

July 17, 2013

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION BERGEN COUNTY

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IN RE: STRYKER REJUVENATE & : Case No. 296
ABG II HIP IMPLANT LITIGATION :
: Master Docket No.
: BER-L-936-13

- - -

Wednesday, July 17, 2013

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Transcript of Case Management Conference
held at Bergen County Courthouse, 10 S. Main Street,
Hackensack, New Jersey, on the above date, beginning
at approximately 10:00 a.m., before Kimberly A.
Overwise, a Certified Realtime Reporter, Certified
Court Reporter, and Notary Public.

- - -

BEFORE: HON. BRIAN R. MARTINOTTI, JSC

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1 THE COURT: We're on the record. I'm
2 going to call our friends on the phone first.
3 Counsel on the telephone, welcome. I
4 assume that you have complied with the order
5 concerning your request to appear telephonically and
6 I trust that you will comply with the order
7 subsequent to this conference and e-mail counsel and
8 let them know that you did appear telephonically.
9 That being said, welcome and I appreciate your
10 patience. We have been working since 9:30, albeit
11 in chambers, on some issues.
12 Counsel in the courtroom, your
13 appearances for the record, please.
14 MS. RELKIN: Good morning, Your Honor.
15 Ellen Relkin, Weitz & Luxenberg, for the plaintiffs.
16 MR. BUCHANAN: David Buchanan, Seeger
17 Weiss, for the plaintiffs.
18 MR. MILLROOD: Toby Millrood, Pogust,
19 Braslow & Millrood, for plaintiffs.
20 MR. ANAPOL: Tom Anapol, Anapol
21 Schwartz, for plaintiffs.
22 MS. SUTTON: Tara Sutton from Robins,
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24 MS. FLEISHMAN: Wendy Fleishman from
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1 MR. SMITH: William Smith, Hook, Smith
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 9 MR. TAMBURELLO: Anthony Tamburello,
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 11 MS. STERN: Felecia Stern, Bernstein
 12 Liebhard, for plaintiffs.
 13 MR. CARBOY: Andrew Carboy, Sullivan
 14 Papain Block McGrath & Cannavo, for plaintiffs.
 15 MR. KINCANNON: Good morning, Your
 16 Honor. Josh Kincannon, Keefe Bartells, for the
 17 plaintiffs.
 18 MS. CATULLO: Kim Catullo from Gibbons
 19 P.C. on behalf of the defendant Howmedica Osteonics
 20 Corp.
 21 MS. SPICER: Samantha Spicer from
 22 Gibbons for Howmedica.
 23 THE COURT: Okay. You can all be
 24 seated. Counsel, since our last case management
 25 order and just today, I am entering two orders. One

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1 is the stipulation regarding Stryker Corporation and
 2 Stryker Ireland Ltd. That was, in fact, e-mailed.
 3 My apologies. I missed it on my e-mail. The second
 4 is the deposition guidelines for plaintiffs who are
 5 in extremis. And that will be entered and filed
 6 today.
 7 We did have a rather lengthy meet and
 8 confer in chambers regarding where we are and where
 9 we intend to be in the short and long term. Would
 10 it be fair to say that the major issue that is -- I
 11 don't want to say delaying but that is preventing us
 12 from advancing the ball is the protective order?
 13 MS. RELKIN: Yes, Your Honor.
 14 THE COURT: Okay. And -- go ahead.
 15 MS. RELKIN: After our chambers
 16 meeting, I met with other members of the steering
 17 committee and the proposal of just carving out the
 18 expert issue to be decided at a later date with an
 19 interim order saying that the documents are not to
 20 be shown to any experts who are consultants would I
 21 think alleviate the issue. Then we can probably get
 22 it resolved pretty quickly.
 23 THE COURT: Well, but that was -- my
 24 recollection is that that was really not -- it was
 25 discussed and the thought was to try to get the

