UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MILLER,	.	
	.	
Plaintiff,	.	
	.	Case No. 09-cv-04414
vs.	.	
	.	Newark, New Jersey
ZIMMER HOLDINGS, INC.,	.	March 24, 2015
	.	
Defendant.	.	
	.	

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE STEVEN C. MANNION
UNITED STATES MAGISTRATE JUDGE

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I N D E X

(Commencement of proceedings at 4:14 P.M.)

THE COURT OFFICER: We're on the record in *In re* Zimmer, Docket Number 9-cv-4414.

Can I have the appearances of counsel, please?

MR. TANKARD: George Tankard, Waters & Kraus counsel for plaintiffs.

THE COURT: Okay. You're just going to have to aim into the microphone a little bit better.

MS. COLE: Kyla Cole, Waters & Kraus on behalf of the plaintiffs.

THE COURT: Okay. Welcome.

MS. FLEISHMAN: Wendy Fleishman from Lieff Cabraser on behalf of the plaintiffs. And we switched sides, Your Honor, just because we have more of us today.

THE COURT: Okay.

MS. FLEISHMAN: A rare occasion that it's more plaintiffs.

MR. LEATHERS: Dan Leathers with Lieff Cabraser for the plaintiffs.

MR. TROXEL: Jeremy Troxel with Lieff Cabraser for the plaintiffs.

THE COURT: Okay.

MR. SAYEG: Ilyas Sayeg of Maglio Christopher & Toale for the Maglio Christopher & Toale state court

plaintiffs.

THE COURT: Okay.

MR. SMITH: Terrence Smith, Davis Saperstein & Salomon for plaintiffs Goldstein and Kayal.

THE COURT: Okay.

MR. BADARUZZAMAN: Good afternoon, Your Honor, Asim Badaruzzaman, Seeger Weiss for the plaintiffs.

THE COURT: Okay.

MR. IRWIN: Good afternoon, Your Honor, Judge Gregory Irwin from the firm of Harwood Lloyd representing plaintiff Kenneth Schopp.

THE COURT: Okay. Welcome. I see from my sign-in sheet no one signed in for the defense? But are you about to, I guess?

MR. TANNER: I think we're maybe on a second page there. We did sign in.

THE COURT: Ah, under the plaintiff's side, got it. Okay. Got it.

MR. TANNER: Sorry, we'll do better next time.

THE COURT: It's all right.

MR. TANNER: I apologize. Joe Tanner, Faegre Baker Daniels on behalf of the defendants.

THE COURT: Got it. Okay.

MR. CAMPBELL: Andrew Campbell, Faegre Baker Daniels, on behalf of defendants.

THE COURT: Okay. Got it.

MR. FANNING: Ed Fanning from McCarter & English for the defendants, Your Honor.

THE COURT: Okay. Got it.

Okay. All right. And now that we've straightened out the plaintiffs versus the defendants, welcome down to Courtroom 3C. This is, I guess, our inaugural visit down here for all of you.

First thing I want to, I guess, bring to your attention, I did sign within the past few days an order adding, I think it was another 13 cases to this MDL, and that brings us up to, I think, 380 cases at this point. And let's see here. I'm looking for our agenda, letter. And that the March 17 letter?

UNIDENTIFIED SPEAKERS: Yes.

MR. TANNER: That's correct, Your Honor.

THE COURT: Okay. Okay. So first up on the agenda was plaintiff's motion to amend the case management order to require a contribution by state court plaintiffs. And we received papers on that.

Who would like to be heard on that issue first?

MR. TANKARD: Your Honor, George Tankard. It's our motion.

THE COURT: Yes, put that microphone directly in front of you, so the folks on the telephone can get the full

pleasure of your voice.

MR. TANKARD: And, Your Honor, I know you've read and reviewed the papers, so I won't go through that verbatim. Just try to hit some of the high points.

Basically, I guess most fundamentally and first, it's the -- it's our view that the Court does have the jurisdiction to impose this. And in our reply memorandum, we specifically acknowledged, although there's a split among the jurisdictions, that the Third Circuit has indicated that Your Honor has the ability to -- to do that.

THE COURT: I'm inclined to disagree, but --

MR. TANKARD: Okay.

THE COURT: -- I'm welcome -- welcome to hear you. I think I have a more narrow view of this Court's jurisdiction than you do.

MR. TANKARD: Understood, Your Honor.

The -- really, the -- the issue is the whole concept of an MDL falls apart -- and this really bleeds over to the other state court motions -- if there's no mechanism, no effective mechanism for funding the efforts of the lead plaintiffs' counsel who are actively litigating the case. And so to -- to allow that is really to allow unjust enrichment and not have a means for -- for the cases to be prepared and ready for trial.

I mean, it's really that simple.

The -- the landscape really shifted also -- and we set that out in our papers -- where there was a period -- and I know Your Honor is relatively new to this MDL -- there was a period where it was all mediation and settlement mode. And by design, there was a stay of discovery, no discovery was ongoing. There were some legal issues that held up discovery. We finally worked through those.

And -- and now, we're in a different -- we're in a different position, and the litigation has to be -- has to be funded. We are hamstrung by a case management order that requires us to give over information, to crossnotice depositions in state court cases, and then basically include individuals for their benefit without having any means of recouping the considerable efforts that we've gone to great lengths in our papers to point out to the Court.

So it's really -- it's fundamental to this process that we be allowed to be compensated fairly for the efforts that will benefit all litigants.

And I think it really goes to the question of not viewing those efforts in a vacuum. It's easy to say, oh, I did not specifically call you up and ask for a deposition of this expert. But if you're negotiating these cases and the defendant does not want to pay fair value or doesn't want to pay anything, then -- then you're really -- you have no choice but to try your case. And you can't try your case if

somebody has not prepared the case to be tried. And that's really -- really the crux of this.

We've outlined here that we believe the Court does have jurisdiction, does have the power to do that. I know you've indicated you do not view it that way.

It's -- it's -- it would be preferable had the CMO made some different provisions and it had been more explicit and addressed some of these issues head on.

But we are where we are in 2015. And so that's why we're simply asking at a minimum on a go-forward basis to do something in the CMO to correct that.

We also think that particularly for cases that have settled recently that were not part of what we view as that prelitigation -- that really began, that the intensive efforts really began in 2013, we believe that the cases from that time forward, that they're benefitting from the litigation moved forward, and defendants knowing that there is -- there is a day of reckoning if they want to take a position at the bargaining table that is not paying fair value for the cases.

THE COURT: Well, I'm curious, what -- what's been happening at the bargaining table between the MDL plaintiffs and the state court plaintiffs? I mean what -- what communications have you had about, hey, you should buy in for the future, as you're talking about.

MR. TANKARD: As the Court might imagine, it varies -- it varies from plaintiffs' counsel to plaintiffs' counsel. And some have been very actively engaged in seeking out our advice and counsel and getting the materials, and others not so much.

THE COURT: Of the ones that have been active, do they want to contribute going forward?

MR. TANKARD: No, I don't think anybody wants to contribute. That's the point. They are -- you know, they are -- they would rather say, oh, we didn't benefit from this, because we didn't specifically obtain your materials and try the case with those materials.

