

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MILLER, .
 .
 Plaintiff, .
 . Case No. 09-cv-04414
 vs. .
 . Newark, New Jersey
 ZIMMER HOLDINGS, INC., . August 18, 2015
 .
 Defendant. .
 .

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

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1 (Commencement of proceedings at 3:14 P.M.)

2

3 THE COURT: We're on the record *In re* Zimmer, CV
4 09-4414.

5 All right. Appearances beginning with the
6 plaintiff's counsel.

7 MS. FLEISHMAN: Wendy Fleishman for plaintiffs.

8 THE COURT: Okay. Welcome.

9 MS. COLE: Kyla Cole for plaintiffs.

10 THE COURT: Welcome.

11 MR. TAYLOR: Lindsey Taylor from Carella Byrne on
12 behalf of plaintiffs.

13 THE COURT: Welcome.

14 MR. BYRD: Kenneth Byrd with Lief Cabraser
15 Heimann & Bernstein on behalf of plaintiffs.

16 THE COURT: Okay. Welcome.

17 MR. BRASLOW: Good afternoon, Your Honor, Derek
18 Braslow, Pogust, Braslow & Millrood.

19 THE COURT: All right. Welcome, anyone else?

20 MR. SMITH: Terrence Smith, Davis Saperstein &
21 Salomon for plaintiffs.

22 THE COURT: Did you sign in?

23 MR. SMITH: I did.

24 THE COURT: You did. Okay. I'll find you
25 eventually.

1 MR. SMITH: Bottom right.

2 THE COURT: That's what got me. On the defense
3 side.

4 You folks want to watch him closely.

5 Welcome.

6 MR. TANNER: Joe Tanner, Faegre Baker Daniels on
7 behalf of defendants.

8 MR. CAMPBELL: Andrew Campbell, Faegre Baker
9 Daniels, defendants.

10 THE COURT: Okay. Welcome.

11 MR. FANNING: Good afternoon, Your Honor, Ed
12 Fanning from McCarter & English for defendants.

13 THE COURT: And welcome.

14 Okay.

15 MS. FLEISHMAN: And we have a call-in number.

16 THE COURT: Say, again. Uh-oh.

17 MS. FLEISHMAN: We do have a call-in number for the
18 Court.

19 THE COURT: All righty. And have they called in?

20 MS. FLEISHMAN: I think we have to call -- I have
21 to -- Your Honor has to call the number. Here, I have it.

22 THE COURT: All right. Just pause the record.

23 (Pause in proceedings)

24 THE COURT: You don't all have to scream, because
25 there's 30 -- I would --

1 MS. FLEISHMAN: 33.

2 THE COURT: 33 of you out there. Okay. Just a
3 reminder that we're, I guess, letting you folks listen in as
4 a courtesy. There's no recording of court proceedings other
5 than by the Court on the record.

6 Okay. Any questions for anyone out there --
7 record.

8 (Pause in proceedings)

9 MS. FLEISHMAN: The first issue on the agenda was
10 just how many cases are currently filed before the Court.
11 And I think that is always Mr. Tanner's expertise.

12 MR. TANNER: Sure, Your Honor, we can give an
13 update on the numbers in the MDL and the settled cases like
14 we have in the past. There have been 629 cases filed in the
15 MDL plus 30 cases that settled before they ever got to the
16 MDL.

17 Currently, remaining in the MDL, there are 397. 16
18 of those are not Duroms. They had a different implant.
19 They're still in the MDL. Six of those --

20 THE COURT: If everyone that's on the telephone,
21 please put your phones on mute, because I hear somebody's
22 speakerphone and moving the phone around, so please put them
23 all on mute. Thank you.

24 Please continue.

25 MR. TANNER: Sure. Of the 397 cases remaining in

1 | the MDL, six are not Durom cups. They're a different
2 | product. So those would be dismissed.

3 | And -- that's 16 of those. I'm sorry, Your Honor.
4 | And six are pending settlements.

5 | That leaves 375 cases left in the MDL.

6 | As far as the settlement report that we give,
7 | there's been 1679 hip cases settled. 20 have settled since
8 | the last conference we had on June 9th. There was a report
9 | in one of the letters about the number in the last six
10 | months. There have been 52 settled in the last six months,
11 | including 13 in the MDL and 52 that are pending in the MDL.
12 | So that's 19 in the MDL in the last six months. Plus, we've
13 | tried three as jury trials in the last six months on Durom
14 | cases.

15 | Mediation still is around 92 percent success rate.

16 | 426 have settled out 465. So those are the settlement
17 | numbers that the Court would ask, has always wanted us to
18 | report on, and the current number of cases in the MDL.

19 | THE COURT: Thank you very much. Appreciate that.

20 | Any questions?

21 | MS. FLEISHMAN: No questions, Your Honor.

22 | We were -- we interviewed a number of the lawyers.
23 | But I think -- many of them are on the phone. And we met
24 | with a number of them, two different -- on two different
25 | occasions. And many of the counsel told us of their own

1 | experiences where they -- they had tried to set up a
2 | mediation and the mediation was either canceled at the last
3 | minute or the mediation was canceled by Zimmer because they
4 | said they needed documents and then not rescheduled.

5 | And we were told that by several people who kept
6 | count of it. That's why we reported it to the Court.

7 | THE COURT: And you're referring to your docket --
8 | your letter Docket 41 -- 741. Correct? Yes.

9 | MS. FLEISHMAN: Yes. Yes, Your Honor.

