

**Chad Phipps**

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**From:** Robinson, Frederick [REDACTED]  
**Sent:** Monday, October 15, 2007 9:18 PM  
**To:** Brown, Michele (USANJ)  
**Subject:** Monitor Agreement  
**Attachments:** FW: Monitor Agreement

Michele,

I believe you and Chris are in Warsaw already. I wanted to alert you to a potential issue with the Zimmer Monitor. On Friday evening, Zimmer received a proposed fee agreement from the Ashcroft Group. Zimmer was told that the agreement needed to be in place by Tuesday morning.

I have to tell you that I was shocked by the proposed fee agreement. It would require, in part, Zimmer to pay the Ashcroft Group a monthly flat fee of \$750,000 for the time of its three senior executives: General Ashcroft, David Ayres and Stacy Taylor. Even if one assumed that these gentlemen, due to their vast experience, could command hourly rates of \$1,000 (which is more than twice what Zimmer can pay a physician under the DPA), that would translate into an aggregate effort level of 750 hours per month for 18 months. I seriously doubt that such a level of effort will ever be required in this matter.

All other time keepers employed by the Ashcroft Group would be billed at hourly rates. At the end of each month, the Ashcroft Group proposes to send Zimmer a bill with three line items: the flat fee; the expenses; and the aggregate fees for the time spent by all other employees and consultants of the Ashcroft Group. Zimmer would be provided with absolutely no detail regarding what tasks were performed to justify the aggregate fee or who performed those tasks. Zimmer would be expected to pay the bill with no questions asked. This total lack of transparency cannot be justified, as the Monitor has suggested to us, by the need for independence. It also strikes me as highly ironic that the Monitor would be trying to avoid the type of transparency that it will be insisting on in Zimmer's relationships with other consultants.

At bottom, what we have here is a demand by the Monitor that Zimmer (1) automatically transfer to it \$13.5 million dollars just for having General Ashcroft and his top two aides available to work on this matter, no matter how much or how little work they actually do; (2) be prepared to pay up to an additional \$38.7 million to the Ashcroft Group without any serious supporting documentation; and (3) agree that an expense burn rate of \$150,000 to \$250,000 per month is reasonable. Zimmer simply is not prepared to agree to that. I cannot believe that your Office would expect them to. I also am somewhat surprised that the Ashcroft Group would

10/15/2007

propose such a fee structure in light of all the questions that have been raised by the press regarding the Monitor selection process.

For your information, as the Monitor fees will significantly impact Zimmer's fourth quarter 2007 and full-year 2008 earnings guidance, Zimmer will need to fully disclose to the public the projected fees for the Monitor engagement. Zimmer will need to make this disclosure for the first time during its third quarter investor conference on October 25.

I have attached a copy of a recent email I exchanged with the Ashcroft Group on these and other topics. Based upon my phone call with them, I do not expect them to offer much in the way of compromise. I will not be in Warsaw for tomorrows' meeting, but I am available at any time to discuss this by phone. If you would like to discuss this matter before the meeting tomorrow morning, I can be reached at 202-262-4268. Thanks.

Rick Robinson  
Fulbright & Jaworski L.L.P.

~~██~~  
~~██~~  
[www.fulbright.com/frobinson](http://www.fulbright.com/frobinson)

## Chad Phipps

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From: Robinson, Frederick [REDACTED]  
Sent: Tuesday, October 16, 2007 9:01 AM  
To: [REDACTED]  
Subject: FW: Monitor Agreement

FYI

Rick Robinson  
Fulbright & Jaworski L.L.P.  
(202) 662-4534

[www.fulbright.com/frobinson](http://www.fulbright.com/frobinson)

-----Original Message-----

From: Brown, Michele (USANJ) [mailto:[REDACTED]]  
Sent: Tuesday, October 16, 2007 8:58 AM  
To: Robinson, Frederick  
Subject: RE: Monitor Agreement

Rick - thanks for bringing this to my attention. I'll discuss it with Chris so we're prepared to address it at the appropriate time. Michele

