

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF ILLINOIS

3 _____) 3:09-md-02100-DRH-PMF
4 IN RE YASMIN AND YAZ)
5 (DROSPIRENONE) MARKETING,)
6 SALES PRACTICES AND PRODUCTS)
7 LIABILITY LITIGATION,)
8 _____) MDL No. 2100
9)

10 **This Document Relates to:**

11 *Pamela Schuchert v. Bayer Healthcare Pharmaceuticals, et*
12 *al.,* 10-cv-11979

13 **TRANSCRIPT OF PROCEEDINGS**
14 **TELEPHONE CONFERENCE**
15 **FEBRUARY 24, 2015**
16 **BEFORE THE HONORABLE DAVID R. HERNDON**
17 **UNITED STATES DISTRICT COURT JUDGE**

18 **APPEARANCES:**

19 **For the Plaintiffs:** Roger C. Denton, Kristine Kraft

20 **For the Defendant:** Timothy Coon, Rebecca Bacon,
21 Terry Lueckenhoff, Kaspar Stoffelmayr

22 **Court Reporter:** Laura A. Esposito, RPR, CRR
23 U.S. District Court
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Proceedings recorded by mechanical stenography;
transcript produced by computer.

1 **(Court convened)**

2 THE COURT: Show we've called -- Mr. Denton, how do
3 you pronounce your client's name?

4 MR. DENTON: It's actually "Shugert", German
5 pronunciation on both from Southern Illinois.

6 THE COURT: *Schuchert vs. Bayer*, 10-11979. So
7 present in this teleconference on the behalf of the
8 plaintiff is Mr. Denton and Ms. Kraft. On the defense side
9 we have Mr. Coon, Ms. Bacon, and Mr. Stoffelmayer. We
10 understand Mr. Lueckenhoff will be joining us momentarily,
11 but Mr. Coon indicates he's going to carry the bulk of the
12 work, along with Ms. Bacon, so he's indicated we should go
13 ahead and get started.

14 So we received, via letter brief, a motion of sorts
15 from the plaintiff in this matter indicating a dispute that
16 plaintiffs have regarding their efforts to achieve some
17 production relative to a representative of Bayer, a sales
18 representative, I guess, a person who would have detailed
19 the product with the -- as I understand it, the prescribing
20 physician for the plaintiff in this case, and there's
21 ensuing disagreement between the parties over whether Bayer
22 should have to produce this material prior to a deposition.
23 I guess the deposition was initially set yesterday in
24 Cape Girardeau. And so that's what we have.

25 So Mr. Denton, are you going the carry the laboring

1 oar or is Ms. Kraft?

2 MR. DENTON: I hope I can, Judge, but Ms. Kraft may
3 have to fill in details as they come up.

4 THE COURT: All right. So apparently, I guess
5 sometime -- was it in January that you revealed to the
6 defendant the name of the prescribing physician, according
7 to the response I saw from Ms. Weber?

8 MR. DENTON: Judge, if I could clear that up. It's
9 not what it seems in Ms. Weber's e-mail. We timely filed
10 answers to the PFS way back in 2010 or 2011. Timely. We
11 identified, based on the records we received, Heartland
12 Women's Specialty as the prescribing entity, and, in fact,
13 disclosed those records. Heartland Women's Specialty has
14 one physician, Dr. Michael Jessup. His name is in the
15 records. If you Google "Heartland Women's Specialty" on the
16 internet today, his name will appear. He is the only
17 OB-GYN, only physician in that group. But nonetheless,
18 Bayer claimed they didn't know who the prescriber was, based
19 on that answer.

20 They raised that issue with us in early January of
21 this year as depositions were being scheduled in this case.
22 We immediately gave them that name and then they provided us
23 an amended fact sheet, or defense fact sheet, and an amended
24 supplemental defendant fact sheet. And so that's the
25 history. And they gave that to us on or about January 22nd

1 or 23rd. So I don't know -- I think that somewhat misses
2 the mark here.

3 What the problem is, from our perspective, is that
4 when they provided these additional amended fact sheets and
5 the production along with that, they haven't complied with
6 CMO 18 and CMO 20. And specifically those CMO's detailed
7 what documents aren't being produced, and they're to be
8 produced through the time the sales rep stopped detailing or
9 having any communication with the prescribing physician.
10 Actually, it goes even further, one year after that ends.