THE COURT: Right.

MR. TANKARD: And that's where the Court --

THE COURT: But if you have something that they want, doesn't that give you leverage to work out an agreement going forward?

MS. COLE: May I address that, Judge?

THE COURT: Please.

MS. COLE: Unfortunately, we have no leverage. We have -- you know, we don't have -- we're not in a situation of some of these MDLs where this is a global settlement being discussed, and we are not able, because the discovery confidentiality order mandates that as soon as a state law -- state court plaintiff signs that discovery confidentiality

order, we are required to share the MDL discovery with them. We have no leverage. We have no tools. We've had to pass out our -- our work to 25-plus firms, just because they were willing to sign the confidentiality order and agree to be bound by the CMO, and the CMO doesn't have a mechanism in it by -- whereby they're also agreeing to contribute.

So for 25-plus firms, the genie's out of the bottle. And what we are hoping for is we're hoping for an amendment to the case management order going forward that at a minimum will allow that anybody who participates in using our discovery has to contribute.

THE COURT: By "participate," do you mean "receiving"?

MS. COLE: That would be my argument, yes. And at this stage, I've had a number of state court plaintiffs call me up and say, hey, the judge -- the state court judge is telling me that if I don't need to do discovery, that I can -- you know, start -- you know, have a trial in six months. Can I take that deal?

And I'm, like, yeah, take it, the work's done. And conversely, Zimmer has been crossnoticing every one of these depositions in every state court case, and my bet is that if a state court plaintiff stood up and said, I want to go back to London and I want to depose those 16 people again, that Zimmer's going to say, no, it's already been done, and you

can't do that.

THE COURT: Okay.

MS. COLE: So that's our problem is is at a minimum we need something moving forward. And we would also like to address, if there's any way to go back and deal with at least the plaintiffs who have taken the benefit of our discovery and, arguably, you know, any plaintiff has benefitted from our leverage.

THE COURT: Let me hear from the state court plaintiffs that are opposing. Because defendants were essentially "me too" briefs.

MR. SAYEG: With just a couple of minor points to that.

THE COURT: Okay. Sure, come up, yeah, please.

MR. SAYEG: Thank you, Your Honor. Ilyas Sayeg, once again, from Maglio Christopher & Toale. And this is -- this is an odd position for us to be in, and we don't necessarily be here and be cross with the plaintiffs with the PLC.

But we do believe that first and foremost, this is an issue of jurisdiction, and we've -- I think we've briefed those points. Without the cooperation from the state courts, I don't -- we don't believe the federal courts can mandate the state court plaintiffs pay fees into a federal court MDL, and we believe the Manual For Complex Litigation discusses

that quite a bit, as does -- I think the --

THE COURT: But we can also -- we also have jurisdiction over this case, and I can restrict the discovery from flowing to the state court plaintiffs. Correct?

MR. SAYEG: I think that's correct, Your Honor. And I think what is missing here is the cooperation before the fact, between the PLC and the state court plaintiffs. And this -- this blindsided us when we saw this motion come in. I can discuss a little bit as far as the crossnotices and the depositions. We didn't ask to be crossnoticed in those depositions. And we made our objections known to defendants, that we object to be crossnoticed in those depositions, given that at the time we were -- we were so early in the litigation in those state court cases in which we were crossnoticed that we could not have possibly been prepared to adequately represent our clients' interests at those depositions.

THE COURT: Well, let's talk about going forward.

MR. SAYEG: Going forward, I believe --

THE COURT: The cake of what's been done before us, that's already -- that's already said and don. But going forward.

MR. SAYEG: I think going forward, if the discovery from the MDL needs to be used in our state court cases, I believe that that mandates a discussion between the state

court plaintiffs and the MDL leadership so that we can discuss what are we going to use, what benefits are the state court plaintiffs going to get, and have an agreement between those two parties as far as what the benefit is and what should be paid.

But to have a blanket order from the MDL stating that all settlements from all state court plaintiffs must contribute the same, I think would be overreaching and would flip the unjust enrichment on its head. We -- our firm has been litigating and settling these cases since before the MDL existed, has continued to do so. And to assume that every single settlement that we're able to achieve on behalf of our state court plaintiffs who choose not to participate in the MDL, have benefitted, I think is an assumption that is not substantiated.

THE COURT: Okay. Well, what would be wrong with, as previously argued, requiring anyone who receives discovery from the MDL from agreeing to some level of contribution, some minimum level, whatever it is. I don't know.

MR. SAYEG: That 's not to say that the discovery is used, however.

THE COURT: No, no, no, but if you sign up and say, yes, I'm signing my name on this list, I want to receive discovery, and for that, whatever it is, I'll receive -- I'll contribute at some level. There'll be some level of buy-in,

and then some sort of agreement on -- that could be arranged from X to Y, based upon what the value is, but at a minimum, there's going to be some contribution. What would be wrong with that?

MR. SAYEG: I think that's what should take place, a discussion between the MDL and the state court plaintiffs as to something like that occurring, but that should take place at the state court level, and order -- or, that should take place, I'm sorry, between the state court plaintiffs and that the MDL plaintiffs as opposed to an order coming out of the MDL and this Court. I believe that can be done in a private agreement without putting the MDL plaintiffs and the plaintiffs' leadership at odds here at this court.

THE COURT: No, I understand.

And -- but would you also agree, though, that this Court can turn off the discovery so that the state court plaintiffs do not receive any, so that they're not receiving an unjust benefit.

MR. SAYEG: I believe that can certainly be done. And I believe if a system like that is used -- I think our firm was put in a weird position, where -- especially with those crossnotices, where we are -- we do believe we're in the position that Ms. Cole stated where we were noticed for discovery in a -- prior to us being ready. And we -- we're fairly sure we're going to get into that situation where in

the future we would not be allowed to take further discovery when we have certain specific needs that we would need to investigate for our particular plaintiffs.

And I think those issues need to be protected, and that needs to take place on a case-by-case basis with the state court plaintiffs that we represent, because they chose to stay out or had the opportunity and chose to stay out of the federal court MDL.

THE COURT: Anything else? I cut into your argument, so ...

MR. SAYEG: That's pretty much it, Your Honor. We -- our main goal was that on its own, the requested amendment would be beyond the jurisdiction of this Court and that the assumption that there's an unjust enrichment without any investigation into the particular issues would be premature.

Thank you.

THE COURT: Thank you very much.

Defendants? Before we have reply?

MR. TANNER: Sure, five quick points, Your Honor.

THE COURT: Sure.

MR. TANNER: First, we would agree with -- sorry -- we would agree with you on the narrow interpretation of jurisdiction. Just don't think this Court has jurisdiction, with all due respect.

Second, we disagree with the factual assumption that the work effort put in by plaintiffs' counsel, which we do not doubt, is value with respect to the settlement. Anything, it's increased Zimmer's costs, and we went into this from the very beginning, four and a half years ago with Judge Arleo, and we said, you know, we were trying to make a concerted effort to settle these cases, but when we start litigating, it's going to affect the values. And it has. And the other thing it's affected is there's been a defense verdict in the only case that's gone to trial.