Sent from my GoodLink synchronized handheld ([www.good.com](http://www.good.com))

-----Original Message-----

From: Robinson, Frederick [mailto:[REDACTED]]  
Sent: Monday, October 15, 2007 09:18 PM Eastern Standard Time  
To: Brown, Michele (USANJ)  
Subject: Monitor Agreement

Michele,

I believe you and Chris are in Warsaw already. I wanted to alert you to a potential issue with the Zimmer Monitor. On Friday evening, Zimmer received a proposed fee agreement from the Ashcroft Group. Zimmer was told that the agreement needed to be in place by Tuesday morning.

I have to tell you that I was shocked by the proposed fee agreement. It would require, in part, Zimmer to pay the Ashcroft Group a monthly flat fee of \$750,000 for the time of its three senior executives: General Ashcroft, David Ayres and Stacy Taylor. Even if one assumed that these gentlemen, due to their vast experience, could command hourly rates of \$1,000 (which is more than twice what Zimmer can pay a physician under the DPA), that would translate into an aggregate effort level of 750 hours per month for 18 months. I seriously doubt that such a level of effort will ever be required in this matter.

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At bottom, what we have here is a demand by the Monitor that Zimmer (1) automatically transfer to it \$13.5 million dollars just for having General Ashcroft and his top two aides available to work on this matter, no matter how much or how little work they actually do; (2) be prepared to pay up to an additional \$38.7 million to the Ashcroft



## Chad Phipps

**From:** Robinson, Frederick  
**Sent:** Wednesday, October 17, 2007 5:29 PM  
**To:**  
**Cc:** Brown, Michele (USANJ);  
david@ashcroftgrouppllc.com  
**Subject:** Monitor Agreement

Chris,

As you know, Zimmer has been in discussions with the Ashcroft Consulting Group ("ACG") regarding certain provisions of the Monitor Agreement, most of which concern the financial arrangements between the parties.

Although everyone has approached these negotiations in the utmost good faith, it appears that the parties have reached an impasse on certain key issues. We regret having to draw you into this, but would like to describe those issues to you in this email and to solicit your input on how they could be fairly resolved. ACG is aware that we are communicating with you on these issues. In the meantime, Zimmer and ACG are continuing to work cooperatively to establish a productive working relationship that can form the foundation for a successful experience under the DPA.

**Flat Fee Provision:** The Monitor has requested that Zimmer pay to ACG a monthly flat fee of \$750,000 as compensation for the time of its three senior executives: General Ashcroft, David Ayres and Stacy Taylor. This fee would be paid regardless of the time actually spent by these three individuals on the Monitor engagement. We believe that this request, in both concept and amount, is unreasonable. Even if one assumed that these gentlemen, due to their vast experience, could command hourly rates of \$1,000 (which is more than twice what Zimmer can pay a physician under the DPA), that would translate into an aggregate effort level of 750 hours per month for 18 months. We do not believe that such a level of effort will be required by these three individuals or that a guaranteed payment of any amount is appropriate. We understand that none of the other Monitors is asking for such a guaranteed minimum payment and that they are all billing hourly rates. We also understand that an hourly fee arrangement has been used by other Monitors previously working for your office. ACG has claimed that a flat fee of this nature is their standard fee arrangement and that having General Ashcroft serve as our Monitor merits a premium payment. We believe that such a premium-based billing arrangement is not appropriate. We also believe that subjecting Zimmer to a fee arrangement that is so radically different than the fee arrangement the other settling companies have with their respective Monitors, would "unlevel the playing field" and cause the public to believe that Zimmer is being treated differently than the other companies.

**Hourly Billing Rates:** We don't think that anyone would dispute the idea that all hourly fees should be reasonable for both consulting services and for legal services. Because ACG, however, has not yet provided us with sufficient information about the individuals who will be assigned to this matter, we cannot tell if the proposed rates are in fact reasonable. I would note, however, that the associate rates for the Ashcroft Law Firm (\$295 to \$495) appear to be high for a Missouri law firm.

