

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MILLER, .
 .
 Plaintiff, .
 . Case No. 09-cv-04414
 vs. .
 . Newark, New Jersey
 ZIMMER HOLDINGS, INC., . June 9, 2015
 .
 Defendant. .
 .

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE STEVEN C. MANNION
UNITED STATES MAGISTRATE JUDGE
And
BEFORE THE HONORABLE SUSAN D. WIGENTON
UNITED STATES DISTRICT COURT JUDGE

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1 (Commencement of proceedings at 3:28 P.M.)

2

3 THE COURT: I'll take us on. I've got the mic.

4 All righty. We're on the record in *In re Zimmer*
5 Durom hip cup products liability litigation, MDL 09-CV-4414.

6 May I have appearances beginning with plaintiff's
7 counsel.

8 MS. COLE: Kyla Cole on behalf of the liaison
9 plaintiffs.

10 THE COURT: Welcome back.

11 MS. FLEISHMAN: Wendy Fleishman from Lief Cabraser
12 on behalf of the MDL plaintiffs.

13 THE COURT: Welcome back.

14 MS. FLEISHMAN: Thank you.

15 MR. SMITH: Terrence Smith, Davis
16 Saperstein & Salomon, for plaintiffs -- Branca, et al.

17 THE COURT: Okay. Good to see you.

18 MR. BADARUZZAMAN: Asim Badaruzzaman, Seeger Weiss,
19 on behalf of plaintiffs.

20 THE COURT: Could you sit any farther back, or do
21 you want to come closer?

22 MR. BADARUZZAMAN: I think I'm against the wall.

23 THE COURT: Okay. Okay. That is fine with me. We
24 won't bite up here. You can come on closer, if you want.

25 MR. TANNER: Joe Tanner, Faegre Baker Daniels, on

1 | behalf of defendants.

2 | THE COURT: Okay, Mr. Tanner. Welcome.

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

5 | THE COURT: Okay.

6 | MR. FANNING: Ed Fanning, McCarter & English, also
7 | for defendants.

8 | THE COURT: Okay. Welcome.

9 | Okay. And did we have folks that were calling in?
10 | No?

11 | MR. TANNER: Not that I'm aware of.

12 | MS. FLEISHMAN: No.

13 | THE COURT: Okay. That's good, then.

14 | Okay. First up, then, on the schedule, since we
15 | have Judge Wigenton joining us, I thought we would talk about
16 | setting additional trial dates first. And the briefing
17 | schedule on the waiver issue.

18 | Okay? So let's go with the trial dates. At this
19 | point, there were four more cases in the bellwether?

20 | MS. COLE: Technically, Judge, there are six more
21 | cases.

22 | THE COURT: Okay.

23 | MS. COLE: In picking the first two trial picks, as
24 | a part of that negotiation process, I vetoed one of the
25 | defendant's picks, and they vetoed one of our picks.

1 I would argue that all six cases are at the same
2 discovery position and should all be eligible to be picked.
3 I believe the defendants will argue it's only four.

4 THE COURT: Mr. Tanner?

5 MR. TANNER: Yes, the deal was we'd each select
6 four and strike one to get rid of the -- the real outliers,
7 and we'd end up with six. We've --

8 THE COURT: Handled two already.

9 MR. TANNER: -- had two scheduled. Now, we have
10 four to go.

11 THE COURT: Okay.

12 You agree on the -- getting rid of the outliers.

13 MS. COLE: I mean, my understanding was that
14 process was a part of negotiation that we entered into for
15 picking the first two trial settings, but, you know, I would
16 have to go back and look at my specific notes on whether or
17 not there was for all time.

18 THE COURT: Okay. So at this point, you don't
19 disagree, so, okay. We've got the fourth.

20 And my understanding is that defense will have the
21 next pick of --

22 MR. TANNER: Yes, Your Honor, based on Judge
23 Wigenton's order.

24 THE COURT: Okay. And it's going to be a defense
25 pick. Do you have the cases picked out now?

1 MR. TANNER: We don't, Your Honor. I apologize,
2 but if we could say, like, in a week or 10 days, we would
3 submit a letter to the -- the Court and saying this is our
4 pick. They can tell us their pick. We'd submit a joint
5 letter saying here's the next two.

6 MS. COLE: That would be our preference as well.

7 THE COURT: Okay.

8 Judge Wigenton, would you want them to just go with
9 the next two or the next four?

10 JUDGE WIGENTON: I don't really care. I guess my
11 question for counsel, I know you have some issues with the
12 case-specific discovery, so you might have to -- that.

13 So maybe we could -- as to how things are going to
14 proceed with the next cases in terms of discovery.

15 So, I can give you a better date obviously on fewer
16 cases more than -- cases.

17 MR. TANNER: Sure. Would you like me to address
18 that, Your Honor?

19 The common issue discovery has been completed. The
20 case-specific discovery has been completed as it relates to
21 fact discovery. The plaintiffs have been deposed. The
22 surgeons have been deposed, those types of things.

23 What is left to be done is mainly expert discovery,
24 and that would be the plaintiff's scientific coating expert
25 on the case-specific issues; our corresponding biomechanical

1 | experts; the plaintiff's orthopedic surgeon expert, again on
2 | case-specifics; our orthopedic experts on case-specific. So
3 | it would be a schedule that would be in essence, as we
4 | understand it, their expert will have to look at the cup, do
5 | his report, be deposed, we'll have to get the cup, look at
6 | it, be deposed, the orthopedic experts will have to review
7 | the records and give their reports and be deposed, and then
8 | there pay or may not be a Daubert motion/summary judgment
9 | motion tied to that.

