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November 5, 2013

VIA ELECTRONIC FILING
The Honorable Arnold New
Complex Litigation Center
602 City Hall
Philadelphia, PA 19107

Re: ***In re: Risperdal Litigation*, March Term 2010, No. 296**

PLAINTIFFS' MOTION TO ENFORCE SETTLEMENT

Dear Judge New:

Please accept this Motion to Enforce Settlement against Defendants Janssen Pharmaceuticals, Inc., Johnson & Johnson Company, and Janssen Pharmaceutical Research and Development, L.L.C. (collectively, the "Janssen Defendants" or "J&J").

I. INTRODUCTION

This Motion seeks to enforce the settlement reached in this mass tort litigation between the Janssen Defendants and seventy-seven (77) Plaintiffs who had filed lawsuits against Johnson

& Johnson, a global pharmaceutical company, and its subsidiaries for injuries and damages caused by the antipsychotic drug Risperdal.

The essence of this dispute is that J&J entered into a legally binding settlement agreement for a confidential amount for 77 Plaintiffs in this litigation (the "J&J Settlement" or "Settlement"), but J&J is now reneging on that Settlement. After agreeing to the Settlement, J&J now suffers remorse because it has apparently discovered or decided that the Settlement does not inure to its benefit to the extent it may have originally anticipated. Entering into an agreement that one party thereto later determines is not in its best interest, however, is not a legal basis for overturning the agreement, denying the agreement or escaping from the liabilities assumed by the parties under the agreement.

II. FACTUAL BACKGROUND

A. Prior Bellwether Settlements

On September 6, 2012, the trial of a Risperdal injury lawsuit began before the Honorable George W. Overton. *See Banks v. Janssen Pharmaceuticals, Inc., et al*., January Term 2010, No. 00618. That case settled after a jury was selected and as the Court was preparing to hear arguments on various pretrial motions, including a motion to compel the trial testimony of Alex Gorsky, the CEO of Defendant Johnson & Johnson.

Two weeks later, on September 20, 2012, another Risperdal trial began before the Honorable Mark I. Bernstein. *See Rolen v. Janssen Pharmaceuticals, Inc., et al*., January Term 2010, No. 00649. This case proceeded until October 3, 2012, when the parties settled the case, as well as four other bellwether cases that were in the trial pool.[1] An email between attorneys

[1] The same defendants, but a different plaintiff, had participated in a Pretrial Conference in a third Risperdal case (*SB v. Janssen Pharmaceuticals, Inc*., May Term 2010, No. 03629) with the Honorable Norman Ackerman on the same day – October 3, 2012 – and were preparing to select a jury when the settlement was reached.

for the parties confirmed this settlement for a confidential amount which was intended to resolve the five bellwether cases. *See* Exhibit A (redacted email between B. McCormick, Esq. and T. Campion, Esq.).

Subsequently, each plaintiff signed and executed a confidential settlement and release document. *See* Exhibit B (redacted copy of settlement agreement and release from one of five bellwether cases).

Despite the fact that claims against J&J's co-defendants, Excerpta Medica, Inc. and Elsevier, Inc. (collectively, the "EM Defendants"), remained viable, and trials possible, **in all six of the resolved bellwether lawsuits** there was no discussion between the Plaintiffs and J&J, nor any provision in the settlement agreements for those six cases, that addressed the issue of whether the EM Defendants would be released or defined as a "Released Party." *See id.*

B. Settlement of 77 Plaintiffs

On January 28, 2013, settlement discussions with the assistance of Discovery Master Rutter, resulted in an agreement to resolve 78[2] Risperdal cases for a confidential settlement amount. *See* Exhibit C (redacted email between B. McCormick, Esq., T. Campion, Esq., K. Murphy, Esq. and Discovery Master Rutter).

The final number of Plaintiffs included in the settlement (77) and the settlement amount were confirmed in a February 22, 2013 email between counsel for the parties. *See* Exhibit D (redacted email between B. McCormick, Esq. and K. Murphy, Esq.).

[2] The initial settlement was for 78 Plaintiffs. However, one of the Plaintiffs was subsequently withdrawn from the settlement by agreement of the parties.

