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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

Case No. 10-MD-02197-DAK

IN RE: DePUY ORTHOPAEDICS,)
INC., ASR HIP IMPLANT)
PRODUCTS LIABILITY LITIGATION))
) West Palm Beach, Florida
) January 23, 2012
)
_____)

TRANSCRIPT OF STATUS CONFERENCE HEARING
HELD BEFORE THE HONORABLE DAVID A. KATZ
SENIOR UNITED STATES DISTRICT JUDGE

Appearances:

(As noted in the record.)

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1 (Call to the order of the Court.)

2 THE COURT: Please be seated. We're going to wait
3 just a minute.

4 Good morning all.

5 VOICES: Good morning, Your Honor.

6 THE COURT: This is the open court portion of the
7 generally bimonthly meetings in the MDL, which is DePuy Hip
8 ASR. As you undoubtedly know, the leadership of both
9 Plaintiffs' and Defendants' counsel met with me for an hour
10 and a half prior hereto, and we have some agenda items which
11 we want to discuss and some other matters which we want to
12 discuss in this open court session.

13 We'll begin with an overview report on the MDL. I am
14 presuming that those in leadership from both Plaintiff and
15 Defendant will wish to comment on that issue.

16 Ellen?

17 Those who speak, please articulate your name for the
18 court reporter.

19 MS. RELKIN: This is Ellen Relkin, from Weitz &
20 Luxenberg, co-lead counsel for the Plaintiffs.

21 There are approximately 3300 cases in suit at this
22 time, and quite a few are getting filed every day
23 incorporating or involving approximately 900 separate law
24 firms, which is pretty impressive, and that's the overall
25 numbers story.

1 In terms of the discovery that's proceeding on the
2 Plaintiffs' end, fact sheets have been getting filed or
3 served, and there's about 994 that have already been served by
4 the Plaintiffs. More discussions about fact sheets later that
5 I think Ms. Kranz will address on behalf of the Plaintiffs.

6 Discovery is proceeding quite well. This might
7 incorporate some of the other agenda items on discovery. I
8 can address it now or later. But 18 million pages of
9 documents I believe we've received. The Plaintiffs' steering
10 committee and other lawyers who have asked to help with
11 document review have been reviewing them and coding them, and
12 we're -- we have conducted a number of depositions already,
13 and we have another I think four or five scheduled over the
14 next two months, some that are taking place in the UK. We can
15 discuss that later in more detail, just the different
16 depositions.

17 But overall I think it's proceeding very well. We're
18 working cooperatively with Defendants, and it's moving.

19 THE COURT: Thank you, Ellen.

20 Mr. Tucker, Bob Tucker.

21 MS. KRANZ: Bob Tucker, for the Defense.

22 Ms. Relkin has conflated into her discussion most of
23 the agenda items, Judge, so I have nothing to add.

24 THE COURT: This is a different MDL, which I'm going
25 to comment upon later, because it does involve, as my past

1 MDLs did involve, outstanding cooperation between and among
2 counsel representing lead counsel, committee members,
3 et cetera, for the Plaintiffs and counsel for the Defendants.

4 Overview report on state cases.

5 MR. ROBINSON: Good morning, Your Honor. Dan
6 Robinson, on behalf of California. Steve Skikos is appearing
7 digitally.

8 There's really not much to report. There are no
9 pending discovery issues. In California there's over a
10 thousand -- well over a thousand cases filed to date, and
11 we're working cooperatively with the MDL to pursue discovery
12 and further litigation of these cases in California.

13 THE COURT: Dan, it's my understanding that the
14 leadership of the state attorneys there is working very
15 cooperatively with Steve Skikos, yourself, others, and doing
16 just what you said, moving forward in tandem with the
17 attorneys representing cases in the MDL. And I understand
18 that reporting has been done to keep Judge Kramer, who has
19 these cases in California, and with whom I am cooperating as
20 best I can, and he has been very cooperative with me, apprised
21 of what's going on. Everything I've learned is that
22 California, which is -- which is the largest state with cases
23 in state court is moving at the same pace as MDL. Am I
24 correct?

