IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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IN RE:	: MDL NO. 13-2436
TYLENOL (ACETAMINOPHEN) MARKETING, SALES PRACTICE AND PRODUCTS LIABILITY LITIGATION	: Philadelphia, Pennsylvania : January 21, 2014 : 10:08 a.m.

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TRANSCRIPT OF CASE MANAGEMENT CONFERENCE
BEFORE THE HONORABLE LAWRENCE F. STENGEL
UNITED STATES DISTRICT JUDGE

- - -

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(The following was heard in open court at 10:08 a.m.)

THE COURT: Good morning.

ALL: Good morning, Your Honor.

THE COURT: Please be seated. This is our case management conference in the Tylenol litigation and I want to just note for our record who is present. We have Mr. Berman, Mr. Weinkowitz, Mr. Milling for the plaintiffs, right?

MR. BERMAN: Yes, Your Honor.

MR. WEINKOWITZ: Yes, Your Honor.

MR. MILLING: Yes, Your Honor.

THE COURT: Alyson Jones and Christy Jones, good morning.

MS. JONES: Good morning.

MS. C. JONES: Good morning.

THE COURT: And Meredith Reinhardt.

MS. REINHARDT: Good morning, Your Honor.

THE COURT: Good morning. Brandon Goodman.

MR. GOODMAN: Good morning, Your Honor.

THE COURT: Good morning. Madeline Sherry.

MS. SHERRY: Good morning, Your Honor.

THE COURT: Good morning. Steven Finley.

MR. FINLEY: Yes, Your Honor. Good morning.

THE COURT: And David Abernethy.

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MR. ABERNETHY: Good morning, Your Honor.

THE COURT: Good morning. And do we have a list of those who are present by telephone? Okay. I see. Thank you. And that's Susan Minkin, Joseph Cod (ph), Leonard Davis, Ronald Moser, Gill Gainer, David Towell, Laura Yeager, Marla Eastwood and Harvey Spiegel.

MR. BERMAN: Your Honor, there was one supplement to that. I received a phone call from a woman at the Shannon law firm in Mississippi. I don't remember her name, but we did send a letter supplementing it. It should be a Ms., I am going to spell it. It is N-A-V-K-E-T-A-N, Navketan, Aujla, A-U-J-L-A. And we had sent that over to Your Honor yesterday afternoon.

THE COURT: Very well.

MR. BERMAN: Thank you.

THE COURT: Thank you, very much. We will note that.

(Pause in proceedings.)

THE COURT: And thank you for your attendance under what appears to be outside growing and dire weather circumstances. But, I did get information through Melissa about at least some counsels flight arrangements and I understood you were here as of

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yesterday, so I thought it made sense to go ahead with this. But, we will get you out of here as soon as we can.

MS. JONES: Thank you, Your Honor.

THE COURT: Okay. Well, we have an agenda and I thank you for working together to compose this agenda. The first item is the pending motion for a protective order related to the confidential study and the highly confidential designation.

The plaintiffs' steering committee has requested a proposed case management order number 17 and I thought I would hear you both out on that at this time. So, go ahead, Mr. Berman.

MR. BERMAN: Thank you, Your Honor. Thank you, Your Honor. Lawrence Berman for the plaintiffs' steering committee.

We submitted the proposed CMO-17 because we thought there may have been some ambiguity and we apologize for being presumptuous with the Court, but thought there may have been some ambiguity with respect to the Court's entry of the amended protective order that now provides for the designation of highly confidential information, but without a corresponding order that formally denied or denied in part, granted in part defendants' underlying motion where they sought

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in the alternative either a complete denial of the obligation to produce highly confidential documents or the alternative, to produce such documents with a highly confidential designation.

Upon our receipt of the CMO one or amended one that was entered by the Court which provided now for the production of the highly confidential documents, the PSC interpreted that to mean that the Court was approving the production of highly confidential documents as the alternative relief that the defendants had requested.

Further, in trying to keep consistency and coordination with what has been occurring in the New Jersey proceedings, we alerted the Court that Judge Higbee entered a very similar, highly confidential protective order, but did formally deny by separate order -- or granted in part, denied in part by separate order the motion for a protective order filed by the defendants, thereby denying relief from complete production, but ordering production subject to the highly confidential designations.

So, we wanted to bring that to the Court's attention. As I said, I apologize if we are being presumptuous in assuming that the entry of CMO, one, amended intended to grant in part, deny in part, but we

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wanted to raise that with the Court for clarification.

THE COURT: All right. Thank you, Mr. Berman.

MR. BERMAN: Oh, if I may add one other thing?

THE COURT: Yes.

MR. BERMAN: We are beginning to receive those documents in New Jersey subject to the highly confidential designation. So, again, in keeping with the consistency and coordination of the two litigations we do feel it would be appropriate that that be clarified on the record.

THE COURT: Okay. Thank you.

MR. BERMAN: Thank you.

THE COURT: Ms. Jones?

MS. JONES: There obviously was, Your Honor, some ambiguity. At least we interpreted. We did not interpret the entry of the protective order with the provision for the highly confidential designations as a ruling on the underlying motion for a protective order, and as much as we had specifically asked and then argued and offered that we would produce those documents, even though highly confidential, that related specifically to Acetaminophen toxicity, but we objected to the production of the remaining documents.

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1 So, it was and is our position that those
2 documents should not have to be produced if they are
3 subject to the protections that we argued about the
4 last time.
5 I would say that it is correct, that we have
6 begun to produce some of those documents. It is also
7 correct, Your Honor, that we sought a stay, we have
8 sought an appeal in New Jersey. Unfortunately, the
9 stay has expired and so we had no choice but to go
10 ahead and begin to produce some of those documents.
11 So, this Court is aware we are not waiving
12 and do not believe that it is necessary for this Court
13 to follow what was done in New Jersey. We still
14 continue to contest that and stand by the position that
15 we have taken in the past.
16 THE COURT: What is the status of the New
17 Jersey appeal? Is the order on appeal in New Jersey?
18 MS. JONES: Well, we don't have an order
19 right now. The Court has not taken the appeal. We had
20 a motion for an emergency stay, that was denied.
21 THE COURT: Okay.
22 MS. JONES: And so it is --
23 MR. BERMAN: If I may, Your Honor? In New
24 Jersey --
25 MS. JONES: The motion for --

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MR. BERMAN: Oh, go ahead.

