

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Case No. 08-11006 (BLS)
. .
. .
JEVIC HOLDING CORP., . 824 North Market Street
. . Wilmington, DE 19801
. .
Debtors. . March 8, 2011
. 9:58 a.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE BRENDAN L. SHANNON
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtors: Klehr, Harrison, Harvey
Branzburg & Ellers, LLP
By: LINDA RICHENDERFER, ESQ.
919 Market Street, Suite 1000
Wilmington, DE 19801

For Sun Entities: Kirkland & Ellis LLP
By: JAMES P. GILLESPIE, ESQ.
655 Fifteenth Street Northwest
Washington, DC 20005

Audio Operator: Dana Moore

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J&J COURT TRANSCRIBERS, INC.
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E-mail: jjcourt@jjcourt.com
Website: www.jjcourt.com

(609) 586-2311 Fax No. (609) 587-3599

APPEARANCES (Cont.d):

For Sun Entities: Morris, Nichols, Arscht & Tunnell
By: CURTIS MILLER, ESQ.
1201 N. Market Street
18th Floor
Wilmington, DE 19899

For Committee: Pachulski, Stang, Ziehl & Jones
By: BRUCE GROHSGAL, ESQ.
919 N. Market Street
17th Floor
Wilmington, DE 19899

Class Counsel: Outten & Golden
By: RENE ROUPINIAN, ESQ.
JACK RAISNER, ESQ.
3 Park Avenue, 29th Floor
New York, NY 10016

For Opt-Outs: O'Brien, Belland & Bushinsky, LLC
By: ROBERT F. O'BRIEN, ESQ.
1001 Tilton Road, Suite 204
Northfield, NJ 08225

TELEPHONIC APPEARANCES:

For Sun Entities: Kirkland & Ellis LLP
By: JAMES A. STEMPEL, ESQ.
300 North LaSalle
Chicago, IL 60654

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1 THE COURT: Please be seated.

2 MS. RICHENDERFER: Good morning, Your Honor. Linda
3 Richenderfer from Klehr, Harrison, Harvey & Branzburg on behalf
4 of the debtors, Jevic Holding Corporation, et al.

5 Your Honor, the agenda today was shortened greatly by
6 Your Honor entering orders with respect to Items 1 through 4
7 yesterday afternoon, which brings us to Item Number 5 on our
8 amended agenda which is a status conference. And for that,
9 with the Court's permission, I'm going to turn the podium over
10 to counsel -- class counsel for the plaintiff in that matter
11 for the status conference.

12 MR. RAISNER: Good morning, Your Honor. Jack
13 Raisner, firm of Outten & Golden for the class of plaintiffs in
14 this matter.

15 Your Honor, as you may know, we've requested a
16 conference because of the issue of a re-noticing of the class
17 to a certain number of individuals.

18 THE COURT: Just remind me -- I just want to make
19 sure I have the chronology right. So back in the fall I
20 remember there was a substantial back-and-forth about the terms
21 of what should and should not be included in the notice. We
22 held a number of hearings or teleconference and ultimately I
23 approved a form of notice. That went out in early December,
24 right?

25 MR. RAISNER: Correct.

1 THE COURT: And the primary -- and that's fine. I
2 mean, the notice was approved by the Court. I took some
3 comments, I rejected some comments, but the notice went out.
4 And then is the thrust of today's status conference and the
5 concerns that have been expressed by you and by Sun Capital
6 based upon the issues or confusion from the December 30 letter
7 from counsel for the New Jersey litigants? Is that basically
8 it?

9 MR. RAISNER: It was a December 30th letter that we
10 found out about really on the eve of the opt-out deadline. And
11 at the same time we were told that there was a meeting, at
12 least one meeting and maybe two in New Jersey which was
13 attended by many of these potential opt-outs. So, yes, the
14 issue is the confusion that was generated by those two
15 communications which we know about.

16 THE COURT: Let me ask you a question because I want
17 to make sure that I understand the dynamic here. This is --
18 but your issue is primarily confusion, and the confusion is
19 obviously on people that are former employees of Jevic with
20 claims of some ilk -- WARN, state or federal or otherwise.

21 And one of your concerns or one of the issues that
22 you point out is that, in fact, if indeed these folks stay in
23 the Jersey litigation rather than this litigation, they may
24 have foresworn or foregone I guess any federal WARN Act rights
25 that they may have, et cetera, and that their recoveries may be

1 substantially reduced. And that they would've done so
2 presumably against their economic interests but presumably upon
3 the advice of, you know, counsel, right?

