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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - BERGEN COUNTY

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IN RE: CASE NO. 293
DePUY ASR HIP MASTER DOCKET
IMPLANTS NO.
LITIGATION BER-L-3971-11

- - -

Thursday, November 21, 2013

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Transcript of the case management
conference in the above-captioned matter, held at
BERGEN COUNTY COURTHOUSE, 10 Main Street, Hackensack,
New Jersey, commencing at approximately 11:07 a.m.,
before Rosemary Locklear, a Registered Professional
Reporter, Certified Realtime Reporter, Certified
Court Reporter (NJ License No. 30XI00171000), and
Notary Public.

- - -

BEFORE: HON. BRIAN R. MARTINOTTI

- - -

GOLKOW TECHNOLOGIES, INC.
877.370.3377 | 971.591.5672 Fax
deps@golkow.com

1 APPEARANCES FOR THE PLAINTIFFS:
2
3 DAVID R. BUCHANAN, ESQUIRE
SEEGER WEISS, L.L.P.
4
5 DANIEL R. LAPINSKI, ESQUIRE
WILENTZ, GOLDMAN & SPITZER, P.A.
6 JOSHUA S. KINCANNON, ESQUIRE
KEEFE BARTELS
7
8 ELLEN RELKIN, ESQUIRE
WEITZ & LUXENBERG, P.C.
9 ESTHER BEREZOFSKY, ESQUIRE
WILLIAMS CUKER BEREZOFSKY, L.L.C.
10
11 GREGG J. BORRI, ESQUIRE
GREGG J. BORRI LAW OFFICES
12 RICHARD D. MEADOW, ESQUIRE
PAUL CORDELLA, ESQUIRE (via telephone)
13 THE LANIER LAW FIRM
14 MATTHEW R. MENDELSON, ESQUIRE
MAZIE SLATER KATZ & FREEMAN
15
16 SCOTT A. HARFORD, ESQUIRE
LYNCH DASKAL EMERY, L.L.P.
17 DAVID EISBROUCH, ESQUIRE
BALKIN & EISBROUCH, L.L.C.
18
19 TODD MUHLSTOCK, ESQUIRE
SANDERS VIENER & GROSSMAN, L.L.P.
20 MICHAEL COREN, ESQUIRE (via telephone)
COHEN PLACITELLA & ROTH, P.C.
21
22 DAVID SIROTKIN, ESQUIRE (via telephone)
MORELLI ALTERS RATNER, P.C.
23 MATTHEW TAYLOR, ESQUIRE (via telephone)
STARK & STARK
24
25 TODD OSHMAN, ESQUIRE (via telephone)
OSHMAN & MIRASOLA, L.L.P.

1 APPEARANCES FOR THE PLAINTIFFS: (Continued)

2

3 SEAN JEZ, ESQUIRE (via telephone)
FLEMING NOLAN JEZ, L.L.P.

4

5 ILYAS SAYEG, ESQUIRE (via telephone)
MAGLIO CHRISTOPHER & TOALE
6 JOHN CONNELLY, JR., ESQUIRE (via telephone)
DRAZIN & WARSHAW, P.C.

7

8 RANDI KASSAN, ESQUIRE (via telephone)
THE SANDERS FIRM
9 MINDY SHEPETIN, ESQUIRE (via telephone)
SHAPIRO & STERNLIEB, L.L.C.

10

11 DAVID LUSTBADER, ESQUIRE (via telephone)
LUSTBADER LAW
12 ABE BOHRER, ESQUIRE (via telephone)
BOHRER & LUKEMAN

13

14 JAMES DOBIS, ESQUIRE (via telephone)
DOBIS RUSSELL & PETERSON, P.C.
15 PAUL DA COSTA, ESQUIRE (via telephone)
EICHEN CRUTCHLOW ZASLOW & McELROW, L.L.C.