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1 entire protective order done in the short term and
 2 if there's a problem with that, then come back to me
 3 and we can work on that. Is that --
 4 MS. CATULLO: Yes, Your Honor. I do
 5 not -- I would object to carving out completely the
 6 experts so that no one can speak to experts during
 7 that period. I think there's got to be a way to
 8 compromise. And as I said in chambers, what is
 9 proposed is actually what was originally proposed by
 10 the plaintiffs and used in other litigation, and
 11 essentially what it requires is a meet and confer if
 12 we can't come to some agreement on that. So I would
 13 object to just a complete carve-out at this point.
 14 MS. RELKIN: Yeah, but just being
 15 realistic, it is a complex issue on the experts,
 16 which may unfortunately -- I have a feeling based on
 17 our discussions we may not be able to work it out
 18 absent a briefing. But we can get the rest of the
 19 protective order done so that Stryker can get us the
 20 documents. We agree we're not going to show any of
 21 those documents to experts in the interim, but we
 22 can start our way on discovery.
 23 THE COURT: Well, you know, candidly,
 24 without prejudice to a formal application, it would
 25 seem to make the same amount of sense and actually

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1 give the plaintiff a little more flexibility to say,
 2 okay, we'll sign the protective order as submitted
 3 with the proviso if there is an issue concerning
 4 whether or not someone is a current employee or
 5 consultant, you meet and confer and then come to the
 6 Court. That seems to me to give you a little more
 7 flexibility to the extent that you can hire an
 8 expert that's never been employed or isn't
 9 consulting for anyone and still work on that
 10 paragraph moving forward. I -- of course, the
 11 concern is then, well, we'll keep pushing that off
 12 and pushing that off. But if you enter -- let me
 13 throw this out. We didn't talk about this in
 14 chambers. Why don't we say sign it as proffered, as
 15 produced, and I'll give you deadlines when you have
 16 to meet and confer on that paragraph. If you can't
 17 come to an agreement by a date certain, motions to
 18 be filed and we'll hear it. So you'll have the
 19 order in place, a briefing schedule in place, and
 20 you're not going to be stuck in the mud because
 21 you're going to be under the court order. I just
 22 throw out that.
 23 MS. RELKIN: Well, maybe if we called
 24 it interim and just -- when you say as proffered, we
 25 just raised in chambers the two bigger issues.

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1 There is other little stuff that I do think we can
 2 work out.
 3 THE COURT: Right, right.
 4 MS. RELKIN: So I think we need to
 5 give them one more response and then perhaps we can
 6 do something along those lines with an interim.
 7 THE COURT: Interim order, interim
 8 order without prejudice to be adjudicated on the
 9 merits if the parties can't agree.
 10 MS. CATULLO: Judge, that's fine. My
 11 only concern is there were only two issues raised in
 12 chambers so I thought actually those were the two
 13 issues. Just I'm concerned about putting off and
 14 putting off since I want to get some documents out.
 15 THE COURT: Right.
 16 MS. CATULLO: So I thought the medical
 17 records issue was raised.
 18 THE COURT: That's been resolved.
 19 MS. CATULLO: I thought it was too.
 20 MS. RELKIN: That was resolved. We
 21 got this last evening so there wasn't much time
 22 between then and now. And I need to confer with
 23 Ms. Sutton, who's been taking the lead on that. I
 24 just don't want to say we agree to every single word
 25 without a little more breather on that. The focus

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1 is what are the complex issues, which we resolved
 2 one and the other one we have a plan.
 3 THE COURT: So what do you want to do
 4 with this protective order?
 5 MS. CATULLO: I think that the
 6 solution Your Honor raised is a good one, that we
 7 get this entered and we have a date for a meet and
 8 confer and then we report back to the Court, and if
 9 we're unable to resolve it, a briefing schedule be
 10 established. We have a lot to do in the next 30
 11 days and a lot of it is somewhat contingent on
 12 getting these documents out related to the
 13 depositions.
 14 MS. RELKIN: How about we get our
 15 revisions to -- if any, to defendants by Friday and
 16 we meet and confer Monday and then hopefully submit
 17 to the Court the interim order with our objection as
 18 to the expert paragraph with the schedule suggested
 19 by Your Honor?
 20 MS. CATULLO: Judge, if I get
 21 something on Friday afternoon, I'm not going to be
 22 ready to confer on Monday. It's not fair to my
 23 client.
 24 THE COURT: Tuesday?
 25 MS. CATULLO: End of the day, I