4 MR. RAISNER: But they were not informed of the
5 choice.

6 THE COURT: Agreed.

7 MR. RAISNER: They were not fully informed.

8 THE COURT: Why don't we -- I mean, if they've been
9 misled or confused, et cetera, by counsel by their letter in
10 the meeting, don't they have the right to -- you know, if it
11 doesn't turn out the way they want, I mean if you folks go
12 forward with yours and everybody gets 15,000 and they get 4,000
13 because it's limited, can't they sue their lawyers?

14 MR. RAISNER: It's putting a big imposition on them
15 to have to sue for malpractice, Your Honor. In the first
16 instance I think the Rule 23 policy is that we safeguard that
17 kind of thing not happening because it spirals into an
18 impairment of someone's rights.

19 THE COURT: You know, we chatted about this at the
20 last -- or I vaguely remember this from the last hearing, and I
21 remember some discussion about it, and I guess I have a
22 question about the mechanics of this process. As I understand
23 it, both you and Sun Capital want to re-notice, I assume with
24 the same form of notice. Is that right?

25 MR. RAISNER: Your Honor, our preference was not to

1 re-notice because we think that the procedures that you laid
2 out originally were very clear about how the proceed -- how one
3 was to opt out. It's like a contract where you have bidding
4 procedures.

5 THE COURT: Right.

6 MR. RAISNER: And they have to be followed, and after
7 the bidding is over you can't open up the bidding again and do
8 it all over because someone says, I did it the wrong way. So
9 we did not really favor re-notice. We wanted to keep the class
10 intact and --

11 THE COURT: But at that point then I'm disregarding
12 opt-out notices. Isn't that right?

13 MR. RAISNER: The opt-out notices that were received
14 were eight in total two years ago and --

15 THE COURT: What about the 86 that we're talking
16 about now?

17 MR. RAISNER: The 86 are infected by people who were
18 misled. It's not that they were informed and made a choice.

19 THE COURT: Right. But then I'm in a -- yes, but --

20 MR. RAISNER: We have a duty to try to police the --

21 THE COURT: I understand that. I guess I'm -- and
22 I'm not fighting with you about any of this. I mean, I'm --
23 you know, I'm trying to figure out a couple things. The first
24 is even -- you know, there is just sort of a baby with the bath
25 water in both directions on this.

1 I mean, you know, I've got folks who have signed an
2 opt-out, and I understand your argument that it's improperly
3 infected with potential -- with communications, but I don't
4 necessarily know that. Or I -- I mean, while I can even
5 conclude -- if I were to conclude that the communications were
6 wrongful, I don't know that that necessarily means that I can
7 again take a look at someone's, you know, opt-out notice and
8 say, no, I'm not going to recognize this.

9 There may be -- you know, I've looked at the case law
10 you've identified and there's certainly case law that supports
11 that proposition but, you know, I'm struggling a little bit
12 with that. But tell me this, and this was my -- the point I
13 was going to get to a moment ago. Understanding your position
14 with respect to re-noticing, but I did notice the Kirkland
15 submission. This is from Mr. Gillespie?

16 MR. GILLESPIE: Yes, Your Honor.

17 THE COURT: Welcome back.

18 MR. GILLESPIE: Thank you.

19 THE COURT: The idea that it be re-noticed and then
20 precluding communications, let me ask you a question about the
21 mechanics of that because I think Mr. O'Brien raised this at
22 the last hearing which is I have clients and I have a
23 professional responsibility to communicate with them. And I
24 think he's probably going to tell me that he believes that in
25 sending this letter, going to this meeting or giving them

1 advice he was equating his professional responsibilities to his
2 clients.

3 I understand I guess that I could preclude
4 affirmative communications -- a letter, a notice, come on out,
5 let's all sit down -- but could I preclude them if they got a
6 phone call -- if the firm got a phone call from a client who
7 said, hey, I got another notice in this, what does this mean?
8 What do -- what would I do with that?