10 | And so I'm just concerned that the mediation
11 | process in its current format is no longer working as well as
12 | it should and that we might want to consider doing a new
13 | process where the mediation process continues on a parallel
14 | course to a -- just a formal discovery process where
15 | plaintiffs file their -- you know, they file their cases,
16 | defendants file their answers, plaintiffs serve their -- the
17 | discovery that's required. Defendants do the same on the
18 | case-specific discovery.

19 | And then we come back and see how many --

20 | THE COURT: Pull that microphone closer --

21 | MS. FLEISHMAN: How many dep- -- I'm sorry.

22 | THE COURT: From the base, from the base, from the
23 | base, otherwise you'll pull it out.

24 | MS. FLEISHMAN: Oh, yeah, sorry.

25 | And then we can discover how many cases we have

1 remaining after that process, because I think that process
2 alone will illuminate what's really left.

3 THE COURT: And through the meet-and-confer
4 process, you got how far on that? Has there been any
5 meet-and-confer since the respective letters were received on
6 this issue?

7 MS. FLEISHMAN: We've tried to meet and confer. We
8 have not successfully done so.

9 THE COURT: All right.

10 Let me hear from defense.

11 MR. TANNER: Certain, Your Honor, just to give a
12 little bit of background, we were here before you on
13 June 9th, as you'll recall, and we asked at that time to --
14 for plaintiffs to identify who the plaintiffs' counsels were
15 that had questions about the settlement process or had
16 thought that they hadn't gotten mediation set, that type of
17 thing so we could answer those questions and clarify what was
18 going on.

19 We did -- we finally got that a couple of months
20 later at the end of July.

21 In June, June 17th, we sent the plaintiffs' liaison
22 counsel a list of every plaintiff, every case in the MDL
23 along with a list of whether they had sufficient records or
24 not sufficient records, et cetera. As we talked about last
25 time, that's kind of their job, but to help the process

1 along, we went ahead and sent them that list.

2 Finally, on July 27th, we got their list, and they
3 listed 64 different plaintiffs who they had claimed had
4 questions about the process or for one -- or one reason or
5 another, had a complaint about the process.

6 So in the couple of weeks since that, we've
7 investigated those. Of those 64 claims, five are not even in
8 the MDL.

9 THE COURT: So this is an update to your August 7th
10 letter?

11 MR. TANNER: Correct, Your Honor. And it
12 supplements -- there's part of that letter. Actually, this
13 is summary of that letter, Your Honor.

14 Of the 64 that they said had complained or had
15 questions, five are not even in the MDL, three have already
16 settled, one has a severe statute of limitations problem, and
17 we've since called that lawyer to talk to them about that.

18 THE COURT: That was one case, you said. Correct?

19 MR. TANNER: Correct.

20 THE COURT: Okay.

21 MR. TANNER: Two, we have absolutely no records on.
22 42, we have insufficient records on, and I'll come back to
23 that in a moment, Your Honor. And 11 of the 64 that they
24 said were complaining or had questions, had sufficient
25 records as required by CMO 1. Of those 11, two have settled;

1 | eight, we have offers either made or we've left messages or
2 | we are in the process of scheduling mediations; and one was
3 | mediated unsuccessfully.

4 | So of the 11 of the 64 that they said were an
5 | issue, there are only 11. Two have settled. One was
6 | unsuccessful mediation. And eight either have offers made or
7 | messages left or a mediation scheduled.

8 | Now, on the -- excuse me -- on the 42 where we've
9 | had insufficient records or no records -- there's 44 of those
10 | total -- we have since sent deficiency letters out to every
11 | one of those that they identified on July 27th, saying, here
12 | are the records that are missing. And I have an example of
13 | that letter. It's a list. Here are the records required by
14 | CMO 1 that we don't have. And the one statute of limitations
15 | person, we've called them to talk about that case and the
16 | unique features of that case.

17 | So when we got the information from them, I think
18 | we've acted quickly. We've acted responsibly. And we're
19 | trying to get the information.

20 | It's kind of their burden under the order to get us
21 | the records, which they haven't done. They said they think
22 | some people did. As soon as they got us the letter and the
23 | list of the names, we've written them all and said, here's
24 | what you're missing.

25 | That's been the process.

1 THE COURT: Okay. Is this the first time you've
2 sent out deficiency letters?

3 MR. TANNER: Yes. Did we send --

4 MR. CAMPBELL: Recently.

5 MR. TANNER: Recently. We did earlier on. We --
6 when the first process was starting, we were doing it on a
7 regular basis, but it became -- so many people weren't
8 responding or sending us anything that it became futile.

9 So when we got the list of the 64 that they have
10 claimed specifically are interested in this, we've taken
11 those and sent them deficiency letters.

12 THE COURT: Ms. Fleishman, your response to the
13 stats?

14 MS. FLEISHMAN: I'm delighted to hear that there's
15 been some response. And whether --

16 THE COURT: Response from whose side?

17 MS. FLEISHMAN: From the defense and from the
18 plaintiffs. That was the idea was to sort of get this moving
19 forward, because you -- as Your Honor recalls when we were
20 here before the Court in June, it had been at a quiet lull.

21 So now, I think that it would be helpful if we
22 could work out some sort of an order where people are
23 reminded they have an obligation under CMO 1 to -- to produce
24 certain defined records and define them so it's clear again.
25 And then also at the same time set up some parallel course

1 | where we can start doing discovery.

2 | THE COURT: So on the first thing is you're saying
3 | the Court needs to send orders to remind people to follow the
4 | prior order?