10 | I don't think we could get that done by September,
11 | given all that has to happen. But I would think we could get
12 | it done by a November -- or we talked earlier about a
13 | February date and a May date, those types of things.

14 | JUDGE WIGENTON: So is it more, I guess, reasonable
15 | to do -- those cases if discovery in the next two cases --

16 | MR. TANNER: Yes, I -- and that's what we did last
17 | time, Your Honor, we did both cases, and we did a
18 | case-specific expert discovery at the same time. It was just
19 | easier to do.

20 | And then -- and then we had one and then the next
21 | one was ready. So we had May, and then right after it
22 | September. So we didn't have to do anything more on that in
23 | between those. And that allows us to set them a little bit
24 | more closely together.

25 | THE COURT: Ms. Cole.

1 MS. COLE: The one thing I would say, Judge, is
2 that from plaintiffs' standpoint, it would actually be easier
3 and more cost-efficient to do it on all cases. Each of these
4 experts, assuming that we don't come up with a brand-new
5 orthopedic on either side, each of these experts has been
6 deposed two to three times. And so all they need to be
7 deposed on is the case-specific issues. We've now done that
8 on multiple cases in a couple of depositions. And I would
9 say it would not be a hindrance from our point of view to do
10 it on four cases at once so that we could save that time.

11 THE COURT: Have you two met and conferred on this
12 issue at all?

13 MS. COLE: No.

14 MR. TANNER: No, I don't -- I think that can work.

15 JUDGE WIGENTON: Yeah, it sounds like --

16 (Simultaneous conversation)

17 JUDGE WIGENTON: It sounds like it --

18 (Simultaneous conversation)

19 MR. TANNER: -- yeah, we could do the four --

20 JUDGE WIGENTON: -- plaintiffs -- you know,
21 plaintiffs.

22 MR. TANNER: Yeah, we -- because it's only expert
23 discovery. It's case-specific, so that means the experts,
24 rather than review two sets of medical records, were served
25 four, and I'm sure we can get that taken care of at the same

1 | time.

2 | THE COURT: Okay. Joint proposed schedule on that?

3 | MS. FLEISHMAN: May I be heard, Your Honors?

4 | THE COURT: Sure.

5 | MS. FLEISHMAN: On behalf of all the MDL
6 | plaintiffs, there are 368 cases behind these cases. And so
7 | I'm quite concerned that they are -- have been there for a
8 | very long time. So I -- I had proposed one kind of tiered
9 | discovery approach that I would ask to be incorporated.
10 | Counsel have not had an opportunity to meet and confer about
11 | that. Perhaps we can do that in -- within a 10-day window so
12 | that we can give back to the Court, report to the Court what
13 | our plan is for the remaining cases so that Your Honor's not
14 | faced with trying these cases well into your senior status.

15 | JUDGE WIGENTON: Trust me, that will not happen.

16 | But -- and I understand your concern, counsel. I
17 | guess the bigger issue is that there's no disagreement that
18 | certain cases were selected to be tried next. No
19 | disagreement with that. Right?

20 | MS. FLEISHMAN: Absolutely.

21 | JUDGE WIGENTON: So we've got to do that anyway.
22 | So I don't think it hinders your ability to find out what
23 | you're going to do with the 300-something cases that are,
24 | filed at all.

25 | But I think we need to get some kind of

1 understanding specifically as to what we're going to do next
2 four cases. So they take precedence, obviously, over the
3 others in terms of trial only. And while they're very
4 important, I'm sure, it just -- in terms of trying to set
5 trial dates and trying to actually service notice and
6 schedule, so -- but I think that is fine. We can
7 certainly -- we are going to -- I think that's outlined in
8 the eight cases, that proposal?

9 MS. FLEISHMAN: Yes, Your Honor.

10 JUDGE WIGENTON: I think it sounds aggressive,
11 quite honestly, but, you know.

12 MS. FLEISHMAN: It can be less. It can be more.

13 JUDGE WIGENTON: Right.

14 MS. FLEISHMAN: I am not sure. I was just -- I'm
15 just trying to get --

16 JUDGE WIGENTON: The ball rolling.

17 MS. FLEISHMAN: -- the ball rolling.

18 JUDGE WIGENTON: So -- okay. So primarily your
19 focus for the at least two more trial days, all right, and
20 then go through case-specific -- case-specific discovery on
21 these four cases. But for my purposes, I'm assuming I can
22 give you two trial dates -- the next two.

23 Is that --

24 MR. TANNER: That's correct.

25 Or you could give us four, if you'd rather do that.

1 | But at least two would be preferable.

2 | JUDGE WIGENTON: Okay.

3 | MR. TANNER: Thank you.

4 | JUDGE WIGENTON: What I would suggest is once you
5 | know which cases are next, just let me know. And if you can
6 | agree on a time frame, great. If you can't, my fall trial
7 | schedule is very packed, so I know that that's probably not a
8 | realistic time for me. Maybe on your best day December, but
9 | even that, I'm going to have several criminal matters that
10 | are going to kind of go right into December, so I would
11 | suggest you probably do look to early 2016. But, you know,
12 | you can agree on some time frames, and I'll set trial dates
13 | on those. And just let me know whose matter is
14 | specifically --

15 | MR. TANNER: Yeah, maybe take one -- I mean, does
16 | like February, May, work for you guys?

17 | MS. COLE: You know, my preference would be
18 | January, February, March instead of May.