**Other Billing Provisions:** At the end of each month, ACG proposes to send Zimmer a bill with three line items: the flat fee; the expenses; and the aggregate fees for the time spent by all other employees and consultants of ACG. Under ACG's proposal Zimmer would be provided with absolutely no detail regarding the number of hours spent, what tasks were performed to justify the aggregate fee or who performed those tasks. Zimmer would be expected to pay the bill with no questions asked.

We do not believe that such a total lack of transparency can be justified, as the Monitor has suggested to us, by its need for independence. At a minimum, Zimmer is entitled to verify that the services performed by the Monitor are actually called for by the DPA and that there are not an unreasonable number of people performing identical tasks. We do not understand why the Monitor would object to operating with the same level of transparency that it will insist upon from Zimmer in its dealings with other consultants. Moreover, as a publicly traded company, Zimmer is obligated to ensure that all payments to third parties are justified and adequately supported.

**Expenses:** ACG has asked Zimmer to agree in advance that the incurrence of monthly expenses in the range of \$150,000 to \$250,000 are reasonable.



**Chad Phipps**

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**From:** Christie, Christopher (USANJ) [redacted]  
**Sent:** Friday, October 19, 2007 11:52 AM  
**To:** Robinson, Frederick  
**Cc:** Brown, Michele (USANJ); [redacted]; O'Dowd, Kevin (USANJ)  
**Subject:** RE: Monitor Agreement

Rick--

I have reviewed your e-mail.

I am very disappointed that this matter has not been resolved by your client. I am not convinced that this dispute is at the point where it cannot be resolved between your client and the Monitor.

Therefore, I will not be resolving these issues on the merits. I am telling you that I expect your client to return to this issue directly with the monitor with an eye towards resolving this issue yourselves in short order.

We have a great deal of work to do at Zimmer. I fear the serious revelations brought to my attention yesterday by the Monitor's team are just an example of the significant issues that Zimmer and the Monitor are going to need to address and resolve together in short order. We cannot afford to be distracted by anything other than bringing Zimmer into compliance with the DPA and federal law.

Take another stab at resolving the substantive issues raised in your e-mail directly with the Monitor. Please update me next week on the progress that has been made by your client and the Monitor.

Christopher J. Christie  
United States Attorney for the District of New Jersey 970 Broad Street Newark, New Jersey 07102

[redacted] office

[redacted] fax

-----Original Message-----

**From:** Robinson, Frederick [mailto:[redacted]]  
**Sent:** Wednesday, October 17, 2007 5:29 PM  
**To:** Christie, Christopher (USANJ)  
**Cc:** Brown, Michele (USANJ); [redacted]  
**Subject:** Monitor Agreement

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We do not believe that such a total lack of transparency can be justified, as the Monitor has suggested to us, by its need for independence. At a minimum, Zimmer is entitled to verify that the services performed by the Monitor are actually called for by the DPA and that there are not an unreasonable number of people performing identical tasks. We do not understand why the Monitor would object to operating with the same level of transparency that it will insist upon from Zimmer in its dealings with other consultants. Moreover, as a publicly traded company, Zimmer is obligated to ensure that all payments to third parties are justified and adequately supported.

Expenses: ACG has asked Zimmer to agree in advance that the incurrence of monthly expenses in the range of \$150,000 to \$250,000 are reasonable. We do not think that this type of expense burn rate is reasonable. We have been working for Zimmer for quite a long time and have never generated expenses at that level.

Conflicts: ACG has asked Zimmer to acknowledge that the Monitor may engage other service providers, in addition to the Ashcroft Law Firm, in which General Ashcroft has a financial interest. Zimmer believes that the Monitor should not be allowed to retain consultants in which General Ashcroft has a financial interest without prior notice to Zimmer and the Office. With respect to the Ashcroft Law Firm, we would also note that we have not been provided with a separate budget for its services as is required under section 19(d) of the DPA prior to the engagement of that law firm by the Monitor.