MS. JONES: I am sorry. The motion for leave to appeal is what is pending.

THE COURT: I see.

MS. JONES: That's it.

MR. BERMAN: I was just going to say, Your Honor, the motion for leave to take the interlocutory appeal that was filed in the first instance before Judge Higbee was denied.

Judge Higbee did grant a ten-day stay of the order requiring the production of the documents by January 1 until January 10 subject to an emergency appeal to extend the stay to the New Jersey Appellate Court.

On January 9 the New Jersey Appellate Court denied the emergency stay and what is left for proceedings is the request for the New Jersey Appellate Court to accept the interlocutory appeal on the discovery matter and that remains open.

But, subject to that, because of the expiration of the stay, to our understanding the documents are being produced and we assume it is a full production as ordered by Judge Higbee.

THE COURT: Okay. For our docket purposes here, we probably should have an order that

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specifically addresses the pending motion. So, whether that's a granting in part and denying in part subject to the case management orders that contain the confidentiality or highly confidential designations, that may be the way to go.

Does the defense object to the entry of any order granting or denying relief?

MS. JONES: What the defense would prefer, Your Honor, is an order grating our motion for a protective order which says we don't have to produce these documents --

THE COURT: Right.

MS. JONES: -- in this case.

THE COURT: Right. But, we have already entered the two confidential and highly confidential designations by order.

MS. JONES: Right.

THE COURT: And I think implicit in that is the direction that those documents be produced.

MS. JONES: I understand that, Your Honor, but I guess this is perhaps has been part of our lack of understanding is that we had offered to produce and not objected to producing certain documents relating to Acetaminophen toxicity notwithstanding the confidential nature.

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THE COURT: Right.

MS. JONES: We object to the production of the remaining documents.

THE COURT: Right.

MS. JONES: So, the question I think frankly that we have, Your Honor, is are you denying our motion for protection against those documents that we believe are irrelevant and not --

THE COURT: Yes, yes. And I am directing that they be produced under and subject to the confidentiality orders that I have already entered. So, yes.

MS. JONES: That was the lack of understanding.

THE COURT: Okay. And I take responsibility for that, because I didn't enter an order that actually granted in part and denied in part, but in terms of our own docket accountability here we have to do that.

MS. JONES: And so there will be a separate order issued --

THE COURT: Yes.

MS. JONES: -- on that, Your Honor?

THE COURT: Yes.

MR. BERMAN: Your Honor, and the steering committee's proposed case management order 17 I think

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accomplishes that. Although I am not sure if 17 remains the accurate number in terms of possibly some other orders that have been entered by the Court subsequent to --

THE COURT: All right. We will take care of that.

MR. BERMAN: Thank you.

THE COURT: Thank you. I am tempted to introduce the next item by asking what's going on in New Jersey, but I watch a lot of CNN and maybe that's an over-broad question.

So, what's going on in the New Jersey Tylenol litigation?

MR. BERMAN: I will not discuss any breach matters, Your Honor. We did submit as part of the agenda the most recent order entered by Judge Higbee providing the pretrial scheduling order.

THE COURT: Yes, I have that.

MR. BERMAN: And we highlighted on the agenda that a jury selection is scheduled to commence on April 14, 2014. We discussed a moment ago the production and the status of the highly confidential documents. There is a pending motion for interlocutory appeal.

Otherwise, I mean what is going on is our desire to complete the discovery so that we will be

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able to proceed to trial under the schedule that Judge Higbee has set forth in her case management order.

I am going to defer for a moment to Mr. Milling because I think he would like to discuss some of the discovery issues that are pending in that case and with the idea of the coordination with the MDL, I think Your Honor should hear the status.

THE COURT: Okay. Good morning, Mr. Milling.

MR. MILLING: Good morning, Your Honor. And I may be speaking out of turn, because I believe this issue was primarily raised by the defense. But, what is going on in New Jersey as we have -- as Ms. Alyson Jones and I were on the call today and we discussed, everybody here is a trial lawyer, we are in crunch time.

We have a trial April 14th, we have expert disclosures for the plaintiff due February 17th. We have completed the first few depositions of corporate witnesses and as the defense put in the agenda there are a number of additional corporate witnesses that we have asked for.

I don't want to bring out a conflict if there is not one, but I sense from the defense's inclusion of this in the agenda that there will be a discussion with Your Honor about potentially, again, limiting

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1 depositions in that nature.
2 And what I want to assure the Court is from
3 the PSC's perspective and from the plaintiffs'
4 perspective in New Jersey we are doing our absolute
5 best to take only depositions that are necessary.
6 We have completed every deposition within one
7 day. We would love nothing more as plaintiffs' lawyers
8 than for this drug to have only been on the market for
9 ten years and for the scope of this litigation to only
10 be ten years, but unfortunately that is not the case.
11 I guess what we just want to assure the Court
12 is, it is going forward here and in New Jersey we may
13 -- there is some, actually some witnesses on that list
14 that we're not going to take because we have now gotten
15 highly confidential custodians.
16 We just got a letter last week concerning the
17 highly confidential documents with 23 new custodians.
18 We have not gotten information in response to our
19 interrogatories who these people are. All we have is
20 their corporate relationships.
21 So, we are on the plaintiffs' side, Your
22 Honor, and we just feel like we have been here a number
23 of times before you, we are doing our absolute best to
24 get through the material, to take the testimony we
25 need, to not take duplicative testimony and to prepare

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our case for trial in April.

And we are going -- you asked what's going on in New Jersey, we are going as fast as we can.

THE COURT: Okay.

MR. BERMAN: If I may?

THE COURT: Go ahead.

MR. BERMAN: Your Honor, I am sorry. The next item on the agenda also discusses the status of the 30(b)(6) marketing depositions.

