own. We negotiated with defendants  
18 on our own and we had no benefit from the common discovery, or  
19 the strategy, or any of that stuff. So, the pitch was to waive  
20 these plaintiffs' contributions to the Common Benefit Fund.

21 I can tell you that in the past, when we had prior  
22 motions granted, the Court said: Okay, you're not paying 4  
23 percent, you're paying 1 percent. I don't know that that is  
24 still good, but that's what --

25 THE COURT: It sounded good then, for sure.



1 MR. SMITH: That's what the precedent was.

2 THE COURT: Give me one second, Miss Cole.

3 Miss Schroeder.

4 MS. BEYEA-SCHROEDER: Yes, your Honor. Under document  
5 number 527 filed on September 23rd, 2014, I had filed a similar  
6 motion on behalf of eight of our plaintiffs that we settled.  
7 We had no assistance from the PLC, no material from the PLC, no  
8 depositions, no contact with them. We mediated and settled  
9 them on our own.

10 When we filed the motion, the Court actually entered a  
11 note on September 23rd, setting the motion for October 20th of  
12 2014, to be decided on the papers. But it was never decided  
13 and then when we had contact with the Court --

14 THE COURT: That's almost like an automatic thing so,  
15 yeah, it wasn't -- no conscious mind was writing that down, I  
16 assure you, so.

17 MS. BEYEA-SCHROEDER: So when he talked to your  
18 Honor's chambers they asked that we come today. In our  
19 paperwork, we asked that the fee be reduced to 1 percent based  
20 on the fact we did not have any benefit from the PLC as far as  
21 getting the case mediated or settled. We had no documents, no  
22 depositions or anything. But we understand that they probably  
23 did have some labor, obviously now being here today, I  
24 understood that they've had labor.

25 THE COURT: A lot of labor, sure.

1 MS. BEYEA-SCHROEDER: But as these plaintiffs didn't  
2 have any benefit of that in their settlement negotiations, we  
3 would respectfully request that the Court reduce the PLC  
4 assessment to one portion for them. In the motion papers I put  
5 it one-half percent from the attorneys and one-half percent  
6 from the plaintiff, just to be fair.

7 THE COURT: Have you had any discussion at all with  
8 liaison counsel?

9 MS. BEYEA-SCHROEDER: I had emailed them when I was  
10 filing the motion asking their position on it and I never  
11 received anything back.

12 THE COURT: Alright.

13 MS. BEYEA-SCHROEDER: And even to date. And then when  
14 the Court entered a request for a status on motions and  
15 everything for today, I actually emailed them and said: Hey,  
16 this motion is out there. CAN you please make sure it's on the  
17 agenda? And all I got was, I emailed the wrong person, I  
18 copied the right person on it, and they never even got back to  
19 me on the motion.

20 THE COURT: And it's not on the list by the way, but  
21 anyway.

22 MS. BEYEA-SCHROEDER: I know.

23 THE COURT: But I knew it was pending because you  
24 actually called my chambers or something to that effect.

25 MS. BEYEA-SCHROEDER: A couple times.

1 THE COURT: Right. Okay.

2 Yes, Miss Cole.

3 MS. COLE: First, I apologize. I never received any  
4 emails about this -- about these motions. And we will make  
5 sure you have the proper addresses because I will have to  
6 object.

7 MS. FLEISHMAN: I'll apologize, I never got anything.

8 MS. COLE: So we'll work to make sure you have the  
9 proper addresses.

10 With all due respect, things have changed materially  
11 in the last two years. You know, there was a period of time  
12 when this entire docket was on hold. There were no cases that  
13 had been judged as to being not settled and ready for  
14 discovery. There was no, you know, major discovery going on in  
15 the last 18 months. We had conducted nearly two million  
16 dollars worth of attorney's fees and costs in discovery.