25 MR. ROBINSON: That's correct, Your Honor. Both the

1 lawyers on both sides, as well as the bench, were all working
2 and striving to work hand in hand with the MDL leadership on
3 both sides and Your Honor.

4 THE COURT: Thank you.

5 MS. SHARKO: Susan Sharko, for the Defense.

6 I have nothing to add as to California. Mr. Robinson
7 accurately summed it up. There are coordinated proceedings
8 moving along in New Jersey and in Illinois, and then there are
9 other state court cases around the country, and we're moving
10 forward. There -- essentially most of the lawyers are related
11 in the sense that Illinois lawyers also have cases in the MDL
12 or in New Jersey, as do many of the state court cases.

13 THE COURT: Anything to add to that, Ellen?

14 MS. RELKIN: On New Jersey there's a status
15 conference before Judge Martinotti on Friday. I think it's
16 basically reviewing the status. I don't think there's any
17 motion practice.

18 But I wanted to introduce Dan Lapinski.

19 Stand up.

20 He is one of the co-liaison with Dave Buchanan, from
21 New Jersey.

22 MR. LAPINSKI: Good morning, Your Honor.

23 THE COURT: Good morning, Dan.

24 I would add that I have been in contact with almost
25 all of the state court judges at one time or another, and many

1 of them within the last 10 days. Those include New Jersey,
2 Maryland, Illinois, Missouri, Nevada, and Wisconsin and
3 Georgia. If I left any out it was unintentional. But there
4 is a spirit of at least understanding and cooperation, not
5 coordination. That's not what we're seeking. What we're
6 seeking is that each of us learn what is happening before each
7 other judge so that there will be an attempt, at least, where
8 it can be done under state law to cooperate in moving these
9 cases forward with uniform orders. They will not always be
10 uniform because state courts are independent of the federal
11 MDL process, and we recognize that.

12 Next matter is the amendment to the common benefit
13 order by interlineation.

14 Michelle Kranz.

15 MS. KRANZ: Thank you, Your Honor. Michelle Kranz,
16 liaison counsel.

17 I think the issue of the interlineation came to the
18 Court's attention and to defense counsel's attention as it
19 related to the concept of those with pending remands. In
20 order to bring clarity to that issue, we asked the Court by
21 interlineation to put in a 30-day deadline following this
22 court's dispositive ruling on any motions for remand, allowing
23 those questions related to participation agreements be
24 deferred until at least 30 days post-decision by this court on
25 remands, if I accurately summed that up.

1 THE COURT: And that -- I may as well -- and I will
2 mention this later. It will be unusual if remand motions are
3 addressed in the near future. So that extends this well
4 beyond -- for instance, someone had a January 26th deadline
5 with respect to the common benefit matter. Those items should
6 be carefully reviewed, those matters, I'm sorry, and if
7 there's any question, counsel should discuss it with Michelle
8 Kranz.

9 Any other important information with regard to that
10 or questions arising from anyone?

11 Thank you.

12 Item number 4, Mr. Tucker, status report on plaintiff
13 fact sheet submissions.

14 MR. TUCKER: Your Honor, we have received I think 994
15 plaintiff fact sheets. There are probably a couple hundred
16 that are delinquent, but I don't say delinquent in any type of
17 pejorative sense. Lots of lawyers have called to ask for some
18 additional time so that they can be filled out completely, and
19 we have provided that to them. We are asking that if you're
20 going to ask for additional time on a PFS, that you have
21 filled out the plaintiff's preliminary disclosure, which is
22 the one-page sheet that was set out in a prior CMO, before you
23 come to us and ask for additional time on a PFS. We'll work
24 with you. We would like to get complete PFSs.

25 Now, I know that Ms. Kranz and Ms. Mayer are going to

1 speak later on some issues that have come up with some of the
2 PFSs that have been sent to us. The CMO provides for them to
3 be sent on a CD, and we do get paper copies, we sometimes get
4 filed copies through the court system. And given the volume
5 of material, we are asking that they all be placed on CDs and
6 then sent to us in that fashion, and that's what the Court's
7 order provided.