THE COURT: Right.

MR. BERMAN: And in the agenda we discussed the status of that in New Jersey in terms of the briefing schedule. The plaintiffs' brief is due the 23rd of January, the defense reply brief is due January 27 and then that is scheduled for disposition or argument, however it is handled in New Jersey, on Friday, January 31.

But, those depositions were cross-noticed as have all of the discovery depositions.

THE COURT: All right. Thank you. Anything from the defense perspective on the status of matters in New Jersey?

MS. JONES: I think in terms of what has been represented to the Court in terms of the status of the matters in New Jersey, Your Honor, there is not much to

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add.

I think that perhaps Mr. Milling was anticipating, and correctly so, some of the concerns that are set forth when we had -- we have set forth in the agenda for Your Honor the deposition schedule.

THE COURT: Can you get closer to the microphone, Ms. Jones?

MS. JONES: I am sorry.

THE COURT: Just bring it over there. It will pick you up.

MS. JONES: I apologize.

THE COURT: There you go.

MS. JONES: Is that better?

THE COURT: Much, thank you.

MS. JONES: The deposition schedule is set forth here. If you will remember, Your Honor, and I don't want to go back and repeat everything that has been said before, but this is litigation involving a product that has been around forever and documents have been produced and depositions taken for years in isolated cases before this MDL was formed and in New Jersey.

Your Honor, when you entered the initial case management orders specifically took that into consideration and the fact that we were not going to do

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1 duplicative discovery.
2 The plaintiffs have all of those depositions
3 that have been taken in the past. They have all of the
4 documents that have been produced, and when Your Honor
5 entered that order initially the order specifically
6 limits the number of corporate depositions to 20 that
7 the plaintiffs may take.
8 And if you will look at the list that we have
9 in front of Your Honor there are now 20 depositions
10 that have been noticed and those don't include the
11 30(b)(6) notices.
12 I am not here requesting any specific relief
13 today and particularly since Mr. Milling has announced
14 that he is not going to take all of these depositions,
15 but the fact of the matter is that we have an order in
16 this case that limits the number of depositions to 20
17 under the circumstances.
18 And that's the issue that we simply wanted to
19 advise the Court about. What happens after this
20 remains to be seen, but I want the Court to be aware of
21 it as we move forward.
22 And that then leads us to what we have is
23 this 30(b)(6) marketing notice that I am perfectly
24 happy to address now or if you wish to wait.
25 THE COURT: No, and I think that makes sense

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that we move to that.

MS. JONES: As Your Honor is aware, the plaintiffs have filed a 30(b)(6) notice for a marketing deposition notice that includes some 160 items of requests spanning 40 years, that if you look at the request it actually clearly involves at least 400 different topics.

First, Your Honor, we would suggest that it is duplicative discovery inasmuch as we attached as an exhibit to our letter to Your Honor an exhibit in which we showed where some of the questions had been answered in other discovery in terms of interrogatories that had previously been held as exhibit -- I can't remember whether it is exhibit -- it is attachment B to our letter.

THE COURT: Okay. This is the letter of January 2nd?

MS. JONES: Yes, Your Honor.

THE COURT: Okay.

MS. JONES: It is a letter of January 2nd. I mean I can hand Your Honor a duplicate of the attachment, Exhibit 2, compilation of duplicative discovery requests.

THE COURT: Right. I have it right here. I have it right here.

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1 MS. JONES: So, one, we think it is
2 duplicative. What we have presented to Your Honor in
3 that attachment relates to interrogatories and requests
4 for production of documents.
5 The plaintiffs also filed an extensive set of
6 requests for admissions, as Your Honor may recall, that
7 involved some 260 I think requests, many of which dealt
8 with some of the same issues here, and frankly, Your
9 Honor, which probably can be used -- there is already
10 an issue that has been admitted. Certainly, there is
11 no need for additional discovery and many of these
12 topics seem to overlap.
13 Finally, I suppose it is simply to say not
14 only is it duplicative, the breadth and scope of the
15 notice is simply over-broad. None of these plaintiffs
16 that we have involved in the MDL ingested Tylenol or
17 allege to have been injured by Tylenol ingested back in
18 the '70s and, yet, they are looking for discovery going
19 back -- of marketing issues to the '70s, the '80s, the
20 '90s.
21 Although, in their response there was a
22 suggestion that there had been no meet and confer, in
23 fact, there was an attempt to meet and confer and an
24 attempt to limit the scope of the notice at least, and
25 to begin to limit it by, you know, the time period

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1 involved.
2 In fact, Your Honor, that's documented in the
3 final attachment to the plaintiffs' response. It is an
4 e-mail from my partner, Michael Hughes, dated January
5 2nd, 2014 in which he noted that we raised the
6 possibility of limiting the scope to a time relevant to
7 the plaintiffs' ingestion.
8 And plaintiffs took the position that the
9 notice is proper on each and every point. The fact of
10 the matter is, Your Honor, that the notice is simply so
11 over-broad that it is not relevant to the plaintiffs'
12 claims. There is no showing that it is.
13 It is not limited in time in any way, shape
14 or form. The number of topics is unreasonable and it
15 is almost impossible for the defendant to prepare a
16 witness or witnesses to testify on all of these topics.
17 The reality of it is we are talking about
18 preparing numerous witnesses for days of depositions
19 if, in fact, we have to attempt to comply with this
20 notice.
21 It is not an objection to providing somebody
22 to testify with respect to a reasonable topic that we
23 can prepare somebody on, but at this stage it doesn't
24 seem appropriate for us to even have to go through and
25 state an objection to each and every topic here.

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Instead, we think the more appropriate thing to do, what we have asked the Court to do, is to instruct the plaintiffs to go back and narrow the topics to some reasonable limitation on the topics and, if necessary, Your Honor, and I confess I know I sound a little bit like a broken record, but if necessary we are happy to come and sit before Your Honor and explain the history as we had hoped to do in the past, and explain the history of what's out there so that we can come together and reasonably narrow the issues before this Court in this MDL.