9 MR. RAISNER: Yes, Your Honor. You have very broad
10 authority to control communications in this process. And both
11 counsel, while they have a right of free speech and they have a
12 professional responsibility code, we nevertheless bend to a
13 fairly referee process for noticing in Rule 23. Gulf Oil v.
14 Bernard, the Supreme Court and also Hoffman-LaRoche --

15 THE COURT: I've read it.

16 MR. RAISNER: -- talk about how this -- how important
17 this is, and it is so rife with potential for unethical
18 conduct. In the sense here there is a -- these people are
19 represented by class counsel, too, and talking to them
20 privately without notifying their attorney is a Rule 4.2
21 violation. So we would have -- we should work on some kind of
22 statement which is, I cannot give you further advice. Here
23 we --

24 THE COURT: Well, I think your threshold -- okay.

25 MR. RAISNER: We should have a statement, a

1 questionnaire that is approved, and we should not go beyond it.
2 And we should -- and it should be comprehensive enough to be
3 fair and controlled and that's I think the best that we can do.

4 But I think that we are able to -- in class
5 situations, in settlement situations I'm often asked by the
6 Court, what would you tell individuals? What kind of guidance
7 would you give? And I'm asked to advise the Court what our
8 statement would be when communications go out so that is not
9 untoward. The Court absolutely I believe has that -- almost an
10 obligation to make sure that it is an antiseptic process.

11 THE COURT: Well, let's take a step back because I
12 think I'll hear from Mr. O'Brien on this, as well. What's the
13 harm in just saying, all right, you know something, I don't
14 necessarily want to get in the middle of this snake pit. You
15 know, we fought over the notice. The notice has gone out.
16 We've got responses, whether it's -- you know, whether the
17 communications were troubling or not, here we are. Let's just
18 move forward. What happens then? Those 86 people that have
19 opted out are in a New Jersey litigation. They're not in your
20 litigation, right?

21 MR. RAISNER: They're not in any litigation, Your
22 Honor. They're in legal purgatory. They have not been allowed
23 into the New Jersey litigation at all. They are nowhere. They
24 have no rights at this point. If they are not allowed into the
25 New Jersey litigation, they have not only forfeited their

1 federal rights; they have forfeited their New Jersey rights.

2 THE COURT: I don't want to be flip, but how is that
3 my problem?

4 MR. RAISNER: Well, it's because we in the first
5 instance have a duty not to allow their individual rights of
6 due process to be abused. And if we see that there has been an
7 abuse, we have a duty to undo the harm and to cure that,
8 especially when that can be relatively easily undone by giving
9 some fair information. There is no prejudice to giving these
10 people balanced, fair information so that they are well
11 informed.

12 I spoke to a number of these individuals because they
13 called my office. They asked, what's the difference between
14 the two cases? I made just that little distinction that Your
15 Honor just made and that was the first they understood it.
16 They should all have the ability to have that moment of
17 comparing their two -- the two situations with full
18 information.

19 THE COURT: Okay. Well, let's assume just for the
20 moment that I have reservations about disregarding the opt-out
21 notices, but that I have concerns -- and I recognize you're not
22 a bankruptcy guy, but I mean by analogy I have dealt with some
23 class action litigation, primarily frankly over WARN issues.
24 But the analogy that I would draw as a bankruptcy guy is where
25 I have for example a disclosure statement that goes out. And

1 it accompanies a plan -- and I know this isn't your problem but
2 it's how works. Disclosure statement accompanies a plan. It's
3 approved by the Court.

4 If somebody purporting to represent a large body of
5 creditors then sends out a big letter describing it, advising,
6 et cetera, at some point they come in here and they leave in
7 handcuffs. Right? They're not allowed to do that, and the
8 reason I think is similar to the process that you've described.
9 There is a controlled amount of information and the risk of
10 deception, confusion, uncertainty, the risk to the processes is
11 sufficient to require that there be control over that process.

12 It doesn't normally get into a question of whether or
13 not somebody communicates and what they can say. Usually
14 frankly there's free and unfettered communication between a
15 creditor and its counsel. That's a somewhat different animal
16 and I think that that goes to the differences between pure
17 class action litigation and bankruptcy which has sometimes been
18 analogized frankly to a class action process on a larger scale.

19 But let's assume that I'm not going -- that I have
20 reservations about the idea of just saying, you know something,
21 we're going to go with the eight opt-outs we originally had.
22 Don't I have a greater risk of confusion now among these folks?
23 How many notices have they gotten? They've gotten, you know,
24 Notice 1, Notice 2, letters from Mr. O'Brien, you know, other
25 -- you know, how do we fix that?