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1 suppose so.
 2 THE COURT: Plaintiff get their
 3 revisions to the defendants by Friday. Defendant to
 4 get back to the plaintiff by noon on Tuesday.
 5 They'll meet and confer on those issues. And if
 6 there's a problem and they can't enter into an
 7 interim protective order -- I mean, it would be
 8 great to have a protective order, but an interim
 9 protective order, call me up, shoot me an e-mail,
 10 I'm usually pretty responsive, and then we'll figure
 11 out how to go from there.
 12 Just understand that 138, you can
 13 agree and I'll sign off on anything you want. Once
 14 you start sending stuff here, you have to comply
 15 with the court rules. Be wary of that.
 16 MS. RELKIN: Right. And one thing I
 17 heard in chambers which gave me a lot of reassurance
 18 was Ms. Catullo saying some documents just don't
 19 come within the protective order.
 20 THE COURT: Right.
 21 MS. RELKIN: Like surgical
 22 instructions and so forth. So that's very good
 23 because I've seen other litigations where defendants
 24 kind of willy-nilly stamp everything. So I'm glad
 25 that Howmedica is going to be discerning what they

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1 stamp as confidential.
 2 MS. CATULLO: Well, obviously, Judge,
 3 there are going to be categories of documents that
 4 do not have confidentiality. We're not going just
 5 to landscape designate things as confidential.
 6 THE COURT: So we'll keep trying to
 7 advance the ball on the protective order. Hopefully
 8 a global, if not an interim, because it's only going
 9 to hold things up if we can't.
 10 Defendant's fact sheet, you'll
 11 continue to meet and confer on that issue as well,
 12 the phase-in perhaps and how it's going to roll out
 13 and how they're going to be produced. There may be
 14 a staggered production at first and once
 15 everything's caught up, then you can start to
 16 generate them.
 17 MS. CATULLO: Yes. I think we said we
 18 were going to meet and confer.
 19 MS. RELKIN: To get that resolved,
 20 yes.
 21 THE COURT: I did the order on the
 22 depositions. The insurance chart, apparently it's
 23 ready to go subject to the protective order; is that
 24 fair?
 25 MS. CATULLO: Correct.

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1 THE COURT: Okay. And that's supposed
 2 to be done by next week, I believe; right?
 3 MS. CATULLO: What?
 4 THE COURT: Subject to --
 5 MS. CATULLO: Well, subject to the
 6 protective order.
 7 THE COURT: We spoke about the
 8 defendant's ESI witness, which will be produced by
 9 August 23rd due to an unfortunate family tragedy,
 10 and the other corporate structure witness by
 11 August 7th; correct?
 12 MS. RELKIN: Yes. On the ESI order
 13 itself, Mr. Buchanan would like to be heard with a
 14 suggestion on that.
 15 THE COURT: Sure.
 16 MR. BUCHANAN: We're addressing the
 17 protective order, Your Honor. Obviously, that is an
 18 impediment to production on a broad scale.
 19 THE COURT: Right.
 20 MR. BUCHANAN: Relatedly is a
 21 production format order which we've been calling the
 22 ESI order. We tendered our proposal to the defense
 23 I guess it was March. We got their response last
 24 night.
 25 MS. CATULLO: That's not true.

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1 MR. BUCHANAN: It is true. That's
 2 when I got it. We met and conferred about two weeks
 3 ago. I got their response last night. I do want to
 4 alert the Court that until that order's entered, we
 5 won't get production of -- we won't get a production
 6 from the defense. So I received it last night. I
 7 forwarded it to our vendors. I would hope to have
 8 comments back from the vendors promptly within a few
 9 days. We'll turn it back to the defense. But
 10 obviously we'd like to ensure that that order, if
 11 there's any further comments from the defense on
 12 that order, that it either be submitted to us
 13 promptly next week and, if not, then we can just get
 14 with Your Honor to get the issue resolved so we can
 15 get the production.
 16 MS. CATULLO: Judge, that's an
 17 unfortunate report on that because there actually
 18 was in my understanding and it was confirmed in an
 19 e-mail from Ms. Relkin that there was a productive
 20 meet and confer on those guidelines and that
 21 protocol that took place right before the 4th of
 22 July holiday.
 23 MR. BUCHANAN: That's what I said.
 24 MS. CATULLO: And then there was a
 25 discussion about the fact that one of the