So, what we are asking the Court to do is perhaps to eliminate us or relieve us of the burden of having to go through and file objections to all of this notice or to otherwise seek another protective order and go through this burdensome notice topic by topic.

THE COURT: Right. Now, the notice that we are talking about is the PSC's cross-notice to videotaped deposition of defendant's corporate designees? Is that the notice?

MR. BERMAN: That's correct, Your Honor.

THE COURT: Okay. And the persons -- do you have specific persons listed?

MR. MILLING: Your Honor, that's -- and we can -- Larry and I can just tag-team if that's okay.

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The 30(b)(6) was issued for a number of reasons. First and foremost, this is the marketing side of the case, and our case involves a --

THE COURT: Are you having trouble picking him up? Yes, you need to get closer to a microphone.

MR. MILLING: I will do the best I can. I can -- obviously, as the Court I think is aware, and as everybody is aware, involves decades of marketing designed to brand a product, and the plaintiffs in this case, despite when they may have ingested it, all will testify that they have been exposed and formulated their opinion on the relative safety or lack thereof of the medicine based on the, what our expert will say is five and a half billion dollars of marketing under the banner of safety.

We served, and Mr. Weinkowitz spent a long time creating that 30(b)(6) notice, and I will tell you it looks long. However, there are reasons why it looks long. Number one is because of the historical nature we have to have a corporate representative, because we can't identify an individual.

Number two, if the Court -- if I could pull my laptop out and show the Court the document production we received from the defendants, virtually every document concerning marketing when under the

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1 category of custodian is listed as unknown.
2 So, we don't have an individual that we can
3 identify to depose, and if we want to talk to a -- for
4 example, to talk to a person about marketing
5 expenditures on a brand or the theme behind certain
6 marketing campaigns or the manner in which the brand
7 Tylenol was defined and grew, there is not an
8 individual that we can do that with.
9 Lastly, there are a lot of topics, but I
10 would represent to the Court that most of the topics
11 will be two or three questions about a document. They
12 are specifically tailored to a document that we want to
13 discuss with the company, but we have no -- we -- there
14 is nobody that we can identify given the discovery we
15 received in order to talk to.
16 Putting all of that aside, the issue of the
17 30(b)(6) is currently before Judge Higbee and is going
18 to be argued in four, five, six days, I believe.
19 MR. BERMAN: It is scheduled for disposition
20 January 31. We are not sure if it will be an oral
21 argument or on the papers, Your Honor.
22 MR. MILLING: And so I guess where we are,
23 Ms. Jones was, respectfully, not on the call. I was on
24 the meet and confer as was Mike. It was a five-minute
25 call.

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We were told that this was abusive and that there would be no negotiation. We said this is why we have done it. We don't know how else to get these documents into this case without a corporate witness. We have no custodian identified by your company, we are happy to work with you to narrow it and the response was we are not going to work to narrow it together.

We said we would limit the time frame and we are happy to do that, but generally with a 30(b)(6) notice in a case like this they start expansive and they get negotiated. That did not happen in this case.

I will let Larry, if he wants to finish up on the 30(b)(6) and then, Your Honor, I do have a few additional comments relative to Ms. Jones' comments about discovery generally in New Jersey.

THE COURT: Okay. Just a couple of questions. First of all, on the proposed agenda in item three, depositions, under Subsection A it says "Updated deposition schedule and discovery dispute on corporate designee Rule (30)(b)(6) deposition notice," there is a list of on the second page, there is a list of persons who have been deposed, there is three of them and then there is nine people who were scheduled in February, actually two the end of January, seven through February and then depositions of, it looks like

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1 six others that are currently under discussion. Are
2 these 30(b)(6) people or are they something else?
3 MR. BERMAN: They are not, Your Honor.
4 MR. MILLING: Those are corporate witnesses
5 and just to be clear so the record is clear, when Ms.
6 Jones said that I was not -- and announced that I was
7 not taking individuals, you will see for example,
8 number 19 is Ellen Cod.
9 THE COURT: Right.
10 MR. MILLING: She was the author of a
11 PowerPoint that the Court and I discussed during our
12 last hearing, a couple of PowerPoints. But, now that
13 we have the production of the highly confidential
14 documents and the 23 custodians that I showed Your
15 Honor, that's all I was saying, is I am not sure we
16 want to take Ellen Cod's (ph) deposition. Now that we
17 have the documents there may be somebody more germane
18 to take.
19 THE COURT: Okay. I guess my concern is if
20 these people are already scheduled and I suspect are in
21 the process of preparing for these depositions, are
22 some of them 30(b)(6) people, or are we talking about a
23 whole different class of witnesses?
24 MR. MILLING: No, these are individual
25 witnesses. For example, Mr. Quan (ph) was the head of

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1 pharmaco vigilance. Mr. Cuffner (ph) is one of the
2 more recent head of medical affairs. They are all
3 targeted individuals covering various areas.
4 There is one person in this list, Ashley
5 McEvoy (ph) who was in marketing and then became the
6 president of the company. So, there is only one
7 marketing person, I believe, on the whole list. Oh,
8 Ron Schmidt, who I think, I would represent that would
9 be --
10 MR. WEINKOWITZ: A very short --
11 MR. MILLING: It would be an hour deposition
12 with Mr. Schmidt. But, so we really have one
13 deposition of Ashley McEvoy on marketing and then we
14 are at a loss, because we have no custodians. We need
15 corporate witnesses to testify about various marketing
16 activities, expenditures, et cetera, over the years.
17 We have a number of documents that we would
18 like to have before this jury and we simply know no
19 other way that we could discern to do it but by
20 30(b)(6).
21 MR. WEINKOWITZ: So, Your Honor, the short
22 answer to your question is these are individual
23 corporate witnesses that we have identified that we
24 want to depose on particular topics. Whether or not
25 they become 30(b)(6) designees, that's up to the