19 | MR. TANNER: Let's confer. January is a little bit
20 | of problem because of some travel schedules for some of the
21 | lawyers, but --

22 | JUDGE WIGENTON: Yeah, and I --

23 | MR. TANNER: As long as we're looking at for -- I
24 | just wanted to make sure you weren't looking late '16, so we
25 | can get them in early --

1 JUDGE WIGENTON: Yeah, January's tight for me,
2 so --

3 MS. FLEISHMAN: Okay.

4 JUDGE WIGENTON: -- but you have some --

5 MS. FLEISHMAN: Good --

6 MR. TANNER: Why don't we submit a letter with our
7 case picks -- sorry, I'm taking over here.

8 Why -- if you don't mind, we can send a letter with
9 our case picks with here's windows when we think it will
10 work, and we can submit it to Your Honor, and if we disagree,
11 we'll put a couple of sentences on our positions, if that
12 sounds fair.

13 JUDGE WIGENTON: That's fine. And then I'll set
14 the trial date on the next two, and as we tee them up, we
15 could probably the first one, I'll probably set the trial
16 date on the third one and we can kind of go from there.

17 MS. COLE: And just for the record, and plaintiffs'
18 position is we have not waived Lexecon on any of these cases.
19 The only two cases we've waived Lexecon on are Brady and
20 Ruttenbur. And I will need to confer with my clients about
21 waiver of Lexecon, and then obviously, subject to the Court's
22 rulings on those briefs.

23 THE COURT: And on that issue, do you want to also
24 speak with defense counsel, after you've spoken with your
25 client about a joint proposed briefing schedule?

1 MS. COLE: Of course, Judge.

2 THE COURT: Okay. Sounds good, so, waiver --
3 proposed schedule.

4 JUDGE WIGENTON: -- this issue with Lexecon is one
5 that we've discussed before, and I know the positions are
6 very -- are vastly different, so I -- it's a motion that you
7 can agree on a briefing schedule for, but I'll take care of
8 it. So you guys can work that out in terms of just timing,
9 whenever and you agree on, it's fine with me.

10 MS. COLE: Is there like a limitation on your
11 available hearings in the next four weeks or so?

12 JUDGE WIGENTON: I don't -- you know, how I -- in
13 school. I don't know even that we have here. So we can't
14 assume that there'll be a hearing. I don't know that I
15 have -- I have to see where you submit.

16 MS. COLE: Okay.

17 JUDGE WIGENTON: So let me do that and let me look
18 at everything. And then I'll be able to --

19 MS. COLE: Thank you, Judge.

20 UNIDENTIFIED SPEAKER: He's -- he's okay.

21 MALE SPEAKER: Thank you, Your Honor.

22 THE COURT: Not a problem.

23 Okay. With that, if you could tell us about the, I
24 guess, status of the MDL overall your efforts at mediation, I
25 believe.

1 MR. TANNER: Sure. And plaintiff put this on the
2 agenda, and, Wendy, I don't know if you had anything in
3 particular you wanted to talk about other than you want me to
4 give a report on where we are on these cases.

5 Is that kind of what you're looking for?

6 MS. FLEISHMAN: It would be great. I think the
7 Court needs a report.

8 MR. TANNER: Sure. Okay. You were standing. I
9 didn't know if you were going to sit.

10 And just to clarify, in 10 days, then, Your Honor,
11 we'll give you the four case picks, the trial -- or suggested
12 trial dates, and a briefing schedule.

13 Is that what you're looking at?

14 THE COURT: Yes.

15 MR. TANNER: Okay.

16 On the -- on the MDL, just to give an overview, and
17 then I can answer specific questions, we've had 601 cases put
18 into the MDL since inception. Right now, there are 371 cases
19 pending. One of those has settled -- actually now two of
20 those have settled in principle, and 14 of those are not
21 Durom cups. A lot of times people file them and we learn
22 they're not the right cup.

23 THE COURT: Okay.

24 MR. TANNER: So that takes us down to 355, now, but
25 356, cups -- cases, excuse me, that are legitimate Durom cup

1 cases that are pending.

2 The orders of the Court under the first case
3 management orders when a case is filed, they're supposed to
4 provide records to the defendants so that the defendants can
5 analyze the cases, and then we can set up a discovery -- or
6 excuse me, a settlement process to try and resolve the cases.

7 Of those 356 cases, 302 of them, we still have not
8 any records or have received insufficient records; in other
9 words, not the records required by the Court's order. Of
10 those that we have, we have received 48 where we have
11 sufficient records and 6 that we've just gotten very recently
12 that we're reviewing.

13 The Court also established an opt-out process by
14 which parties, plaintiffs who did not wish to pursue their
15 cases in discovery and be deposed, but wanted to just go to a
16 mediation or a resolution process, 161 of those have either
17 opted out or otherwise indicated that they prefer to mediate.
18 So of the 48, 20 -- that we have sufficient records on, 25 of
19 those have indicated they do not wish to litigate and conduct
20 discovery, so there's only 23 cases of plaintiffs who have
21 indicated they want to pursue, or stated another way, have
22 indicated they do not want to -- have not opted out, that we
23 have even sufficient records on. And I can go through what
24 those cases are.

25 We've settled 1656 cases. 22 -- this is

1 nationwide, since our last --

2 THE COURT: 1600?

3 MR. TANNER: 1,656.

4 THE COURT: Okay.

5 MR. TANNER: 22 since we were together in March.

6 Mediations are still running at a 91 percent success rate.

7 We have several -- we have 11 MDL cases of the 25
8 we have sufficient records that are in active negotiation or
9 are being scheduled at the present.