5 | MS. FLEISHMAN: Unfortunately, what's happened in
6 | prior MDLs in the -- in other cases is -- or in other MDLs,
7 | is that the Court actually sends an order out that says, you
8 | know, there are these orders and you could find them here,
9 | follow -- you're obligated to follow them.

10 | We have not put anything like that in place in this
11 | MDL. And I think that that is certainly my fault and defense
12 | counsel's fault that we haven't even said to the Court, you
13 | know, I think we need something like that that they do in
14 | other cases. And then that tells people, okay, you have an
15 | obligation to go on the docket and go find the orders that
16 | have been -- already been filed.

17 | And we also are sent -- we as plaintiffs' counsel
18 | are also sending letters to every single lawyer who has a
19 | case to say, you've got -- you have an obligation. Your case
20 | will be dismissed eventually if you don't get these required
21 | materials to the defense. We're doing that.

22 | But I think it would be helpful just if we sent
23 | something to them or if we can post something, that there's a
24 | reminder of an obligation.

25 | I could do it in a bunch of different ways.

1 THE COURT: Has Mr. Tanner objected to this when
2 you met and conferred and discussed it?

3 MS. FLEISHMAN: I haven't even -- I haven't even
4 raised it with him. The first thing -- time I raised it that
5 I've actually raised it is now.

6 What I did raise with defense counsel was that we
7 should not set up weekly calls where we go through all of
8 these cases and say, okay, what's missing, who haven't you
9 heard from. Let me go back, let's find out what's going on
10 and let us actively get this to some sort of resolution so
11 that the next time we're before Your Honor in a month, we can
12 report that we have 60 more cases that have moved forward.

13 THE COURT: I think that all sounds great. You
14 don't need me for that. And you could have done that
15 yesterday, last week or last month.

16 But let me hear from Mr. Tanner.

17 MR. TANNER: Thank you, Your Honor. And just a
18 point of clarification, and with all due respect, I don't
19 think Ms. Fleishman's correct. Every case that's filed, as
20 soon as it's centralized in the MDL, it's an order with a
21 copy of the CMO 1 that says exactly what they have to do. So
22 the idea that people are filing cases and don't know what the
23 rules are or what the orders are that apply to them is simply
24 not the case.

25 They get a copy of this order. It very clearly

1 | says, here are the records on paragraph 35 that they're
2 | supposed to produce. It has our name on it. And they can
3 | contact us and send the letters.

4 | The fact is people aren't contacting us.
5 | Apparently, they contacted counsel. When we -- as soon as we
6 | got the list of those people, acted accordingly.

7 | Right before this conference, she came over and
8 | said, should we have a weekly phone call about this? That's
9 | fine by us, but these are the plaintiffs' cases, and we're
10 | happy to walk through this process and provide the input when
11 | they need it. But they kind of have to tell us what -- which
12 | plaintiffs are having problems, which plaintiffs do they
13 | think have produced records that haven't, and we can look at
14 | that and get back.

15 | But -- and there's also the factor that 197 of
16 | these plaintiffs have opted out and said we don't want to do
17 | discovery. We only want to mediate. And we're working
18 | forward with those people --

19 | MS. FLEISHMAN: We don't have that information. We
20 | checked on the information, whether -- 197 have actually
21 | opted out. And no one has said that they actually opted out,
22 | when we asked them that question -- because that was one of
23 | the questions we posed in the several letters we've now sent
24 | out and at the meetings with them. So I am not sure that
25 | they have -- that that same understanding that it's an

1 | opt-out of discovery is going. So --

2 | THE COURT: Well, I think from Mr. Tanner's letter,
3 | he had two different categories of opt-out: those who
4 | formally opted out and those who simply requested to mediate,
5 | which he interpreted as an opt-out. Correct?

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

7 | MS. FLEISHMAN: The court order says, Your Honor,
8 | that you have to mediate. It's not -- it's not a yes or no
9 | option. It's a mandatory mediation. And until one mediates
10 | the case to conclusion, either up or down, one can't move
11 | forward in discovery.

12 | And then Mr. Tanner told us the last time that he
13 | also now wants plaintiffs' counsel to then write him a letter
14 | after the mediations are unsuccessful to say, now, I want to
15 | move on with discovery, which seems unnecessary --
16 | burdensome, and I think it also is the reason why we've had
17 | this big lag in movement of all those cases.

18 | I mean, we need to -- the reason why we've brought
19 | this to Your Honor is because we have to address this lag,
20 | because Your Honor doesn't want 397 cases on your docket.
21 | You know, you want us to get them resolved one way or the
22 | other.

23 | THE COURT: I absolutely do. But to me, it sounds
24 | like there needs to be more communication going that way. I
25 | am not sure we need more communication coming this way.

1 MS. FLEISHMAN: We've had trouble communicating
2 that way, so that's why we're doing it this way, in this
3 triangle, that method, Your Honor. So I think maybe after
4 today, we will have a more effective way of communicating
5 horizontally -- or vertical, whatever --

6 THE COURT: I'm happy to order you folks to meet,
7 you know, bimonthly.

8 MS. FLEISHMAN: I think we should meet weekly for
9 now.

10 THE COURT: If that's necessary.

11 MS. FLEISHMAN: Because I think we need -- I really
12 think we need to move these cases forward.

13 MR. TANNER: We've never been opposed to talking.
14 Never been opposed to -- as soon as they got us a list, I
15 think we acted pretty quickly on that list. And her
16 recitation of the orders say, again, is not what the orders
17 say.