11 When we got their amended fact sheets, they tell
12 us, on January 22nd, 2015, just a few weeks ago, that the
13 date range of contact for Mrs. Zoellner, the sales rep in
14 question for Dr. Michael Jessup, the date range was from
15 July 2001 to March 29th, 2010. We now understand that that
16 is not an accurate statement. My staff assumed that's true,
17 and when they looked at all the contacts, all the things in
18 Your Honor's custodial file, it all ended on or about
19 April 2010, so my staff assumed that that was the end of
20 Ms. Zoellner's contact.

21 When I came back from Amsterdam, started looking at
22 the file, said, *Okay. Well, if Ms. Zoellner didn't see this*
23 *physician after 2010, who did?* Because the fact sheet
24 required them to answer that. So when they went back and
25 looked, lo and behold, all the contacts, according to their

1 answers in January 2015, ended in April of 2010. That
2 seemed odd to me when this company had seen this doctor over
3 150 times over all these years. I said no one from Bayer
4 ever talk to this physician after 2010. As we got into
5 this, I called this Ms.-- actually I called it to the
6 attention of defense counsel: *Can you confirm that*
7 *Ms. Zoellner never saw the doctor since April 2010?* They
8 didn't respond. I bothered Mr. Lueckenhoff Sunday morning:
9 *Can you confirm she's not seen this doctor since 2010?* He
10 didn't respond to that; Ms. Bacon did, and for the first
11 time on Sunday said, *Well, you know, there's a July 2010*
12 *cut-off. We don't have to produce anything beyond that.*

13 And so then I dug back into CMO 18 and CMO 20 and
14 it pretty clearly says they're ordered to comply. There's
15 been no amendment to CMO 18, no change or amendment to
16 CMO 20, and now apparently, based on Ms. Weber's response,
17 that Bayer has taken the position they didn't have to
18 collect and produce any documents since July 2010. She
19 cited to the Court a minute order. I went back to that
20 hearing because I was there. That was a hearing concerning
21 the scope and production of regulatory materials, and at
22 that hearing, which I think was six months after July of
23 2010, I said, *You know, we'll get them through the present*
24 *time so we can have them for January.* The Court said, *No.*
25 *We're going back to the July 2010 reference.* That has

1 nothing to do with CMO 18 or 20.

2 And frankly, the answers in their fact sheets that
3 we just received in January of 2015 are very misleading at
4 best because there's no footnote, there's no anything to me
5 or any other plaintiffs' counsel for that matter that, *Oh,*
6 *by the way, we're only giving you documents through the*
7 *summer of 2010, even though our sales reps continue to visit*
8 *with doctors, continue to detail these products, continue to*
9 *talk to them about scientific literature and promotional*
10 *materials or whatever.* And we're entitled to that
11 information. CMO 18 and 20, right on point. I was stunned
12 to find this out. And of course then we had to hold down
13 Ms. Zoellner's deposition which they agreed to do.

14 The other thing we have, Dr. Jessup, prescriber's
15 deposition is set tomorrow. These depositions of doctors
16 are five, six, seven hours. They're entitled to that but
17 that's not an easy chore to get a physician to set aside
18 that kind of time. We should, before Dr. Jessup is deposed,
19 know what has taken place over the last four-and-a-half
20 years, what materials -- that's what CMO 18 and 20 ordered
21 him to do. We don't have that information, and we don't
22 want to reschedule Dr. Jessup's deposition. It's hard
23 enough to get a full day from him. But at a minimum with
24 that deposition we would like the call notes that were
25 relayed to him from whenever they stopped producing them

1 sometime in April 2010 through the present time. That's
2 about eight, ten pages of documents. Should be in a
3 database. That's how they produced the previous ones. We'd
4 also like to know what promotional materials he was shown,
5 which would be the promotional materials that are in their
6 database that they have produced.

7 We can deal with Ms. Zoellner's updated custodial
8 file and performance reviews and all this other stuff when
9 we take her deposition but we need an order from the Court,
10 at a minimum, to have them produce these documents before
11 Dr. Jessup's deposition, and then order them to produce all
12 these other materials that they're required to under CMO 18
13 and CMO 20 for Ms. Zoellner, and then give us a date for her
14 deposition. If they can't do it -- ironically, they say
15 they can't do it very quickly. We gave them Dr. Jessup's
16 name in January. Eight days later they produced everything.
17 Doesn't seem to be that cumbersome. I'm sure Mr. Coon will
18 respond that that.