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1 defense to select.
2 THE COURT: Right. Okay.
3 MR. WEINKOWITZ: We have two corporate
4 designee 30(b)(6) notices out with the marketing one
5 which is at issue and then one we call fix the product
6 one. And the defense has identified Anthony Temple to
7 be the designee to testify to those topics.
8 THE COURT: Okay.
9 MR. MILLING: And to be clear, Dr. Temple
10 will also testify as a fact witness about his role in
11 the medical department which he routinely does in these
12 cases. But, his deposition will be two days, one day
13 as a corporate designee on the fix the product issues
14 that we have discussed in this case, one day on his
15 personal role in the company.
16 THE COURT: Okay.
17 MR. BERMAN: What I wanted to add, Your
18 Honor, is looking at the 30(b)(6), and while it is nice
19 to say it involves 400 topics and all of these
20 different issues and things of that sort, it is broken
21 down into main headings. We need a 30(b)(6) witness
22 who is capable of discussing their public relations.
23 Now, because the case spans from a marketing
24 perspective 40 years, there may be more than one
25 witness who could address public relations issues for

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them, but we don't know that and we haven't been able to ascertain that, but public relations is clearly a relevant topic.

But, what we do not want to be limited to, though, is the idea that it starts in 2006 and not before then when the product has been on the market for years, there had been the cultivation of the buyers and consumers perspectives about the product for years, and that's all part of the marketing as to how the product became what it did in the marketplace.

It is ubiquitous, it is Kleenex, and as such we need to be able to get the discovery relating to how they built that from a marketing perspective to cultivate the buyers perceptions.

The second topic, brand marketing expenditures and profits, again, because of the scope of the production of the product it may evolve more than one 30(b)(6) witness who can testify because of the change of personnel.

But, we are not in a position to target one particular witness by a corporate deposition notice. Instead we are trying to get at that through the 30(b)(6) process.

Next topic, market and other research, and we do break that down into various kinds of market

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research activity. The company was top heavy, very top heavy in marketing and because of that there may be more than one witness who can testify about these various issues, but they are all relevant. They are all material to the case.

I could go on and on with the various topics, but --

THE COURT: In fact, your notice does go on and on.

MR. BERMAN: Well, it does, I admit that, but again we are trying to make sure that we have the opportunity to discover, you know, everything that is relevant that's the back fill to the general topic that is identified and not be caught with an idea that we start asking questions.

I mean, if we issued a 30(b)(6) and said produce a witness who only can speak about public relations, the real back fill description of what we intended, and then they produced a witness and then we started asking questions about any of the subtopics they said well, that wasn't in your notice or our witness is not prepared and by the way you are limited to 20 witnesses, so try again.

I mean it really shouldn't be a game of, you know, hiding the ball. It is a game of trying to -- it

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is not a game, it is an effort to try to obtain the discovery that we need so that we can prepare the case.

And as a steering committee in an MDL we do have the responsibility not to be limited to, as stated in their letter brief, to the Bellwether plaintiffs. The Bellwether plaintiffs haven't even been selected yet. They would be the plaintiffs who completed fact sheets.

The earliest date might be a 2006 ingestion, but we have an example in a response letter of one of the plaintiffs who said the exact dates are unknown, however repeatedly, for many years, plaintiff recalls seeing commercials on television for the products.

And that's the guts of this, is that the plaintiffs were cultivated by seeing many, many years of the products, and along the line they ended up with an acute liver failure. And the marketing, the advertising never contained the warnings that we think should have been included.

THE COURT: Is there a similar 30(b)(6) notice in the New Jersey litigation?

MR. BERMAN: Yes, Your Honor.

THE COURT: All right.

MR. BERMAN: And that's the subject of the briefing.

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1 THE COURT: And you expect to accomplish
2 compliance with these 30(b)(6) depositions in time for
3 an April 14 trial?
4 MR. BERMAN: As Mr. Milling said we are not
5 here to go out on larks and to take depositions that
6 are unnecessary. If there would be an identification
7 of who the witnesses are and we could have some
8 dialogue in a meet and confer it may be that there will
9 only be ten witnesses.
10 And maybe some of the witnesses will have
11 been noticed for specific depositions can be produced
12 as 30(b)(6) witnesses as well and can cover all of the
13 topics.
14 But, we have been left without the meet and
15 confer by the argument that it is so abusive we don't
16 even want to talk to you about it.
17 MR. MILLING: Your Honor, and this may be a
18 good opportunity for me to segway back to something I
19 wanted to raise with the Court, because I think in
20 Georgia we oftentimes call this the goose gander rule,
21 what's good for the goose is good for the gander.
22 And during crunch time things get a little
23 edgy in litigation, they get tight, schedules are
24 tight, things have to move quickly. And, you know, we
25 on the plaintiffs side, there is complaints from the

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1 defense. Look at this notice, you've had it for a long
2 time, we don't want to comply with it.
3 And then the flip side is here, here is
4 January 17th, here is 23 new people you might have to
5 depose and most importantly, Your Honor, in case
6 management number ten the defendants were supposed to
7 produce all documents to us for a witness within 30
8 days of the deposition being noticed.
9 We are taking the depositions or we are
10 supposed to take the deposition of Dr. Cuffner, one of
11 the key witnesses in the case. His deposition was
12 noticed at the beginning of December and last week on
13 January 15th, a week before his deposition, I got a
14 letter saying here are 25,000 more documents for Dr.
15 Cuffner's deposition which have still not even been
16 uploaded into our system.
17 So, we have maybe six days, theoretically, to
18 review 25,000 documents that have been -- the
19 deposition was actually requested last November. So,
20 we are all playing with this. We are trying not to
21 raise issues.
22 We are in good faith and I think we have
23 tried to demonstrate this to Your Honor, willing to
24 talk to the defense and find out who would be the
25 proper people, how can we narrow the scope, and we are

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1 going to do that with Judge Higbee next week.
2 THE COURT: Okay.
3 MR. MILLING: At the same time we want to
4 say, though, look, you can't give us 25,000 documents a
5 week before a deposition and you can't say here is 23
6 new custodians that we're not telling you anything
7 about that you may want to depose while at the same
8 time saying we want to limit you to 20 depositions and
9 we have a trial in April.
10 So, I think all of this is coming together,
11 not necessarily -- we're trying to do it without
12 frustration, but I think what we have asked the Court
13 from the plaintiffs' perspective is we simply want to
14 try our case in April. We are going to give it
15 everything we can to get it done.
16 We may need to take 21 depositions, we may
17 need to take 18, we may need to take 25. I don't know
18 who these people are, but we can assure the Court from
19 the plaintiffs' steering committee that we have no
20 intention, Your Honor, especially given the fact that
21 we're the plaintiffs, of taking and giving the time
22 crunch of taking more testimony or in any way wasting
23 anybody's time with what we're doing. We are doing our
24 best to be targeted and to be on track.
25 THE COURT: Well, I appreciate that. Looking

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at this notice of deposition, though, it would be, I think, certainly a challenge for the defendant to be able to identify a person or persons who can address what really is a very detailed and broad deposition notice.