1 They're going to get this notice. If I say, you
2 know, we've got to send another notice out, I mean if I were on
3 the receiving end, and I've received these class action notices
4 before. When you're, you know, a credit card user, that sort
5 of thing. You look at and you say what am I going to do with
6 this? And now this seems to be the second or third or fourth
7 notice that I've gotten, communication that I've gotten. What
8 am I going to do here? How do I address that?

9 MR. RAISNER: But not doing anything rewards the
10 conduct that leads us to where we are now, and we can't endorse
11 that conduct by saying, well, they've made enough of a mess of
12 it that it's unsalvageable. That -- again, that awards
13 improper behavior, so I think that we have to kind of just
14 redouble our efforts and to try to undo it.

15 It is deplorable. I do not envy anyone who is in a
16 class that the people I spoke with feel like they're being
17 pulled from various -- they should never have been in that
18 position though. If we don't -- if we allow the status quo,
19 again we are giving imprimatur to the behavior that created
20 that confusion and that's --

21 THE COURT: Okay. I think I understand. All right.

22 MR. RAISNER: Thank you.

23 THE COURT: Mr. Gillespie? And, Mr. O'Brien, I'll
24 hear from you in response, okay?

25 MR. GILLESPIE: Your Honor, I have a brief timeline

1 that sort of outlines what I think are salient points.

2 THE COURT: Sure.

3 MR. GILLESPIE: I provided it to plaintiff's counsel
4 but Mr. O'Brien is here so I'll hand him back one. And with
5 the Court's permission may I approach?

6 THE COURT: Please. Thanks.

7 MR. GILLESPIE: Thank you. And again for the record
8 it's Jim Gillespie on behalf of the Sun defendants in this
9 case, Sun Capital Partners, Inc.

10 And, Your Honor, I realize we're trying the Court's
11 patience with this opt-out process.

12 THE COURT: Oh, you don't know. There are people --
13 you guys are fine.

14 MR. GILLESPIE: Well, in any event, any measure of
15 trying the Court's patience and using up resources I try to
16 avoid. But I do think this does raise important issues,
17 process issues, class action policy issues. And from Sun's
18 perspective the two most significant issues raised by New
19 Jersey counsel's conduct are as follows:

20 First, Your Honor, and as we outline on the timeline,
21 on December -- on November 12th, our colleagues in the New
22 Jersey action, Mr. O'Brien and his colleagues, moved for leave
23 to amend to add new plaintiffs in the New Jersey case. And on
24 November 16 -- or December 16th the Court sent out a bankruptcy
25 notice of an opt-out, noting that that motion was pending and

1 it was going to be opposed. On December 30th of 2010 we have
2 Mr. O'Brien's letter that's an exhibit that the Courts refer
3 to, and in that letter it tells the class members, you will be
4 part of the New Jersey action if you opt out. But the New
5 Jersey action, that was a contested motion that was pending and
6 the Court didn't even hear argument on that until February
7 15th. So that to us was a false and misleading statement that
8 was very troubling and problematic.

9 The second one that we note in our papers is that New
10 Jersey counsel's December 30th letter suggested that Jevic was
11 the only party of interest or of note being sued in the
12 adversary action that we're here in Delaware on and that Sun
13 Capital Partners was the only -- was only being pursued in the
14 New Jersey action. That's just not true and that's troubling.

15 I was not obviously present when Delaware counsel
16 spoke with class members who told them about other
17 communications that they find troubling, but those are the two
18 that we can note just from the letter. And at bottom, Your
19 Honor, what this suggests to me is that the Court in its
20 discretion will have to decide whether what Sun believes were
21 false and misleading statements by New Jersey counsel that were
22 contrary to the notice and infected the notice process and that
23 were designed to prompt class members to opt out based on
24 misleading and incomplete information merits a remedial
25 response.

1 And I appreciate, Your Honor, that there are problems
2 here that have cropped up and that there's multiple notices
3 going on here, but I think logically the only response that
4 really makes sense here given the policy issues and given the
5 conduct at issue is for a re-notice that does, as Mr. Raisner
6 noted, spell out what has gone on, and then plaintiffs,
7 Delaware class counsel, New Jersey counsel should not then
8 further initiate contact.

9 To your question, Your Honor, whether you should bar
10 them from responding to questions if their name is in the
11 notice, my own -- our own view is that that is an option. It's
12 an option to allow them only to respond but not to initiate
13 contact. Either result I think would be within the Court's
14 discretion.