So we respectfully dispute that it's increased the values of the settlements to the plaintiffs.

Third point, we think it'll chill settlements. If the -- if the state court plaintiffs know there's 4 percent they have to pay in to a fund that they themselves that don't agree should be paid into, we think that has an effect on the settlements.

Fourth point, this CMO on the payment of the common benefit fund was what they wanted. This is the language that they put forth, that they now want to change. And the ability to share discovery with state court plaintiffs is something they wanted to put in there. And we found a way to say, okay, we'll do it, but we have to make sure the state courts have a protective order that is a substantially similar to the MDL order, and then that's okay, but this is

not something that should -- that is a surprise or something we put through. They wanted -- they wanted to be able to share it with state courts. And now they're coming back and saying, well, wait a minute, now we want it -- we want to make money from that, or we want to pay for that, and we just don't think that's appropriate.

And fifth is the final point made in our papers is if some order like this were put in place, we would like protection to Zimmer that basically we're not going to get caught in the middle of this. We'll reserve the funds as we've reserved, we'll pay the funds as part of -- court's order, but we think the state court plaintiffs should be put on notice with that they should have a right to object, all that fighting includes them. We just don't want us to incur the costs and the administrative hassle of dealing with that -- thank you.

THE COURT: Okay.

MS. COLE: Judge, we have no problem with -- with Zimmer staying out of it. We don't think that's any of their business, with the caveat that part of the problem is Zimmer-created. Zimmer marched to every state court in this country and stood up and said, you're not allowed to do discovery here. You need to take place in the MDL discovery. I stood in both California and Illinois and been told that I didn't -- couldn't stand up in my own state court cases and

argue for discovery, that the only place Zimmer wanted to argue it was the MDL. And they've been doing that with the state court plaintiffs who don't have liaison counsel level as well.

So I expect Zimmer's going to keep doing that. And to the extent that plaintiffs, you know -- I think you've got it right. Discovery is flowing from the MDL to the state court plaintiffs. It is benefitting everybody. It's benefitting --

THE COURT: At least arguably.

MS. COLE: Arguably.

THE COURT: Some say no.

MS. COLE: But, I mean, it's benefitting Zimmer. It is been -- to the -- if the plaintiffs choose to use it or to the extent that they're hamstrung from doing their own discovery by Zimmer's arguments, they've at least got options available to them.

So we would like the CMO to be amended to shut the valve down until we can craft a better -- a better option.

We would also ask that we be able to submit findings of fact for the Court to find that in the cases of the 25-plus firms that have already received our discovery, that there has been an enrichment -- by our work, so that we can at least, you know, begin the discussions with those state court plaintiffs. If there is to be a private

agreement, as the state court counsel suggests, the CMO is going to have to be amended to allow for a private agreement.

So regardless of whether or not you feel you can argue the state courts to do anything, we've got to amend the CMO to shut the -- shut the faucet off and make provisions for whatever the Court feels is the appropriate way to address this going forward.

THE COURT: Thank you.

All right. I will reserve a decision on this issue. It's given me some interesting things to think about.

Next issue up for discussion, let's see, certain plaintiffs' motion to reduce common benefit contribution.

This one -- this motion was filed September 23d, 2014. I did not receive opposition until March 19th, 2015.

So let's start, why was there no opposition until just this past week?

MS. COLE: Your Honor, we apologize for that. There was a miscommunication between the plaintiffs' coliaison offices. Ms. Fleishman's office was the one that the individual state court plaintiffs reached out to say that they were filing the motion. We were not aware the motion had been filed until we were standing in Judge Wigenton's court last month or earlier this month, I guess, and that was the first time that we had learned about the motion being filed. And we've now taken the opportunity to respond.

THE COURT: Okay. Well, I guess that would explain why it wasn't on the list, at least, from your perspective before Judge Wigenton.

So let me hear from you folks. Why wasn't it on the prior list?

MS. FLEISHMAN: We never got it. That was the problem we raised when we were before Your Honor and Judge Wigenton, that we had not -- we had not gotten notice of this. And she -- counsel said that she had called us or emailed us, and I went back and double-triple-checked and I haven't found anything.

THE COURT: Okay.

MS. FLEISHMAN: So -- and I looked in my spam filter, quarantine filter, couldn't find it there. I'm not sure where it had been filed. But we didn't know.

So I went back and -- and then -- and counsel just said that they were going to oppose it, because it's not been our position to oppose this in the past, especially in her situation when it was so much earlier. You know, that --

THE COURT: Well, I forgot, just say your name for the record for the recording.

MS. FLEISHMAN: Oh, I'm sorry.

THE COURT: Sorry.

MS. FLEISHMAN: My name is Wendy Fleishman.

THE COURT: Okay. If you'd just -- yeah, move the

base of the microphone. You grab it by the base, otherwise, it'll pull out. Don't bring the microphone to you.

MS. FLEISHMAN: Oh, okay, thanks.

We -- in the -- at the time, she had filed this, we would not have opposed it either, because at that point, it was still early and it was still before we had engaged in any substantive discovery. And at that point, we were not opposing requests for reduction in common benefit costs and fees, because it seemed that that -- that there was no benefit, you know, exchanged.

But then once discovery was undertaken, then it -- I think the situation had changed dramatically.

THE COURT: Okay.

MR. SMITH: Judge --

THE COURT: Why don't you come on up to the microphone.

MR. SMITH: -- I may be able to add something to the procedural aspect.

THE COURT: Introduce yourself so the record knows.

MR. SMITH: Sure. Terrence Smith, Davis, Saperstein & Salomon.

We were kind of in the same situation. We had two clients recently settled. We filed motions on their behalf to waive common benefit assessment. And we filed them in their specific cases.

As it turned out, our motion was filed on the same day that the Court entered the order closing the case, because stipulation of dismissal memorializing the settlement had been put in place.

I don't know how the actual email notice chain works for specific cases, but it was my understanding that I was sending our motions through the general PACER to all counsel who were involved in the entire litigation. That may not have been the case, because when we called the other day, our advice was to refile them on the general docket, which we did.

And we -- we filed them after liaison counsel's opposition to the general issue had been posted to the Court. Our papers were there in closed cases. Liaison counsel filed their opposition, and then I sent in a reply to the opposition the other day on behalf of our clients.

But I think that there may have been a procedural problem simply in if you file motions in specific cases, they may not have gone out to the universe.

THE COURT: Yeah, it won't, as far as I know.

MR. SMITH: Okay.

And I will address the merits for my client when we get around to it.

THE COURT: Okay. Well, you can do that at this point, if you'd like.

MR. SMITH: Okay. We filed motions on behalf of Mark Goldstein and for Michael Kayal and his wife, both of whom had recent mediations out in San Diego with a mediator. And those cases resolved successfully following the discussions. We filed the motions for waiver of the assessment, as we had done back in 2011 for other cases that we settled, and the basic point of the argument was we have received no common benefit from any of the activities of liaison counsel with regard to liability issues. We were not provided any information on strategy. We were not provided any information on prior settlement ranges, as is appropriate because all settlements, I understand, have confidentiality clauses. We have never benefitted from any of the substantive liability discovery. We have not requested copies of depositions or expert reports or any of that work product based on our understanding that the mediations, at least in years past and we believe carried forward, addressed issues of proximate cause and damages only, that it was -- the reason we were having mediations at all was because they were -- Zimmer was essentially conceding the issue of liability for those purposes.