17 Regardless of the fact that you didn't rely upon  
18 discovery and depositions at those individual mediations,  
19 obviously we're going to argue that the work that we were doing  
20 and getting trial dates and putting them at risk, and getting  
21 experts worked up, played into the overall mindset of Zimmer in  
22 their settlement negotiations.

23 At this point in time I think that, and I apologize  
24 because this has evidently been pending a while and I didn't  
25 know about it, at this point in time we would ask that these

1 motions as well as our motion to modify the CMO to allow for  
2 state court contribution be dealt with at the same time so that  
3 all the parties can, you know, adequately address their  
4 objections and their positions and let the Court make a full  
5 decision on all of the facts for all of the parties.

6 THE COURT: Okay. And I know it's hyphenated, but I'm  
7 saying Schroeder because I can't hear the other one. It's  
8 Bayee or Bay something. It says something Schroeder.

9 DEFENSE ATTORNEY5: That's okay.

10 THE COURT: Miss Schroeder, you have any issue with  
11 that because I think that makes sense, quite frankly. I do  
12 have the motion filed by liaison counsel to provide for  
13 contribution to the Common Benefit Fund by state court  
14 plaintiffs. A number of people have called today, prior to  
15 today, asking if they could be in participation in today's  
16 conference by phone, which I denied. Because I just felt there  
17 was really no way to really kind of keep a handle on that. So,  
18 in fairness, before I can address their motion, likewise  
19 obviously giving them the opportunity to address your motion  
20 more fully, I think it would make more sense to do it all  
21 together.

22 MS. BEYEA-SCHROEDER: Your Honor, our clients are  
23 differently positioned. Our clients are not in state court.

24 THE COURT: Sure.

25 MS. BEYEA-SCHROEDER: The clients that we're

1 addressing are not in the same position as that other motion  
2 and therefore it will be different than that motion. In the  
3 same vein, I'm here today pursuant to your request in order to  
4 address the motion.

5 THE COURT: We're addressing it. That doesn't mean  
6 I'll rule, but we're addressing it.

7 MS. BEYEA-SCHROEDER: Trying to save my client money.  
8 Having to have me come back to argue it a second time.

9 THE COURT: I didn't say you're coming back.

10 MS. BEYEA-SCHROEDER: Okay. I was going to say, it's  
11 not going to save my client.

12 THE COURT: I didn't say you were coming back.

13 MS. BEYEA-SCHROEDER: Okay.

14 THE COURT: And we are addressing it, so I was honest  
15 on both ends.

16 MS. BEYEA-SCHROEDER: Thank you.

17 THE COURT: You know, once again, the call was made as  
18 to whether it would be addressed. And when I suggested --  
19 obviously you can see it was wise for you to come because  
20 counsel didn't even know that you had been attempting to reach  
21 out to them. So it has at least hopefully been beneficial in  
22 that regard.

23 But I don't think it is an efficient move for the  
24 Court to make to address your motion, albeit -- cause I'm sure  
25 other plaintiffs are going to argue their situations are

1 different as well from certain other plaintiffs. So, the issue  
2 will get addressed. I think it's part of the global issue as  
3 to certain plaintiffs and whether they contributed to the  
4 Common Benefit Fund, what percentage they contribute, et  
5 cetera. So, it will get addressed. But I highly doubt we'll  
6 have oral argument subsequently on the issue.

7 MS. BEYEA-SCHROEDER: Okay.

8 THE COURT: Doesn't mean I won't, just mean I highly  
9 doubt it. Okay.

10 MS. BEYEA-SCHROEDER: Thank you, your Honor.

11 THE COURT: You're very welcome.

12 Alright. So we'll table that for the moment, Miss  
13 Cole and Miss Fleishman, as it relates to the Common Benefit  
14 Fund until we can find out exactly who does this involve, et  
15 cetera. I will more than likely ask Judge Mannion if he'd be  
16 kind enough to probably kind of orchestrate that and coordinate  
17 that getting addressed as it relates to the Common Benefit  
18 Fund.