15 As my colleague points out, there is ample authority
16 for this Court to control the notice process such that there
17 aren't responses and the notice stands on its own, the re-
18 notice stands on its own. But it's within the Court's
19 discretion. The Court -- Rule 23 empowers this Court with a
20 great deal of discretion to have the best notice practicable.

21 But the one I think important and overarching
22 principle that Rule 23 speaks to is the Court shouldn't allow
23 conduct that caused miscommunication and misinformation to go
24 to class members to stand. And if we do nothing here and just
25 move on because life is short and there's been a process, that

1 conduct will be rewarded and Rule 23's principles will not be
2 vindicated. Thank you.

3 THE COURT: Okay. Thank you. Mr. O'Brien?

4 MR. O'BRIEN: All the good seats got taken, Your
5 Honor.

6 THE COURT: That's all right. Good morning. Welcome
7 back.

8 MR. O'BRIEN: Your Honor, Robert F. O'Brien of the
9 law firm of O'Brien, Belland & Bushinsky representing the
10 opt-outs.

11 A couple of points, Your Honor, for starters. Many
12 of the cases have been kicked around and put into the
13 memorandum that's been filed here concerning situations where
14 there are contesting attorneys on the class itself. This case
15 comes to you where in effect I'm sort of stuck as a New Jersey
16 lawyer on the fact that we have 150 -- approximately 150
17 individuals who signed representation forms for us,
18 individuals.

19 They came to us. We explained the situation to each
20 and every group and signed those individuals to retainer
21 agreements, so this isn't a bunch of strangers that we're
22 looking at. And as the Court passingly commented upon, we've
23 got some professional responsibilities here. With all due
24 deference to class counsel, he doesn't know any of these
25 people. He hasn't signed them up individually and we're not

1 strangers to this particular group of people that we contend we
2 do indeed represent.

3 I think we would have fallen far short not
4 communicating with them, and if there is a guilty plea to be
5 entered here, I plead guilty. We wrote the letter. We held
6 the meeting. We answered questions. We talked to our clients
7 because as far as we're concerned, at least as far as New
8 Jersey is concerned, they indeed are our clients until there is
9 some other disposition made.

10 Now, Mr. Raisner raises the point he's class counsel.
11 The fact of the matter is under the New Jersey rules we're
12 their attorneys until we're told otherwise. It's an
13 interesting question here between the two jurisdictions.

14 Before Your Honor makes any disposition in this case,
15 I think it's very important that you look at the transcript of
16 the decision that Judge Schneider made, and we sent that to the
17 Court last week when we finally got it. But Judge Schneider
18 essentially, and he's the US Magistrate handling the matter,
19 he's waiting on the Court relative to the addition of
20 plaintiffs, and I think he's indicated in that transcript that
21 if these individuals are indeed found to have opted out, he's
22 going to put them in as part of the plaintiff's group. He
23 however is waiting on your court.

24 THE COURT: Well, you know, interestingly that wasn't
25 the state of play when you sent your letter. That was not the

1 state of play when you sent your letter in December. Isn't
2 that right?

3 MR. O'BRIEN: No, it was not.

4 THE COURT: You had filed a motion and --

5 MR. O'BRIEN: We had filed a motion. We didn't know
6 where we were. That's correct.

7 THE COURT: Right. But your letter actually said to
8 people, you're in in New Jersey if you just fill this out.

9 MR. O'BRIEN: We --

10 THE COURT: I mean, as a -- and it may be that the
11 Court's ruling or its indication from the transcript is that
12 there are going to be, and presumably your instinct,
13 experience, professional judgment would've said, yeah, this
14 won't be an issue. But as a practical matter you sent that
15 letter. You know, the Court could come back -- I've denied
16 motions to amend. Other courts have. If these people -- if
17 actually, you know, it didn't play out that way, what sort of
18 jam would these people be in?

19 MR. O'BRIEN: Well, the question is if they opt out
20 you get into the question, you know, if they were not permitted
21 to -- if they were permitted to opt out and the plaintiffs were
22 not allowed to amend, we took a judgment call here. We thought
23 they were going to be admitted or the complaint would be
24 allowed to be amended simply under --

25 THE COURT: That's not a judgment call actually

1 because, you know, a judgment call would be to say we would
2 recommend that you do so but there is a risk. What you said
3 was opt out and you're in. I mean, I read your letter.