I mean, I am looking at Tylenol consumer marketing and branding, V, where you say in connection with this topic the witness should be able to testify about how and why the brand has the ability to set itself apart from its competition in the analgesic market, defendant's brand vision, essence, promise, character, personality, positioning, equity, identity, strategy and objectives for Tylenol and defendants' plans and activities to establish and maintain the brand through consumer marketing programs, campaigns, strategies and objectives.

Number two, any and all key drivers to Tylenol's growth and success in establishing Tylenol as an iconic brand. I mean, there may be somebody who can address that. That sounds to me like a business school thesis.

MR. MILLING: It does. I will tell you that the language came directly from the documents. We made these categories directly from the documents, but the document -- on our metadata, the data that has been

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1 supplied to us about the documents does not give us a
2 custodian. So, we have nobody to ask about the
3 document.
4 If the defendants would like to engage into
5 conversation, it is difficult because, obviously, we
6 don't want to tip our hand as to every document we want
7 to use, but with marketing we are probably, I think I
8 can say, we are more than welcome to tip our hand, but
9 essentially that language and the specificity that you
10 are seeing is because we took the words from the
11 defendants' documents that we cannot otherwise -- that
12 we don't know who to discuss them with other than
13 having the company tell us who to discuss them with.
14 THE COURT: How many marketing directors have
15 there been in the last 20 years at McNeil or J & J?
16 MS. JONES: I don't think I can answer that.
17 THE COURT: Don't these companies usually
18 have a head of marketing?
19 MS. C. JONES: There is a vice president.
20 THE COURT: Okay.
21 MS. JONES: A vice president of marketing.
22 THE COURT: Okay.
23 MS. JONES: But, there have been -- I can't
24 even tell you how many there have been in that 40-year
25 period.

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THE COURT: Right.

MS. JONES: I mean I would be happy to supply that information to you, but I can't answer that today.

MR. MILLING: We can tell you, Your Honor. Six people.

MR. WEINKOWITZ: About six.

MR. MILLING: About six.

THE COURT: Over 40 years?

MR. MILLING: And even if we got -- if we start at 1980, then maybe four, and all of them, just so the Court knows, the reason why marketing is so important is that this company, every head of marketing has gone on to be the head of -- the president of the company.

This company has not moved anybody from science to the head. They have all gone from marketing. So, marketing is, from the plaintiffs' perspective, is a large driver of this company's activities and certainly any one of those four people --

THE COURT: But, do you need each former marketing head to get to the -- I mean, it seems to me that if you are the vice president of marketing you may be aware of the marketing tradition or history of the company.

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1 MR. MILLING: And we would love it if Ashley
2 McEvoy, she was the president of marketing and then she
3 became the president of the company, and if she is
4 qualified and willing to discuss what we think are
5 actually basic historical documents that articulate
6 just in their own words the way in which the company is
7 going to promote and market this brand, and actually in
8 the documents they call Tylenol the brand, capital B,
9 that's how it is referred to.
10 And there is a strategy that's articulated in
11 the documents which involved reaching out to doctors
12 and selling it and giving it to doctors and surveying
13 them to be the number one best.
14 That involves having people write articles,
15 that involves advertising under the brand of safety and
16 trust. These are basic components and if the defense
17 is willing or has somebody, which we think they should,
18 who can not only talk about what happened during their
19 time period, but also acknowledge what was going on and
20 the historical build up, I really don't think this is
21 as big of an issue as it is being made to be.
22 We were, as Mr. Berman said we did feel, as
23 we thought, how are we going to draft this, caught
24 between a rock and a hard place. If we draft it narrow
25 and there is no objection we go to the deposition and

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we have the potential of facing I am not prepared to answer that, it wasn't in the notice.

If we actually take the documents and quote from them we end up with this discussion. We see it as very much --

THE COURT: And then the problem becomes how in good faith do they come up with somebody or some team of people?

MR. MILLING: And that may be the ultimate, I suspect that's the ultimate what we're talking about between the three of us.

THE COURT: All right.

MR. BERMAN: Which is the reason why I said we got stuck, because there wasn't a meet and confer. I mean, it is good that we're here in Court because we can articulate these issues and then get the correct guidance.

MS. JONES: With all due respect, Your Honor --

THE COURT: Yes?

MS. JONES: -- we attempted to have --

THE COURT: Sit down, guys.

MS. JONES: -- a meet and confer and were told that we couldn't even limit the time period involved.

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1 Now, at some level we have to think about
2 what the right way to handle these things are. The
3 federal rules are very specific. It doesn't make a
4 difference that we are in the MDL as opposed to an
5 individual product liability case in terms of what the
6 right way to do discovery is and what is relevant.
7 And if there is a better and easier way first
8 to do that we ought to look at that. If, in fact, what
9 they want is to look at specific documents and they
10 want them either authenticated or they want a
11 foundation laid, then maybe they can identify those and
12 ask us about them. Requests for admissions, for
13 example. I don't know.
14 But, we cannot look at and prepare a witness
15 in good faith based upon this document because there is
16 no way, ultimately, we can satisfy our obligation
17 without being subject to criticism because it is so
18 broad and because it does cover 40 years and, frankly,
19 Your Honor, one of the issues that we have tried to
20 come to grips with is this is a basic products
21 liability case here.
22 We have advised the Court and counsel from
23 the very first time we stood up here that we were
24 willing to stipulate to certain issues. There are
25 certain facts or certain issues of law that provide a

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basis for liability, but advertising, in and of itself, does not.