16

17

APPEARANCES FOR THE DEFENDANTS:

18

19

20 SUSAN SHARKO, ESQUIRE
ZOHA BARKESHLI, ESQUIRE
DRINKER BIDDLE & REATH, L.L.P.

21

22

ALSO PRESENT:

23

DAVID VOREACOS, Bloomberg News

24

KIBRET MARKOS, The Bergen Record

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1 THE COURT: Good morning, everyone. You
2 may be seated.

3 (Discussion off the record.)

4 THE COURT: Counsel on the phone, can you
5 hear me?

6 UNIDENTIFIED SPEAKER: Yes, your Honor, I
7 can hear you.

8 THE COURT: Okay. Thank you. We are on
9 the record in court.

10 Good morning, Counsel. Your appearances
11 for the record, please.

12 MR. BUCHANAN: David Buchanan, Seeger
13 Weiss.

14 MR. LAPINSKI: Good morning, your Honor.
15 Daniel Lapinski from the Wilentz firm.

16 MR. KINCANNON: Good morning, your Honor.
17 Josh Kincannon, Keefe Bartels.

18 MS. RELKIN: Good morning. Ellen Relkin
19 from Weitz & Luxenberg.

20 THE COURT: Anyone else?

21 MS. BEREZOFSKY: Esther Berezofsky,
22 Williams Cuker Berezofsky.

23 MR. MEADOW: Hi, Judge.

24 THE COURT: No other appearances?

25 MR. MEADOW: Rick Meadow, Lanier Law Firm.

1 MR. EISBROUCH: David Eisbrouch, Balkin &
2 Eisbrouch.

3 MR. HARFORD: Scott Harford, Lynch Daskal
4 Emery.

5 MR. MUHLSTOCK: Todd Muhlstock, Sanders
6 Viener & Grossman.

7 MR. BORRI: Gregg Borri from Borri Law
8 Firm.

9 MR. MENDELSON: Matthew Mendelsohn, Mazie
10 Slater Katz & Freeman.

11 UNIDENTIFIED SPEAKER: Susan -- for David
12 Lustbader.

13 THE COURT: Okay. Wait. We're just doing
14 counsel in chambers. In court. I'm sorry.

15 MS. SHARKO: I think there's two more
16 people in the back, your Honor.

17 THE COURT: They are just observing.

18 MR. VOREACOS: David Voreacos, with
19 Bloomberg News.

20 THE COURT: Thank you. Welcome, sir.

21 MR. MARKOS: Kibret Markos, from The
22 Bergen Record.

23 THE COURT: Thank you. Welcome.

24 MS. SHARKO: Thank you.

25 Susan Sharko, S-H-A-R-K-O, from Drinker

1 Biddle, for the defense, and my colleague, Zoha,
2 Z-O-H-A, Barkeshli, B-A-R-K-E-S-H-L-I, also an
3 attorney from Drinker Biddle, for the defense.

4 THE COURT: Okay.

5 Counsel appearing telephonically, rather
6 than go through the very daunting task of having you
7 put your appearances on the record verbally, I'm
8 going to ask that you E-mail plaintiffs' liaison
9 committee your appearance, that you appear
10 telephonically, and it will be noted in the record
11 that you did appear telephonically.

12 Is that okay, Counsel?

13 MR. LAPINSKI: Yes, your Honor.

14 THE COURT: Okay. Thank you.

15 That has been our protocol in the past. I
16 apologize if it hasn't made it into any of these
17 Orders.

18 Just for the record, this is In Re. DePuy
19 ASR Hip Implant Litigation, Case Number 293, Master
20 Docket Number L-3971-11.

21 This matter was assigned to this Court
22 pursuant to the Supreme Court's Order of April 12th,
23 2011, ordering then centralized management, now
24 multi-county litigation, of this matter, which was
25 thereafter referred to as DePuy.

1 The initial case management conference in
2 this matter was conducted on May 10th, 2011.

3 Counsel, welcome back to New Jersey. It
4 was truly an honor and a privilege to preside, and I
5 put that in quotes since it was done via Skype and
6 telephonically with Judge Katz and various state
7 court judges at this past hearing this Tuesday.