8 Just so that everyone knows -- and, again, this will
9 be something that will be communicated from liaison counsel --
10 that we need to make sure these PFSs are filled out in order
11 to trigger our ability to and obligation to fill out a DFS.
12 We are sending letters out. If the PFS comes to us and it's
13 not signed, or if it comes to us without an authorization, or
14 an authorization is not signed, or, importantly, if we don't
15 have the sticker pages for the implant attached to the PFS or
16 section two, part two, which asks for the part number and the
17 lot number filled out, then we can't fill out a DFS. So we'd
18 ask that everybody pay particular attention that.

19 But generally speaking, I've got to say that the PFSs
20 have come in in good order, and there's a process in place
21 that I think all counsel are adhering to.

22 THE COURT: Michelle or Ellen.

23 MS. RELKIN: Michelle.

24 MS. KRANZ: No, I would tend to agree with that, Your
25 Honor. I think we've had a pretty good relationship at least

1 trying to communicate with counsel, be sure counsel
2 understands what the expectations are, and I think we'll
3 continue that. I can say to the extent those who are
4 reviewing this record, there will be a follow-up e-mail
5 shortly addressing the specifics that we think can be
6 addressed by counsel and eliminate some of these deficiencies
7 and expedite the entire process.

8 THE COURT: Thank you very much.

9 MS. RELKIN: Just one addition to that for anyone
10 that's reading this. You know, since some people, very few,
11 but some are filing them on ECF, which is not supposed to
12 happen, but it's a dangerous thing, because there is
13 confidential information like Social Security numbers. So
14 that should not be publicly filed.

15 THE COURT: And HIPAA violation.

16 MS. RELKIN: Yes.

17 THE COURT: And liaison counsel, Michelle Kranz, and
18 Crystal will be -- on behalf of the Defendants will be working
19 together so that you -- that counsel will receive an e-mail
20 pointing out the fact that these deficiencies should be cured
21 if already done, and to avoid them as you prepare these PFS
22 documents.

23 Item 5, Mr. Tucker.

24 MR. TUCKER: So with respect to document discovery,
25 Your Honor, we continue to push out documents about every 30

1 days. To date, there are approximately 18 to 20 million pages
2 that have been produced, so that over the course of the 11
3 months of this MDL we have nigh on to 20 million pages of
4 documents that have been produced. This includes documents
5 from more than 80 percent of the custodians of ASR documents.
6 So in terms of being able to get documents out to plaintiffs
7 to permit them to review them and be prepared for the next
8 step, which are the setting of depositions which are being set
9 right now, we're in pretty good stead.

10 The -- we've been asked about the distributor
11 productions. So far we have produced approximately 750,000
12 pages of documents related to distributors that we've been
13 requested to produce. It is our expectation that the
14 distributor productions will be completed for approximately
15 the 40 distributors sometime within the next 45, 60 to 90
16 days.

17 So the document discovery is moving along. We have
18 teams both on the plaintiff side and on the defense side. As
19 issues come up regarding the productions, we are addressing
20 them in meet and confers, and to date, I'm pleased to say that
21 we've been able to work through those issues.

22 MS. RELKIN: That's pretty accurate. We've, you
23 know, had little issues here and there on privilege logs where
24 we send letters making challenges, and that's working quite
25 well, and numerous documents that were marked as privileged

1 have been de-designated. We're kind of doing that on a
2 rolling basis with the different custodial files. We just
3 received supplemental interrogatory responses over the weekend
4 which give us more information, and, you know, we're
5 working -- we're working on, you know, the issues that need to
6 be ironed out, but it's moving.

7 THE COURT: Thank you, Ellen.

8 Anyone else on that issue?

9 Item 6, report on scheduled depositions.

10 Ms. Sharko.

11 MS. SHARKO: So I have, between state and federal
12 court, about a hundred different requests for depositions of
13 approximately 50 witnesses. We have produced three witnesses
14 so far for substantive depositions. We have done three or
15 four 30(b)(6) depositions. We have one, two, three, four,
16 five, six depositions scheduled for February and March, I have
17 dates out for a seventh, and I continue to reach out to the
18 people on the list whose depositions have been requested and
19 try and get dates and give them to the other side. These are
20 witnesses in four different continents. There are current
21 employees and former employees. We are tracking down the
22 former employees to find them to see if they will voluntarily
23 appear and be represented to us, and frankly it has become a
24 rather difficult process, but we are moving ahead.