In the numerous discussions that preceded the agreement of January 28, 2013, whether in writing or oral, there was never a discussion that the EM Defendants had to be included as a released party as a condition for settlement.[3]

Moreover, since January 28, 2013, there have been nine Status Conferences with the Court – in February, March, April, May, June, July, August, September, and October. At every Status Conference there has been some discussion of this Settlement, even if it is in the form of a brief status report.

Moreover, during these Status Conferences, on numerous occasions, the treatment, prosecution and/or dismissal of the remaining claims against the EM Defendants have been discussed among this Court, counsel for the Plaintiffs and counsel for the EM Defendants. J&J's counsel has been present for all of these discussions.

Also, Case Management Orders setting trial dates for many of the EM-only cases were entered on September 12, 2013, ***setting these cases for trial solely against the EM Defendants***. At no time during these discussions or when these Case Management Orders were set, did the J&J Defendants ever raise or argue that the EM Defendants were released.

Indeed, on June 25, 2013, Kenneth Murphy, Esq., lead counsel for J&J, wrote to Plaintiffs' counsel concerning the J&J Settlement:

> [Your] letter is both premature and unnecessary. **There is no question that the parties have agreed to settle numerous cases filed by Sheller P.C. in this Risperdal Mass Tort**. The broad contours of that agreement and the identity of the cases involved are the subject of earlier correspondence between me and Brian McCormick of your office.

[3] For example, on March 1, 2013, Plaintiffs' counsel reported that they intended to use a Qualified Settlement Fund to fund the settlement. *See* Exhibit E (email between C. Gomez, Esq. and K. Murphy, Esq.). There was no indication in response to this proposal that the entire case was being dismissed as to all defendants.

See Exhibit F (letter from K. Murphy, Esq. to C. Gomez, Esq.) (emphasis added). Mr. Murphy's letter was in response to Plaintiffs' counsel submitting proposed terms and conditions for the 77-case inventory settlement.[4]

In reliance on Mr. Murphy's June 25, 2013 letter and other communications like it, counsel for Plaintiffs incurred substantial costs, and performed numerous services, on behalf of the 77 Plaintiffs affected by the Settlement. For example, Discovery Master Rutter, who was charged with allocating the settlement fund among the 77 Plaintiffs, spent more than 40 hours over several weeks in exhaustive review of medical records, consultation with counsel and interviews, by video or over the telephone, with many of the 77 Plaintiffs. In addition, Plaintiffs' counsel retained a lien resolution company that has worked tirelessly for several months to resolve any and all lien issues for all 77 Plaintiffs. Finally, Plaintiffs' counsel has spent countless hours on the telephone with almost every one of the 77 Plaintiffs and their families, explaining the settlement process and the allocation process. Plaintiffs' counsel would not have proceeded as they did, but for the proper reliance that the parties settled the 77 cases, as Mr. Murphy confirmed, in June 2013.

Subsequently, on August 7, 2013, Plaintiffs circulated a draft Master Settlement Agreement ("MSA"). *See* Exhibit H (email from C. Gomez, Esq. to K. Murphy, Esq, and portions of redacted MSA). The draft MSA specifically includes a provision that the EM Defendants would not be released from the litigation. *See id.* at p. 10, § J.

In response, on September 17, 2013, after numerous requests and demands for a response by Plaintiffs, J&J finally circulated revisions to the MSA and, for the first time, made an issue of

[4] In his letter, Plaintiffs' counsel laid out several key terms of the eventual Confidential Master Settlement Agreement. *See* Exhibit G (letter from C. Gomez, Esq. to K. Murphy, Esq.). If the inclusion of the EM Defendants in the J&J Settlement was truly an imperative perception for J&J, it should have been raised in Mr. Murphy's letter, rather than his acknowledgement that "[t]here is no question" that Risperdal cases had settled. *See* Exhibit G.

whether the EM Defendants would also be released. *See* Exhibit I (letter from K. Murphy, Esq. to B. McCormick, Esq., and portions of redacted MSA). In Section H (formerly Section J), the language "except as to Excerpta Medica and Elsevier, Inc." was stricken by Defendants from the MSA. *See id*. at 20-21. In the cover letter accompanying the draft MSA, Mr. Murphy again confirmed the Settlement – "Attached is the revised Confidential Master Settlement Agreement that we propose to memorialize the settlement reached earlier this year." *See id.* (emphasis added).