19 But the fundamental problem here, Judge, is, Bayer
20 has unilaterally taken the position on sales reps that
21 they're not going to collect or produce any materials after
22 July 2010, across the board, and that is fundamentally
23 unknown to the plaintiffs, fundamentally inconsistent with
24 CMO 18 and 20.

25 That's basically what I have.

1 THE COURT: Mr. Coon?

2 MR. COON: Yes, Your Honor. The request for
3 additional sales rep, custodial, and other materials made in
4 this case is the first request we received. It was made on
5 Saturday, as Mr. Denton described, a month after we had
6 produced Ms. Zoellner, the sales rep's, file. They received
7 the complete file from Ms. Zoellner up through July 2010,
8 which is two year -- more than two years beyond when the
9 plaintiff in this case stopped taking the product. Since --
10 up until Saturday we had never received a request.
11 Discussion hadn't been made to us in any general discussions
12 with the PSC or in any specific case about updating sales
13 rep files through the present. We produced materials,
14 again, two years beyond when the plaintiff here stopped
15 taking the product.

16 As to the request that came in over the weekend, it
17 was simply impossible to comply with it by Sunday -- by
18 Monday. There was just no means to get additional material
19 to produce on Sunday for a Monday deposition. Now, we
20 have -- we think it's doubtful that contacts that might have
21 occurred between Ms. Zoellner and the healthcare provider
22 here years after Ms. Schuchert stopped taking the product,
23 many years after, would be relevant to this case in terms of
24 causality and other issues. But nonetheless, if the Court
25 feels that it's appropriate, we're willing in this case to

1 update the materials currently, and we have already started
2 that process. We can provide the sales call reports for
3 Ms. Zoellner as to Dr. Jessup, updating them to current.
4 We'll provide her performance evaluations, the annual
5 performance evaluations. And we've obtained her e-mail file
6 and we'll update that if the Court thinks we should update
7 through the current date.

8 We think we can get that all out before the end of
9 this week. We think that should be all that would be
10 necessary. Her e-mail file, that would include her
11 communications and materials concerning the products at
12 issue here as well, again, her sales call reports and her
13 performance evaluations, which was something that Mr. Denton
14 had noted in his letter to the Court.

15 *THE COURT:* Okay. So Mr. Denton, address the issue
16 of the relevance of the file subsequent to the time your
17 client took the subject matter pharmaceutical.

18 *MR. DENTON:* Judge, was that a question to me? I
19 had a hard time hearing you.

20 *THE COURT:* I'm sorry. It's directed to you.

21 *MR. DENTON:* Judge, well briefly, the reason it is
22 relevant particularly to Dr. Jessup is this: Since
23 July 2010, a lot of things have happened with respect to
24 these products. There's been six new safety studies that
25 have been published. There's been an FDA ad com addressing

1 the safety of these products. There's a major label change
2 that took place in April of 2012. Additional contacts with
3 Dr. Jessup by this sales rep after April 2010 to the present
4 time certainly may impact his current view of YAZ and the
5 safety of it, and he may not remember the chronology of what
6 happened when and those kinds of things, and at a minimum we
7 ought to know what the sales rep told him every two weeks
8 when she goes into his office. That has to have some
9 influence on his views of products. We don't know what
10 those are, even though Bayer's representative has access to
11 this physician and has continued, we assume, now to have
12 this contact, and so it would -- it potentially influences
13 information, and it would be important to know what they
14 showed him and what perhaps they didn't show him, which has
15 been their practice in the past concerning safety
16 information, and to test whether or not he would have liked
17 to see certain safety information that wasn't provided to
18 him.

19 So although this is after the prescription, no
20 question about that, the evidence and the fact and the
21 safety have changed dramatically. In 2008 the sales reps,
22 for example, were telling the doctors there's only two
23 safety studies, the Bayer studies in genetics and Europe,
24 and it showed no increased risk and their product was as
25 safe as any other pill. Have they gone back out and told

1 him about all the other studies since July 2010 to say they
2 say quite a different situation? So I think it's relevant.