4 MR. O'BRIEN: Yes, that's what we said, and we
5 believe very strongly perhaps in retrospect it might've been
6 more prudent to put in that it's subject to the motion or the
7 approval of the Court.

8 THE COURT: Well, you know, I've got a question for
9 you though and, you know, I will defer frankly to your
10 collective experience in some of these areas, but I have some
11 exposure to class action litigation. Doesn't it by some --
12 doesn't it functionally disrupt or affect the process that -- I
13 mean, we went to a heck of a lot of effort to come up with a
14 notice that was crafted in a way that was sufficient in its
15 information to allow people to make an informed judgment and
16 then they get a letter and the letter has a bunch of
17 suggestions, encouragements, recommendations, et cetera.

18 You know, as I read the case law, the purpose of
19 these notices is that it be done in a court-approved manner. I
20 mean, I have no control over what judgment calls you may make,
21 what you stick in a letter that you want to put under your
22 letterhead to a bunch of people. I mean, again you guys went
23 at it hammer and tongs, and while I have a good deal of
24 patience, I exercised it in hearing you, looking at competing
25 forms of notice, sitting back there with the competing

1 documents that you were kind enough to give me on whatever --
2 in electronic format and finalizing the notice. And so I do
3 that so that these people get an informative, neutral package
4 that will guide them. And then do you have Court approval to
5 send a letter? Do you need Court approval to send a letter?

6 MR. O'BRIEN: To answer you question, I thought we
7 did not because there was a specific request made by
8 Mr. Raisner and class counsel that you stop any communications.

9 THE COURT: Well, and my --

10 MR. O'BRIEN: He asked that be put in the order.

11 THE COURT: My concern -- and on that you're right.
12 All right. My concern was what I've just raised with
13 Mr. Raisner which is it may be that there is case law that
14 supports the proposition that I could frankly preclude. I may
15 have the power under Rule 23 to preclude an attorney from
16 saying more to his client than this is the notice that the
17 Court has provided. I don't know whether or not I do. I was
18 troubled by that.

19 But I'll tell you what I was not thinking. I was not
20 thinking that you would go and send a multi-page single-spaced
21 letter to all the people that were getting this and saying, you
22 know, you can take a look at this dense notice or you can read
23 my letter.

24 MR. O'BRIEN: We felt we had some obligations. Again
25 this is --

1 THE COURT: Okay. Well, you know something, hang on.
2 We're done. I think that I --

3 MR. O'BRIEN: Could you hear me out, Your Honor,
4 before --

5 THE COURT: Bring it on.

6 MR. O'BRIEN: -- you make a disposition?

7 THE COURT: Yes.

8 MR. O'BRIEN: The important thing is here this is not
9 a case where there are two competing class counsels.

10 THE COURT: Oh, I'm aware of that.

11 MR. O'BRIEN: This is a case where we represent
12 individuals under New Jersey law where this case started in
13 state court. We started with the proposition that these are
14 our clients and essentially a New York firm comes in and makes
15 a class assertion over the detriment of individuals who have
16 selected us as counsel.

17 THE COURT: But hang on. I don't disagree with that.
18 All right. And were we starting from a standing start, that
19 would be fine. But that letter, that note -- I'm sorry, that
20 notice did not go out in a vacuum. Okay. That notice was --
21 you were involved in it. If I had just -- if I had completely
22 jammed you, I didn't know that you even existed and I had
23 counsel coming in and they said, Judge, here's the notice,
24 routine matter, approve the notice, send it on out, at that
25 point that might have been fine.

1 But you had asked to weigh in -- some comments I
2 took; some comments I didn't -- and then so we labored over
3 that notice and then, you know, the point is isn't that
4 frustrating the process of providing, you know, a cacophony of
5 sources of information where I don't think that Rule 23
6 contemplates that? We're supposed to get a notice.

7 MR. O'BRIEN: Understood, and you did exactly what
8 you were supposed to do, Your Honor, in this case. However, if
9 you're going to say to me, Mr. O'Brien, you're not going to be
10 able to communicate, I would've thought up front Mr. Raisner's
11 order would've been accepted saying no communication, counsel.
12 But that raises a whole -- another issue, Your Honor, relative
13 to not talking to our own clients.

14 THE COURT: Okay. Here's what we're going to do. We
15 are going to re-notice. No, no, no. Don't look at me like
16 that. You are lucky that I am approving these opt-outs. Okay?