Total Fee Estimate: ACG has asked Zimmer to acknowledge that it "understands and agrees that ACG's total estimated monthly budget, which includes the Ashcroft Law Firm, LLC, for all compensation, fees, and expenses will average between \$1,550,000 and \$2,900,000 (but may exceed this range)." This estimate strikes us as extremely high and underscores the need for some meaningful review of the Monitor's invoices. For your information, we have contacted a nationally recognized professional services firm that frequently acts as an Independent Review Organization for the Office of Inspector General of HHS. This firm has estimated that if it were hired to perform the Monitor function for Zimmer, the total estimated fees would range from

\$3 million to \$3.5 million for all 18 months of the DPA.

Zimmer is hopeful that it and the Monitor will be able to resolve their differences over these issues so that they can promptly focus their efforts on their mutual objective of ensuring that the Company successfully complies with the DPA. Zimmer also needs to resolve these issues in time to publicly disclose by October 25 the impact that the Monitor's projected



**Chad Phipps**

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**From:** Robinson, Frederick  
**Sent:** Friday, October 19, 2007 11:59 AM  
**To:** Christie, Christopher (USANJ)  
**Cc:** Brown, Michele (USANJ); O'Dowd, Kevin (USANJ)  
**Subject:** RE: Monitor Agreement

I would like to discuss this with you by phone today. When would you be available?

Rick Robinson  
Fulbright & Jaworski L.L.P.

~~\_\_\_\_\_~~  
~~\_\_\_\_\_~~  
www.fulbright.com/frobinson

-----Original Message-----

**From:** Christie, Christopher (USANJ)  
[mailto:~~\_\_\_\_\_~~]  
**Sent:** Friday, October 19, 2007 11:52 AM  
**To:** Robinson, Frederick  
**Cc:** Brown, Michele (USANJ); ~~\_\_\_\_\_~~  
~~\_\_\_\_\_~~; O'Dowd, Kevin  
(USANJ)  
**Subject:** RE: Monitor Agreement

Rick--

I have reviewed your e-mail.

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We have a great deal of work to do at Zimmer. I fear the serious revelations brought to my attention yesterday by the Monitor's team are just an example of the significant issues that Zimmer and the Monitor are going to need to address and resolve together in short order. We cannot afford to be distracted by anything other than bringing Zimmer into compliance with the DPA and federal law.

Take another stab at resolving the substantive issues raised in your e-mail directly with the Monitor. Please update me next week on the progress that has been made by your client and the Monitor.

Christopher J. Christie  
United States Attorney for the District of New Jersey 970 Broad Street Newark, New Jersey 07102

~~\_\_\_\_\_~~ office

~~\_\_\_\_\_~~ fax

-----Original Message-----

**From:** Robinson, Frederick [mailto:~~\_\_\_\_\_~~]

fees will have on its fourth quarter 2007 and full-year 2008 earnings guidance. Accordingly, we would appreciate hearing your views on these matters at your earliest convenience.

Rick Robinson  
Fulbright & Jaworski L.L.P.

  
[www.fulbright.com/frobinson](http://www.fulbright.com/frobinson)

Sent: Wednesday, October 17, 2007 5:29 PM

To: Christie, Christopher (USANJ)

Cc: Brown, Michele (USANJ); [REDACTED]

Subject: Monitor Agreement

Chris,

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Although everyone has approached these negotiations in the utmost good faith, it appears that the parties have reached an impasse on certain key issues. We regret having to draw you into this, but would like to describe those issues to you in this email and to solicit your input on how they could be fairly resolved. ACG is aware that we are communicating with you on these issues. In the meantime, Zimmer and ACG are continuing to work cooperatively to establish a productive working relationship that can form the foundation for a successful experience under the DPA.