8 As always, the coordination and
9 cooperation with Judge Katz and other state court
10 judges is paramount, in this Court's opinion, and has
11 worked effectively not only in this litigation but in
12 also the other litigations that I have in management.

13 We certainly owe Judge Katz a great deal
14 of gratitude for working day and night with
15 plaintiffs' and defendants' leadership and liaison
16 committees in brokering the settlement. Likewise, I
17 would again like to extend thanks to the leadership
18 and liaison counsel for their cooperation with each
19 other, the Court and their diligent efforts in
20 bringing to fruition this settlement.

21 Just for the record, this settlement was
22 not done in haste. The lawyers representing the
23 plaintiffs worked very hard to get to this point.
24 There was extensive discovery conducted, including
25 many depositions and the review of millions of pages

1 of documents.

2 Lawyers in New Jersey had one case that
3 was trial ready, and after many fact and expert
4 witness depositions, that bellwether case ultimately
5 resolved.

6 Furthermore, there were another two cases
7 that were scheduled for trial this upcoming January.
8 After extensive briefing and over DePuy's objections,
9 this Court entered an Order, rendered a decision that
10 those cases were to be tried jointly.

11 With respect to the settlement, I
12 personally think it's creative and a unique method to
13 resolve this litigation. It has a structure that's
14 flexible to accommodate the many variables that could
15 exist for plaintiffs.

16 There is no doubt in my mind that the
17 settlement is well conceived, and I urge the
18 claimants to consider participation in this program.
19 Again, I urge that no lawyer or client make any snap
20 judgments about the settlement until they have a
21 chance to fully read the settlement and understand
22 the settlement program.

23 In that regard, I direct all parties,
24 claimants and counsel to the official Website, which
25 is www.usasrhipsettlement.com. That's

1 www.usasrhipsettlement.com, only one A.

2 The claims administrator's -- did I do it
3 wrong?

4 MR. KINCANNON: You're okay.

5 THE COURT: Oh, okay.

6 The claims administrator's phone number is
7 877-391-3169.

8 The Court has become aware that there are
9 several rogue, if you will, Websites out there. This
10 is the only official Website. Please be wary of
11 other Websites and, again, I direct your attention to
12 the official Website.

13 Most unique about the settlement, in my
14 opinion, is the lien section of the settlement. I've
15 never seen anything like this in any prior
16 settlements. It's a benefit to the plaintiffs and
17 claimants because the payment is made outside of the
18 settlement. In other words, the payment will not be
19 deducted from the proceeds.

20 Specifically, there will not be any
21 attorney fee for the lien section of the settlement,
22 which would usually be imposed in a conventional
23 settlement.

24 That being said, again, I commend counsel,
25 I thank counsel for their hard work, their diligent

1 efforts in bringing this settlement to fruition, and
2 I will hear from plaintiffs' counsel.

3 MR. BUCHANAN: Thank you, your Honor.

4 I guess it was two and a half years ago,
5 your Honor, that you appointed plaintiffs' leadership
6 in New Jersey, myself, Mr. Lapinski and also Mr.
7 Kincannon and his firm. And, like all cases, this
8 has been a winding road, and cases take different
9 paths.

10 From the very beginning, with leadership
11 in other jurisdictions -- and I just want to spend a
12 moment, frankly, on behalf of New Jersey leadership
13 to acknowledge and thank and provide appreciation to
14 the strong leadership we received from the MDL from
15 the very beginning.

16 And it became very clear that this would
17 not be a litigation with islands of litigation in New
18 Jersey, the MDL, California, Illinois without
19 connections between the islands. And there was very
20 strong leadership at the outset on the plaintiffs'
21 side at the lawyer level, there was cooperation from
22 the defense and ultimately very strong leadership and
23 cooperation among the judiciary that I think led a
24 very successful, coordinated litigation that brings
25 us to this point today.

1 And so on behalf of plaintiffs'
2 leadership, we're appreciative to the Court and thank
3 you for the guidance and leadership in that regard.
4 We're greatly appreciative of the leadership in the
5 MDL, Miss Relkin, Mr. Skikos; the leadership in
6 California, Mr. Kelly, Mr. Devine, Mr. Seeger; also
7 in Illinois, the Flowers firm. And there were other
8 coordinated pockets.