During this same time period, on two occasions, the Court entered Case Management Orders setting an EM-only case for trial, first on September 12, 2013 and then entering an Amended Case Management Order on October 22, 2013, solely against the Excerpta Medica Defendants. *See C.R., et al. v. Janssen Pharmaceuticals, Inc., et al.*, April Term 2011, No. 01998. Before the *C.R.* Case Management Order was entered, there was an email exchange, on October 22 and 23, 2013, among this Court's chambers and representatives of all parties regarding the timing of that trial. Counsel for the EM Defendants and counsel for the Plaintiffs both responded to the Court with their thoughts. Curiously, when given another chance to object to the trial against the EM Defendants only, the J&J Defendants again did not raise the issue.

Plaintiffs responded to J&J's suggestions on October 1, 2013. *See* Exhibit J (email from C. Gomez, Esq. to K. Murphy, Esq., and portions of redacted MSA). In that version, the Plaintiffs again excluded the EM Defendants from the settlement. *See id*. at pp. 17-18, § I. In response, on October 21, 2013 J&J again deleted Plaintiffs' exclusionary language as to the EM Defendants. *See* Exhibit K (email from T. Campion, Esq. to B. McCormick, Esq., and portions of redacted MSA).

Thereafter, in a telephone discussion, counsel for J&J informed Plaintiffs' counsel for the first time that J&J would revoke the Settlement unless the *C.R.* case was dismissed against the EM Defendants, and no trial would go forward.

Finally, the Court and its staff have taken steps to administratively dismiss claims against J&J where the Excerpta Medica Defendants has remained the defendant. This arguably was done based on representations to this Court that the J&J claims had indeed settled. Moreover, counsel for Plaintiffs had discussions with the Court on or about October 25, 2013 on the issue of a mechanism to administratively remove J&J claims from the Court's docket. After those discussions counsel for Plaintiffs wrote to J&J's counsel to inform them of said discussion. *See* Exhibit L (attached email of October 22, 2013).

III. LEGAL ARGUMENT

The law of this Commonwealth establishes that agreements to settle legal disputes between parties are favored. *Compu Forms Control Inc. v. Altus Group Inc.*, 574 A.2d 618, 624 (Pa. Super. 1990). There is a strong judicial policy in favor of the voluntary settlement of lawsuits because settlements reduce the burden on the courts and expedite the transfer of money into the hands of complainants. *Felix v. Giuseppe Kitchens & Baths, Inc.*, 848 A.2d 943, 946 (Pa. Super. 2004).

Moreover, if courts were called on to re-evaluate settlement agreements, the judicial policies favoring settlements would be deemed useless. *Greentree Cinemas, Inc. v. Hakim*, 432 A.2d 1039, 1041 (Pa. Super. 1980). Without a clear showing of fraud, duress, or mutual mistake, a settlement agreement will not be set aside. *Rago v. Nace*, 460 A.2d 337, 339 (Pa. Super. 1983). "Buyer's remorse is not grounds to overturn a valid settlement." *Smith v. Gilardi, Cooper &*

Gismondi, 2007 Pa. Dist. & Cnty. Dec. LEXIS 341 (Allegh. C.P. July 31, 2007), *aff'd*. 2008 Pa. Super. LEXIS 3811 (Pa. Super. 2008).

Under Pennsylvania law, the judicial enforcement of settlement agreements is governed by the principles of contract law. *McDonnell v. Ford Motor Co.*, 643 A.2d 1102, 1105 (Pa. Super. 1994). All the ordinary and necessary elements in a valid and enforceable contract must be present in a settlement agreement in order for the agreement to be valid, which includes a meeting of the minds between the parties on all terms and subject matter of the agreement. *Onyx Oils & Resins, Inc. v. Moss*, 80 A.2d 815, 817 (Pa. 1951). *See also Nationwide Insurance Enterprise and Nationwide Mutual Insurance Co. v. Anastasis*, 830 A.2d 1288, 1292 (Pa. Super. 2003) (for a contract to be enforceable, the court must find the presence of all requisite elements of a valid contract: offer, acceptance and consideration); *Century Inn, Inc. v. Century Inn Realty, Inc*., 516 A.2d 765, 767 (Pa. Super. 1986) (a settlement agreement will be enforced if all of the material terms of the bargain are agreed upon). An agreement will be considered sufficiently definite and enforceable if the parties intended to make a contract and there is a reasonably certain basis upon which the court can grant a proper remedy. *Miller v. Clay Township*, 555 A.2d 972, 974 (Pa. Commw. 1989).