18 The orders say and are very clear on what happens,
19 what the opt-out process is. And plaintiffs can say I'd
20 rather not enter into depositions and discovery. I want to
21 mediate first. I don't want to do that. And that's the
22 people that have formally -- as Your Honor said, formally
23 opted out, you know, like 85 of those. And then we've gotten
24 letters from other people who said, I'd rather just mediate.
25 We've kind of put those in the informal, because they didn't

1 | opt out by the particular deadline of, I think it was
2 | December 31st, 2013.

3 | And those, we've treated and said, get us the
4 | records. And 27 of those have gotten us records and, you
5 | know, we've had three -- one that's not a loosening case; one
6 | that's an infection; we've had high valuations in those, and
7 | we're ready to move forward on those.

8 | As far as the unsuccessful mediation cases, the
9 | order is set where it's -- as soon as your case is an
10 | unsuccessful mediation, we file a joint stipulation to that
11 | effect, or they could move for the Court. We just had one
12 | the other day call me, and we said, yeah, it's an
13 | unsuccessful mediation. We'll sign a stipulation to file. I
14 | think it was probably filed before Your Honor last week or
15 | so. That's how the process works.

16 | But, again, we can't force them to prosecute their
17 | cases or take these steps. We need the records. And we've
18 | said all along, if we don't have records, the chances of
19 | mediation are very unsuccessful; the perfect example of which
20 | is when we get records, we see that 16 of them didn't even
21 | have Durom cups. That's why we can't settle or mediate
22 | without records.

23 | THE COURT: Well, that was 16 of 397.

24 | MR. TANNER: Correct.

25 | MS. COLE: Judge, my firm's cases are in a

1 different position. My firm's cases opted out of mediation.
2 It is agreed that we're past that point. We have
3 approximately 50 cases. And I don't want that to get lost in
4 the shuffle. We need a scheduling order. We need a system
5 in place to move forward. At this point in time, we've had 8
6 bell -- 8 bellwether other cases. Two have been vetoed. Two
7 have been try to resolve. And, you know, two more are
8 scheduled. That's not getting us anywhere.

9 I would suggest, and I'll be happy to have
10 additional --

11 THE COURT: Two more are scheduled with four in --
12 waiting in the wings. Correct?

13 MS. COLE: Two are vetoed. Two are try to resolve.
14 Two are scheduled with two more waiting in the wings.

15 I -- and I'll be happy to confer further with
16 defense counsel on this. I've been in trial, and I
17 apologize.

18 I think that maybe what would be a workable
19 solution at this point is to, you know, give the option for
20 a -- plaintiffs to unilaterally, you know, move their cases
21 out of the mediation docket. If they're tired of this delay,
22 if they have feel like they've given everything to the
23 defendants and the defendants are still saying, we don't have
24 your -- you know -- your hysterectomy from 1984, then, you
25 know, the plaintiff, rather than having to do the joint

1 stipulation and call and wait -- and I know that they can
2 unilaterally --

3 THE COURT: Can you give me a list of those cases
4 that fall into that category?

5 MS. COLE: Ms. Fleishman, may be able to.

6 MS. FLEISHMAN: I will, Your Honor.

7 THE COURT: Right. Because I'd be curious to see
8 that. I mean, so far, the defendants say that there are 64
9 cases that fall into this category, and they gave me
10 breakdown, at least by number of how they're accounting for
11 that 64. I'd be curious to see how plaintiffs account for
12 that number within the 64 or a large number.

13 MS. FLEISHMAN: We gave -- we gave that number to
14 defense counsel. Defense counsel then communicated with
15 them, and this is the new number.

16 So then now there are 42 with insufficient records
17 of that 64.

18 THE COURT: Yes.

19 MS. FLEISHMAN: But none of these include my cases,
20 many of which have -- have proceeded to mediation
21 unsuccessfully.

22 And we've asked for discovery, and it's just
23 been -- more.

24 So I am not quite sure -- we need a process in
25 place if they -- if now we're saying --

1 THE COURT: You're talking about case specifics.

2 MS. FLEISHMAN: Yeah, case specifics, yes,
3 Your Honor.

4 And now, if they're -- if counsel for the defense
5 is saying they want to file stipulations that now it's the
6 mediation is unsuccessful, that is great. We'll tell
7 everybody to file those stipulations or stipulations that say
8 they want to stay the mediation process and proceed with
9 discovery, perhaps return to a mediation process after the
10 cases-specific discovery has been undertaken.

11 I mean --

12 THE COURT: So --

13 MS. FLEISHMAN: -- we need to have -- plaintiffs
14 need to have an option now.

15 THE COURT: How would the case-specific discovery
16 be impacted upon by the pending decision on the Lexecon
17 waiver?

18 MS. FLEISHMAN: Some of it is going to be done
19 before Your Honor, no matter what. You know, I think the
20 initial discovery of handing over the records, preparing a
21 plaintiff fact sheet, having the defendants send a
22 plaintiff -- a defendant fact sheet over to the plaintiffs,
23 that sort of thing gets done. I think it can be done with or
24 without -- under Lexecon.

25 THE COURT: Go back to letter, 741.

1 MS. FLEISHMAN: Oh, sorry.

2 THE COURT: Maybe it was like in a joint letter.
3 Let me see here.

4 Okay. Sorry -- Docket Entry 724, the joint
5 submission.

6 I guess I shouldn't be surprised that defendants
7 proposed plan would have dismissal with prejudice of
8 plaintiffs' cases if they aren't --

9 MR. TANNER: Yeah, we think an order that's been in
10 place since 2010, should be abided by. If it's not -- we
11 either need to get the records or not, Your Honor -- they
12 need to pursue their case or not.