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1 individuals involved was going to be on vacation
 2 over the 4th of July holiday and, yes, that did get
 3 circulated yesterday. But to suggest that this was
 4 produced in March and nothing has happened till
 5 yesterday is not accurate.
 6 MR. BUCHANAN: To correct the record,
 7 Your Honor, that certainly wasn't my suggestion. We
 8 tendered the order in March. We got their markup
 9 following the meet and confer two weeks ago
 10 yesterday. My only request, Your Honor, is that
 11 when plaintiffs tender a revised markup back to the
 12 defense that it not take four months or even two
 13 months, that it take a few days so we can get it to
 14 Your Honor to enter so we can get a production.
 15 MS. CATULLO: Again, that is not
 16 accurate. There were a lot of discussions both with
 17 the Court on the time of the meet and confer and
 18 with counsel in that interim period. So I certainly
 19 don't want the record to reflect that it took months
 20 without any discussion of timing on that issue.
 21 THE COURT: Well, let's not worry
 22 about what the record is going to reflect. Let's
 23 worry about what the future record will hold, which
 24 is I'm sure a continued cooperation by and between
 25 counsel on this issue. You know how to find me if

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1 you need me and we can move forward and work
 2 together.
 3 MR. BUCHANAN: My specific request,
 4 Your Honor, is a deadline for the parties to submit
 5 either a joint production protocol I would suggest
 6 by the end of next week or, if not, competing
 7 proposals for Your Honor's consideration. I would
 8 hope it would be joint, but I think given the
 9 defendants' expressed desire to produce documents
 10 and the need for both a protective order and also a
 11 production order to be entered, I think having the
 12 production order entered by the end of next week
 13 will best facilitate that objective.
 14 MS. CATULLO: I would not agree to
 15 that, Your Honor. My understanding was the meet and
 16 confer was going to continue once that was
 17 circulated yesterday. I don't think having next
 18 week as a deadline is realistic on that.
 19 THE COURT: When are you going to meet
 20 and confer? Let's get a date that you're going to
 21 meet and confer on this.
 22 MS. CATULLO: We can certainly meet
 23 and confer by next week, that's for sure. I didn't
 24 bring the individuals who participated because I
 25 didn't think I needed to.

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1 THE COURT: Okay.
 2 Go ahead.
 3 MR. BUCHANAN: There is a need, Your
 4 Honor, to have a production order entered. I
 5 understand defense counsel's desire to make a prompt
 6 production. There are two orders that stand in the
 7 way: One is the protective order, the other is the
 8 production order. As I mentioned, we received their
 9 comments last night. I will flip around comments to
 10 those comments by the end of this week, but I would
 11 like to have a deadline for completing the meet and
 12 confer process and submission of competing proposals
 13 or a joint proposal I propose by the end of next
 14 week or an alternative date Your Honor selects just
 15 so we can bring this in for a landing.
 16 THE COURT: Well, let's do this:
 17 You're going to get your comments on the production
 18 order back to counsel when?
 19 MR. BUCHANAN: I'll do it by Friday.
 20 THE COURT: By Friday. Meantime
 21 you're working on --
 22 MS. CATULLO: Judge, can I just make a
 23 point on the production?
 24 THE COURT: Sure.
 25 MS. CATULLO: Production that's coming

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1 is a production of the corporate organizational
 2 charts --
 3 THE COURT: Right.
 4 MS. CATULLO: -- and the insurance.
 5 So I understand that obviously when we get into the
 6 big production, that's obviously an issue, but these
 7 charts and this insurance chart is something that's
 8 not -- you know, this is not critical information,
 9 metadata, whatever. It's not necessary for that.
 10 This is just a production to move along with the
 11 deposition coming up on corporate organization and
 12 insurance concerns counsel had raised and we want to
 13 be responsive to.
 14 THE COURT: So get your comments to
 15 counsel by Friday. Ms. Catullo can get her comments
 16 back to you by the following Friday. And then if
 17 there is an issue, shoot me an e-mail and we'll
 18 discuss how we're going to proceed, whether it's
 19 competing orders, whether it's a joint order,
 20 whether it's a briefing schedule, an order to show
 21 cause, contempt, I don't know.
 22 MR. BUCHANAN: That's great. Thank
 23 you, Your Honor. I appreciate it.
 24 MS. CATULLO: Thank you.
 25 THE COURT: So that's on the