Liability never came up. We have had four mediations so far; two in 2011, two in this year. The issue of liability was never addressed by any of those sessions, with a passing note of the mediator recently that -- as a

result of the defense verdict, Zimmer's position vis-à-vis settlement has probably entrenched further from what it had been all along, starting back, originally, Zimmer had made a settlement offer to unrepresented plaintiffs with regard to resolving their claims, paying certain kinds of hospital bills.

So the point of it is that while we understand common benefit and we have paid into it on behalf of our clients in many other MDLs, that common benefit became part and parcel of the broader settlement negotiations that resulted in these national-level settlement programs.

The Durom MDL has been different in that respect that it has been proceeding on essentially two parallel tracks. There has always been mediation. The push for liability discovery began in 2013, maybe a little earlier, on behalf of certain plaintiffs. Our firm, our clients were not part of that initiative and have not participated in it through the present time.

We are happy to pay for common benefit as it becomes an actual benefit to our clients. In the future, if our mediation sessions prove unsuccessful and we are obliged to move cases into liability and case-specific, there's no question, I think that we would be obliged to make a fair share payment of that common benefit discovery.

Our clients to date have not needed that.

And from a purely fairness point of view, I don't think was -- is appropriate to require people to contribute to a common benefit that is no benefit to them.

And we had in the past made the same motions. I can tell you just for purposes of the record that our prior motions, the court did not agree with us to waive the assessments completely, and for our past mediations, the court entered an order that the assessment was one percent rather than what the case management order says.

We have a different circumstance now, a different court. Our initial motion was the same, and that is that in the absence of any provable benefit to our clients, we don't think we should pay.

THE COURT: Okay. Thank you.

MR. SMITH: Thank you, Judge.

MR. TANKARD: Well, really it's the same arguments essentially recycled except more compelling here, they are part of the MDL. It's worth noting that these two plaintiffs were direct-file MDL cases, so presumably, they received some benefit of being part of the MDL.

I think it's just unrealistic to -- bless you -- to view this in a vacuum and not confer benefit on the fact that the case is being actively worked up and that there is some leverage point. And so if they get to a point, if they have more clients, I don't know if they do, and they can't settle

those cases, they don't get their value for those cases, they get no offer for those cases, they don't have to spend two years working up the liability case. And that -- they are conducting negotiations in that environment, in that atmosphere. And that is the underpinnings of all the MDLs is -- is that the case is being -- is charging forward and that you by -- inherently benefit from the -- from the case being worked up. Otherwise, they're going to be left there alone. Go try your case, and then you've got no case to try, you know, there's nothing for you to do.

So I -- to say that to prove direct benefit, I don't know how you would do that under these circumstances, but to ignore these extraordinary efforts that have put the case in a position to be tried and they're going to be an MDL case, as this Court knows, May 6th, I don't think anybody that practices civil litigation can deny the value of a trial date as a pressure point, value the case workup, meaningful case work up as a pressure point for settlement. And obviously, we're hamstrung because we don't know the particulars of these mediations, and we don't know a lot about settlement values. It's confidential. We have advice that we have been given by our fellow state court plaintiffs and fellow MDL plaintiffs that as of the time the discovery initiated intensely, that Zimmer moved into a much different posture and was more reluctant to come to the mediation table

at all, and several MDL plaintiffs came before Judge Arleo to say we can't seem to get our cases scheduled for mediation. And then -- again, this is anecdotally -- we don't -- there's no way to conduct discovery on this issue or do some sort of survey, most importantly, because of confidentiality issues. But we have been told that, no, we are not able to settle our cases, and that's well illustrated by the dearth of these types of motions seeking waiver of the costs during this time period, you know, really subsequent to 2011 when the tide really shifted.

So I think you have to step back and use common sense and knowledge of how civil litigation works and the pressure points for settlements. And to -- to deny that there's a benefit from that, I think it's just -- that's just not common sense.

THE COURT: Okay. Thank you.

Okay. I'll also reserve decision on that application.

And we will go to our discussion regarding request for common issue discovery related to metallosis.

MS. COLE: Judge, we -- Number 3, plaintiffs' -- counsel's request for expense reimbursement? It is a different issue.

THE COURT: Yeah. Okay.

MS. COLE: It's -- it's a very minor issue, Judge.

THE COURT: Okay. Sure.

MS. COLE: We have filed a motion and an order as of whatever date we filed that motion, we were informed by Zimmer that there was $327,297.78 in their fund.

We submitted my declaration and a motion requesting that that would be paid out to plaintiff's counsel, $36,973.04 to Lieff Cabraser; $290,324.64 to Waters & Kraus. And it should be important to note that this is so solely expense reimbursement. We have not submitted any fees because of the dearth of money in the fund. We're just asking that expenses be reimbursed. As far as I know, there's been no objections raised, and we just need the order signed so that Zimmer can issue us a check.

MR. TANNER: We have no objections to plaintiffs' -- the money. We'll pay it however the Court orders, so long as we're just absolved of any liability; once we pay it, we're done. That's our only concern.

THE COURT: Okay. And the proposed order?

MS. COLE: Should be with the motion, Judge.

THE COURT: Do you have the tag number for docket -- for docket entry?

MR. TANNER: 680-2.

THE COURT: 680 tag 2.

MS. COLE: I have a copy of the order, Judge. If you'd like me to approach.

THE COURT: Sure. You can give it to Ms. -- it's probably here in this stack for me.

(Pause in proceedings)

THE COURT: Okay. And defense counsel has no objection to the form of the order. Correct?

MR. TANNER: Correct, Your Honor, with the understanding that if Your Honor makes it on the record, I think that's sufficient that we're absolved of liability once we pay this amount of money. We don't want other state court or other plaintiffs coming in and saying you shouldn't have paid it, et cetera. We're following the Court's --

THE COURT: Okay. Next progress of mediations.

MR. TANNER: I don't know that there's a lot to talk about, Your Honor. Usually, Judge Arleo wanted to know how things were going. We've had 17 cases settled since we were before Judge Wigenton on the 25th of February. We had five scheduled yesterday and today. We're continuing to resolve certain sets of Durom cases.

THE COURT: Okay. And 17 cases settled since then, and those stipulations --

MR. TANNER: No, no, not all in the MDL, I should --

THE COURT: Oh, because I was going to say, my numbers aren't going down. That's what I'm looking for.

MR. TANNER: There are --

THE COURT: I see them going up. I don't see them going down.

How many of those in the MDL?

MR. TANNER: I don't know the answer to that, Your Honor. I don't have a list of which ones those are.

We're still mediating cases. I don't know exactly how many of those 17 were in the MDL. I apologize.

THE COURT: Okay. Yeah, that's probably the number that we're more interested in.

MR. TANNER: Understood.

THE COURT: I'm very happy, though, that the state matter settled.