3 And I'd also go back, Judge, to CMO 18 and CMO 20.
4 The parties negotiated and agreed that it was relevant to
5 produce all contacts through one year after the sales rep
6 quit detailing a physician. That's verbatim out of both of
7 those agreed-to CMO's, so it was negotiated and agreed and
8 ordered by the Court that this information was discoverable.

9 And Bayer, notwithstanding those agreements, those
10 orders, and what's contained in the BFF and supplemental
11 BFF, have taken upon themselves to say, well, it's no longer
12 relevant, notwithstanding their agreement to the contrary.
13 So that's why we want the information in advance of
14 Dr. Jessup's deposition. I'm not asking for all of her
15 file, just her contact with him and what did she show him,
16 and that's why I believe it relates to this deposition, and
17 it's reasonably urgent to get this information that's
18 readily obtainable.

19 The other stuff from Ms. Zoellner's file, they can
20 produce and we'll get it in time to reschedule her
21 deposition.

22 *THE COURT:* So what -- so this doctor's deposition
23 is set tomorrow, right?

24 *MR. DENTON:* Correct.

25 *THE COURT:* And what have you got now in terms of

1 your ability to prepare for the doctor's deposition?

2 MR. DENTON: We have the sales call notes through
3 April -- looks like April 2009, best we can tell on what
4 they've produced, and that's all we have. We have any
5 promotional materials that Ms. Zoellner had in her file at
6 that time. That's what -- and those productions are
7 consistent with their answer to the interrogatory that she
8 stopped detailing him in April of 2009, or maybe it was
9 2010, but, of course, now we know that not to be true. But
10 that's what we have. And we really would like that
11 continued forward so we know what they've been talking to
12 him about over the last four years about their product in
13 question.

14 THE COURT: So April of 2009 puts you at -- how far
15 past her use of the product?

16 MR. DENTON: She was prescribed in August 2008,
17 Your Honor. Her injury was in December of 2008.

18 THE COURT: All right. Now, what about -- nobody's
19 really talking about it, but one of the concerns I have is,
20 you have an issue here with respect to the interpretation of
21 CMO 18 and CMO 20, which could have an implication in terms
22 of cases beyond Ms. Schuchert's case.

23 But what about, for example, the schedule that I
24 ordered specifically in Ms. Schuchert's case in CMO 70?
25 Nobody's arguing that the discovery cut-off in CMO 70, which

1 says fact discovery closes March the 6th -- what's the
2 impact of that on issues such as this, that -- insofar as it
3 specifically relates to Ms. Schuchert, and not every case in
4 the MDL, that that in some way has an impact on the
5 case-specific discovery including requests such as this?

6 MR. DENTON: Judge, I -- this is Roger Denton.

7 I do think that this has application to these other
8 cases, it specifically does Schuchert, and the discovery
9 cut-off of March 6, we have every expectation to meet that.
10 We have three or four more doctors on the calendar that
11 Bayer requests, including one today in Cape Girardeau,
12 Dr. Jessup tomorrow. And we, you know, want to get
13 Ms. Zoellner done by March 6, assuming that the defendants
14 give us these materials. They say they can.

15 But what is telling here, and I think perhaps
16 applies across the MDL, is, I think I'm the first
17 plaintiffs' lawyer that has figured out that the
18 supplemental BFF's are, first, misleading in their answers
19 and very much not in compliance with CMO 18 and 20, and that
20 folks think they have complete files and they don't because
21 of some oblique reference to a foreign regulatory hearing
22 where there was a mention that they didn't need to collect
23 documents after July of 2010.

24 This is going to be an issue in all these cases, I
25 believe. Now, it may not be, Judge, if the sales rep left

1 the company or sales rep quit detailing a physician, but if
2 they continue to detail these physicians through the present
3 time, then based on those CMO's plaintiffs are entitled to
4 this additional production on those cases. And it only
5 triggers, Judge, when a defendant asks for a deposition in a
6 case-specific, and then they're supposed to amend and
7 produce this stuff within 60 days. That's CMO 20.

8 And so it's going to trigger an issue, Judge, I
9 think in other cases. I'm just the one that first uncovered
10 it. I couldn't believe they quit detailing this guy in
11 April of 2010. It didn't make any sense. Now we know my
12 suspicions were correct.