**Flat Fee Provision:** The Monitor has requested that Zimmer pay to ACG a monthly flat fee of \$750,000 as compensation for the time of its three senior executives: General Ashcroft, David Ayres and Stacy Taylor. This fee would be paid regardless of the time actually spent by these three individuals on the Monitor engagement. We believe that this request, in both concept and amount, is unreasonable. Even if one assumed that these gentlemen, due to their vast experience, could command hourly rates of \$1,000 (which is more than twice what Zimmer can pay a physician under the DPA), that would translate into an aggregate effort level of 750 hours per month for 18 months. We do not believe that such a level of effort will be required by these three individuals or that a guaranteed payment of any amount is appropriate. We understand that none of the other Monitors is asking for such a guaranteed minimum payment and that they are all billing hourly rates. We also understand that an hourly fee arrangement has been used by other Monitors previously working for your office. ACG has claimed that a flat fee of this nature is their standard fee arrangement and that having General Ashcroft serve as our Monitor merits a premium payment. We believe that such a premium-based billing arrangement is not appropriate. We also believe that subjecting Zimmer to a fee arrangement that is so radically different than the fee arrangement the other settling companies have with their respective Monitors, would "unlevel the playing field" and cause the public to believe that Zimmer is being treated differently than the other companies.

**Hourly Billing Rates:** We don't think that anyone would dispute the idea that all hourly fees should be reasonable for both consulting services and for legal services. Because ACG, however, has not yet provided us with sufficient information about the individuals who will be assigned to this matter, we cannot tell if the proposed rates are in fact reasonable. I would note, however, that the associate rates for the Ashcroft Law Firm (\$295 to \$495) appear to be high for a Missouri law firm.

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\$3 million to \$3.5 million for all 18 months of the DPA.

Zimmer is hopeful that it and the Monitor will be able to resolve their differences over these issues so that they can promptly focus their efforts on their mutual objective of ensuring that the Company

successfully complies with the DPA. Zimmer also needs to resolve these issues in time to publicly disclose by October 25 the impact that the Monitor's projected fees will have on its fourth quarter 2007 and full-year 2008 earnings guidance. Accordingly, we would appreciate hearing your views on these matters at your earliest convenience.

Rick Robinson

Fulbright & Jaworski L.L.P.

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~~\_\_\_\_\_~~  
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**Chad Phipps**

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**Sent:** Friday, October 19, 2007 2:58 PM  
**To:** Christie, Christopher (USANJ)  
**Cc:** Brown, Michele (USANJ); O'Dowd, Kevin (USANJ)  
**Subject:** RE: Monitor Agreement

Chris,

I just want to be clear that there are issues besides the Monitor's fees that need to be addressed. One example is the fact that the Monitor apparently told you that there had been "serious revelations" made to it by the Company. At this time, nobody knows whether the matter which the Company disclosed to the Monitor team, which involved a seven year-old memo by a single employee and which may or may not be factually accurate, is "serious" or not. Nevertheless, this is certainly a matter that needs further review, which is what the Company intends to do pursuant to the terms of the DPA. The Monitor, however, has asked the Company not to pursue that investigation until it has completed its own review of the matter, which is a request that, in our view, conflicts with the DPA. In addition, the fact that the review the Monitor anticipates conducting involves three individuals who showed up unannounced at Zimmer's offices today, plus at least three more individuals who are planning to join them next week, only heightens our concern that the Monitor's staffing decisions regarding this matter will unreasonably increase the projected cost of his engagement.

For these reasons, we believe it is important that we speak as early as possible on Monday. Since the Monitor's staff has indicated to us that they have no trouble getting you on the phone when they need to speak to you, I would think you would extend us a similar courtesy.

Rick Robinson  
Fulbright & Jaworski L.L.P.  
[REDACTED]  
www.fulbright.com/frobinson

-----Original Message-----

From: Christie, Christopher (USANJ)  
[mailto:[REDACTED]]  
Sent: Friday, October 19, 2007 12:24 PM  
To: Robinson, Frederick  
Cc: Brown, Michele (USANJ); O'Dowd, Kevin (USANJ)  
Subject: RE: Monitor Agreement

Rick--

Very busy day today. Leaving for my Trenton office in a bit for a plea and press conference. This will have to wait until next week. In the meantime, please try to resolve the issues as I requested in the e-mail without the need for my intervention.