25 Distributors and detail reps, six depositions have

1 been taken, and we're in the process of scheduling more as
2 they are requested. Those are easier.

3 THE COURT: Ms. Relkin?

4 MS. RELKIN: It's been difficult on the plaintiffs'
5 end, as well, just because we're MDL, we're working very
6 closely with California and New Jersey, and because of the
7 juggling of trying to coordinate the depositions there's been
8 some stresses, but we're working, hopefully, you know,
9 succeeding to work them out. California, New Jersey and the
10 MDL have coordinated in terms of allocation of time. A lot of
11 the lawyers know each other, and I think that's -- it's
12 working.

13 In Illinois there have been some issues, but I think
14 we're striving to get that coordinated, as well, recognizing
15 that some depositions may require three, probably the majority
16 two, some simple ones maybe one day, and it's kind of case by
17 case, but we're working on it.

18 MS. SHARKO: So perhaps -- perhaps I was a little too
19 discrete in my remarks. The problem is, just laying it on the
20 table, there are certain lawyers who want their own private
21 depositions, and if everybody got their own depositions we'd
22 be 10 years into this litigation. So we really need the
23 Court's help, I think, in guiding us through this so that the
24 witnesses are deposed once, so that the time is allocated
25 fairly and we can move on through the discovery process.

1 There are motions pending now in state court in
2 Maryland to have us reproduce a witness who was deposed in the
3 MDL, cross-noticed, he's been deposed for two days, and now
4 the Plaintiffs' lawyer wants his own private day with him.
5 And I think we need some guidance from the Court on how to
6 deal with this. I haven't ever had this problem in any other
7 litigation, but it is really frankly slowing things down here
8 in terms of getting the witnesses up and deposed.

9 THE COURT: Well, it's my -- it's with some pride,
10 not in myself but in the leadership of both Plaintiff and
11 Defendant in this case, that there was created by negotiation
12 early on in this MDL a unique and innovative approach to
13 discovery depositions and other matters to be handled
14 cooperatively. And that includes the production of documents,
15 which you've heard reported, and the taking of depositions.
16 It is my hope that that cooperation, while having fits and
17 starts, as Ellen Relkin just indicated and as Susan Sharko
18 just indicated, will continue for the benefit of all parties.

19 This MDL is growing daily. At least one or two
20 cases, and many times more cases are added daily. This may be
21 a good time to discuss the deposition issues, and if there are
22 those who wish to address this issue who are not on the
23 Plaintiffs' steering committee or the Defendants' leadership,
24 now's the time to do so.

25 MR. MAGLIO: Well, Your Honor, Altom Maglio.

1 THE COURT: Right up here.

2 MR. MAGLIO: Good morning, Your Honor. Altom Maglio.
3 I represent plaintiffs in Maryland. And I believe that is
4 what was mentioned earlier as where some issues lie, and the
5 deposition that is being spoken of is the deposition of Aaron
6 Morey (phonetic) that was taken the week of Christmas, and
7 during that deposition, which was cross-noticed in the
8 Maryland -- it was initially noticed in the MDL, and then it
9 was cross-noticed in the Maryland case. I attended that
10 deposition on behalf of two sets of clients in Maryland with
11 filed cases. The first, the Jackson, O'Bryhim and Rassier,
12 which was filed in October of 2010 -- or, actually, September
13 of 2010, which actually preceded this MDL, and is presently
14 set for trial in October of this year, and in a second case
15 for other plaintiffs.

16 And, you know, quite frankly, Your Honor, I attended
17 that deposition, and day one, you know, an attorney on behalf
18 of the MDL asked questions, and then on the second day an
19 attorney on behalf of California asked questions, and then --
20 in the morning, and in the afternoon an attorney on behalf of
21 New Jersey asked questions. And it got to 3:30, and then
22 finally it was my turn to be able to ask questions. I got a
23 grand total of half an hour to ask questions before the
24 witness was removed by defense counsel. And, quite frankly,
25 Your Honor, with all due respect to the wonderful attorneys

1 who preceded me, we have different cases, different things
2 that need to be proved, and -- you know, and quite frankly I
3 needed a lot more time to question this witness and examine
4 this witness, and thus we've moved for that witness to be
5 reproduced in Maryland, Your Honor.