13 MS. BACON: Your Honor, this is Rebecca Bacon. If
14 I can just respond on responding directly relating to CMO
15 70.

16 We have every intention of meeting the deadline.
17 If Your Honor does order that, we need to update the
18 production for Ms. Zoellner. The most -- even if the dates
19 for Dr. Jessup, we need to go beyond the March 6 fact
20 discovery date, if we can't reschedule before then, I don't
21 see any problem with us still meeting the rest of the
22 deadlines. My every hope is that we do, we are able to --
23 the lawyers work to get this done by March 6, and we've
24 worked well together so far. We've got a number of
25 providers scheduled as well as the plaintiff and her

1 husband.

2 *THE COURT:* Well, I think that misses the point,
3 but -- so let me ask either Mr. Coon or Ms. Bacon either
4 one.

5 First of all, I think we've got two issues looming
6 here, and that is: One is whether or not the defendant has
7 properly interpreted the duty of supplementation for all of
8 the cases in the litigation; and secondly, the position that
9 you don't have to disclose something on a case-specific
10 basis with a case that's being prepared for trial, relying
11 on your interpretation of the CMO in the generic form in the
12 face of an order such as CMO 70 that says you're conducting
13 fact-specific or case-specific discovery, and the cut-off
14 for fact discovery is March the 6th, which is to say that
15 that's the end of it. That's not necessarily all the
16 deadlines where everything is due March 6th, and that's
17 where I think Ms. Bacon's comment misses the point, but that
18 it should be done, it should all be done by March the 6th.

19 So I can't understand a position where you say,
20 well, we don't have to -- in this case, specific discovery
21 we're engaged in, we don't have to produce something because
22 our interpretation of what took place back at certain period
23 of time cut off discovery in the generic way and so in this
24 case-specific discovery we don't have to produce that. I'm
25 having a hard time wrapping my head around that position.

1 Could you respond to that.

2 MR. COON: Yes, Your Honor.

3 For all of the cases that have been listed, the
4 case-specific material that has been produced has gone well
5 beyond the time of injury and the time the individual was
6 prescribed the product by her healthcare provider. We
7 interpreted that as meaning we would use the cut-off that
8 was well-known among the parties of July 2010 for discovery,
9 and that was applied basically across the board.

10 As the litigation matured, when we got into late
11 2010 and then into 2011, the plaintiffs came back to us and
12 asked for updates of various additional files. There was no
13 discussion of sales rep files or any case-specific discovery
14 at that point, but certain specific files, custodians were
15 identified to be updated, and those were done then.
16 Your Honor will recall, those were done through July 2011.

17 Then you'll recall that in the fall of 2011, the
18 advisory committee meeting was scheduled for the end of that
19 year, and pursuant to discussions with Your Honor and with
20 the plaintiffs, a program was set up to do another subset of
21 custodians to update their data through December 2011,
22 through the date of the ad com, and that was done. Then the
23 stay took place.

24 Following -- early last year, in discussions with
25 the PSC, we talked about discovery that would need to be

1 updated for the ATE cases. A number of files were
2 identified to be updated, and those were done. Additional
3 files were requested during the course of the year. Those
4 were updated or produced. At no time did anyone ever
5 request an update in 2015 for cases involving injuries in
6 2008 or 2006 or 2007.

7 *THE COURT:* Okay. So what do you have at present,
8 if you know, with respect to Ms. Zoellner's records that
9 could be produced today to the plaintiff in terms of
10 supplementation? I know you talked --

11 *MR. COON:* What could be produced today,
12 Your Honor, are updated sales call reports.

13 *THE COURT:* Yes. And her personnel evaluations
14 from 2010 through the year 2013.

15 *MR. COON:* The one for 2014 hasn't been done yet,
16 but that won't relate to YAZ. We do have her e-mail file
17 being reviewed but it would not be possible to produce that
18 today. We're just starting on it as of this morning. That
19 could be produced, I expect, before the (inaudible) by
20 potentially earlier.

21 *THE COURT:* Okay. So I'm sorry. I had a hard time
22 understanding your answer. So what could be produced as of
23 today?

24 *MR. COON:* What can be produced today are the
25 updated sales call reports and Ms. Zoellner's updated

1 personnel evaluations, performance evaluations.