19 Miss Fleishman.

20 MS. FLEISHMAN: I was going to say, as part of that,  
21 we'll give the Court a schedule of what happened when. So when  
22 we really began to engage in discovery as opposed to just  
23 resolving cases without doing so. Because that seems to be the  
24 differential date.

25 THE COURT: Right.

1 MS. FLEISHMAN: So we'll do that for the Court.

2 The other request, I do have for both your Honors, is  
3 if we could have a telephone conference call-in where people  
4 would at least be able to listen in, not be able to speak, but  
5 be able to listen in so that all of the other counsel who have  
6 the 300 plus cases can hear what's going on. I think that  
7 would be really helpful.

8 THE COURT: Okay.

9 MS. FLEISHMAN: That's the reason for our request for  
10 the telephone conference.

11 THE COURT: And Judge Mannion may be very amenable to  
12 that. That's just not my practice. So I appreciate the  
13 request and the request was made prior to today. But that --  
14 because I did not have any indication -- I mean, I knew I was  
15 dealing with in limine motions so that was my focus in setting  
16 a trial date. And so my focus was that more so than trying to  
17 coordinate who's calling in, when they're calling in, how that  
18 whole thing was going to work. So you may be able to work that  
19 out with some future conferences. I don't know, have you done  
20 that with Judge Arleo as well, they all called in and sat and  
21 listened?

22 MS. FLEISHMAN: Yes. And we've done it with some  
23 other MDL courts as well.

24 THE COURT: No, no, I've done it in other situations.  
25 It's just for today's purposes, as I said, we were trying to

1 set a trial date in addition to actually addressing the in  
2 limine motions.

3 MS. FLEISHMAN: And frankly, your Honor, this is the  
4 first time we've even been before you to ask your permission to  
5 do this and explain why we even wanted it.

6 THE COURT: Sure.

7 MS. FLEISHMAN: So that would be --

8 THE COURT: Understood. That's fine.

9 MS. FLEISHMAN: And we'll request it in the future.

10 THE COURT: Excellent.

11 Alright, so before we depart, is there anything else,  
12 counsel, that we need to address? Just so we're clear, at this  
13 point we're setting the trial date for Wednesday, May 6th, for  
14 Christine Brady.

15 MS. FLEISHMAN: Right.

16 THE COURT: Okay? So unless somebody tells -- I see a  
17 hand.

18 MR. TANNER: I'm sorry, and I think you said you have  
19 four weeks set aside?

20 THE COURT: Yes?

21 MR. TANNER: My son, who's graduating from high school  
22 in June 6, I will not get in trouble with my wife is what I  
23 hear.

24 THE COURT: I promise you, we want to keep families  
25 together.



1           MR. TANNER:  It's a sacred date, she told me to make  
2   sure.

3           THE COURT:  There are a couple of days in there that  
4   are going to have a few issues, but I understand -- but what  
5   I'm going to do is make sure that we've blocked off four weeks,  
6   essentially, for trial purposes.  Okay?

7           Miss Fleishman.

8           MS. FLEISHMAN:  Yes.  This is not just pure  
9   housekeeping.  The final pretrial conference then is before  
10   your Honor or before --

11          THE COURT:  It will be before Judge Mannion.  And  
12   he'll set that date for counsel, so obviously it will be before  
13   then.  But we will -- we'll talk before we actually begin jury  
14   selection just in terms of how I select a jury, what we need to  
15   present before the jury, which will be the sort of neutral  
16   statement of the case, those sort of things, we'll go over all  
17   of that as well.

18          MS. FLEISHMAN:  And do we have another status date  
19   before your Honor that we can address what's going on in the  
20   MDL generally, or does your Honor want to have us do that  
21   before Judge Mannion?