Christopher J. Christie  
United States Attorney for the District of New Jersey 970 Broad Street Newark, New Jersey 07102

[REDACTED] office  
[REDACTED] fax

-----Original Message-----

From: Robinson, Frederick [mailto:[REDACTED]]  
Sent: Friday, October 19, 2007 11:59 AM

To: Christie, Christopher (USANJ)

Cc: Brown, Michele (USANJ); [REDACTED]

[REDACTED]  
(USANJ)

Subject: RE: Monitor Agreement

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Fulbright & Jaworski L.L.P.

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From: Christie, Christopher (USANJ)

[mailto:[REDACTED]]

Sent: Friday, October 19, 2007 11:52 AM

To: Robinson, Frederick

Cc: Brown, Michele (USANJ); [REDACTED]

[REDACTED] O'Dowd, Kevin

(USANJ)

Subject: RE: Monitor Agreement

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**Flat Fee Provision:** The Monitor has requested that Zimmer pay to ACG a monthly flat fee of \$750,000 as compensation for the time of its three senior executives: General Ashcroft, David Ayres and Stacy Taylor. This fee would be paid regardless of the time actually spent by these three individuals on the Monitor engagement. We believe that this request, in both concept and amount, is unreasonable. Even if one assumed that these gentlemen, due to their vast experience, could command hourly rates of \$1,000 (which is more than twice what Zimmer can pay a physician under the DPA), that would translate into an aggregate effort level of 750 hours per month for 18 months. We do not believe that such a level of effort will be required by these three individuals or that a guaranteed payment of any amount is appropriate. We understand that none of the other Monitors is asking for such a guaranteed minimum payment and that they are all billing hourly rates. We also understand that an hourly fee arrangement has been used by other Monitors previously working for your office. ACG has claimed that a flat fee of this nature is their standard fee arrangement and that having General Ashcroft serve as our Monitor merits a premium payment. We believe that such a premium-based billing arrangement is not appropriate. We also believe that subjecting Zimmer to a fee arrangement that is so radically different than the fee arrangement the other settling companies have with their respective Monitors, would "uneven the playing field" and cause the public to believe that Zimmer is being treated differently than the other companies.

**Hourly Billing Rates:** We don't think that anyone would dispute the idea that all hourly fees should be reasonable for both consulting services and for legal services. Because ACG, however, has not yet provided us with sufficient information about the individuals who will be assigned to this matter, we cannot tell if the proposed rates are in fact reasonable. I would note, however, that the associate rates for the Ashcroft Law Firm (\$295 to \$495) appear to be high for a Missouri law firm.

**Other Billing Provisions:** At the end of each month, ACG proposes to send Zimmer a bill with three line items: the flat fee; the expenses; and the aggregate fees for the time spent by all other employees and consultants of ACG. Under ACG's proposal Zimmer would be provided with absolutely no detail regarding the number of hours spent, what tasks were performed to justify the aggregate fee or who performed those tasks. Zimmer would be expected to pay the bill with no questions asked.

We do not believe that such a total lack of transparency can be justified, as the Monitor has suggested to us, by its need for independence. At a minimum, Zimmer is entitled to verify that the services performed by the Monitor are actually called for by the DPA and that there are not an unreasonable number of people performing identical tasks. We do not understand why the Monitor would object to operating with the same level of transparency that it will insist upon from Zimmer in its dealings with other consultants. Moreover, as a publicly traded company, Zimmer is obligated to ensure that all payments to third parties are justified and adequately supported.

**Expenses:** ACG has asked Zimmer to agree in advance that the incurrence of monthly expenses in the range of \$150,000 to \$250,000 are reasonable.

We do not think that this type of expense burn rate is reasonable. We have been working for Zimmer for quite a long time and have never generated expenses at that level.