Okay. Individual plaintiffs' requests for case-specific discovery.

MS. COLE: Hold on one second, Judge.

THE COURT: Sure.

(Pause in proceedings)

MS. FLEISHMAN: We don't know -- I don't -- I think that may just have been an error.

THE COURT: Okay. I was going to say, because I don't see it discussed in the body.

MS. FLEISHMAN: No, we're --

THE COURT: Okay.

MR. TANNER: That -- there were some people that asked me to send letters about whether they could take

case-specific discovery. And there's already a court order laying out how to do all that. So we -- we were going to say --

THE COURT: See the order.

MR. TANNER: Yeah, there's another order. And some people sent some letters in. That's all we were trying to clean that issue up.

THE COURT: Okay. So for everybody on the telephone, see the order.

MR. TANNER: There you go.

THE COURT: Now, we get to talk about metallosis. This is one that got me out of bed this morning. I want to hear about this.

So, please.

MS. FLEISHMAN: That's --

THE COURT: Oh, well. I won't say.

MR. LEATHERS: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. LEATHERS: Daniel Leathers for the plaintiffs.

Our points are pretty well laid out in the letter, but very briefly, it states that this, as has been stated multiple times already today, that this case has gone on for nearly five years now, and today's case is a very different case than the case four and a half years ago. Today's case involves people who -- especially cases that are filed right

now, people who were implanted with Durom cups many, many years ago, almost a decade ago in many cases, and people who have failing Durom cups that loosening acetabular cups is what it's known, which is the -- not the cup component, the actual Durom cup component, that has become loose, and when it becomes loose and for lack -- very nonscientific terms is rattling around in there, hitting the ball, it can cause metallosis.

As you might imagine, the longer people go with those types of problems, the more chance that metallosis can occur, and those are the types of cases that are being filed today which are very different than the cases that were being filed initially.

Not only that --

THE COURT: Do we know how many plaintiffs, if any, from -- that previously filed, that have cases pending, have been diagnosed with metallosis?

MR. LEATHERS: We don't have a specific breakdown of the current number of cases of the 380 that are filed that are metallosis cases versus nonmetallosis cases. Plus, in addition to that, it very well could be as of the date of the filing, they weren't metallosis cases and today that they are.

THE COURT: That -- that's the what I -- that's the number I was looking at, if you had it.

MR. LEATHERS: And in addition to that, the discovery that was propounded back in the day, I would say -- I guess it was as early as 2010, this case, as we were told by defendants explicitly, is not a metallosis case whatsoever. This is about the Durom cup loosening. Those are your claims in this case, which is absolutely true as of 2010, that those were our claims, our discovery was based on those claims, and discovery moved forward on that basis. The two cases that are set up to go to trial right now are not metallosis cases.

And we need to have discovery, especially for the next set of cases, but that we anticipate going to trial, unless there's some sort of immediate mass resolution, that are likely to be metallosis cases, that certainly plaintiffs would want to push those cases as a separate category and set of cases to go to trial and understand really that those would be more complicated cases.

THE COURT: Well, talk to me about the pleadings on how metallosis is included.

MR. LEATHERS: Sure, so, obviously, every individual plaintiff can file however they want to plead their cases, but for those that have pled their cases, they would detail specifically in revision operation reports that they've seen pseudotumors, that the doctor saw a pseudotumors, that they removed metallosis, that they saw

blood test results for cobalt and chromium of X, Y, or Z levels above what the standard range should be. So those would be the particular types of claims that plaintiffs individually would have.

Sort of, I guess, as a side note, that maybe that you were sort of indicating, to maybe narrow down for everyone's benefit where someone would fall into those types of categories on a -- maybe just on a going-forward basis, having a short-form complaint created, which is pretty common in other MDLs, a short-form complaint basically being that these are the -- these are the basic pleadings. There would be a long-form complaint that states the general -- the general causes of action, but then the individual plaintiffs could say, I was implanted with a Durom cup on this side, on this date, I was revised on X date by this doctor in this hospital in this state. And I am or I am not claiming metallosis as a result. Obviously that can change. And there could be future case management orders that specifically state that, yes, you do have to, you know, update that claim later on so that way the Court and really the plaintiffs and the defendants can keep a run- -- a running record and a running tally and understanding sort of where the overall case is going as far as where the individual plaintiffs are.

And that also can serve an additional benefit of

knowing how many cases are bilateral hips because many people who received one Durom cup actually received two -- well, eventually received a second Durom cup.

THE COURT: Okay.

MR. LEATHERS: So that's all I have on the metallosis in addition to a few other issues that I addressed.

THE COURT: Okay. Thank you.

MR. CAMPBELL: Thank you, Your Honor, Andrew Campbell for the defendants.

Your Honor, I'd like to make four points. First, metallosis is a well-known side effect of metal on metal acetabular components, and plaintiffs have been aware of metallosis as a theory of defect in these cases since the litigation began.

There's simply no question that Zimmer warned about metallosis as a side effect at the time it released the product to the market in 2006. Zimmer conducted an investigation into allegations of metallosis in 2009. This MDL was not created until 2010, after that investigation had been completed.

The plaintiffs in this litigation have filed numerous cases with allegations specific to metallosis in addition to plaintiffs with general allegations of defect related to the Durom cup. Upon examination of medical

records, it's clear that they are metallosis cases. So there's simply no questions that plaintiffs knew that metallosis was a theory of defect at the outset.

Plaintiffs have also had every opportunity to take full discovery on all theories of defect in this case, including metallosis, and indeed, the plaintiffs have taken fact discovery and expert discovery on metallosis. Discovery in this case began in May of 2011. It closed in May of 2014. And during that three-year period, Zimmer has responded to 243 requests for production; we've produced 1.8 million pages of documents; we've participated in 22 common issue fact depositions. Plaintiffs have taken discovery specific to metallosis in that discovery. They have asked for specific documents related to Zimmer's investigation of metallosis. In depositions, they have asked company witnesses about that investigation related to metallosis. So they had every opportunity to explore these issues.

The third point, Your Honor, is that the parties have disclosed at least six common issue experts who have offered opinions about metallosis in this case. The plaintiffs' lead orthopedic surgeon, common issue expert Dr. Grimes, offers a specific opinion about a theory of defect in the Durom cup that leads to metallosis. They have a second orthopedic surgeon who has opined about the potential for long-term complications of metal ion

dissemination, another term for metallosis. They have case-specific experts who have done SEM analysis of individual Durom cups and offered opinion about how those individual Durom cups could give rise to metallosis.

And in response, Zimmer has disclosed three experts: a biomechanical engineer who has spent sections of his expert report analyzing plaintiffs' experts to respond to metallosis claims. We've provided a toxicology expert report, 22-page report devoted solely to the issue of metallosis raised by Dr. Grimes. And finally, we've provided an epidemiologist report who's analyzed complaint data to study and look at how many of these claims relate to Durom loosening, as Mr. Leathers said that this case was original about, and how many relate to metallosis. All of that happened within this three-year period of fact discovery and expert discovery.