10 So that front is still moving along. Obviously
11 trying cases has an effect on that schedule, which we all
12 knew going into this, so that's kind of an overview of where
13 we are on MDL cases. I'm happy to answer questions if you
14 have any.

15 MS. FLEISHMAN: The plaintiffs' view is contrary,
16 Your Honors, and I need to get -- I have a list of the -- I
17 have the documents, and I will reach out to all the
18 plaintiffs' lawyers on the docket list to find out what their
19 status is so we can get a more up-to-date report to the Court
20 within 10 days, and that way, I think the Court will know
21 really what you're, you know, in charge of.

22 And then -- because we have gotten many, many
23 complaints that people have tried to settle the case, they've
24 tried to schedule mediations, and they've gotten no response.

25 So I think I need to work with counsel for the

1 | defense so I can see his list and we can reach out to those
2 | plaintiffs' lawyers and see what's going on and perhaps get
3 | this more under control for the Court, because what the --
4 | counsel's telling us is quite different than what
5 | Mr. Campbell's telling the Court. So I want to figure out
6 | what's going on.

7 | JUDGE WIGENTON: So, Mr. Tanner -- are you
8 | disagreeing with what Mr. Tanner has said in terms of what's
9 | been resolved?

10 | MS. FLEISHMAN: Not in terms what's been resolved,
11 | but in terms of what -- what -- every case has to go to
12 | mediation under the original order. It's not an opt-out.
13 | It's -- that's the process.

14 | I represent lots of cases in which we went to
15 | mediation, my clients weren't able to med- -- weren't able to
16 | resolve the case, and that -- and they have all the
17 | discovery, and I haven't heard anything about moving forward.

18 | I know that that's true of other counsel. I want
19 | to now reach out to all the counsel on the cases -- here's
20 | the docket -- I want to reach out to all the counsel in the
21 | cases here, Your Honors, and find out exactly what's going
22 | on, and then I'll report back to the Court. Just tell me
23 | what --

24 | JUDGE WIGENTON: All right. I mean, if there's an
25 | issue, I mean, we --

1 MS. FLEISHMAN: Yes.

2 MR. TANNER: I'd like to know who's been calling
3 you, because they're not calling us.

4 MS. FLEISHMAN: Okay. Well, we've had --

5 MR. TANNER: Do you have --

6 MS. FLEISHMAN: I am not -- I am not going to
7 engage with you right now. I'll -- I'll have a
8 meet-and-confer. I'd asked you if you wanted to do it before
9 we came here today. So we'll do that.

10 MR. TANNER: No, you didn't.

11 THE COURT: That's all right.

12 MS. FLEISHMAN: That's all right. So -- and then
13 the second issue is I will get -- if it's possible,
14 Your Honors, I know you're going to be busy with these other
15 motions. But if we can also schedule a tiered discovery for
16 the cases that are -- even of the 25 that counsel's referring
17 to, so we can get this moving and at least either have them
18 trial-ready, or they -- or Your Honors could decide whether
19 you want to transfer them back to the transferor boards, but
20 we'll --

21 JUDGE WIGENTON: Well, we obviously can't do that,
22 because we have to do -- this Lexecon issue is sort of
23 looming, so we cannot do that.

24 So we have to wait until that issue is decided.
25 Once that's decided, it may give some clarity on whether

1 that's even an option or not.

2 And in the event that it's not an option, are you
3 proposing, what, in the next 25 cases, to set trial dates on
4 them? Or you say you need discovery completed.

5 MS. FLEISHMAN: Let's get the discovery completed.

6 JUDGE WIGENTON: Okay.

7 THE COURT: The case-specific discovery completed,
8 and then Your Honor -- Your Honor can look at a briefing on
9 transferring them back to the courts where they were
10 originally filed, the transferor courts to see if that's
11 possible.

12 JUDGE WIGENTON: They were -- two different --

13 MS. FLEISHMAN: I think we are, Your Honor.

14 JUDGE WIGENTON: I thought we were talking -- we
15 just discussed that they're going to brief the issue of the
16 Lexecon and transfer cases. Right?

17 MS. FLEISHMAN: No, Your Honor. I think they're
18 going to brief the issue of whether the law of New Jersey
19 will -- the District Court's procedural law will apply to the
20 trials here, or if the Court has to apply the law of the --

21 (Simultaneous conversation)

22 JUDGE WIGENTON: That's not what I understood.

23 (Simultaneous conversation)

24 MS. FLEISHMAN: That's what --

25 JUDGE WIGENTON: Okay.

1 MS. FLEISHMAN: -- the Lexecon issue is,
2 Your Honors.

3 JUDGE WIGENTON: No.

4 MS. FLEISHMAN: I don't understand what --

5 MR. TANNER: The Lexecon issue is whether the case
6 is tried here or tried where the case was originally filed.

7 MS. FLEISHMAN: Right, but they can -- but they can
8 also ask this Court to apply the law of their own state.
9 It's another way of addressing the Lexecon issue.

10 MR. TANNER: Well, this Court -- just like in the
11 trial we had with Ms. Brady, this Court -- the choice of law
12 rules typically apply the state where the implant and
13 revision were in Louisiana. I don't think that's going to be
14 much of an issue.

15 (Simultaneous conversation)

16 JUDGE WIGENTON: Right. I -- apply Louisiana law.
17 That's not an issue right now. That's not our issue.

18 Our issue is whether these other cases remain here
19 or do they go back to the courts they originally -- that's
20 the issue. And until that issue is decided, because there's
21 a dispute as to whether that waiver, in fact, took place.
22 Defendants say that waiver did take place. The plaintiffs
23 say it did not take place. So that's the issue that's teed
24 up for a decision, a decision from me.