**Conflicts:** ACG has asked Zimmer to acknowledge that the Monitor may engage other service providers, in addition to the Ashcroft Law Firm, in which General Ashcroft has a financial interest. Zimmer believes that the Monitor should not be allowed to retain consultants in which General Ashcroft has a financial interest without prior notice to Zimmer and the Office. With respect to the Ashcroft Law Firm, we would also note that we have not been provided with a separate budget for its services as is required under section 19(d) of the DPA prior to the engagement of that law firm by the Monitor.

**Total Fee Estimate:** ACG has asked Zimmer to acknowledge that it "understands and agrees

that ACG's total estimated monthly budget, which includes the Ashcroft Law Firm, LLC, for all compensation, fees, and expenses will average between \$1,550,000 and \$2,900,000 (but may exceed this range). This estimate strikes us as extremely high and underscores the need for some meaningful review of the Monitor's invoices. For your information, we have contacted a nationally recognized professional services firm that frequently acts as an Independent Review Organization for the Office of Inspector General of HHS. This firm has estimated that if it were hired to perform the Monitor function for Zimmer, the total estimated fees would range from \$3 million to \$3.5 million for all 18 months of the DPA. Zimmer is hopeful that it and the Monitor will be able to resolve their differences over these issues so that they can promptly focus their efforts on their mutual objective of ensuring that the Company successfully complies with the DPA. Zimmer also needs to resolve these issues in time to publicly disclose by October 25 the impact that the Monitor's projected fees will have on its fourth quarter 2007 and full-year 2008 earnings guidance. Accordingly, we would appreciate hearing your views on these matters at your earliest convenience.

Rick Robinson

~~Fulbright & Jaworski L.L.P.~~

~~[REDACTED]~~  
~~[REDACTED]~~  
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**Chad Phipps**

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**From:** David Ayres [dayres@ashcroftgroupllc.com]  
**Sent:** Monday, October 22, 2007 6:02 PM  
**To:** Christie, Christopher (USANJ)  
**Cc:** Brown, Michele (USANJ); [REDACTED]; O'Dowd, Kevin (USANJ); Robinson, Frederick  
**Subject:** Monitor Engagement

Chris,

In light of the emails to you from Mr. Robinson about the Monitor Agreement, the Ashcroft Monitoring team would like to respond to his concerns. We regret that Zimmer has chosen to escalate disagreements regarding Ashcroft Group monitoring service fees to you for resolution. We hope, as you suggest in your email of last week, that these issues can be resolved quickly between Zimmer and the Monitor.

It is important to raise two concerns. First, it will be a difficult 18 months for everyone involved in this engagement if disagreements routinely are raised to the Office for resolution. As you clearly understand, the Monitor has substantial responsibilities under the Deferred Prosecution Agreement (DPA) which he intends to honor. While frequent objections to the Monitor's actions by Zimmer will not deter him from those responsibilities, they will make the process far more difficult and expensive for everyone involved.

Second, it is disturbing that the Monitor and his team have been working on this project for twenty-five days without an approved Monitoring Agreement. The Monitor and the Monitoring team have made significant personal, professional and financial commitments to this important project. Such commitments include substantial financial resources such as personnel, expenses and time. The Ashcroft Group Consulting Services presently is advancing these costs. Over the next week, the costs are expected to rise rapidly in order to undertake the Monitor's responsibilities to investigate potential wrongdoing and to review the legality of payments to consultants.

This significant increase in activity is necessary because upon the effective date of the DPA, Zimmer suspended making many payments in business operations involving Consultants. Such payments include employee reimbursements, in-kind payments, and training and education programs. Zimmer also chose to defer making quarterly royalty payments of over \$20 million to consultants. Zimmer requested the Monitor's permission to proceed with all of those payments.

After long, productive discussions, conducted in good faith by all involved, we do not have an Interim Standard Form for Consultant Services and Payments acceptable to Zimmer and approved by the Monitor as required by the DPA to process this backlog of Consultant payments. We also do not have mutually agreeable processes in place to review these payments. The entire team is concerned about the impact this delay will have on Zimmer's business operations.