The fourth point, Your Honor, is that when discovery closed in this case, it closed with the agreement of all parties in the case. We got together and said, okay, we've extinguished fact discovery in the case. We're ready to close fact discovery. Let's conduct our expert discovery. Then let's get these cases set for trial. Everyone was in agreement on that. No one raised this issue of, wait, we want to take additional discovery on metallosis and reopen this at some later date.

The practical consequence of this, Your Honor, reopening fact discovery to a new theory of defect, another round of fact depositions, another round of expert reports, expert opinions, expert depositions, simply shouldn't be done when the plaintiffs had a full opportunity over the course of this three years, they knew about the theory of defect, they filed cases involving metallosis, they took discovery on this specific issue, they've disclosed experts. And at this point, we think it's simply too late to reopen that door.

THE COURT: Okay. Thank you.

MS. COLE: Your Honor, may I address a couple of his specific points about discovery?

THE COURT: Sure.

MS. COLE: First, I think it's important for you to understand that the science or at least the way doctors were viewing hips changed drastically in December of 2012. That is when the FDA gathered all of the experts on hip implants and really began to look at metallosis as an issue going forward and put standards out requiring practitioners to conduct periodic x-rays and look at periodic blood monitoring when there was any question of metallosis.

The difference between the cases filed in this MDL in 2010 through 2012, and the cases filed in the MDL today is that the doctors were actually looking for metallosis. My client, Mrs. Brady and Mrs. Ruttenbur [phonetic], whose cases

are set for trial in the coming year, their doctors never even did any metallosis testing. They never monitored their blood. They weren't interested in metallosis. The people whose cases are being filed today, they call me up on the phone, and they say, let me tell you about my cobalt and chromium levels. I mean, it's a totally different world.

THE COURT: But for the folks that were early on, why, then, in 2013, 2014, after the FDA changed how it views it this, why wasn't that discovery done at that point?

MS. COLE: Well, because it -- it was a factor of where we were and what we were trying to do. There was a lengthy period of time when we were working diligently to do discovery on all of the aspects, including metallosis, and frankly, that's why Dr. Grimes' report contains opinions about metallosis is because we were trying desperately to protect future plaintiffs because we were bumping up against this deadline.

Ultimately, when the bellwether selection process was completed, we realized that none of the cases that were up in the initial bellwether, because they had to meet certain date and filing criteria to even be eligible, that none of those plaintiffs were metallosis plaintiffs. I think there was only one person in the entire potential bellwether pool that plaintiffs were looking at, that arguably had a metallosis claim.

And so ultimately, we withdrew Dr. Grimes' report as to metallosis and stated that we thought that it should be pushed more specifically in cases where metallosis was an issue.

It is -- it was an inaccurate statement, when they talk about the plaintiffs have three experts that talk about metallosis. We got a general causation opinion from Dr. Grimes to kind of try to protect everybody. Dr. Kitziger [phonetic] gave a case-specific opinion in which he has a one-paragraph citation to the articles that exist about metallosis, but he has not given a general causation opinion in the MDL. And Dr. Bloebaum is a coatings analysis expert who was not hired to give a metallosis opinion, so that was a misrepresentation to tell you that.

We have asked some -- some questions about metallosis when we were talking to witnesses, common issue witnesses, that we thought had that knowledge. We went ahead and did that work. But there was specific corporate requests regarding metallosis and 30(b)(6) topics on metallosis that we ultimately agreed with Zimmer to pull down to raise in case-specific situations. And we did that with several things, like, there -- you know, there was a clinical trial in the U.S. relating to Durom that looked at resurfacing a different type of femoral product than most of these clients had. And we had initially asked some questions about that

and ultimately agreed with Zimmer to pull that back into case-specific discussions.

It was -- it was always just a matter of these are the deadlines that are in front of us, and these are the plaintiffs that are initially eligible to be in the bellwether process, and metallosis is not an issue for any of those plaintiffs.

THE COURT: Okay. Again, I guess I -- I guess, this was answered to some degree before, but I'm curious your answer, what number of plaintiffs is this an issue for?

MS. COLE: I think that that's a mighty fine question. And I think that maybe we should go back and look and talk to the other MDL plaintiffs' counsel and get you a number. That's the only way I can answer that question.

I can tell you that my firm only has two or three cases out of 100-plus cases that are metallosis. But I can tell you that we're seeing hugely increasing numbers of metallosis cases in intake.

THE COURT: Okay. The two things that I'm interested before I make a decision is the number of plaintiffs and what discovery.

Anything else on the metallosis for now?

MR. CAMPBELL: No, Your Honor, I want to clarify the record just so it's clear, Dr. Kitziger did offer a common issue opinion as to metallosis, so there is not a

misrepresentation there.

Otherwise, you know, if you want the parties to gather this information, including discovery that's already been taken on this issue and provide additional information to you, we can certainly do that.

THE COURT: Perhaps a summary from defendants on what -- just -- not a detailed, not --

MR. TANNER: A letter?

THE COURT: Yeah.

MR. TANNER: Lay it out.

THE COURT: A letter laying out what's been done in the metallosis through 2014.

MR. TANNER: Okay.

THE COURT: And then obviously, if there are -- I mean, we've got new cases being filed, you know, as we speak, and they may fall into a different ball game than the older cases. So from you folks, like to know how many plaintiffs in general, I suppose. And then what discovery you're looking for.

You had something else, Ms. Fleishman?

MS. FLEISHMAN: I was just going to address the fact that, Your Honor, we had -- actually we raised some of this discovery really early on. We met -- we met and conferred in July 2011 in my office, roughly around July 25, 2011. And at that point, we agreed to pull back a lot of the

discovery, a lot of the requests for production, a lot of the interrogatories and pull back a lot of the requests to depose groups of witnesses so that we could do more focused discovery going forward. And there was an agreement between the parties that we would revisit this at a later point.

THE COURT: Was that memorialized somewhere some for the Court?

MS. FLEISHMAN: It was. We reported it to the Court -- and I'll go back to the transcripts, because I -- to make sure, if I can find the information. But I recall meeting, because I had just had a kidney transplant and Mr. Tanner asked me to come into work to have this meeting, so that is why I remember it so clearly.

THE COURT: And was that a meeting before Judge Arleo?

MS. FLEISHMAN: It was a meeting in my office. And then we reported about the meeting, I think, subsequently to that. And I don't recall the date of that. But I will go back and double-check.

THE COURT: Mr. --

MALE SPEAKER: What's -- which part?

MR. TANNER: I just can't -- Judge Arleo set the date and said she wanted all the parties to meet in New York in their offices. I didn't ask her to be there.

MS. FLEISHMAN: Yes, you did, actually. I'm sorry

you don't recall, but, yes, you did.

THE COURT: Okay. Minor point.

MR. CAMPBELL: That's neither here nor there. It is true, the parties did sit down, we met and conferred in person to talk about the request for productions that had been served early on in the case. Some of those requests were, in fact, tabled. I don't recall that any of those were specific to metallosis. They may have been.

But that would just further appoint that plaintiffs knew about this as of the time discovery started in 2011.

THE COURT: I agree, it goes both ways.