25 MS. FLEISHMAN: Your Honor also has the authority

1 | to send the cases back to the -- to --

2 | (Simultaneous conversation)

3 | JUDGE WIGENTON: Absolutely.

4 | MS. FLEISHMAN: -- cases back to the places where
5 | they were originally filed.

6 | JUDGE WIGENTON: Absolutely.

7 | MS. FLEISHMAN: Or -- or to ask other courts to
8 | address these issues, these ongoing issues and try to get
9 | the -- I mean the trials settled or trials tried.

10 | So we're just trying to come up with a way that we
11 | can present you with at least 25 more cases that are ready of
12 | the 368 cases that are -- or 370 cases that are pending
13 | before Your Honor.

14 | And then I want to report to the Court about the
15 | rest to find out why the discovery's missing. We'll get the
16 | discovery to counsel. And we'll get these cases ready for
17 | Your Honor. And then Your Honor can decide what to do with
18 | them.

19 | JUDGE WIGENTON: Okay. So now I'm confused. I
20 | thought we just -- we had an agreement that I will decide on
21 | what rules to -- whether there's a waiver or there's not a
22 | valid waiver.

23 | MS. FLEISHMAN: Your Honor can decide to send them
24 | back to the transferor court --

25 | JUDGE WIGENTON: Right.

1 MS. FLEISHMAN: -- as a discretionary decision,
2 because --

3 JUDGE WIGENTON: But that's what you're going to
4 brief. Right?

5 MS. FLEISHMAN: We're actually going to brief both
6 issues. Okay?

7 JUDGE WIGENTON: Okay. Because you've got to
8 brief --

9 MS. FLEISHMAN: Right. So that -- I just want to
10 make sure that I understand -- I didn't understand that
11 that's what Your Honor wanted. So I can -- and we can
12 definitely do that.

13 JUDGE WIGENTON: It's not what I want. This is
14 what you all put on -- I didn't ask for --

15 MS. FLEISHMAN: There's two issues here. Counsel
16 can -- can move this Court, send the cases back to the
17 transferor court on a discretionary basis because there's --
18 the case is ready for trial. I mean, that's what certain
19 cases have --

20 (Simultaneous conversation)

21 MS. FLEISHMAN: -- courts have done.

22 JUDGE WIGENTON: They say -- and that may be.

23 All I'm suggesting to you is that they say the
24 waiver -- the defense maintains that the waiver in this case
25 was such that you cannot just simply send it back.

1 Now, do I have discretion to do it? Absolutely.

2 But that's not something that I'm willing to do
3 until I at least get it briefed out and have an opportunity
4 to make a decision. I thought I was clear on my --

5 MS. FLEISHMAN: A hundred percent, now, Your Honor.
6 Thank you.

7 JUDGE WIGENTON: Okay.

8 So -- so all I'm saying is to now jump to next 25,
9 to me that's premature. We at least have to decide are they
10 staying here? Are they not staying here?

11 MS. FLEISHMAN: They don't have any depositions
12 done yet. They don't have any additional discovery
13 exchanges. They just need to do just those basic steps of
14 the plaintiffs' depositions and the doctors' depositions --

15 JUDGE WIGENTON: I -- I think they've got to -- at
16 some point anyway. Right?

17 MS. FLEISHMAN: Right. So --

18 JUDGE WIGENTON: I don't have any problem with
19 that.

20 MS. FLEISHMAN: -- we're asking that it get -- that
21 it get started now. That's all. I mean, we just need to
22 report to Your Honor what -- that we're getting it moving,
23 that we're not letting all these cases languish.

24 JUDGE WIGENTON: No, and able -- you guys -- that's
25 for sure.

1 MR. TANNER: I'm a bit confused, because Judge
2 Arleo ordered in December 2013 that they could go forward
3 with discovery. And we've had two --

4 JUDGE WIGENTON: I thought they were going forward.

5 MR. TANNER: -- two plaintiffs want to go forward
6 with discovery. I don't know what the issue is on that
7 front.

8 What was ordered was the plaintiffs had to produce
9 these records. And we've had very few do that. And when we
10 get to that point, just so the record's clear, moving
11 forward, as Ms. Fleishman suggests, on the -- it's actually
12 23 that we have sufficient records on, we have a little bit
13 of a problem on that, because then the plaintiffs are in
14 essence self-selecting which cases by forward by which ones
15 they decide to give us records on, which we think is unfair.

16 So when we get to that point, we think there needs
17 to be, perhaps, a reinforcement of the order. You need to
18 get us the records so we can review them, or dismiss your
19 case. And then we can go forward with an analysis and
20 discovery, et cetera.

21 But there's been an order already on discovery.

22 THE COURT: Well, one thing is clear is that you
23 folks need to meet and confer about what cases have provided
24 what you believe are the records, what cases haven't, and
25 what plan that you've met and conferred on with regard to

1 | those remaining cases before presenting it back to the Court.

2 | MS. COLE: I agree, Judge.

3 | Could we just ask that the defendant provide us
4 | with the list of the cases that they believe, the 25 that --
5 | or 20, whatever, that they have sufficient records on, the
6 | ones that they believe have opted in to discovery. Just so
7 | that we have -- because part of our issue is is that we kind
8 | of have to send out emails where we ask plaintiff lawyers to
9 | give us information, and, you know, you never know if they're
10 | in trial and that's why you're not hearing from them,
11 | et cetera.