13 If I might be heard on that point, there's -- I'll
14 let you finish reading. But ...

15 THE COURT: Certainly. Go ahead.

16 MR. TANNER: A couple of things to address that
17 Ms. Fleishman said. Again, she said that we haven't
18 responded to discovery. And that's just not true. They
19 haven't served discovery unless she -- that she has cases in
20 the 64, but five of them aren't even in the MDL. They're not
21 even filed cases in the MDL. I don't know how they follow on
22 the MDL.

23 MS. FLEISHMAN: Yes, they are -- counsel.

24 MR. TANNER: The date, were they just filed?

25 MS. FLEISHMAN: No, they've been filed.

1 (Interruption in proceedings)

2 MR. TANNER: Do you have the list of the files? We
3 can report them -- in any event.

4 There's a couple of things going on here,
5 Your Honor. There's already orders in place talking about
6 plaintiffs' discovery. And I don't know where the confusion
7 lies. They can take plaintiff's discovery.

8 The problem what they want to do is in essence
9 self-select which cases get to move forward by deciding which
10 cases they want to provide documents on.

11 They obviously want their best cases to be
12 forward -- tried first, so they want to produce documents in
13 those cases, saying the mediation's not working, let's go
14 forward to discovery. Let's put it on a fast track to trial,
15 and let's try those cases. But that's fundamentally unfair.

16 So our system is set up to be more fair,
17 reasonable, and also not a waste of resources where we would
18 say everybody needs to get us -- everybody needs to get us
19 the records, or those cases are out, and they shouldn't be
20 considered.

21 Then we take those pool of cases of the plaintiffs
22 that have actually acted in accordance with the Court's
23 orders and have produced the information, and then we each
24 pick 10, 15, whatever, and we have 20 cases. And those cases
25 then get worked up. But then we're working from a fair,

1 equitable pool of cases where both sides have gotten all the
2 records and can look at those to determine what's the next 20
3 cases to move forward.

4 And then we proposed a schedule by which we would
5 answer those 20 cases. There would be written discovery, and
6 there would be plaintiff's fact sheets, defendants fact
7 sheets. We'd have to get all the authorizations, because
8 those 20 cases obviously, will require a lot more records to
9 get them ready for trial than the simple CMO 1 records which
10 were for settlement purposes.

11 So two things. It makes, first of all, no sense to
12 get authorizations and all the x-rays and all the psychiatric
13 records and all the employment records and all the treating
14 records and et cetera, et cetera for 397 cases. Right?

15 But we need to see the basic records so that we can
16 all analyze those cases, pick the ones that you can afford,
17 and get a bunch of cases, 20, if that's the right number, 10
18 apiece, is it 15 apiece, we can take a pick and move those
19 cases along. We're all for moving those cases along.

20 But you can't do it with simply the cases that
21 plaintiffs self-select through their process of which ones
22 they give us records on.

23 That's our issue.

24 MS. COLE: Judge, may I address that?

25 THE COURT: I have a question for you.

1 MS. COLE: Yay.

2 THE COURT: All right. So of your 50 --

3 MS. COLE: Yes, Judge. --

4 THE COURT: -- 5?

5 MS. COLE: It's approximately 50.

6 THE COURT: Of your approximately 50 cases, how
7 many of those have provided all the documents required of
8 them under the CMO?

9 MS. COLE: I believe --

10 THE COURT: All of them.

11 MS. COLE: -- the vast majority. They have taken
12 plaintiff-specific depositions and treater depositions in the
13 cases that they have self-selected as being the most
14 beneficial cases for them of that.

15 So we occasionally get requests for an updated
16 authorization or updated records on these cases, but the
17 records have been produced over a year ago in my cases.

18 THE COURT: Okay.

19 MS. COLE: And I would like to address the intent
20 that Mr. Tanner is laying at our feet.

21 THE COURT: Sure.

22 MS. COLE: You know, it's not a matter of us
23 self-selecting our better cases to get in the trial track.
24 It's a matter of what is your plaintiff, your client, asking
25 you to do. And I've got some clients that are calling --

1 calling and burning up the phones and screaming at me and
2 asking where their trial date is, and I have some clients
3 that tell me I don't really want to go to trial. That scares
4 me to death.

5 And so, you know, I -- I take offense to the -- you
6 know, the thought that plaintiffs are over here conspiring to
7 make sure that we self-select only the best cases. And
8 that's the problem with their plan, is the problem with their
9 plan, you know, does not allow the -- the plaintiffs who want
10 their day in court to move forward without dragging
11 plaintiffs who may not necessarily want their day in court
12 and don't feel like they have completed the mediation
13 process.

14 MR. TANNER: And my response to that, Your Honor,
15 is simply they all filed a lawsuit, and they don't get to
16 pick and choose which ones get to go first.

17 And with all due respect, Ms. Cole is liaison
18 counsel. She has a fiduciary obligation to all the lawyer --
19 all the clients, not just her own. And I think putting her
20 own cases ahead of the others is, again, not within the
21 spirit or the purpose of the original order setting up the
22 liaison counsel system.

23 MS. COLE: And the reason my cases were put forward
24 is because we opted out by that December date, the December
25 of 2013 or 2012, whatever the date was.