On Friday, an initial legal team arrived in Warsaw in order to begin cataloging, scanning and reviewing documents related to these royalty payments. Today, we have sent another legal team to supplement this review and a third team to assist Zimmer in reviewing and processing other Consultant payments essential to their business operations. At least eight to ten professionals will be on-site at Zimmer headquarters until procedures, policies and practices are established and implemented to review thoroughly this backlog of payments.

Presently, the Ashcroft Group Consulting Services has been paying all the substantial costs (travel, lodging, personnel, etc.) associated with this rapid mobilization of resources to ensure that the Monitor's obligations are being fulfilled. This information is being provided to the Office in order to validate earlier conversations concerning the significant amount of time and commitment this engagement will require in order for the Monitor to fulfill the Monitor's obligations under the DPA..

The remainder of this memo addresses the points in the Robinson email:

1. **Flat Fee Provision:** While flat fees may not be the standard billing arrangement for legal fees, they often are the standard payment structure used by consulting firms. Because the Monitoring team is uncertain as to the issues that will be uncovered and the resulting staffing requirements necessary to fulfill the Monitor obligations in the DPA, the fees have been structured as part fixed and part hourly. The fixed portion of the fee is for the following individuals: John Ashcroft, David Ayres, Stacy Taylor, and six other professionals, three of whom have previous experience as senior officials at the United States Department of Justice. The fixed portion of the monthly fee is \$750,000 per month. While we do not bill our executive leadership team on an hourly basis, to test the reasonableness of the fixed fee, we have analyzed several scenarios of utilization have been considered that would result in an average billing rate of approximately \$700 per hour for this senior group of individuals. In contrast to Mr. Robinson, we believe the fixed fee for the above personnel is reasonable. The fixed fee portion reflects the significant time and attention this engagement will require of this senior group.
2. **Hourly Billing Rate:** The hourly billing rates projected for associates of the Ashcroft Law Firm range from \$295 to \$495. The Ashcroft Group Law Firm engages in practice focusing on large-scale national projects typically handled by national law firms from New York, Washington and Los Angeles. Its attorneys bear resumes comparing favorably to those of national and international law firms. The range of fees is required to ensure that appropriate specialists, who have experience with corporate law, corporate structure, health care law, and general fraud issues can be employed.
3. **Other Billing Provisions:** It is important to address Zimmer's objections to the limited amount of information the Monitoring team proposes should be provided to the Company. The Monitoring work plan includes a thorough analysis of the sales and marketing organization and the related business functions that interface with sales and marketing. The team needs to have the flexibility to analyze troublesome issues uncovered during the Monitor's work without providing Zimmer a road map of where the research is leading. Zimmer has been informed that the Monitoring team will keep appropriate time and expense records. Obviously, members of your Office are welcome to review the supporting detail. With regard to Zimmer's fiduciary responsibility to ensure the fees paid to third parties are "commercially reasonable," we suggest that Zimmer relies on the oversight provided by the Office.
4. **Reimbursable Expenses:** The quoted range of \$150,000 to \$250,000 for reimbursable fees is only a projection. The Ashcroft Monitoring team's policy is to bill only actual expenses.

Because the business dealings of Zimmer include the entire United States, it is extremely difficult, at this point, to know the amount of reimbursable expenses to be incurred. While the projection may in fact turn out to be high, it is prudent to make conservative projections.

5. Total Fee Estimate: The total fee estimate of \$1.5 to \$2.9 million per month is a projection that includes estimates for the Monitoring team's professional fees, external consultants, and reimbursable expenses. The actual fees charged will depend entirely on the issues uncovered and the degree of cooperation Zimmer provides. While cooperation to date has been sufficient, recent issues and the sheer volume of documents suggest a significantly challenging Monitoring engagement. Based on discussions with others involved in previous monitoring relationships, we believe the projected fees are well within reason.

Hopefully, this information will assist the Office in understanding the Monitoring team's fee structure. As always, please do not hesitate to call if you have any questions or comments.

Best regards,

David Ayres