9 And, ultimately, the islands that may have
10 existed for a period of time were bridged and
11 ultimately joined and cooperated and proceeded I
12 think quite successfully to this point in time.

13 That happens sometimes; it happens rarely
14 as well as it happened here. Absent that, there can
15 be significant chaos, and I'd say the chaos in this
16 litigation, to the extent it existed, it was minimal
17 and, frankly, quickly forgotten.

18 So with that, your Honor, we'd like to
19 overview some of the particular elements of the
20 settlement. I know it's not news anymore. It was
21 discussed, obviously, a few days ago. But it had
22 come to the final minutes, I think, on Tuesday
23 afternoon. Mr. Lapinski will provide a brief
24 overview, but Miss Sharko can give a broader overview
25 of really how we got here in terms of the extensive

1 discovery that's been undertaken and the enormous
2 time spent on both sides of the V developing a case
3 that allowed people to be informed and present an
4 opportunity for people to consider.

5 THE COURT: Thank you.

6 MS. SHARKO: Thank you.

7 So how did we get here? We have produced
8 approximately 77 million pages of documents, we had
9 60 depositions of company and third-party witnesses,
10 which were conducted over 105 days, resulting in over
11 38,000 pages of transcript. That's more than 1,000
12 hours of deposition time. We tried two cases to
13 verdict. We had other cases set to go for trial,
14 fully prepared, and among all the preparation that
15 was done for those cases we had over 50 days of
16 expert depositions.

17 And so, again, as I said on Tuesday when
18 the settlement was announced to your Honor and to the
19 other judges, on behalf of the men and women of DePuy
20 and our legal team and with thanks to Ms. Relkin and
21 Mr. Skikos and Mr. Lapinski and their legal team, we
22 were pleased to report that the parties reached
23 agreement on a private settlement program for
24 patients who are U.S. residents and citizens who had
25 the ASR hip implanted in the United States and had a

1 surgery to replace the ASR hip before August 31,
2 2013.

3 As was alluded to, this was a very long,
4 hard road, it was a hard-fought negotiation over many
5 months with lawyers from around the country
6 representing thousands of ASR patients, representing
7 them aggressively and with vigor.

8 We were still negotiating and drafting the
9 Agreement until we walked into the courthouse the
10 afternoon we announced the private settlement in
11 Toledo.

12 The settlement is valued at approximately
13 \$2.475 billion, assuming that approximately 8,000
14 patients participate.

15 We believe -- and we greatly appreciate
16 your Honor's remarks -- that this is a program which
17 is good for patients, which helps bring finality to
18 the litigation and takes us in a new direction.

19 There's detailed information about the
20 program at the claims processor Website, and that
21 will be updated regularly.

22 There are eligibility requirements for the
23 program, which we discussed in Toledo and which are
24 on the Website. Basically, you have to be a U.S.
25 citizen or resident, have been implanted with the ASR

1 XL Acetabular Hip System or resurfacing system in a
2 surgery that took place in the United States or in a
3 United States military hospital and had the ASR
4 removed for reasons related to the recall on or
5 before August 31, 2013, after having been in place
6 for more than 180 days.

7 If you do not already have a lawyer, you
8 don't need to go out and hire one nor do you need a
9 lawsuit to participate in the program. The U.S.
10 program will resolve the claims of unrepresented
11 people on a comparable basis to represented people
12 but you don't save any money by going without a
13 lawyer here.

14 And I would urge people to beware of the
15 aggressive advertising that's going on now as a
16 result of this announcement on the Internet and not
17 to change lawyers just because of some ad or some
18 conduct which is worse than advertising.

19 Claims forms and registration packets will
20 be available soon. The U.S. program is structured in
21 two parts: Part A, under the first part of the
22 program, patients who are qualified to participate
23 will receive one base award of \$250,000, subject to
24 potential reductions. And that award includes a
25 component for attorneys' fees.