1 THE COURT: Opted out of the mediation.

2 MS. COLE: We opted out for all of our cases. I
3 had no ability to force other plaintiffs firms to opt, and
4 that -- that's not my position. I -- we gave them the
5 opportunity that they -- some of those firms have been
6 disappointed in the mediation process. Since then, that's
7 what we're hearing. They've asked us to come to the Court
8 and try to -- try to resolve that issue for them. Some of
9 them are happy with the mediation process.

10 And I -- I can't -- I can't, you know, change their
11 litigation strategies or their settlement strategies. That's
12 not my role.

13 THE COURT: All right. What I'm thinking right
14 now --

15 MS. FLEISHMAN: We actually have a spreadsheet of
16 all the comments we did receive. If Your Honor wants to hear
17 them, I'm happy to share them.

18 THE COURT: No. What I do want, though, is a list
19 from plaintiffs' counsel, all the cases that have provided
20 the documents required under the Case Management Order 1,
21 that you feel fall into the category have provided sufficient
22 documents either for mediation or for other purposes, but
23 have complied with their requirements there.

24 And within that summary, tell me which of those
25 cases have opted out of mediation and are looking for

1 case-specific discovery.

2 On the defense side, I would like a list of cases
3 for plaintiffs within the MDL that have failed to produce the
4 required documents and identify those that have not cured
5 those deficiencies within 30 days of your deficiency letter.

6 So that I've got more concrete idea of what the
7 respective sides believe they're dealing with.

8 Does that work?

9 How much time does liaison counsel for plaintiff
10 need for that?

11 MS. FLEISHMAN: Actually, I think because of the --
12 all the vacations and things, if the --

13 THE COURT: I'm hoping there are vacations that
14 you're not all a bunch of boring lawyers.

15 But go ahead.

16 MS. FLEISHMAN: Me too, Your Honor.

17 If we could do it the first -- we have to the first
18 week of September, then if that's possible.

19 THE COURT: Week of September. Okay.

20 And for defense?

21 MR. TANNER: We can do it by then easily on the
22 ones we sent deficiency letters to, which are the 44 of the
23 64 they've identified.

24 If Your Honor would like us to send deficiency
25 letters on the other 300 or whatever number is, we can do

1 that, and we can get those out fairly quickly.

2 THE COURT: If they are deficient, certainly.

3 MR. TANNER: Okay. But we can probably get those
4 out within a week, easy.

5 THE COURT: Sure.

6 MR. TANNER: And then so that extends the 30 days
7 by which you wanted us to give you a list of those that
8 didn't respond.

9 So did you want it in that the same letter?

10 THE COURT: We'll take what you've got now, and
11 then we'll update it --

12 MR. TANNER: When we have --

13 THE COURT: -- as necessary, right.

14 MS. COLE: And just spitballing here, Judge, if,
15 say, the holdup on a plaintiff responding is a facility, say,
16 that, you know, a facility has to go into storage and it
17 takes them two or three weeks to get the records or, you
18 know, we moved and you've got to go ask from this other
19 doctor somewhere else, maybe there -- would there be a system
20 whereby a plaintiff's lawyer could contact you and go, I know
21 I am not going to make my 30-day deadline, here's the steps
22 I've taken.

23 MR. TANNER: Certainly, we'll listen to anybody's
24 reasoning.

25 I mean, but this is kind of an ironic situation

1 here, where they're saying -- we keep saying, we don't have
2 the records, they now are saying, you should have the
3 records, but now it's going to take longer.

4 At some point our position is, we need all the
5 records to move forward, so ...

6 THE COURT: My typical practice is within 30 days
7 of any deficiency being noted, it should be -- well, I
8 usually require less but -- it should be cured, or at a
9 minimum, providing a letter from counsel explaining why
10 something is still outstanding. So that there's no
11 guesswork, so we know exactly what we're dealing with.

12 MR. TANNER: And then we could put that in the
13 letter as to here's the reason we've been given or we've been
14 given no reason.

15 THE COURT: Right.

16 MR. TANNER: Is that fair?

17 THE COURT: Absolutely -- yeah, absolutely.

18 MR. TANNER: Okay.

19 THE COURT: And then at that point, if the Court
20 requests motion practice, then at least we have a more
21 complete record, and we can move forward. And everybody
22 knows exactly what page we're on.

23 Does that work?

24 MS. FLEISHMAN: Yes, Your Honor.

25 THE COURT: Is there anything else that plaintiffs

1 think need to be in their letter? Anything you think that
2 I'm missing?

3 MS. FLEISHMAN: I'm sure that if plaintiffs'
4 counsel feels that if they want to tell the Court that they
5 have tried to schedule mediation and they've been
6 unsuccessful, I'm sure that if it's okay with Your Honor,
7 they will write to Your Honor directly.

8 THE COURT: I don't know that I want 300 separate
9 letters.

10 MS. FLEISHMAN: Well, then perhaps they'll just
11 send me a letter --

12 THE COURT: That would be great.

13 MS. FLEISHMAN: -- and I will incorporate their
14 information in my letter to Your Honor.

15 THE COURT: That would be great. And, yes, when
16 you do so, specifically reference the case.

17 MS. FLEISHMAN: The case name.

18 THE COURT: So that we can correspond it with
19 defendant's information, and that way we know exactly what
20 we're dealing with.

21 Okay?

22 MS. FLEISHMAN: Perfect, thank Your Honor.

23 THE COURT: Is there anything that I'm missing from
24 the letter I'm asking you folks to write on the defense side.

25 MR. TANNER: No, I think that makes sense,

1 Your Honor.

2 THE COURT: Okay. Okay.

3 So next issue on your -- on the agenda?

4 MR. TANNER: Kind of handled a lot of these in one.

5 THE COURT: We strive for efficiency. I can't -- I
6 don't have control over the other branches of the government,
7 but this branch and this Court.