12 | THE COURT: Mr. Tanner, I'm sure you have no issue
13 | with giving them the information.

14 | MR. TANNER: They have the same access. I have no
15 | problem with giving them that information.

16 | MS. FLEISHMAN: And it would be helpful for me --
17 | the information on the cases that are noncompliant. And so
18 | that we can reach out to them and tell them that there's a
19 | court order and they're not compliant and that they need to
20 | go their discovery to you right away.

21 | MR. TANNER: You want a list of the 329 cases?

22 | MS. FLEISHMAN: Yes, yes. That's the only -- I
23 | think that's the only way we can actually --

24 | MR. TANNER: Put something like that together for
25 | you.

1 MS. FLEISHMAN: Okay.

2 MS. COLE: Thank you.

3 MS. FLEISHMAN: That would be great. Thanks.

4 THE COURT: Look at that: We're all agreeing.

5 Okay.

6 Okay. I believe the only remaining issue is the
7 metallosis issue. Am I wrong?

8 MS. FLEISHMAN: Yes, Your Honor, you're right.

9 THE COURT: Defense counsel?

10 MR. CAMPBELL: Sure, Your Honor.

11 Since we met, I think it was in March, Your Honor
12 requested additional information from the parties, which has
13 now been provided. In short, the plaintiffs have reached out
14 to some of the plaintiffs' counsel in the MDL and have gotten
15 some information from them about what cases involve
16 metallosis. At the same time, the defendants have done an
17 analysis of which cases have pled metallosis and in which
18 cases we have medical evidence of metallosis. All relates to
19 plaintiff's request to reopen common issue discovery on
20 metallosis.

21 What all this information shows at the end of day,
22 it just bolsters the fact that plaintiffs are looking for a
23 redo on common issue discovery, common issue experts, on an
24 issue that they've known about since the beginning of the
25 litigation, an issue that they've already taken fact

1 | discovery on, an issue they have already taken expert
2 | discovery on, an issue that we've already filed Daubert
3 | motions on expert opinions related to metallosis. We've
4 | already taken expert depositions on the issue. The parties
5 | agreed a year ago to close fact discovery by agreement of the
6 | parties and with Judge Arleo without a carveout on
7 | metallosis.

8 | So all this confirms that they're simply looking to
9 | redo what they had three years to do, did not do to their
10 | satisfaction, apparently, and are now looking for the Court
11 | to reopen common issue discovery, common issue experts on
12 | metallosis.

13 | In their letter, plaintiffs point to Sherilyn
14 | Thompson [phonetic] an example of a plaintiff who is
15 | potentially affected by this issue. And this is a perfect
16 | example of what I'm talking about. Ms. Thompson filed her
17 | case in November of 2013, seven months before common issue
18 | discovery closed in the litigation. And in her complaint --
19 | and I quote: In consultation with her doctor, the doctor
20 | stated that Ms. Thompson was a candidate for revision, given
21 | her elevated ion levels, which is an allegation related to
22 | metallosis.

23 | The complaint went on to say, quote: The revision
24 | surgery performed in January revealed a massive pseudotumor
25 | that was removed. The pseudotumor was caused by, according

1 | to her medical records, the result of metal-on-metal contact
2 | of the Durom cup.

3 | So Ms. Thompson is a plaintiff who knew that she
4 | had metallosis at the time that she filed, seven months
5 | before discovery closed, but plaintiffs waited almost a year
6 | before asking this court to allow that discovery to go
7 | forward.

8 | Zimmer's analysis of this issue further bolsters
9 | the fact that this was well-known at the time that the
10 | litigation started. We went back and looked at all the cases
11 | filed in the MDL through December 31, 2012, and what we found
12 | was that 30 percent of those cases pled metallosis, 38 cases
13 | out of 127 that had been filed, and 25 percent for which
14 | Zimmer had sufficient medical records, had evidence of
15 | metallosis. That was 27 cases out of 110 for which we had
16 | records. So 30 percent and 25 percent pled versus having
17 | evidence of metallosis. And that was 17 months before common
18 | issue discovery closed. So to say that this is a new issue,
19 | just doesn't bear out based on the information the parties
20 | have provided.

21 | In addition, plaintiffs have already taken
22 | discovery on this issue or certainly had to take -- had the
23 | opportunity to take as much discovery on this issue as they
24 | would have liked during that three-year period. There have
25 | been document requests, interrogatories, depositions in which

1 | this issue has been discussed, 16 Zimmer company witness
2 | depositions over 25 days. One of the -- or multiple
3 | witnesses talked about this issue, but one in particular was
4 | asked a lot of questions about this. And, in fact, the
5 | Zimmer witness who led the investigation into metallosis was
6 | deposed over three days. Every opportunity to ask those
7 | questions, and they chose not to do it.

8 | In addition, experts have been disclosed. Both
9 | plaintiffs and defendants have disclosed multiple experts who
10 | have offered specific opinions on metallosis. The parties
11 | have filed Daubert motions as to those opinions. Those
12 | motions have now been ruled on. We've filed summary judgment
13 | motions based on those issues. Those motions have now been
14 | ruled on.

15 | So, again, all this shows the plaintiffs are
16 | seeking to redo what they had every opportunity to do, in
17 | many cases what they have already done, already taken that
18 | discovery, and are looking for this Court to reopen that a
19 | year after discovery closed to do additional fact discovery,
20 | additional expert discovery, et cetera.