MR. CAMPBELL: They had the opportunity to do this. We all agreed that discovery would close in May of 2014 and that experts would be disclosed in September 2015. They disclosed an expert to cover all the plaintiffs because they knew this was an issue if they thought they needed more discovery and needed more experts, this should have been a discussion we were having then. Plaintiffs want a do-over, and at some point, this needs to stop. We need to close discovery and wrap these cases up.

THE COURT: So what I want to hear on this is what was the agreement, whether or not metallosis was not going to be pursued at that point or whether or not it was something left for -- I don't know, maybe individual discovery or what.

But how much time do you need?

MALE SPEAKER: A couple of weeks, Your Honor.

THE COURT: Okay. All right. 14 days each side? Is that enough time?

MS. COLE: For this information?

THE COURT: Yes.

MS. COLE: Yes, Judge.

THE COURT: 14 days joint letter, joint letter supplement on the metallosis issue. Okay.

Then we move on to the revision rate discussion.

MS. COLE: Judge, just to short-circuit this, basically in April of 2010, April 10th of -- I'm sorry, April 10th of 2014, defendants had inadvertently produced some documents in their discovery. They did a -- they did a clawback letter. We agreed to give them all but one letter back. And at April 10, 2014, we were addressing the one letter and -- with Judge Arleo.

The reason we didn't want to give the letter back was because the letter -- or I'm sorry -- the document, whatever it was, I forget now the details of the document, actually laid out the revision rate as Zimmer saw it that day. And our point to the judge was, we're fine giving this document back. We agree it's work product, we want to give it back, but we have a pending discovery request, Interrogatory Number 2, which asks specifically for them to give us the number of revision surgeries as of

September 19th, 2013, relating to the Durom cup. And their answer provided no details, just said, Go look at all of our documents. And then here's this one document that we found that had this information in it, and they were clawing it back.

So Judge Arleo --

THE COURT: But that document, you agree was work product.

MS. COLE: We do. And Judge Arleo said fine, give the document back, but I'm ordering Zimmer to provide its revision rate. And Zimmer made all the same arguments then that they've made today, that, oh, my gosh, we'd have to hire an epidemiologist and why should we have to do this work and this is so hard. And Judge Arleo said, no, never mind, you have to give it.

And so the order was that as of December 2013, what is your revision rate.

Since that order, I took the 30(b)(6) witness on the topic of the number of U.S. revision surgeries. I took Carlo Ventre in London, and the man knew nothing. He had been given five documents to review, and he had a, quote/unquote, high-level understanding of those documents.

But basically, they have a -- a complaint tracking system. And their complaint tracking system allows -- it encompasses everything, you know. Did some doctor call you

up and say the instrument broke? Did some doctor say the cup was loose? Did some doctor say they were having a metallosis issue?

And so they had produced through early 2014 -- I forget, I think, May, June time frame -- the complaint ratio for 2014. And one of the 30(b)(6) topic that Mr. Ventre was there to testify on was what is the revision rate or the -- what -- how many revision surgeries have there been of the U.S. Durom cup? He couldn't answer the question.

I asked him, I said, so I don't understand, am I -- is nobody at Zimmer tracking revision ratio -- the number of revision surgeries?

And he said he didn't know. And he said, I know we track these complaint systems.

And then he went on to testify, I said, question: In order to determine how many revision surgeries there were, you would have to go into the individual descriptions of the complaints that are attached to the postmarket surveillance report.

And he said yes.

And I went on and asked him: Did you ask if anybody within the company was tracking actual revision surgeries?

Answer: No, I didn't ask.

"So if I asked you how many revision surgeries

there have been for loosening of the U.S. acetabular cup, you would not be able to provide me that number.

"That is correct, yes.

"Is there anybody within the company that you were -- like before I go do all this work of looking at all of these individual descriptions of these complaints and pulling out which ones are the ratios, is there anybody within the company that you would ask, hey, are we already tracking this?"

His answer: I would ask the postmarket surveillance group, and based on the InnoVia system, the name of their system, we can correlate and take out the right information and then select based on the Excel table that you have seen, looking on search criteria, we could put together a list of the revision surgeries.

So that's all we're asking, Judge. We already know how many cups were sold. That was the -- part of the equation that they provided us in 2014.

So all we're asking for is for them to give us the number of revision surgeries as it exists today or at some designated point in the recent past, because this is part of their ongoing duty to supplement discovery. They don't have to hire an epidemiologist. They don't have -- this isn't some crazy thing that Judge Arleo ordered that there's no discovery on, because we have an interrogatory and a

deposition topic that asks specifically for how many revision surgeries have there been.

THE COURT: I don't see a docket reference here in the letter to the order from Judge Arleo. Was it reduced to writing?

MS. COLE: So I know that in her transcript, which I have and I can bring to you, she ordered that they provide it, and then I have the letter where they provided it. Whether or not we followed the hearing with a -- with an agreed order, we might have. I just don't remember.

THE COURT: Okay. I'll take the transcript.

MR. CAMPBELL: Yeah, I don't believe, Your Honor, that there was an agreed order, that it was reduced to writing.

I do want to point out that Ms. Cole has conveniently left out parts of Mr. Ventre's testimony in which he says that Zimmer does not track revision surgeries.

Question: Does Zimmer track revision surgeries relating to the U.S. Durom cup in any documents outside of the PMS system?

Answer: No, we are tracking complaints. We are not tracking revisions.

The company does not track revision surgeries. It tracks complaints. We have produced to the plaintiffs the complaint data within its postmarket surveillance system that

including all complaints, from which they could go through themselves, identity which of those are revisions, which are not revisions, and have that number. But to force Zimmer to do that and to do it on a continuing basis requires us to do plaintiffs' work for them.

And, yes, we would argue that it does require an epidemiologist. This is not easy data to analyze. There are a lot of factors that go into revision surgeries.

THE COURT: So you're saying that it was only done that one time and that one document that --

MR. CAMPBELL: Yes, Judge Arleo in the context of this clawback argument where plaintiffs were holding Zimmer's document hostage in order to get a revision rate that was calculated for purposes of litigation, for purposes of settlement negotiation, she said, all right, I'm going to -- you know, to resolve this issue, Zimmer, you give them a revision rate.

We had to hire a third-party epidemiologist, who we disclosed an expert report for, provided his opinions about how he had to analyze the data and come up with this revision rate as of December 2013.

To order Zimmer to have a continuing obligation to supplement discovery that's never been requested and that Zimmer does not independently track, we think goes beyond what Zimmer has an obligation to supplement.

The other point I would make, Your Honor, is the relevance of this information. The cup went off the market in December 2010. We're sitting here in March of 2015. The revision rate only has one way that it can go. It can go up. And everybody agrees there are lots of reasons for revision surgeries unrelated to a defect in the product.

The plaintiffs' only intent in getting this revision information is to use it to unfairly prejudice Zimmer five years after the fact after the cup's been off the market, and it show some artificially inflated revision rate to try and suggest the product is defective as a matter of course.

So not only do we think Zimmer doesn't have an obligation to do this, we think the information has very limited relevance, will unfairly prejudice Zimmer, and the Court shouldn't order Zimmer to continue to update this information that it doesn't track and the plaintiffs haven't asked for it.