8 MR. TANNER: We kind of -- the status of the
9 mediation process, Your Honor, is kind of what we were just
10 talking about. And I think -- I think we had a good
11 resolution to that for the time being, so ...

12 THE COURT: Okay. I did see a, I guess, a joint
13 motion to amend the schedule?

14 MS. COLE: That was related to the next two
15 bellwethers that are scheduled because of our respective
16 state court trials, we needed a little bit more time, and
17 have agreed give each other more time.

18 MR. TANNER: And I thought that that had been
19 entered already. So -- maybe not. It has not been entered.

20 THE COURT: It was filed. It wasn't entered so --

21 MR. TANNER: Basically, we bumped each of our
22 deadlines back a week. And we agreed to that, Your Honor.

23 MS. COLE: Yeah.

24 THE COURT: Okay. Yep, and I looked at it. And I
25 have no problem. I will incorporate it into my own form of

1 order, just breaking that out a little bit, and ...

2 So we've got that track. That's for the next four
3 bellwethers.

4 Then I think we need a separate date -- the other
5 cases. So let's see what we have for the beginning of
6 October. How about 2 o'clock on October 7th?

7 MR. TANNER: That works for defendants, Your Honor.

8 MS. COLE: Works for Waters & Kraus.

9 THE COURT: You folks prefer to be in person?
10 Telephone?

11 MS. COLE: In person.

12 THE COURT: In person. Do you want a dinosaur
13 barbecue first?

14 MS. COLE: New Jersey's lovely in October.

15 THE COURT: Yeah, it is, isn't it? It is. In
16 person. Okay. And that we will discuss all of the other
17 matters.

18 Do you have a time line at all on the Lexecon
19 issue? Judge Wigenton, has she given you a deadline on that?
20 That's all been fully briefed?

21 MR. TANNER: It's fully briefed. We're just
22 waiting on her ruling, Your Honor.

23 THE COURT: Okay. So I'll touch base with her
24 before then and see if that has any impact on what we need to
25 discuss.

1 Okay. Let's see, was there anything else for
2 plaintiffs before I get to the revision rate issue?

3 MS. FLEISHMAN: No, Your Honor, I think we
4 addressed it other than the case-specific discovery issues.
5 Then I think we move this forward, we'll reach that next
6 hurdle.

7 THE COURT: Absolutely. Yeah, well, let's -- I
8 want to see these letters to help me flesh out that idea what
9 to do for the case-specifics.

10 Anything else?

11 MR. TANNER: I had one minor issue, Your Honor.
12 Your Honor, ordered -- and I didn't raise this with Ms. Cole,
13 so I apologize ahead of time, but it just came to me, the
14 mediations that the Court has scheduled for, I think it's the
15 12th and 13th of November --

16 THE COURT: Yes.

17 MR. TANNER: -- in the four -- next four trial
18 cases. There's a comment that says plaintiffs -- parties
19 appear, plaintiffs if they're more than 150 miles away, can
20 appear by phone.

21 And my two comments, we have found it more
22 successful when plaintiffs are actually here. But my client
23 would have to travel in, and would it be possible that if the
24 plaintiffs don't travel, my client wouldn't have to travel?
25 I mean, we've done a lot of these cases.

1 THE COURT: Is your client more than 150 miles
2 away?

3 MR. TANNER: Yes. In Indiana.

4 THE COURT: What I'll most likely do, then, is
5 require that if they are not here in person, that they've
6 given a power attorney to whomever to sign -- if we reach
7 settlement and they -- they agree to it by the telephone,
8 somebody can sign it on their behalf.

9 Does that work? That's what I've done in the past.

10 MR. TANNER: That's fine with us, Your Honor. I
11 appreciate that. Thank you.

12 THE COURT: Okay. Sure. No problem.

13 Okay. So, all right, last but not least, the
14 revision issue. Okay.

15 Before the Court is plaintiff's application seeking
16 updated revision rate to be provided by defendant Zimmer --

17 (Interruption in proceedings)

18 THE COURT: -- Docket Entry 684. In April of 2014,
19 Zimmer inadvertently produced privileged documents pursuant
20 to discovery request and subsequently served a clawback
21 letter. Docket Entry 702.

22 Plaintiffs agreed to return all documents except
23 the document that calculated the revision rate of subsequent
24 corrective surgeries of those implanted with the Durom hip
25 cup, as "Zimmer saw it." Id. citing Transcript 46:14-25.

1 On April 10th, 2014, Judge Arleo held oral argument
2 on the issue and ordered Zimmer to produce the revision rate,
3 finding the information is core to the litigation. Docket
4 Entry 349, Transcript page 34:21-25.

5 Judge Arleo specifically ordered Zimmer to produce
6 the rate as of December 30th, 2013. Id. at 35:2-3.

7 March 17, 2015, plaintiffs made this application by
8 way of a joint agenda/dispute letter. Docket Entry 684.

9 **Discussion.** Magistrate judges are authorized by
10 Title 28 U.S.C. § 636(b)(1)(A) to decide any nondispositive
11 motion designated by the Court. This District has specified
12 that magistrate judges may determine any nondispositive
13 pretrial motion pursuant to Local Civil Rule 72.1(a)(1).
14 This District has further provided in Local Rule 37.1 that
15 discovery disputes are to be brought to the magistrate judge
16 on an informal basis. Decisions by magistrate judges must be
17 upheld unless "clearly erroneous or contrary to law."
18 Title 28, 636(b)(1)(A).