6 And that's kind of I guess what is bringing all this
7 to a head, and, you know, quite frankly, Your Honor, I mean,
8 the -- I'm all in favor of cooperation. I think that that is
9 a wonderful idea. But, you know, under the Maryland rules,
10 you know, we get seven hours to depose a witness, and, you
11 know, we're asking the Court to give us the other six and a
12 half hours that we didn't get. And, you know, I just, quite
13 frankly, don't see a way to do this differently than that,
14 Your Honor.

15 THE COURT: Where was the witness from?

16 MR. MAGLIO: The witness was from Singapore, Your
17 Honor.

18 THE COURT: And you want the witness brought back
19 again?

20 MR. MAGLIO: Yes, Your Honor.

21 THE COURT: Okay. I understand now.

22 MS. SHARKO: So if I could, if Mr. Maglio is done, if
23 I could just fill out the rest of the facts.

24 The witness was brought over from Singapore. He had
25 a plane to catch on Thursday. There was an agreement with

1 counsel that the deposition would end promptly at 4:00 so he
2 could get the plane and get home for Christmas. The
3 deposition was noticed in the MDL, it was cross-noticed in
4 California, Illinois, Mr. Maglio's Maryland cases and New
5 Jersey. Mr. Maglio also has four cases in the MDL, he has one
6 case in Illinois, and he has about two dozen cases in New
7 Jersey.

8 The first day of the deposition the witness was
9 questioned by counsel for the MDL, representing all of the
10 lawyers, including Mr. Maglio in the MDL, and those beyond the
11 MDL. The second day of the deposition the witness was
12 questioned in the morning by California counsel and in the
13 afternoon by counsel designated by New Jersey. Again, a forum
14 where Mr. Maglio has cases, and then Mr. Maglio.

15 As I understand the Maryland rules, they do not give
16 a lawyer a unilateral right to seven hours with every witness.
17 Rather, they set a cap on the length of the time of a
18 deposition. Here, the deposition was not seven hours.
19 Actually, it was 14 hours. So to the extent Maryland says you
20 can have up to seven hours in a deposition, this deposition
21 went twice as long.

22 We object to bringing the witness back from Singapore
23 for Mr. Maglio to have six and a half more hours. We believe
24 the deposition should be marked as concluded.

25 THE COURT: Mr. Maglio, did you request, once you got

1 notice of the deposition, attended the notice, did you make
2 any effort to request designation of some time? And follow-up
3 to that, does it sound reasonable that when the MDL,
4 representing over 900 firms of lawyers, takes the time it did,
5 which would be, let us say, seven hours one day and six and a
6 half the next, that you take a separate, on two cases, a
7 separate seven hours? Those are the two questions I've had.

8 First, did you contact anybody requesting time for
9 taking the deposition?

10 MR. MAGLIO: Let me answer that, Your Honor.

11 No, I did not request any sort of specific period of
12 time in which the witness -- to question the witness. Johnson
13 & Johnson and DePuy Orthopaedics noticed the -- cross-noticed
14 the deposition in my case. I assumed that I would have
15 adequate time to depose the witness, and I found out, quite
16 frankly, Your Honor, that that was not --

17 THE COURT: Isn't it obvious to you, an experienced
18 lawyer, sir, that someone would have to know up front, if
19 they've scheduled two days, how much time you are asking, and
20 you and they work cooperatively to work that out to get you
21 some time? How would they know that if you didn't let them
22 know until 3:30 on the second day? That's a rhetorical
23 question. They wouldn't, correct?

24 MR. MAGLIO: Of course not, Your Honor.

25 They cross-noticed the witness, Your Honor, in my

1 case, in which case they have a duty to produce the witness to
2 testify. And I was there for that very purpose. I traveled
3 all the way to New Jersey for a deposition the week of
4 Christmas, I brought a paralegal with me to assist in the
5 documents. I was there to depose this witness, and I did not
6 get that opportunity adequately.