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1 production, which is different than protective.
 2 Protective you're still working.
 3 The fact sheet we spoke about.
 4 Medical authorization regarding vendor status by
 5 July 31st did we say?
 6 MS. CATULLO: Yes.
 7 THE COURT: There are apparently still
 8 some plaintiffs who feel that they are eligible or
 9 who wish to be included in mediation that have not
 10 yet completed and served their fact sheets. Please
 11 make sure that those are forwarded to the defendant
 12 no later than July 26th. I am not going to make any
 13 selections prior to July 26th, but I will certainly
 14 entertain whatever application the defendants see
 15 fit or the Court sees fit if I do select a case for
 16 mediation and there is not a fact sheet attached to
 17 it. And that could be a sanction, a penalty, or
 18 whatever else I deem to be just and reasonable. So
 19 if you want -- there's a list. There's 51 cases on
 20 that list. If your case is on that list, make sure
 21 you have a fact sheet by July 26th. If you don't
 22 and you happen to win the lottery, we'll address how
 23 to proceed thereafter. The plaintiffs have chosen
 24 Nos. 14 and 28 as their selections and that would be
 25 Docket No. BER-L-1744-13 and Docket No.

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1 BER-L-1022-13.
 2 We've modified the time for the
 3 exemplar charts until July 26th; is that correct,
 4 counsel?
 5 MS. CATULLO: Yes.
 6 MS. RELKIN: Yes.
 7 THE COURT: Or that was the time?
 8 MS. CATULLO: It was extended from
 9 Thursday.
 10 THE COURT: I understand that defense
 11 counsel no longer wants to hear the Court request
 12 that they speak to their client about accepting
 13 service and has come up with a plan that the Court
 14 finds to be sensible and reasonable, which is that
 15 the defendants will accept service. Ms. Catullo
 16 will advise liaison counsel who -- or the names of
 17 the individual or individuals who will be able to
 18 accept service on behalf of plaintiffs, but it shall
 19 be limited to those firms that have at least 25
 20 cases filed in New Jersey.
 21 MS. CATULLO: No, Your Honor, it was
 22 filed and properly served.
 23 THE COURT: Okay. Filed and properly
 24 served in New Jersey.
 25 MS. CATULLO: Correct.

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1 THE COURT: Okay. And that means
 2 filed -- 25 filed and properly served, so No. 26 can
 3 get served on your designee?
 4 MS. CATULLO: Correct, and any
 5 obviously going forward.
 6 THE COURT: Correct.
 7 MS. CATULLO: And, Your Honor, I don't
 8 have the e-mails of those who should be on that
 9 service e-mail. Is that something you'd want to
 10 incorporate into the order or is that something that
 11 I will just communicate to counsel?
 12 THE COURT: Just work out with liaison
 13 counsel.
 14 MS. RELKIN: Maybe we should work out
 15 just a simple order so it's clear --
 16 THE COURT: Right.
 17 MS. RELKIN: -- the exact procedure
 18 for that.
 19 THE COURT: Right. And actually in
 20 that order you can say these are the firms as of the
 21 date of this order that are permitted to serve.
 22 This way there's no misunderstanding.
 23 MS. CATULLO: Sure.
 24 THE COURT: Right?
 25 MS. CATULLO: But that list will

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1 change obviously as it goes forward.
 2 THE COURT: Sure. But as of the date
 3 of the order, this firm can serve and then maybe two
 4 weeks later another firm can serve, and we'll keep
 5 amending that. Or if you send in an e-mail, we can
 6 incorporate that into the case management order and
 7 subsequent case management orders since we're going
 8 to be here on a regular basis. We can almost modify
 9 that on a monthly basis. However you want to do it,
 10 whatever's easiest.
 11 MS. RELKIN: That makes sense.
 12 THE COURT: With respect to
 13 depositions, we're not going to have a free-for-all.
 14 We're going to have two lawyers I'm going to say
 15 from New Jersey, in quotes, meaning here pro hac or
 16 admitted in New Jersey with New Jersey cases pending
 17 being able to ask questions. There's going to be a
 18 cross-notice issue with the MDL. I'm going to reach
 19 out to the judge in the MDL to see how that's going
 20 to be handled. Okay?
 21 Did we address everything that needs
 22 to be addressed today?
 23 MS. RELKIN: One item I see, the File
 24 & Serve. And I think, as we discussed, Ms. Catullo
 25 I think is discussing with the File & Serve people