19 Federal Rules of Civil Procedure set forth a
20 "liberal policy for providing discovery." In Jones v.
21 DeRosa, 238 F.R.D. 157 at 163 (D.N.J. 2006). Federal Rule of
22 Civil Procedure 26 defines the bounds of relevant discovery.
23 Pursuant to (b)(1), "Parties may obtain discovery regarding
24 any matter not privileged that is relevant to the claim or
25 defense of any party." Federal Rules of Civil Procedure

1 "allow broad and liberal discovery." Pacitti v. Macy's, 193
2 F.3d 766 at 777 (3d Cir. 1999). Courts have interpreted the
3 federal rules to mean that discovery encompasses "any matter
4 that bears on or reasonably could lead to other matters that
5 could bear on any issue that is or may be in the case."
6 Kopacz v. Delaware River and Bay Authority, 225 F.R.D. 494 at
7 496 (D.N.J. 2004).

8 **Continuing obligations under Fed. R. Civ. P.**

9 **26(e) (1)**. Pursuant to Fed. R. Civ. P. 26(e) (1), parties have
10 a continuing obligation to supplement initial disclosures or
11 discovery responses if, "the disclosures or responses is --"
12 "the disclosure or response is incomplete or incorrect and if
13 the additional or corrective information has not otherwise
14 been made known to the other parties during the discovery
15 process." See Carnegie Mellon Univ. v. Marvell Group
16 Limited, 906 F. Supp. 2d 399 at 412. (W.D. Pa. 2012). This
17 rule ensures that a party failing to provide or supplement
18 discovery as required is prohibited from using that
19 information at trial. See Fed. R. Civ. P. 37(c) (1).

20 **Analysis**. Plaintiffs are seeking an updated
21 revision rate of known revision surgeries and asserts the
22 last revision rate provided on April 30th, 2014, which
23 disclosed the revision of 10 and a quarter percent as of
24 December 31st, 2013, is "almost certainly no longer
25 accurate." Docket Entry 684.

1 Zimmer opposes plaintiff's request and asserts it
2 will "gladly" supplement the data necessary to calculate the
3 revision rate through February 28th, 2015, but is unwilling
4 to incur the expense of calculating the rate when plaintiffs
5 are "equally capable of doing it on their own."

6 The Court is not persuaded by plaintiffs'
7 unsupported arguments and denies their request to the extent
8 Zimmer is required to calculate the revision rate.
9 Interrogatory Number 2 as provided by Zimmer in the joint
10 agenda letter states:

11
12 "Please identify the total number of Durom
13 cups that to your knowledge have been removed
14 from patients implanted with the device in the
15 United States as of today's date,
16 September 19, 2013. Include in your
17 response -- include in your response
18 information pertaining to (A) the dates on
19 which each Durom cup was implanted and
20 explanted; (B) the date you became aware that
21 the Durom cup had been removed; and (C) the
22 date a Product Experience Report was filed in
23 connection with the removal." Docket Entry
24 684 at page 5.
25

20 Note, Zimmer's reference and quotation of the
21 relevant interrogatory request is the only source of the
22 actual request in the docket. Plaintiffs did not and have
23 not objected to the characterization of this request, and
24 therefore, the Court will consider this excerpt accurate and
25 true of Interrogatory Number 2.

1 Although Zimmer has agreed to provide the raw data
2 pursuant to the interrogatory request to fulfill its
3 continuing obligation, nothing in the interrogatory request
4 requires a continued update of the information. Docket Entry
5 702, March 25th, 2015, Transcript at 54:10-15. In fact, the
6 request gives a date certain for the information being
7 requested. Furthermore, Judge Arleo did not order Zimmer to
8 continue to provide their revision rate, but also selected a
9 date certain.

10 The Court notes that Fed. R. Civ. P. 26(e) (1)
11 provides the supplementation obligation continues "during the
12 discovery process" or as ordered by the Court. However, the
13 continuing obligation is not meant to continue in perpetuity.
14 And plaintiffs have not provided a single case to support
15 that proposition, the proposition Zimmer is under that kind
16 of obligation. See Kuhns v. City of Allentown, 2010 WL
17 4236873 *7 (E.D. Pa. 2010) (citing Corning, Inc. V. SRU
18 Biosystems LLC, 223 F.R.D. 189 (D. Del. 2004) (stating that
19 Fed. R. Civ. P. 26(e) (1) does not impose a broad duty to
20 supplement rolling or open-ended discovery))).

21 Therefore, the Court finds plaintiffs are not
22 entitled to an updated calculation of the revision rate, but
23 will be provided with the number of revision surgeries
24 performed, *i.e.*, the raw data, including the date of the
25 Durom cup implant and explant, the date Zimmer became aware

1 | of the explants, and the date of the Product Experience
2 | Report filing.

3 | I am satisfied that in this matter, Zimmer will
4 | provide plaintiff with the aforementioned information as of
5 | May 31st, 2015, and do so in a timely manner.

6 | Anything else for plaintiffs today?

7 | MS. FLEISHMAN: No, Your Honor.

8 | THE COURT: No?

9 | Anything else for defense?

10 | MR. TANNER: No, Your Honor, thank you.

11 | THE COURT: All righty. I thank you all very, very
12 | much.

13 | We are adjourned. And next time I see you, it'll
14 | be on the second floor.

15 | (Conclusion of proceedings at 4:03 P.M.)

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Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 41 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*

27th of August, 2015

Signature of Approved Transcriber

Date

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