THE COURT: Okay.

MS. COLE: Judge --

THE COURT: Do you have the transcript?

MS. COLE: May I?

MR. TANNER: My only comment is that it's got plaintiff's counsel's highlight- --

MS. COLE: And if you want to mark it --

THE COURT: Is it on the docket already somewhere?
MR. TANNER: Yeah.
MS. COLE: If you didn't want to highlight --
MR. TANNER: Yeah.
THE COURT: Just give me the Docket Entry. I mean, if it's already posted to the docket.
MS. COLE: No, no, the transcript's not posted --
MR. TANNER: I mean, maybe we can give you the page number of the transcript and give them a clean copy.
MR. CAMPBELL: Yeah, I only have the portion that's relevant to this discussion.
MS. COLE: And that's all I was trying to give --
MR. TANNER: What? 32.
MS. COLE: 32.
MR. TANNER: Is that right, 32, 33, 34, 35?
MS. COLE: Mm-hmm.
MR. TANNER: Yeah, that's fine. If that's all right.
MS. COLE: -- and provide him with you-all's response letter where you answered --
MR. CAMPBELL: Yeah, we have that.
MR. TANNER: Do you have a clean copy of that?
(Pause in proceedings)
MS. COLE: And, Judge, I would just like to respond that, you know, we have an outstanding discovery request that

asks for the number of revision surgeries. They have a continuing obligation to -- to supplement discovery. We took a 30(b)(6) witness where this specific topic that I was in London to question this witness about was the number of revision surgeries for the U.S. Durom cup. And even when they provided me the documents from their complaint system, that only went through May or June of 2014. So we -- as of today, I do not have the information I would need to calculate it myself.

MR. CAMPBELL: And we're happy to supplement that, Your Honor. We're happy to supplement the raw data.

MS. COLE: But I would also point out that it doesn't matter if I hire my own epidemiologist and do it. Zimmer will hire their own epidemiologist, and they will question what I've done. They're going to spend the money regardless, because they fight everything we do.

It makes more sense for them to use their system, as Mr. Ventre described it here, you know, it's like an Excel spreadsheet, we can just go in there and highlight what we want and come up with the number, and then give us that number, and that way it's their blessed number. I mean that -- it was amazingly useful in the trial that we didn't have to both bring epidemiologists and put boring number-crunchers on for the jury to fight about what the data was. We had -- you know, this is the Zimmer admitted rate.

If you want to give me leave to serve, you know, a request for admission, I'll serve a request for admission, but I believe that, you know, we're now a year later from when this was ordered, and we need to update that rate. The number does go up because more and more people have to have their cups revised.

THE COURT: Well, of course, keeping in mind that I've not yet read Judge Arleo's prior discussion on this, if the plain- -- in the defendants do not regularly calculate this number and what you're asking is -- taking their argument -- asking the Court to basically ask them to go above and beyond their discovery allegations in producing the raw data, but to then crunch the numbers and that has a cost factor for them, and as you just pointed out from your example, whereas if you hired your own expert to go crunch the data, you would have to incur an expense, and then of course, they would go and get their own epidemiologist anyway, well, rather than go through all that and shifting all of the costs to defendants, why wouldn't the plaintiffs bear some of the costs to crunch those numbers?

MS. COLE: We're fine with that.

MR. CAMPBELL: Your Honor, I -- again, we shouldn't be required to do plaintiffs' work for them.

And at this point, at this point, where discovery is closed, expert discovery is closed and to calculate this,

it requires an expert to offer expert opinion that they chose not to do, we shouldn't have to do that after the fact, because plaintiffs chose, while the discovery was open, not to hire an epidemiologist, not review the complaint data that was produced, not offer an expert opinion on what the revision rate is or was, we shouldn't be obligated to do that work for plaintiffs and essentially disclose an expert for the plaintiffs with an expert opinion after discovery is closed. It simply -- it just doesn't make sense.

Again, we are doing plaintiffs' work for them --

THE COURT: Humor me for a moment and let's just -- let's suppose that I am considering making you do that.

MR. CAMPBELL: Sure.

THE COURT: Plaintiffs just offered to pay for a portion of it.

MR. CAMPBELL: Obviously, if Your Honor orders Zimmer to calculate this updated revision rate, then we absolutely think the plaintiffs should bear the full cost of calculating that.

Again, it's not information that we are going to use in our affirmative case; we think it's irrelevant.

THE COURT: Understood. Okay.

MS. COLE: I would just point out there -- the choice I made was dictated by what the information I had. Judge Arleo had ordered them to produce a number as of

December 2013. I had four or five months of additional information available to me from what they've produced. It made no sense to do any additional work with those numbers, where now, a year down the road, and the number has definitely changed.

MR. CAMPBELL: Your Honor, they wouldn't have done the work if Judge Arleo had not ordered them -- or ordered Zimmer to produce that information.

MS. COLE: I disagree. We asked for the numbers because we had to do the work. And so you came --

MR. TANNER: Hire an epidemiologist.

MS. COLE: We would have hired an epidemiologist as soon as you-all gave us numbers. You gave us numbers until you were ordered to do so.

THE COURT: Okay. I will review Judge Arleo's transcript, I will get back to you on that.

All right. So we've, I think, run the gamut of the agenda letter.

Was there anything else for today's discussion?

MR. CAMPBELL: Very quick points, Your Honor.

MR. TANNER: We had submitted a letter, a joint letter, despite maybe some of the bantering of the last 10 minutes, we've actually gotten along pretty well, I think, in agreeing on some deadlines. There were some issues with the pretrial order sent out by Judge Wigenton and then your

order, and we came up with a schedule on how to get this case to trial, including exchanging trial exhibit lists, which we've already done; the final pretrial order, we've got a draft, our draft to them is due today, we'll file the final one on the 31st.

THE COURT: Okay.

MR. TANNER: But the March letter that I sent which was jointly kind of written, I don't know that you've approved that yet. And if that were to be approved, then we would have all the deadlines set from between now and getting everything ready for trial.

Oh, and the docket number is 36 in the Brady case.

THE COURT: I don't think I'll have that with me.

MR. TANNER: I don't know that I have a clean copy of it --

THE COURT: That won't be in this jacket, I don't believe.

MR. TANNER: May I approach, Your Honor?

THE COURT: Sure.

MR. TANNER: Here's a clean copy of it.

THE COURT: So that's in one of the individual cases. Right?

MR. TANNER: Yes, that's the one that's set for trial May 6th, and it kind just sets out the final pretrial order and when everything would be due.

THE COURT: Okay. All right. I will look at this as well as that jacket and put something up on ECF in the next day or two.

MS. COLE: Thank you, Judge.

THE COURT: All right. Anything else for today? No?

MR. TANNER: I don't believe so. Thank you.

THE COURT: All righty. Who has the longest ride home?

MR. TANNER: Texas or Indiana, I don't know.

THE COURT: For the folks on the phone, thank you very much. We're adjourned. All right.

(Conclusion of proceedings at 5:30 P.M.)

Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 60 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

S/ *Sara L. Kern* 6th of April, 2015

Signature of Approved Transcriber Date

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