21 | So we'd ask the Court not to reopen discovery as it
22 | relates to metallosis for those reasons.

23 | THE COURT: Okay.

24 | MR. CAMPBELL: Thank you.

25 | THE COURT: Ms. Fleishman? Or Ms. Cole?

1 MS. FLEISHMAN: Ms. Cole is going to --

2 MS. COLE: I'm going to address the discovery that
3 has already happened.

4 THE COURT: Pull that microphone a little bit
5 closer. Thank you.

6 MS. COLE: So I think the Sherilyn Thompson being
7 filed seven months before discovery closes is a really
8 relevant example. I was dealing with a docket of 108 cases
9 in my own firm, only one of which had any indication of
10 metallosis. We did -- as discovery documents came up that
11 had metallosis in them, we did question those witnesses,
12 specifically the ones in London, because it wasn't in
13 anybody's best interest to go back to London.

14 But there -- there was additional document
15 requests. They -- we didn't have a final version of the
16 health hazard evaluation on the metallosis. There were
17 additional witnesses that we would have requested on the
18 metallosis issue. And frankly at the time that we were
19 making all of these decisions throughout the discovery
20 period, there was not enough metallosis cases on anybody's
21 radar to make it worth it.

22 In our experts, Dr. Kitziger -- Dr. Kitziger, who's
23 mainly a specific causation expert, but he did issue a
24 general opinions report. His general opinions report simply
25 has one or two sentences in which he references the

1 metallois literature, because we wanted to leave the door
2 open for him to talk about metallois literature. But none
3 of the cases that he specifically reviewed had a metallois
4 issue, and so he's never been deposed on his beliefs about
5 metallois. He's never given opinions about metallois.

6 Dr. Roy Bloebaum, they point to his report as
7 evidencing some sort of metal on metal opinions. That was
8 never an opinion that we hired him to give. It's not my
9 opinion that his report gives it. It is -- he is simply a
10 coatings expert. He talks about the coating.

11 Now, whether or not the coating flakes off in the
12 body is different from the metallois issue of whether or not
13 the stem rubbing against the ball causes metallois, which is
14 what most of these plaintiffs, as far as I know, claimed.

15 The only case the general causation expert from the
16 plaintiffs' side that give any extensive metallois opinions
17 was Dr. Jim Grimes. Dr. Grimes' primary responsibility in
18 this litigation was to do the cadaver study. He did a study
19 where he implanted two cups into cadavers and then did some
20 testing to see if those cups got into the right place and to
21 see the effect of clamping on the cup; in other words, did it
22 clamp down when you put it in the body in the way that it was
23 supposed to be implanted. So some of his opinions touch upon
24 metallois when it comes to deformation. Again, he did not
25 implant anything relating to the stem and the trunnion. He

1 | didn't -- he didn't have anything to do with those parts
2 | rubbing together. He has some general opinions on it, and
3 | what the defendants figured out was if you asked Jim Grimes a
4 | question, he's going to answer it. And it doesn't matter if
5 | it's in his report, it doesn't matter if it's something I'm
6 | paying him to give, he will give you his opinion. So there
7 | were a lot of opinions elicited from him, but they were not
8 | the opinions that we were really pushing for in this thing.

9 | And as to the first two trial picks, when those
10 | Daubert motions were filed, we specifically withdrew his
11 | metal opinions, because they weren't relevant to those cases.
12 | Those cases did not have metallosis issues.

13 | And it was always our intention that if there was
14 | another round of bells selected, that we would request
15 | specifically the ability to -- to select some metallosis
16 | cases now that it's a clear that that's part of this
17 | litigation. When we selected the first rounds of metallosis
18 | case -- or the first rounds of bellwether cases, there simply
19 | were not enough metallosis cases that were eligible to be
20 | picked that any of us thought metallosis was an issue. And
21 | as we've completed common issue discovery, we had to make
22 | decisions based on the docket that was in front of us, and
23 | the docket that was in front of us was not a metallosis
24 | docket. Over the year since that discovery has closed, every
25 | intake call I've gotten has had to do with metallosis. And

1 | so it's clear that the character of these cases is changing,
2 | which makes perfect sense from a biological standpoint.
3 | You've got a loose cup that never achieved osseointegration.
4 | You're going to most likely have problems that drive you to a
5 | revision quicker than the people who had metallosis shavings
6 | coming off in their blood and the metal building up in their
7 | systems over time causing problems.

8 | And just to remind Your Honor, it wasn't until
9 | 20 -- is it '11 that the FDA -- it wasn't until 2011 that the
10 | FDA issued a finding after multiple hearings and multiple
11 | reaching out for information from the orthopedic community
12 | that they recommended that American surgeons test for
13 | metallosis. And so any of our plaintiffs that came to us
14 | before 2011, it was very rare, if not unheard of, for there
15 | to be any blood tests for metallosis. And so it was only
16 | after 2011 that the plaintiffs started getting tested for
17 | that. And even then, my firm didn't see heavy metallosis
18 | cases until last year.

19 | So although there has been some discovery, it was
20 | very limited at that there was never a reason for us to push
21 | for more discovery. And frankly, as liaison counsel, I was
22 | unaware that there had been this many metallosis cases filed.
23 | And, you know, we would request that discovery be reopened to
24 | deal with the unique circumstances of the changing face of
25 | the litigation.