In the instant case, there was an offer (the settlement figure), acceptance, and consideration (in exchange for Plaintiffs terminating 77 lawsuits, J&J will pay Plaintiffs the agreed upon sum). Defendants' counsel made an offer to settle the case for a confidential amount and Plaintiffs acknowledge that they accepted the offer. *See, e.g., Korean Am. Ass'n of Greater Philadelphia v. Kye Hyun Lee*, 2007 Phila. Ct. Com. Pl. 46 (Phila. C.P. Feb. 12, 2007) (New, J.). In exchange for the payment, Plaintiffs' counsel agreed to dismiss claims against the J&J Defendants in 77 cases.

J&J will presumably argue that it revoked its offer after learning that it may have to somehow "defend itself" in a lawsuit to which it was not even a party. However, the power to accept can be terminated only by a counter-offer by the offeree, a lapse of time, a revocation by the offeror, or incapacity of either party. *First Home Savings Bank, FSB v. Nemberg*, 648 A.2d 9, 15 (Pa. Super. 1994). "`Once the offeree has exercised his power to create a contract by accepting the offer, a purported revocation is ineffective as such.'" *Mastroni-Mucker v. Allstate Insurance Co.*, 976 A.2d 510, 518 (Pa. Super. 2009) (citing RESTATEMENT (SECOND) OF CONTRACTS § 42 cmt. c (1981)). Therefore, any purported revocation by J&J was ineffective once Plaintiffs accepted the offer. Because the requirements for a valid contract are met, this Court must enforce the terms of the Settlement. *McDonnell*, 643 A.2d at 1105.

Alternatively, J&J may argue that an agreement does not exist because a release was never prepared and executed. While the preparation of a release was discussed during settlement negotiations, the fact that a release was not executed does not invalidate the Settlement. Even the absence of a signed release does not prevent the enforcement of an otherwise valid settlement agreement. *Pulcinello v. Consolidated Rail Corp.*, 784 A.2d 122, 124 (Pa. Super. 2001).

J&J also cannot argue that the parties were mutually mistaken about any facts when the settlement was made. *See, Com., Dept. of Educ. v. Miller*, 466 A.2d 791 (Pa. Commw. 1983) (where a mistake made in contracting is not mutual, but unilateral, and is not due to the fault of the party not mistaken, but rather to the negligence of one who acted under the mistake, it affords no basis for relief). A mere "mistake by one party to the agreement" is not a mutual mistake. *Morris v. Starr Rest. Group Partners LP*, 2005 Phila. Ct. Com. Pl. LEXIS 472, *5-6, *aff'd*, 903 A.2d 40 (Pa. Super. 2006) (New, J.) (adequate proof of mutual mistake as to a material fact of the settlement agreement must be shown). J&J cannot successfully argue that at the time the

settlement was made it had no knowledge that unresolved claims against the EM Defendants existed.[5] As discussed above, Plaintiffs' counsel made clear in discussions with opposing counsel and during numerous Status Conferences that the EM Defendants cases remained viable and were going to be tried.

