

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 RECORDED OPINION
BY THE HONORABLE STEVEN C. MANNION
UNITED STATES MAGISTRATE JUDGE

This oral opinion has been reviewed and revised in accordance with L. Civ. R. 52.1

APPEARANCES:

For the Plaintiffs: No one was present

For the Defendant: No one was present

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1 (Commencement of proceedings)

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3 THE COURT: On the record in the matter of Zimmer
4 Durom hip cup products liability litigation, Docket
5 09-cv-4414 MDL.

6 Before the Court is plaintiffs' informal motion to
7 amend the case management schedule to reopen common issue
8 discovery related to metallosis. Defendant opposes the
9 application. I have reviewed the parties' submissions. Oral
10 argument was heard earlier today.

11 Plaintiffs assert that discovery should be reopened
12 for the limited purpose of conducting common issue discovery
13 related to metallosis because there is a significant number
14 of and proportion of the total cases and MDL plaintiffs that
15 have claims of metallosis. Docket Entry 701. Pursuant to
16 the previous conference, plaintiffs were instructed to obtain
17 data regarding plaintiffs affected by metallosis. Of the 224
18 responding plaintiffs, 108 or 48 percent have evidence of
19 metallosis. Id. Thus, plaintiffs assert this percentage is
20 basis alone for further discovery regarding metallosis.

21 Zimmer asserts additional discovery on metallosis
22 is not warranted because this is not a new issue in the MDL.
23 In fact, Zimmer asserts that through 2012, 30 percent of new
24 Zimmer complaints filed included allegations of metallosis.
25 Zimmer further asserts that following an investigation Zimmer

1 | conducted in 2009 on metallosis, MDL plaintiffs took fact and
2 | expert discovery on metallosis, which included document
3 | requests related to Zimmer's investigation. Lastly, Zimmer
4 | asserts both parties disclosed common issue experts who
5 | opined to the metallosis issue in the case during fact
6 | discovery. Thus, Zimmer asserts that this issue was widely
7 | known about and therefore plaintiffs should not be entitled
8 | to additional discovery.

9 | I note that during oral argument defense counsel
10 | noted that the FDA in 2011 came out with a significant ruling
11 | regarding metallosis and that plaintiffs' counsel has
12 | represented they had pleadings regarding metallosis in 2012
13 | and 2013.

14 | Magistrate judges may consider and decide
15 | nondispositive pretrial matters pursuant to 28 U.S.C.
16 | § 636(b)(1)(A). This application concerns a nondispositive
17 | pretrial matter. A pretrial order "controls the course of
18 | the action unless the court modifies it."
19 | Fed. R. Civ. P. 16, paragraph (D). Prior to seeking a
20 | modification to a schedule, parties must confer regarding a
21 | proposed modification, as required by Local Civil Rule 16.1,
22 | paragraph (F). Local Civil Rule 6.1 paragraph (A)(2)
23 | requires that requests to extend time be served prior to the
24 | expiration of the period sought to be extended.

25 | The at-issue scheduling order prescribed that

1 common issue discovery closed on May 30th, 2014. Docket
2 Entry 227.

3 Plaintiffs' request to open common issue discovery
4 was not made until almost one year after the close of that
5 discovery. At this point, the scheduling order may be
6 "modified only for good cause and with the judge's consent."
7 Fed. R. Civ. P. 16(b)(4).

8 When determining whether to reopen discovery, the
9 court considers whether it was "bad faith on the part of the
10 party seeking to call witnesses not listed in ... a pretrial
11 memorandum," the "ability of the party to have discovered the
12 witnesses earlier," the "validity of the excuse offered by
13 the party," the "willfulness of the party's failure to comply
14 with the court's order," "the party's intent to mislead or
15 confuse his adversary," "and ... the importance of the
16 excluded testimony." Meyers v. Pennypack Woods Homeowner
17 Association, 559 F.3d 894 at 904-05 (3d Cir. 1977), *overruled*
18 *on other grounds*.

19 Here, common issue discovery ended on May 30th,
20 2014, and all expert discovery related to common issues ended
21 on September 15, 2014. That is according to Docket Entry
22 227.

23 MDL plaintiffs have not shown that, despite
24 diligence, discovery related to metallosis could not have
25 been conducted where there is no evidence this is a recently

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Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 6 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

Date

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