And the ads in this litigation are subject to regulation by the Federal Trade Commission which don't require warnings in them, and perhaps if we are going to do this we need, if nothing else, to be able to sit down and wrestle through this in terms of what's really relevant to the issues before this Court.

THE COURT: Of the plaintiffs in this, we have what, 100 some plaintiffs now in the MDL?

MR. BERMAN: I believe it may be 125 or so, maybe a little bit more than that, Your Honor.

THE COURT: Okay. In what time period did they ingest Tylenol?

MS. JONES: Over half of them, Your Honor, after 2009. I think it is right that 93 percent are after like 2004. I may have this mixed up with New Jersey, I might be mixing my figures up, but the vast majority of them, according to the information that we have been provided, ingested Tylenol or are basing a claim upon an ingestion after 2003, 2004.

THE COURT: Okay. What is the relevance of, just to pull something out here, the defendants' brand vision, whatever that means, 30 years ago to a claim of liver failure for someone who ingested Tylenol in 2005?

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1 MR. WEINKOWITZ: Your Honor. the brand of
2 Tylenol was developed over 40 years using the same
3 consistent messaging of safety and safest. It is the
4 only over-the-counter drug that advertises and promotes
5 itself as safe.
6 Plaintiff in 2006 had suffered liver damage
7 and we gave you an example. They asked the question
8 what advertising have you been exposed to, has seen
9 repeated commercials over and over again, TV
10 commercials, print ads, newspaper ads that have said
11 that it's doctor recommended, that it's the safest,
12 that it's the one that hospitals use most.
13 So, by the time the consumer gets to the box
14 of Tylenol they have a predisposed notion based on how
15 the brand was developed as to its safety. So, it is
16 the safest.
17 So, what the box says about liver warnings or
18 what the box says about dangers, is totally outweighed
19 and totally, you know, minimized by the fact that the
20 cultivation of the brand as the safest has occurred
21 over 40 years.
22 The plaintiffs have been exposed to a variety
23 of different avenues of advertising. Brand essence is
24 the very thing that was developed and implemented into
25 every single advertising, every single phrase of every

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1 magazine article.

2 In order for us to really -- the issue of

3 when did the plaintiff take the drug and when did he or

4 she have liver failure is not the issue in the

5 marketing. These plaintiffs, most of them, took

6 Tylenol or some form of Tylenol all their lives and

7 were exposed to advertising all their lives.

8 So, the date of the liver injury is really

9 not the important date in terms of assessing how it

10 was they came to select Tylenol as the safe brand to

11 take.

12 THE COURT: Okay. And what is, I think I

13 know the answer to this, but what is the relevance in

14 your case to marketing in the first instance? I mean,

15 why do you want to know what they advertised and what

16 they said and what was out there in terms of the

17 marketing campaign?

18 MR. WEINKOWITZ: Yes. It's important because

19 what happened --

20 THE COURT: What legal claim does that attach

21 to?

22 MR. WEINKOWITZ: It attaches to a failure to

23 warn claim, Your Honor.

24 THE COURT: Okay.

25 MR. WEINKOWITZ: And by the time the

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1 plaintiff actually gets to the warning on the box, the
2 defendant has told the plaintiff in the most persuasive
3 way, using the most sophisticated marketing campaign
4 that their drug is, in fact, the safest, that doctors
5 recommend it more than anybody else, that hospitals
6 recommend it more than anybody else.
7 So, the plaintiff goes in and buys Tylenol,
8 by that time this defendant has told the plaintiffs
9 that it's the safest. So, it goes directly to the
10 failure to warn claim.
11 MR. BERMAN: I think, Your Honor, if I may,
12 it would also be relevant to the standard of care as
13 well. And, although Ms. Jones had spoken about the FTC
14 regulations, they would do no more than set a floor and
15 not a ceiling and it's not a question of preemption.
16 So, the companies have more freedom in which to contain
17 more information than the marketing.
18 THE COURT: Ms. Jones.
19 MS. JONES: Plaintiffs are very creative.
20 What I suggest is that if that's really the issue, that
21 perhaps what we ought to do is be allowed to submit
22 briefing on the issue to Your Honor to see whether or
23 not there is any legal authority whatsoever to support
24 their position, because I don't think that there is.
25 THE COURT: That position being that the

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1 marketing history of this product is relevant to the
2 failure to warn claim?
3 MS. JONES: That's right.
4 THE COURT: Okay.
5 MS. JONES: Because the obligations of a drug
6 manufacturer, the over-the-counter drugs are set out by
7 FDA regulations. Advertising is covered by the Federal
8 Trade Commission regulations, which don't require the
9 same type of requirements that you have in the case of
10 a prescription drug, because an over-the-counter drug
11 by definition is one that's generally regarded as safe
12 under the FDA regulations.
13 There is a history to that, but the point of
14 the matter is if Your Honor looks at the law and comes
15 to the conclusion that there is a basis, a legal basis
16 for this, perhaps then discovery is appropriate on a
17 limited basis. I still don't think it covers 40 years.
18 But, the reality of it is is that I don't
19 think that legally there is a claim that provides for
20 liability based upon this theory, based upon law.
21 THE COURT: That's why I asked the question.
22 MR. BERMAN: Your Honor, if I may just
23 address that one point. As you know, these notices
24 were cross-noticed for New Jersey and the legal
25 standard in New Jersey we believe certainly provides

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1 for this type of discovery. There is case called Perez
2 which impacts even --
3 THE COURT: Then maybe you will get it in New
4 Jersey. You know, we have two different courts
5 involved here --
6 MR. BERMAN: I understand.
7 THE COURT: -- and I know there is certainly
8 some overlapping. But, I appreciate that and that will
9 be certainly interesting. Well, we have two ways to go
10 here.
11 Now, I do think this notice is extremely
12 broad and very detailed, very well done, I might add,
13 but it certainly is comprehensive. I think it makes it
14 very difficult for the defendant to select a person or
15 even several people who can be responsibly prepared to
16 answer all of the various questions or topics.
17 So, with that I mean we could go the meet and
18 confer, try to pare down the request route, or we can
19 address the relevance and where it fits into the case,
20 and then once that is resolved, talk about how
21 extensive the discovery can be on the marketing issue.
22 We have the benefit of time in this case. We
23 don't have a trial scheduled. You have another concern
24 in New Jersey., but I don't think that I am limited by
25 that.