Finally, the Janssen Defendants cannot avail themselves of the doctrine of frustration of purpose. In *Step Plan Servs. v. Koresko*, 2009 Phila. Ct. Com. Pl. LEXIS 114 (New, J.), the plaintiff was a fiduciary and plan sponsor of a multiple employer supplemental benefit plan and trust. After two days of mediation, the parties reached an agreement to settle and signed two preliminary term sheets reflecting the settlement. After the parties reached the settlement but prior to any distribution of proceeds, a group of the plaintiff's alleged creditors filed an action in Massachusetts to attach the settlement proceeds to satisfy a judgment obtained in Massachusetts. A district court granted an injunction enjoining payment of the proceeds of the litigation to the plaintiff for a period of six months. As a result of the injunction, the defendants filed a motion to enforce settlement. The court held that although the plaintiff might be irritated over its judgment creditors' efforts to attach the settlement proceeds in the case, or annoyed over the delay or possible inability to use the settlement proceeds according to its personal agenda, the

[5] Even if Janssen should improbably argue that it had no knowledge of the outstanding claims, Janssen may not avoid the valid Settlement made between the parties. In *Kramer v. Schaeffer*, 751 A.2d 241 (Pa. Super. 2000), following a jury trial of their personal injury case in which they were awarded no monetary damages, the plaintiffs were contacted by a representative of the defendant insurance company and offered the sum of $3,500 to settle the case. The Plaintiffs accepted, but the defendant then refused to pay, as the defendant's representative claimed that she had been unaware that the case had been tried at the time that she made the settlement offer. The Plaintiffs filed a motion to enforce the settlement agreement and to impose sanctions for failure to deliver settlement funds.

The trial court denied the motion; however, on appeal, the appellate court reversed. The appellate court held that in this case the asserted mistake would not excuse the defendant from its contractual obligation unless the evidence showed that the plaintiffs knew or had good reason to know of the defendant's unilateral mistake. The court concluded that such was not the case.

Massachusetts injunction did not frustrate the purpose of the settlement agreement or render it impracticable.[6]

Here, J&J is not without fault such that the doctrine of frustration of purpose would apply, as the existence of claims against the EM Defendants was not a truly unexpected event that would thwart the purpose of performance. Again, Janssen knew well all along the existence of the actions against the EM Defendants.

Simply put, Janssen entered into the settlement agreement which it subsequently discovered does not inure to its benefit to the extent it may have originally anticipated. However, entering into an agreement that one party thereto later determines is not in its best interest is not a legal basis for overturning the agreement, denying the agreement or escaping from the liabilities assumed by the parties under the agreement.[7]

IV. JANSSEN SHOULD BE REQUIRED TO PAY ATTORNEYS' FEES

The Court should also award attorney's fees for having to bring this motion. The Pennsylvania Judicial Code states:

> The following participants shall be entitled to a reasonable counsel fee as part of the taxable costs of the matter:
>
> (7) any participant who is awarded counsel fees as a sanction against another party for dilatory, obdurate, or vexatious conduct during the pendency of a matter.

42 Pa.C.S.A. §2503.

Plaintiffs should be awarded attorneys' fees for J&J's refusal to comply with the terms of the Settlement. This dilatory behavior has caused Plaintiffs to incur unnecessary counsel fees in order to enforce compliance.

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[6] The Pennsylvania Superior Court affirmed the trial court's decision. *Step Plan Servs. v. Koresko*, 12 A.3d 401 (Pa. Super. 2010).

[7] *See Mowry v. McWherter*, 74 A.2d 154, 157 (Pa. 1950) (where parties enter into an unambiguous agreement, with knowledge of the facts, the courts will not relieve them of their contractual obligations because of the questionable wisdom of the bargain).

J&J's refusal to comply with the Settlement forced Plaintiff's counsel to research, prepare and file Plaintiff's Motion to Enforce Settlement consisting of eleven (11) pages and several exhibits, as well as other related matters. In addition, Plaintiffs; counsel has spent numerous hours over the past two weeks in discussions with J&J's counsel to resolve this issue.

V. CONCLUSION

The undisputed evidence of record clearly establishes that an enforceable settlement agreement was created on January 28, 2013 between Plaintiffs and the Janssen Defendants. In keeping with the judicial policy favoring the voluntary settlement of lawsuits, Plaintiffs' Motion to Enforce Settlement should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing Motion to Enforce Settlement was served on all Defendants pursuant to the Pennsylvania Rules of Civil Procedure and paragraph VI.1. of Case Management Order No. 1, and a courtesy copy was forwarded by via electronic mail on the counsel listed below:

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Date: November 5, 2013