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1 their proposal.
 2 MS. CATULLO: Yes, Your Honor, we are
 3 discussing that.
 4 THE COURT: So we'll just say File &
 5 Serve pending proposal and continued discussion.
 6 And then we're back here on August 13?
 7 MS. CATULLO: Yes, Your Honor.
 8 MR. BUCHANAN: 10:00 in the morning,
 9 Your Honor?
 10 THE COURT: Is that what it is? Yep.
 11 Anything else?
 12 MS. RELKIN: No, Your Honor.
 13 THE COURT: Anyone wish to be heard?
 14 (No response.)
 15 THE COURT: Counsel, thank you very
 16 much. I really prefer not to do it the way I'm
 17 going to do it, but we're going to work on this
 18 order, we'll e-mail it to liaison counsel. I'd ask
 19 when we do e-mail you an order, you get back to us
 20 within 24 to 48 hours.
 21 MS. RELKIN: As to the start time, we
 22 talked about trying to minimize folks' waiting while
 23 we hammer things out in chambers so that going
 24 forward the start time would be 10:30.
 25 THE COURT: Oh, okay.

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1 MS. RELKIN: Is that all right, Your
 2 Honor?
 3 THE COURT: 10:30. And why don't we
 4 say the next case management conference is scheduled
 5 for 10:30. Liaison counsel to meet at 9:45. How
 6 about that?
 7 MS. RELKIN: That's fine.
 8 THE COURT: Does that work out?
 9 MS. CATULLO: That's fine. That's
 10 fine.
 11 One other thing I had mentioned to
 12 Ellen I noticed is the caption on some of the orders
 13 is different from some others. It's just supposed
 14 to be In Re: Stryker Rejuvenate and ABG II Modular
 15 Hip Implant Litigation. So I don't know if we can
 16 correct that.
 17 THE COURT: Well, it looks like the
 18 ones you're preparing are right and the ones that I
 19 set up are wrong. So we'll make that note.
 20 MS. CATULLO: I didn't want to point
 21 that out.
 22 THE COURT: That's mixed in with the
 23 July 2nd order I never saw.
 24 MR. BUCHANAN: We can do it wrong too
 25 if you'd like.

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<p>1 THE COURT: Okay. Anything further? 2 I trust everyone's going to cooperate, meet and 3 confer, and we'll have a bunch of orders for me to 4 sign at the next conference. 5 Counsel, thank you very much. Those 6 on the telephone, we appreciate your patience. 7 We're going to disconnect. And see you in a couple 8 weeks. Thanks. 9 (Adjourned at 11:00 a.m.) 10 --- 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>1 2 LAWYER'S NOTES 3 PAGE LINE 4 _____ 5 _____ 6 _____ 7 _____ 8 _____ 9 _____ 10 _____ 11 _____ 12 _____ 13 _____ 14 _____ 15 _____ 16 _____ 17 _____ 18 _____ 19 _____ 20 _____ 21 _____ 22 _____ 23 _____ 24 _____ 25 _____</p>
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<p>1 CERTIFICATE 2 3 I, KIMBERLY A. OVERWISE, a Certified 4 Court Reporter and Notary Public of the State of New 5 Jersey, do hereby certify that the foregoing is a 6 verbatim transcript of the testimony as taken 7 stenographically by and before me at the time, place 8 and on the date hereinbefore set forth, to the best 9 of my ability. 10 I DO FURTHER CERTIFY that I am 11 neither a relative nor employee nor attorney nor 12 counsel of any of the parties to this action, and 13 that I am neither a relative nor employee of such 14 attorney or counsel, and that I am not financially 15 interested in this action. 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;">KIMBERLY A. OVERWISE CCR: 30X100224600 Dated: July 17, 2013</p>	

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