2 *THE COURT:* All right. And the part that cannot be
3 produced today, what part is that?

4 *MR. COON:* The update of her e-mail file, which
5 would contain communications about the products;
6 potentially -- I don't know that there are any, but
7 potentially communications that reference Dr. Jessup.

8 *THE COURT:* Okay. All right. Well, in terms of
9 the overall litigation, I agree with the plaintiffs'
10 interpretation of CMO 18 and CMO 20. The defendant
11 misinterprets the comment at the time of the conference
12 relative to the European regulation, and the suggestion that
13 I was cutting off everything is not accurate. There should
14 be -- should have been, once we resumed discovery,
15 supplementation of these custodial files, and then the -- I
16 think -- I think that's a serious problem, but I think also
17 a serious problem is that when these -- as these cases are
18 engaged in case-specific discovery, something that's
19 requested in a specific case, even if it's not been produced
20 generically, I think it's a different analysis. It becomes
21 a case-specific analysis and I think it has to be decided on
22 the basis of that particular case.

23 So I'm going to order the defendant to produce what
24 they have today, today, and produce the balance of what they
25 can't produce -- Mr. Coon said they could have it by Friday.

1 Now, whether the plaintiff believes that this destroys their
2 ability to properly depose the doctor is up to them, and
3 strikes me that they'll be able to depose the doctor, but if
4 they can demonstrate that they are unable to do that and
5 have to cancel the deposition and incur some cost in doing
6 that, they'll have to -- that will have to be the subject of
7 another motion, but -- so the motion to compel by the
8 plaintiff then is granted in that the defendant is required
9 to update these files and provide Ms. Zoellner's personnel
10 file, her custodial file, the training and sales materials
11 and call notes with Dr. Jessup. And I understand that they
12 cannot produce the e-mails until Friday, but they'll be
13 required to produce those other portions of the file today.

14 Mr. Coon, you can have those by what time today?

15 MR. COON: We can -- just needs processed quickly.
16 I can have them before close of business today, and I'll
17 actually try to get them out early, within the next couple
18 hours. I can have the sales call -- updated sales call
19 reports and the personnel evaluations performance
20 evaluations produced within the next couple hours.

21 THE COURT: Okay. So --

22 MR. COON: It's not a particularly large amount of
23 material, Your Honor. It's a few pages.

24 THE COURT: So then you'll produce that portion
25 that you can produce today by 1 p.m. central time. Now --

1 and then there's the subject of the availability of
2 Ms. Zoellner for deposition. Is that still a dispute that
3 needs to be resolved?

4 *MR. DENTON:* Judge, Roger Denton. If I may.

5 Unfortunately, timing-wise, we'd be happy to take
6 Ms. Zoellner's deposition after we get the materials.
7 Obviously, we'll have to take a few days to look at them,
8 but next week and the following week I have spring break
9 planned out of town and I would ask the Court, just for
10 Ms. Zoellner only, to amend CMO 70 as to this case and let
11 me take Ms. Zoellner's deposition maybe by March 21st. That
12 would be the only deposition we'd take out of time and it's
13 only due to my planned vacations.

14 *THE COURT:* Is there any objection to that?

15 *MS. BACON:* Your Honor, that should be --
16 Rebecca Bacon. That should be in few --

17 *THE COURT:* I'm sorry, I couldn't understand that.

18 *MS. BACON:* I'm sorry. That's fine with us.

19 *THE COURT:* Just work out a time with that and then
20 that will be something you can do without objection.
21 Anything else we need to take up?

22 *MR. DENTON:* Not from the plaintiff's side,
23 Your Honor. We appreciate your time.

24 *THE COURT:* All right. From defense side?

25 *MR. COON:* No, Your Honor.

1 THE COURT: All right. We stand adjourned.

2 Thanks.

3 *(Court adjourned)*

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REPORTER'S CERTIFICATE

I, Laura A. Esposito, RPR, CRR, CCR(MO), Official Court Reporter for the U.S. District Court, Southern District of Illinois, do hereby certify that I reported in shorthand the proceedings contained in the foregoing 21 pages, and that the same is a full, true, correct, and complete transcript from the record of proceedings in the above-entitled matter.

Dated this 13th day of March, 2015.

LAURA A. ESPOSITO, RPR, CRR, CCR