1 Under Part B, the U.S. program will
2 provide supplemental awards to patients who can
3 demonstrate that they have extraordinary injuries
4 related to the removal of the ASR, for example,
5 people who have had multiple surgeries following
6 their ASR surgery, called re-revisions, people who
7 had extraordinary medical events during revision
8 surgery, such as heart attack or stroke and other
9 things, which will be on a matrix which will be
10 developed by the plaintiffs' lawyers.

11 Qualifying for a base award in Part A does
12 not automatically entitle a patient to a supplemental
13 award in Part B. Medical records must be produced to
14 support all claims.

15 In addition to these benefits, DePuy will
16 be responsible for the negotiation and resolution of
17 certain liens by qualified lienholders for medical
18 care directly associated with revision surgery and
19 for certain other treatment.

20 This is a private resolution, it's not a
21 class action. It does not require approval by the
22 Courts. And this is henceforth the only settlement
23 program. This is the only program available for
24 patients who have been revised as of August 31, 2013.

25 There's a lot more detail, terms and

1 conditions in the final settlement agreement that was
2 executed by the parties.

3 We are most grateful to your Honor for
4 your careful and fair management of this large
5 litigation. You played a role in it, you guided us,
6 you were patient with us and, most of all, we
7 appreciate your confidence in us, in all of us, in
8 giving us the time and space we needed for these
9 negotiations.

10 We hope that you will now give U.S.
11 patients and their lawyers around the country the
12 time and space they need to carefully consider the
13 benefits of this important program so they can make
14 an informed decision on participation.

15 Each eligible patient must have the right
16 and the ability to consider the benefits of this
17 program and to receive accurate and objective
18 information about it, not rumors, speculation or
19 misleading information.

20 As for people who are not eligible for the
21 program because they have not been revised, the
22 Broadspire program is available to them.

23 It's important to note that this product
24 continues to perform well in some patients, and the
25 decision whether to be revised is a medical decision,

1 not a legal decision. It should be made by patients
2 and their surgeons.

3 We all, the plaintiffs and the defense,
4 have worked hard on this program. We've fought and
5 wrestled over many issues, but we now come together
6 with a common goal of ensuring that each eligible
7 patient has the opportunity to evaluate the program
8 objectively, in good faith, and to reap the benefits
9 of it.

10 Thank you.

11 MR. LAPINSKI: Your Honor, thank you very
12 much.

13 Mr. Buchanan has already expressed his
14 thanks to the Court but I also wanted to extend our
15 thanks to you, our thanks to the MDL as well, Ellen
16 Relkin and Mr. Steve Skikos, for allowing the New
17 Jersey litigation to coordinate and participate in
18 the MDL and, in particular, allowing New Jersey
19 lawyers and New Jersey law firms to play an active
20 role in everything that was going on in the MDL. So
21 I just want to express that thanks.

22 A couple of points that I wanted to bring
23 up. In regard to the settlement, as Ms. Sharko
24 indicated, this settlement will not cover all cases
25 and all claims that are currently pending.

1 There will be unrevised patients who have
2 claims that are pending, there will be people who
3 underwent revision surgery after August 31st of 2013.
4 Their claims continue to be pending.

5 It's important to note that their rights
6 are not impacted by this settlement and they continue
7 to maintain all of their rights. And, in addition,
8 both within the MDL and within the State of New
9 Jersey, counsel will continue to work on behalf of
10 those patients with respect to those claims.

11 The \$2.475 billion settlement number that
12 was mentioned by Ms. Sharko is an estimated number
13 based upon an estimate of approximately 8,000
14 enrollees into the settlement program, and it should
15 be noted that that 8,000 number is not a fixed
16 number. If there are more enrollees in a program,
17 there is a ratio program in place that will allow for
18 additional funding and, as Ms. Sharko noted, in
19 addition to that money, there is money in order to
20 resolve liens outside of that particular segment of
21 funds.