1 THE COURT: Okay. The common issues discovery
2 ended December of 2013?

3 MS. COLE: No.

4 MR. CAMPBELL: May of 2014.

5 THE COURT: I'm sorry, May of 2014, Your Honor.

6 MS. COLE: And then, Andy, the expert discovery
7 went on past that. Correct?

8 MR. CAMPBELL: It did. I'm sorry, it was May of --
9 it was May of 2014. And then expert discovery went on until
10 September.

11 MS. COLE: Right.

12 MR. CAMPBELL: Of 2014. And then we tried -- in
13 November.

14 MS. COLE: Correct.

15 And so the -- and the medical literature has
16 changed substantially. In 20- -- beginning in 2013 and
17 certainly throughout the last two years is when we've really
18 seen a surge of medical literature on this issue, which makes
19 sense. They began looking at it hard core in 2011. It takes
20 several years to get your studies done and get them
21 published. And so, you know, all of our experts, both sides,
22 have a whole new body of literature to rely upon. This whole
23 new body of literature would drive us to ask different
24 questions in discovery, to push for different things in
25 discovery. There simply are things that were left undone.

1 And at the time discovery closed, I did not understand the
2 need to do them.

3 THE COURT: Okay.

4 MR. CAMPBELL: Your Honor --

5 THE COURT: It's their application so I'm going to
6 give them the last word. Is there anything new?

7 MR. CAMPBELL: I'm sorry.

8 THE COURT: It's their application, so I'm going to
9 give them the last word.

10 MR. CAMPBELL: Yeah, it's fine, I just want to -- a
11 couple -- a couple things. Did you have something to add?

12 But I think Ms. Cole has hit the nail on the head.
13 They're liaison counsel. They're not representing only their
14 109 plaintiffs. And Ms. Cole's comment was there was not
15 enough to make it worth it, and this wasn't on our radar.

16 Well, as of the end of 2012, 30 percent of the
17 cases had pled metallosis. 20 percent of the cases had
18 medical evidence of metallosis. And to say that that wasn't
19 on their radar, I think just isn't -- doesn't bear out.

20 The Daubert motions that were filed in the case
21 were as to all common issue experts, including Dr. Grimes and
22 his opinions on metallosis. We thought the issue was put to
23 bed. We thought plaintiffs had what they needed. We moved
24 to dis- -- or to eliminate those opinions at that time, and
25 we thought the issue was done.

1 And then this point about the FDA issuing a
2 recommendation in 2011 to test for metallosis, well, that was
3 three years before common issue discovery closed. And
4 although I know I haven't provided to the Court and I don't
5 have a copy here, I'm looking at a letter this morning from
6 2010 where Mr. Johnson, one of the lawyers who created the
7 MDL was writing to one of the plaintiff's doctors saying,
8 please test for cobalt chromium levels in this plaintiff.

9 So they were asking surgeons to look at this issue
10 before FDA issued their recommendations.

11 So with that, I'll turn it back to the plaintiffs.

12 Thank you.

13 THE COURT: Okay. Thank you.

14 Last word?

15 MS. COLE: Judge, I would just say that I don't
16 have access to the medical records that have been provided by
17 the other plaintiffs. That's not the way these scheduling
18 orders and discovery orders have been -- have been done. I
19 have access to my records and anybody who I can -- you know,
20 who I reach out to.

21 And so based upon what Ms. Fleishman and I were
22 seeing in our own dockets, we just never understood that
23 these -- that they were receiving medical records about --
24 about metal-on-metal issues in 25 percent of the cases. We
25 had no way of knowing that. It certainly was not

1 representative of my docket.

2 And the belief is is that based upon our review,
3 that it's 48 percent currently, which might make sense
4 because they're saying there is a significant amount of
5 records they have received.

6 THE COURT: 48 percent of the current cases?

7 MS. COLE: Of current cases.

8 THE COURT: Okay. Thank you.

9 MR. CAMPBELL: Your Honor, it was pled. It was in
10 the complaints.

11 THE COURT: They got the last word.

12 MR. CAMPBELL: They had -- they had access to it.

13 THE COURT: Now, you have to give them a chance to
14 stand up again. Because you slipped that one in.

15 MR. CAMPBELL: I understand, Your Honor. I
16 withdraw.

17 THE COURT: Anything else?

18 MS. COLE: No, Judge.

19 THE COURT: Okay. Thank you very much.

20 All right. I've heard arguments on both sides, and
21 I will reserve decision. It will be out this week. Okay?
22 Anything else for today?

23 MS. COLE: One item, Judge. We are still waiting
24 on a decision from you on ordering them to update their
25 revision rate. At this point the revision rate that we've

1 | been provided was through December of 2013. So it's a full
2 | year and a half since that date. And, you know, since we
3 | have two more -- coming up, it would be nice to have a new --
4 | new data point.

5 | MR. CAMPBELL: And, Your Honor, the only thing I
6 | would say on that point is we did offer our comments to that
7 | in the last status conference. To the extent that issue is
8 | still -- it's still open, I'd encourage you to go back and
9 | look at --

10 | THE COURT: Has that transcript been put up on the
11 | record in the docket?

12 | MR. CAMPBELL: It has been put on the docket.

13 | THE COURT: Okay. I'll review that and get you an
14 | answer on that, then. Because I thought I already did.
15 | Okay. Review last conference.

16 | MR. CAMPBELL: Unless you'd like to hear from me on
17 | that.

18 | THE COURT: Okay. I thank you all very, very much.
19 | A pleasant day to all. We're adjourned.

20 | UNIDENTIFIED SPEAKERS: Thank you.

21 | (Conclusion of proceedings at 4:10 P.M.)
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Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 40 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*

16th of June, 2015

Signature of Approved Transcriber

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