7 And, Your Honor, just to clarify a couple things.
8 One is that under the Maryland rules, there -- the rules work
9 in such a way that if you're exceeding seven hours you have to
10 ask leave of court to depose a witness after that point, so
11 that the rules definitely do contemplate being able to depose
12 the witness up to seven hours without leave of court.

13 And, secondly, I actually have only one case in the
14 MDL, Your Honor, and that is the McConnell case, which is
15 neither here nor there, but . . .

16 THE COURT: All right.

17 MS. SHARKO: Well, Mr. Maglio is co-counsel. I can
18 get the case names, but they're on the record.

19 THE COURT: All right. Anything else, sir?

20 MR. MAGLIO: No, Your Honor. Unless you have any
21 other questions, Your Honor, I believe I've answered your
22 questions.

23 Thank you.

24 THE COURT: Is Mr. Maglio here?

25 MR. MAGLIO: Your Honor, that is me.

1 THE COURT: Well, that's what I thought. That's what
2 I thought, but when I phonetically spelled your name I didn't
3 hear a "G".

4 MR. MAGLIO: You don't pronounce the "G", Your Honor.

5 THE COURT: Off the record.

6 (Discussion held off the record.)

7 THE COURT: Thank you. Thank you, sir.

8 MR. MAGLIO: Are you done with me, Your Honor?

9 THE COURT: Yes, thank you very much, Mr. Maglio,
10 correct?

11 MR. MAGLIO: Correct.

12 THE COURT: I'd like to address this issue about
13 which I have had significant time to consider it before we
14 met -- we met in our meeting today. I obviously became aware
15 of it many days ago. Let me say a few things.

16 As the judge appointed to handle this MDL matter, I
17 was authorized and therefore empowered to appoint leadership
18 of the Plaintiffs' bar to work together and with all other
19 attorneys in the MDL, as well as Defendants' counsel and this
20 court. Among, but not limited to, those areas so empowered by
21 me to that leadership was the arranging and taking of
22 depositions.

23 In past MDLs in which I have been involved, those
24 issues which have now become, quote, important, unquote, in
25 this MDL regarding the taking of depositions in pending state

1 court cases have never been an issue. Why? Leadership in the
2 MDL arranged for depositions, in many, if not most, cases
3 cross-notice. And when those depositions were taken and
4 transcripts became available, those transcripts were
5 appropriate or made available to lawyers in the MDL, period,
6 so that that information of what was covered as to each
7 witness, the answers in response. And if there was something
8 unique to a particular case, the lawyer handling that case was
9 free to contact counsel for leadership, including liaison
10 counsel and the co-chairs, and ask how that would be handled.

11 Now, after arranging these depositions which you've
12 heard reported by both plaintiff and defense counsel here
13 today, after cross-noticing those depositions by defense
14 counsel, Mr. Maglio wishes to take 50 percent of the time
15 allocated, or seven hours, to take a witness' deposition. As
16 I said, the lawyers taking those depositions are standing in
17 the stead of approximately 900 firms representing, latest
18 count, 3269 plaintiffs in this MDL. As I said, every day new
19 ones are filed.

20 Adding your one day, without you ever seeking in
21 advance cooperation with those arranging and taking the
22 depositions, both plaintiff and defense counsel, it appears to
23 me would be wasteful and expensive if carried out throughout
24 the process of taking deposition testimony in this MDL. I
25 simply will not permit it. And toward that end, I intend to

1 issue the following order which I think I might change as to
2 language before issuance. Proposed order, or the order I
3 propose to issue, is as follows:

4 Recognizing that the state courts are separate and
5 independent, even though often working in cooperation with
6 this MDL, this order shall govern all counsel and co-counsel
7 with cases in this MDL. Lead counsel for the MDL shall be
8 responsible for scheduling all generic company witness
9 depositions with Defendants and assignment of responsibilities
10 for questioning. Any dispute arising out of this order
11 concerning participation in a generic company witness
12 deposition, which dispute cannot be resolved between or among
13 the attorneys, shall be brought by motion before this MDL,
14 which motion shall set forth the specific facts warranting
15 participation.

16 This court will then schedule a hearing and will
17 involve the state court judge, if any, of course, at the
18 option of that state court judge, so that a joint ruling may
19 be considered, and, if appropriate, issued.