17 MR. O'BRIEN: Understood.

18 THE COURT: Because I honestly think in a different
19 context, and you heard me. I understand you're not a
20 bankruptcy guy, but if I had a bankruptcy lawyer that did
21 something like this in a situation that I regard as more than
22 roughly analogous, I would crucify them.

23 MR. O'BRIEN: Understood.

24 THE COURT: All right. Because I think -- I've read
25 your letter and I've read the response and I understand that

1 some of these issues are in material dispute. Okay. But I
2 think that your response, among other things, you made a
3 judgment call. You're lucky -- you're lucky that apparently
4 the Court is New Jersey seems to be inclined to go with what
5 your instincts are because you told them not go ahead and take
6 the risk, we think it's a good deal to opt in. You said -- you
7 said, you're my client, file the opt-out and you are in the New
8 Jersey litigation and that is -- that was not true. Okay. All
9 right. So I'm --

10 MR. O'BRIEN: Understood.

11 THE COURT: You know something, hang on. I'm getting
12 ahead of myself and I don't like to. Here's what we're going
13 to do. We're going to re-notice. There will be no affirmative
14 communications by counsel outside of the notice. If you
15 receive a phone call you may respond to it. All right? And I
16 am being clear with both counsel, but particularly I want to
17 note that I don't want any kind of cute exercises where you're
18 sending somebody a birthday card and say, give me a call, I'd
19 like to, you know, chat with you about your birthday. Okay?
20 These people have had a lot of notice.

21 MR. O'BRIEN: They have.

22 THE COURT: They're getting this notice again. I
23 frankly and worried that there's going to be even more
24 confusion because people are going to get this and say, didn't
25 I already respond to this? But you know something, that's

1 where we're going. We're going to send this notice out again.
2 I'm going to ask and I don't -- because I don't want to spend
3 the next two weeks noodling over this, I'm going to ask I think
4 that it should be labeled either a re-notice or updated notice.
5 I don't want a lot of changes to the language. Okay?

6 MR. O'BRIEN: Your Honor, may we inform the class
7 that the US District Court Magistrate has indicated that in
8 his --

9 THE COURT: No, he hasn't ruled.

10 MR. O'BRIEN: He hasn't ruled but he's given an
11 opinion --

12 THE COURT: No.

13 MR. O'BRIEN: -- the transcript of which we sent you.
14 So what should we be telling the folks, that they're hanging
15 out there as potential plaintiffs in the lawsuit that the judge
16 has an inclination to allow to be amended in? Don't we have
17 some obligation to --

18 THE COURT: Well, hold it. I mean, I didn't have
19 that information in December when I sent this notice out.

20 MR. O'BRIEN: None of it --

21 THE COURT: Mr. Raisner, what do I do with this?

22 MR. RAISNER: You're allowing a -- information in
23 that doesn't belong in the notice. They are not in -- to spin
24 it and to mold it and to try to get susceptible people to
25 understand something with creative language shouldn't be the

1 case. They should just know what the current state of play is,
2 what the options are in the two cases. Even if they go into
3 that other case, do they know that they're going to be losing
4 their rights? There are a couple of issues that should just be
5 laid out in block letters in a clear chart, something graphic
6 that they can understand. The legalese is very difficult for
7 them. We had a suggestion of a --

8 THE COURT: We had that discussion about the chart
9 before and I believe --

10 MR. RAISNER: It was to give them a graphical sense
11 because that's how they understand information to --

12 THE COURT: All right. Here's what I want to do. I
13 don't want to go through this exercise again. We're going to
14 send this notice and we're going to call it a re-notice and
15 that's the only change we're going to make to it. Okay?

16 MR. O'BRIEN: Don't we have some obligation to tell
17 them about the New Jersey lawsuit --

18 THE COURT: No.

19 MR. O'BRIEN: -- and their place in it?

20 THE COURT: No. I want this notice to go out.

21 MR. O'BRIEN: Understood.

22 THE COURT: Okay. There hasn't been a ruling in the
23 New Jersey litigation. These people can make that judgment
24 call if they want on their own. Okay. But I don't have a
25 ruling. I read the transcript. It seems to -- you know, I

1 read it, but it is what it is. I don't know whether there's
2 going to be an appeal of that or whether or not somebody's
3 opposed to it. I don't know, and that's asking me to fore --
4 to crystal ball this.