22 The base award amount of \$250,000 is the
23 Part A of the program. There are a couple of factors
24 that can influence that \$250,000 claim. Some of
25 those factors include how long the ASR device was

1 implanted, whether the patient smoked during the time
2 of the revision surgery, whether the ASR hip
3 replacement surgery was used as part of a revision
4 surgery, person's body mass index will also impact
5 the \$250,000 number as will the age of the patient at
6 the time the ASR was implanted.

7 There will be a supplemental award that
8 people will be eligible for as well. The
9 supplemental award will be determined by a chief
10 special master who's been appointed.

11 There's been three special masters and
12 also a chief special master who's been appointed:
13 Judge Corodemus, a retired judge from the State of
14 New Jersey; Retired Judge John Trotter from
15 California; and Cathy Yanni, who's a nationally
16 recognized mediator. The chief claims administrator
17 is Judge John McMonigle from Ohio, who sat on the
18 bench for over 20 years in Ohio. And they'll oversee
19 the entire claims process, including Parts A and Part
20 B.

21 You mentioned the Website earlier, your
22 Honor. There's going to be documents, hopefully as
23 soon as tomorrow, that will be posted and it will be
24 a fluid Website. There will continually be updates
25 and documents that will be posted on there.

1 There will be a couple different
2 requirements that we're going to have of counsel and
3 of patients who are going to be enrolling in the
4 program. First of all, the MDL Court is in the
5 process of considering a registration order, which
6 would be a request out to all counsel and all
7 patients that the names of all individuals who are
8 ASR recipients, whether revised or unrevised,
9 register so that we're able to keep track of the
10 number of individuals who may be eligible for this
11 program.

12 In addition to that, there will be a
13 requirement that, whether the case is filed or
14 unfiled, those individuals register, and in addition
15 to that, during the registration process the
16 appointment of a primary attorney, a single attorney
17 who would be the primary contact for that individual
18 so that information can be shared with that
19 individual through an attorney if that person is
20 represented.

21 Your Honor, as you're aware, the MDL
22 entered an Order on November 18th appointing a
23 settlement oversight committee. We would ask that
24 your Honor give the same consideration to that Order
25 so that the settlement oversight committee has the

1 ability to oversee the cases that are filed in New
2 Jersey as well.

3 THE COURT: Thank you.

4 MR. LAPINSKI: Lastly, your Honor, just a
5 couple of deadlines that pertain.

6 As of right now, the deadline for
7 enrollment in the program is set as April 1st of
8 2014.

9 Defendants do have a right to be able to
10 make a decision based upon the number of enrollees in
11 the program to walk away or opt out of the
12 settlement, and to the extent that they're going to
13 do so, that would have to be done by June 1st of
14 2014. They do also have the ability prior to June
15 1st of 2014 to decide that there won't be any need to
16 do that.

17 That's some of the deadlines that we're
18 currently dealing with.

19 Thank you, your Honor.

20 THE COURT: Thank you.

21 MS. SHARKO: So we have two Orders we
22 would like to present to your Honor. I will talk
23 about one, Ms. Relkin will talk about the other.

24 The Order I will present not today,
25 because I don't have it, the parties are still

1 working on it but I hope we are close to finishing
2 it, is the registration order. Mr. Lapinski
3 described that.

4 It's really a two-step process:
5 Registration and enrollment. Registration is not
6 accepting the program, it's just registering. You
7 then have to fill out a claim form and formally
8 enroll.

9 So we hope to get you the registration
10 order certainly by the end of the week for review and
11 consideration, and it will be the same registration
12 order as we have in the MDL, as we will present to
13 the other coordinated judges.

14 MS. RELKIN: If I may approach the bench
15 with the Order.

16 THE COURT: Sure.

17 MS. RELKIN: I've just presented you with
18 proposed Case Management Order Number 26, which
19 embodies the Order appointing the settlement
20 oversight committee.

21 I should note that, consistent with what
22 everyone else has said in court today, it represents
23 a diverse group of the various jurisdictions who have
24 worked cooperatively. It includes 22 lawyers who
25 played a key role in the negotiation, drafting of the

1 settlement, which was a long and arduous process, and
2 will be involved in the administration of the
3 settlement, especially the Part B aspect of the
4 settlement.