20 Now, let me add something. Any attorney who has a
21 case in the MDL is under the jurisdiction of the MDL judge, in
22 this case me. I practiced law for 37 years before I came to
23 this bench 17 years ago. I can tell you that whether as
24 litigation or business negotiations, I never had a matter
25 which I could not work out with opposing counsel. It would

1 appear to me that working these matters, such as a
2 participation in depositions, is something that you attorneys
3 are able to work out between and among yourselves without
4 running to a judge to make that decision which will govern you
5 and your client.

6 I think we've covered that issue.

7 Ellen, do you have anything further to add?

8 MS. RELKIN: No, Your Honor.

9 THE COURT: Ms. Sharko?

10 MS. SHARKO: No, Your Honor. Thank you.

11 THE COURT: Next matter is report on protective order
12 enforcement.

13 Susan?

14 MS. SHARKO: We have an issue pending in state court
15 where there were some documents which were inadvertently not
16 fully redacted. The Plaintiff's lawyer took the information
17 in the documents and used it to recruit new clients, some of
18 whom are already represented by counsel, some of whom are
19 apparently represented by him, others are new. That issue is
20 pending now in a motion for sanctions before the state court
21 judge. We brought the matter to Your Honor's attention
22 because this lawyer also has cases in the MDL which were
23 recently filed on behalf of clients whose names were
24 inadvertently disclosed in these documents, although the
25 lawyer apparently says that wasn't how he retained or came to

1 retain those clients.

2 Nevertheless, we would ask Your Honor to remind all
3 of us of our respective obligations under the protective
4 order, because it seems to me if there is material which
5 should have been redacted and it wasn't, the appropriate thing
6 to do is to notify counsel, return the documents, and new ones
7 will be issued promptly.

8 And there is no dispute here that this information
9 should have been redacted. It's protected by HIPAA, we should
10 have redacted it, and we missed that in our haste getting
11 documents out.

12 THE COURT: I asked that this be placed on the
13 agenda. In the first instance, Judge Alvin Wong, in Georgia,
14 will rule independently on this issue due to the matter being
15 subject to motion practice before him.

16 Ms. Sharko has adequately and accurately described
17 the obligations of counsel receiving what is marked protected
18 or confidential documents by mistake. If confidential or
19 protected documents are inadvertently disclosed, this is
20 subject to ethical rules at multiple levels, including but not
21 limited to the federal rules, case law, and in particular
22 Amended Stipulated Protective Order of Confidentiality,
23 Document 315 in this MDL.

24 I want you to remember that when we first met in
25 February 2010 -- and I'm sorry that you're being blocked out,

1 and I apologize.

2 AUDIENCE MEMBER: I'm fine, Your Honor.

3 THE COURT: And this court takes extremely seriously
4 all ethical mandates incumbent upon us as lawyers and judges
5 to follow and will not contenance violation of those ethical
6 constraints and directives. I see no one in -- well, except
7 some ladies in the back who are very, very young. I see no
8 one in this room, especially those of us with white or gray
9 hair, who are not well aware -- and I'm joking, in part,
10 because everybody who comes out of law school should be aware
11 of those ethical precepts and constraints. I expect them to
12 be followed.

13 I do not have any such motion or violation in front
14 of me at this juncture, but be prepared, because that is my
15 view. And any violation will have to be proven, not assumed
16 by me.

17 Any question or comment by anyone in this courtroom?

18 Okay. Thank you.

19 The last matter. Did you want to comment first,
20 either Ellen or Bob, or do you want me to handle number 8,
21 remand motions?

22 MR. TUCKER: Your Honor, that's fine. I've got
23 nothing to add to the issue.

24 MS. RELKIN: We have nothing to add.

25 THE COURT: All right. There have been some -- oh.

1 MR. MAGLIO: Yes, Your Honor, if I may be heard on
2 the remand motion issue? Thank you, Your Honor.

3 Hello again, Your Honor. Altom Maglio.

4 And, Your Honor, I have, in conjunction with other
5 counsel, one case that's presently before Your Honor in the
6 MDL, the Mark~-- the McConnell versus Mark DiBiase (phonetic),
7 Inc. case that's actually out of Palm Beach County, Florida,
8 Your Honor. It was removed by Defendant to federal court, and
9 this was done despite the fact that Ms. McConnell lives here
10 in Palm Beach. Everything leading up to -- well, her surgery
11 was performed here in Palm Beach. She distributed -- she sued
12 the distributor that's based here in Florida, Your Honor, and
13 Florida has no innocent seller doctrine. So there's no
14 question the distributor was in the chain of distribution in
15 this case, and under Florida law the distributor is clearly
16 liable.