5 Previously there was a request that we have this
6 chart in there, and I considered it and I ultimately concluded
7 based upon your opposition that I didn't want it in there. To
8 the extent that Mr. Raisner is unhappy that his people may not
9 be sufficiently informed, similarly you're bearing the same
10 concern.

11 This notice is going out again, and if you're upset
12 and if you're annoyed with it, you want to know why it's going
13 out? It's because I think that your actions frustrated the
14 prior notice. I don't know whether you would've had all 86.
15 Maybe you would've had all 86.

16 MR. O'BRIEN: I don't --

17 THE COURT: I don't know, either, and I can't know.
18 And what I've been asked is that I disregard them, and I'm not
19 comfortable doing that. I've considered it, but I'm not
20 comfortable doing it because I don't know that I can be that
21 certain of the rate of infection, et cetera, and if someone
22 makes an informed judgment I think it's incumbent upon the
23 Court to respect them and let them make their own economic
24 decisions.

25 Mr. Raisner?

1 MR. RAISNER: To whom would this re-notice go out,
2 the 86 or the 145?

3 THE COURT: I think it goes to the 145, but again I
4 want to be clear that I do not want any exercise that will
5 frustrate this process. The notice goes out. We all sit tight
6 and we look for the response to come back in.

7 MR. O'BRIEN: Understood, Your Honor, and essentially
8 we consider it a gag order. It's understood, and we understand
9 you're trying to do your job, Your Honor. In our instance
10 because we had representations here we were trying to do ours.

11 THE COURT: And I think that this closes that
12 process.

13 MR. O'BRIEN: Understood.

14 THE COURT: Okay. You've done what you did and I
15 think we need to go ahead and re-notice, but I'm not imposing
16 or inclined toward any additional remedy, sanction or fix. I
17 think that to head down any further path is going to require us
18 to go through this exercise of coming up with a further notice
19 and I don't want to do that. I want these people to largely
20 get what they got.

21 And I'll tell you what, it's going to be called a
22 re-notice, and there will be either a footnote or a statement
23 on Page 1 of that. And I will draft it to you and I will send
24 it to you both in a letter that's basically going to say by
25 order of the bankruptcy court this re-notice is going out.

1 This is the same notice that you received several months ago
2 but due to the Court's -- it will be something along the lines
3 of due to the Court's concerns about the process by which it
4 was circulated, you are being given another opportunity to
5 review the notice and to elect to opt in or opt out. Okay?

6 MR. RAISNER: It's not an opt-in -- there isn't an
7 opt-in --

8 THE COURT: It's opt-out.

9 MR. RAISNER: Okay. So --

10 THE COURT: Okay.

11 MR. RAISNER: So to the extent that a person does not
12 opt out and they are in --

13 THE COURT: In.

14 MR. RAISNER: -- among the 86, Your Honor will
15 consider that an election --

16 THE COURT: Yes.

17 MR. RAISNER: -- to remain in the class?

18 THE COURT: That's correct.

19 MR. RAISNER: To remain in the class?

20 THE COURT: Yes. Okay? All right.

21 MR. O'BRIEN: 145 --

22 MR. RAISNER: So --

23 THE COURT: It goes to the 145.

24 MR. O'BRIEN: Understood.

25 MR. RAISNER: And only those who opt out of this

1 re-notice will be considered opt-outs?

2 THE COURT: That's correct.

3 MR. RAISNER: And there was some confusion as to the
4 number of individuals. Originally it was 143.

5 THE COURT: I think it's 140 -- you said it's --

6 MR. O'BRIEN: I had 144.

7 MR. RAISNER: Okay.

8 THE COURT: Well, we can figure that out.

9 MR. RAISNER: Okay, fine.

10 MR. O'BRIEN: So Your Honor is aware, this decision
11 of yours from the bench will be taken back to the magistrate in
12 the District Court matter because he --

13 THE COURT: I understand. You can communicate to the
14 magistrate that I'm requiring that the matter be re-noticed.

15 MR. O'BRIEN: Understood.

16 THE COURT: All right.

17 MR. RAISNER: Thank you.

18 THE COURT: Anything further? All right. We'll
19 stand in recess and I will be in touch with counsel with
20 respect to the addition that will hopefully to the extent
21 possible communicate to people why they're receiving the same
22 notice again. Stand in recess.

23 * * * * *

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C E R T I F I C A T I O N

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I, ILENE WATSON, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

/s/ Ilene Watson DATE: March 9, 2011

ILENE WATSON

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