22          THE COURT:  I don't know -- yeah, more than likely  
23   you'll do that with Judge Mannion.  My focus at this point  
24   going forward will be trial.  Okay?  So, my goal will be to  
25   move towards trial.  Judge Mannion will certainly keep me

1 apprised of exactly what the status is of the balance of the  
2 cases in discovery, but my focus will be to proceed to trial.

3 MS. FLEISHMAN: Thank you.

4 MR. TANNER: And a final pretrial order, I think your  
5 Honor uses a pretty elaborate final pretrial order. Is that  
6 due on the day of the final pretrial conference that Judge  
7 Mannion will set or is that --

8 THE COURT: Exactly. Judge Mannion will set out and  
9 probably electronically, counsel, it will be set and he'll give  
10 you due dates when you're suppose to have your proposed draft  
11 order prepared and all that and submit it.

12 MR. TANNER: Thank you.

13 THE COURT: Okay.

14 Counsel?

15 MR. EPSTEIN: Your Honor, one small housekeeping  
16 thing, if someone in your chambers could email me a copy of  
17 your pretrial order form so that I can share with my  
18 colleagues.

19 THE COURT: Sure. I'll just ask you to see my law  
20 clerk Miss Sybblis and she can make sure that you have access  
21 to it. Judge Mannion also does have it as well so counsel will  
22 have access to that as well.

23 And, counsel, in the back. Now, you're going to have  
24 to tell me your name again. Terrence Smith?

25 MR. SMITH: No, that's me, Judge.

1 THE COURT: Morris Dweck.

2 MR. DWECK: I spoke to Mr. Tanner briefly. We had one  
3 case Patricia Bramhall we mediated before Judge Arleo. We  
4 wanted to give you I think one more time, hopefully, to wrap it  
5 up with litigation we just wanted a make sure it was okay.

6 THE COURT: It's fine with me. Does Judge Arleo know  
7 she's mediating.

8 MR. DWECK:

9 MR. DWECK: From my understanding from my firm, they  
10 had spoken with her, they haven't set a date yet.

11 MR. TANNER: When Judge Arleo, this was right after  
12 she was confirmed, said on this particular case it involved  
13 some fairly complicated lien issues that she was happy to  
14 continue to mediate that case.

15 THE COURT: Okay.

16 MR. TANNER: And we certainly don't object to that if  
17 she's still amenable to doing that.

18 THE COURT: I'm sure she will. As long as she's  
19 aware, I have no problem with it at all.

20 MR. DWECK: Fine.

21 THE COURT: Now, anything else, counsel, we need to  
22 address? That's it?

23 Alright, so what I'm going to do is, I'm going to ask  
24 plaintiffs' counsel, if you'd just be kind enough to reduce  
25 this to a form of order. We do have the record, but just as it

1 relates to the motions and the trial date, et cetera, make sure  
2 defense counsel has an opportunity to see the proposed form of  
3 order so that there are no objections to that, and then submit  
4 that, and we will have that filed electronically.

5 In the interim, you can expect to receive a final  
6 pretrial conference date. We'll also post the trial date on  
7 the schedule. And I will tell you now, for scheduling  
8 purposes, my intention, barring either dismissal or something  
9 else occurring, is on Ruttenbur, to start that trial on  
10 September the 1st, which is a Tuesday. It's before Labor Day,  
11 so actually we have Labor Day off, but that's my intention.  
12 The Ruttenbur date will not go on the docket yet, but I have  
13 blocked the time out on my calendar. But I want counsel to  
14 know that so you can sort of plan your lives accordingly, okay?

15 Alright. And if that is all, then I thank each of you  
16 for making the sacrifice to come, and for your time and your  
17 effort, and the extremely diligent way you've pursued the cases  
18 and all the wonderful work you've submitted. So, the Court  
19 does appreciate it. It does help the Court as well. But I  
20 will look for the order from counsel. Okay? So, everyone have  
21 a great day.

22 MS. COLE: Thank you, your Honor.

23 MR. TANNER: Your Honor, thank you.

24 (Matter concluded)

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