17 The case was removed and sent down to the Southern
18 District down in Miami, Your Honor, and after initially
19 denying the Defendant's motion to stay the case pending a
20 transfer to Your Honor's court, we fully briefed the motion
21 for remand. And unfortunately, though, the Court did not rule
22 on the motion for remand before it was transferred to Your
23 Honor, and right now the motion sits fully, fully briefed in
24 Your Honor's court. And there's been a few motions in dealing
25 with that, Your Honor, because of one of your case management

1 orders that may have -- that we're not clear on whether or not
2 it made us refile the motion for remand in your court, and we
3 also asked, in the event that that's what the intention of
4 your order was, that you would reconsider that.

5 Your Honor, Ms. McConnell is eager to get on with
6 litigation of her case here in state court where it properly
7 rests. And Your Honor might not be aware, but last week in a
8 very similar case where the defendant made the same exact
9 arguments up in Pinellas County, Florida, that had been
10 removed to the Middle District of Florida, a Middle District
11 federal judge remanded that case back to state court last week
12 in rejecting defendant's reasoning.

13 So, Your Honor, on behalf of Mrs. McConnell, I
14 request that Your Honor rule on the pending motion to remand
15 and remand her case back to state court.

16 THE COURT: Thank you.

17 That will not be done, and you know why it will not
18 be done. It will not be done until the Sixth Circuit acts on
19 your mandamus motion, which covers the same issues in all MDL
20 cases, if the circuit so rules. Until the Sixth Circuit acts,
21 since they're above me the last time I looked at the chart, I
22 will not act on your case.

23 With respect to other remand motions, as they come
24 before me I will make a decision on whether to act on those
25 remand motions or not. And I will not -- however, on the

1 McConnell case, clearly it would be inappropriate in my
2 opinion for me to act prior to the Sixth Circuit ruling on the
3 issue of mandamus.

4 MR. MAGLIO: Thank you, Your Honor.

5 THE COURT: Thank you.

6 I believe that we have covered everything that was on
7 the agenda. Am I correct, Ms. Relkin?

8 MS. KRANZ: Yes, Your Honor.

9 THE COURT: Ms. Sharko?

10 MS. SHARKO: Yes, Your Honor.

11 THE COURT: Since we are -- you have all taken the
12 opportunity to be here, I think it is appropriate to ask if
13 there are those among you who have questions or issues which
14 you believe should be brought to my attention or leadership's
15 attention. Anyone who has those issues and who wishes to
16 address the Court at this juncture should feel free to do so.

17 Seeing no one come forward, I want to thank you for
18 being here. I think that you show a great respect for both
19 your profession, this court and the matters which have come to
20 your hands to handle. Thank you.

21 Those who have to travel, travel safely.

22 Wait a minute, one minute.

23 MS. RELKIN: I think we had discussed the next status
24 conference date.

25 THE COURT: Yes, I was looking for the notes that I

1 have. The next one is March 15th, the Ides of March, in this
2 courthouse. Open court will be at 11:30 maybe in courtroom 6.
3 We do not know at this juncture, but you will get well in
4 advance advice as to both time and place.

5 In addition, we will, of course, have our usual
6 pre-open court conference with leadership.

7 Thank you. We're adjourned.

8 (Proceedings concluded.)

9 * * * * *

10 CERTIFICATE

11 I, Stephen W. Franklin, Registered Merit Reporter, and
12 Certified Realtime Reporter, certify that the foregoing is a
13 correct transcript from the record of proceedings in the
14 above-entitled matter.

15 Dated this 25th day of JANUARY, 2012.

16
17 /s/Stephen W. Franklin

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Stephen W. Franklin, RMR, CRR

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