5 So it includes 22 lawyers from New Jersey,
6 from the MDL, from California, and from Illinois.
7 And Judge Katz is entering this Order as well, and we
8 ask that you do so in addition.

9 Thank you.

10 THE COURT: I have reviewed the same and I
11 will execute the Order.

12 Counsel?

13 MR. BUCHANAN: I think, your Honor, at
14 this point, as Ms. Sharko urged, more information is
15 going to be public in a few days.

16 Counsel and their clients need to consider
17 and evaluate the program. It's a significant
18 program, one that we in leadership support and urge
19 people to give serious consideration to and make
20 those determinations on full information rather than
21 based on preliminary reports.

22 And we welcome the opportunity for that
23 information to get out very specifically in the form
24 of available information on the Website and specific
25 communication from the SOC committee that your Honor

1 has separately authorized.

2 MR. BORRI: Your Honor, Greg Borri.

3 Might I just ask a question of counsel on
4 the collective end of the Court?

5 Just when is the Settlement Agreement that
6 was signed going to be published and when will these
7 matrices that were referred to be finalized and
8 published, just so we get an idea of what the time
9 line is?

10 MS. SHARKO: In all due course. We've all
11 been working around the clock for as far back as I
12 can remember.

13 THE COURT: I can echo that, in working
14 with Judge Katz, that counsel have been diligently
15 working on all Agreements and I know they will use
16 their best efforts to get the Settlement Agreement
17 executed and published as soon as practical.

18 MS. RELKIN: Just consistent with that,
19 there's the Settlement Agreement, which will be made
20 available soon.

21 THE COURT: Right.

22 MS. RELKIN: There's a separate document
23 that's being prepared called the informed consent
24 document, which is being drafted now. It's very
25 detailed because the settlement is detailed, it's

1 inherently complex, because it has the revision of
2 all the different scenarios of many thousands of
3 people who have had the revisions.

4 So the informed consent document is being
5 drafted, it will be sent to and made available to
6 every lawyer to make available to their clients and
7 that they must present to their clients which lays
8 out all the details of the settlement. And we're
9 just trying to write it in an intelligible way
10 because it's so complicated, and we're working on it
11 night and day.

12 MR. BORRI: Thank you.

13 THE COURT: Thank you, sir.

14 Just by way of housekeeping, I'm going to
15 enter -- I've signed the oversight order today. I'm
16 going to enter an Order, Case Management Order Number
17 27, which will, one, on my own motion stay this
18 litigation until June 15th, 2014; two, note the
19 official Website in the Order, this Order will be
20 posted on New Jersey's Website, so if anybody goes to
21 our Website, they'll be able to see a link to the
22 official Website; three, schedule this matter for
23 another case management conference on January 29th,
24 2014, at 11:00 a.m.

25 As I was going through my notes, I

1 realized that we had our joint conference with Judge
2 Katz back in June of 2011. It feels like it was
3 yesterday that Judge Katz came to New Jersey and
4 presided over a joint conference but it was over two
5 years ago, which is remarkable.

6 That being said, Ms. Sharko, anything
7 further?

8 MS. SHARKO: No.

9 Once again, thank you very much, your
10 Honor, for your leadership and your guidance in
11 working with us on this program.

12 THE COURT: Okay.

13 Counsel?

14 MR. BUCHANAN: No, your Honor.

15 Thank you.

16 THE COURT: Okay. We are adjourned.

17 (Whereupon the conference concluded at
18 11:35 a.m.)

19 TESTIMONY CLOSED

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CERTIFICATE

I HEREBY CERTIFY that the witness was duly sworn by me and that the deposition is a true record of the conference in the above matter.

ROSEMARY LOCKLEAR
REGISTERED PROFESSIONAL REPORTER
CERTIFIED COURT REPORTER (NJ)
30XI00171000
CERTIFIED REALTIME REPORTER
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Dated: 11/21/2013

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