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1 Well, let's do that. Let me get briefs from
2 you about the relevance of the marketing information
3 and we will see if there is anything in that, you know,
4 that informs the scope of the potential discovery.
5 Should I get a brief first from the defendants who are
6 objecting to these designations? That makes sense to
7 me.
8 MS. JONES: I think that's fine, Your Honor.
9 I think that we're kind of arguing against the negative
10 because I'm not sure that the plaintiffs have the
11 authority to support it. But, if Your Honor wishes for
12 us to do it, as long as we have an opportunity to
13 respond, we're perfectly happy.
14 THE COURT: Yes, you certainly will. But, I
15 think you are objecting to these notices --
16 MS. JONES: And that's fine.
17 THE COURT: -- so I would like to get --
18 MS. JONES: We would be happy to do that.
19 THE COURT: -- a brief from you in support of
20 those objections focusing on the relevance of the
21 marketing information to any legal claims in the case.
22 How long do you need to do that?
23 (Pause in proceedings.)
24 THE COURT: Everybody seems to be looking at
25 Alyson, Ms. Jones.

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MS. JONES: I'm looking at Alyson because I'm going to be in trial, and I'm trying to see.

THE COURT: What's this?

MS. JONES: February the 4th.

THE COURT: February 7th, that's a Friday, that gives you to the end of the week.

MS. JONES: That's fine, Your Honor.

MS. A. JONES: That's fine.

THE COURT: And then two weeks to respond? Do you need more time?

MR. BERMAN: We may need some more time --

THE COURT: That's fine.

MR. BERMAN: -- because of some of the depositions and other scheduling conflicts, Your Honor.

THE COURT: Okay.

(Pause in proceedings.)

MR. BERMAN: If we could have three weeks, Your Honor, so I guess that would be the 28th.

THE COURT: That's fine with me.

MR. BERMAN: Thank you.

THE COURT: Okay. And then can you respond in a week?

MS. A. JONES: Yes.

MS. JONES: Sure.

THE COURT: Okay. Let's do that.

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(Pause in proceedings.)

THE COURT: Is there anything else that we need to cover this morning?

MS. JONES: I don't think so, Your Honor.

MR. BERMAN: No, Your Honor. If I may, just the plaintiffs have put on the agenda item number four request to withdraw as counsel on this specific case.

THE COURT: Right, right, right.

MR. BERMAN: The defendants have not objected to that request. They indicated that they are going to file a motion to dismiss. If we are permitted to withdraw as counsel, then we would not be responding to that motion.

THE COURT: Okay.

MR. BERMAN: If the Court needed more information we request to discuss it in camera as we currently still have an attorney/client relationship with the plaintiff.

THE COURT: Have you provided notice to the plaintiff?

MR. BERMAN: We did, Your Honor.

THE COURT: Okay. And have you gotten a response from the plaintiff?

MR. BERMAN: No, Your Honor.

THE COURT: Okay. All right. And there has

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been no plaintiff fact sheet as to that person?

MR. BERMAN: That's correct, Your Honor.

THE COURT: Okay. Okay. All right. Then I will expect a motion to dismiss as to that plaintiff. Okay.

MR. BERMAN: As I said, Your Honor, we would appreciate the approval of the withdrawal so that we're not obligated to respond to the motion to dismiss though, and we have informed the plaintiff that a motion to dismiss was likely to be filed.

THE COURT: Okay.

MR. BERMAN: Thank you.

THE COURT: I will grant leave to withdraw. Do you have a current address for that plaintiff?

MR. BERMAN: Yes, we do, Your Honor.

THE COURT: All right. So, we will provide a copy of that order, and I hope you will as well.

MR. BERMAN: We certainly will, yes, sir.

THE COURT: All right. I guess the motion to dismiss would just be on your schedule?

MS. A. JONES: Yes, Your Honor.

THE COURT: I don't have any preference. Okay.

MS. JONES: We'll get it filed promptly, Your Honor.

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THE COURT: Okay.

(Pause in proceedings.)

THE COURT: Is there anything else other than the items that we've covered on the agreed to agenda?

(No response heard.)

THE COURT: Okay. I wanted to just ask you, and I don't know that there is an answer to this, but where you are in terms of any settlement discussions in these cases, be it in New Jersey or here, or is that just not on the table without prejudice to whoever speaks first. Sometimes people don't want to address settlement first. Ms. Jones?

MS. JONES: Well, Your Honor, there have been no discussions at all. To be candid, I'm not sure whether or not -- there certainly have been no discussions at all in the MDL.

I don't remember whether or not -- it seems to me that there was one discussion in the past, but obviously this is a very important litigation to my client. It's a very important product of my client.

We are confident that at the end of the day this Court and the jury will understand and appreciate the fact that we appropriately studied, tested, marketed and so forth Tylenol.

Now, it's not to say -- never say never by

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1 any means, but this certainly is -- we believe that the
2 warnings and so forth are frankly adequate as a matter
3 of law, and that when we show historically how things
4 have developed, we think at least a significant number
5 of these cases will be disposed of on dispositive
6 motions.
7 THE COURT: Okay.
8 MS. JONES: So, there have been no
9 discussions. We're certainly willing to listen to any
10 proposal by anyone at any time.
11 THE COURT: Okay. That answers the question.
12 How about from the plaintiffs' side?
13 MR. BERMAN: I think Ms. Jones accurately
14 represents that we have not had any discussions. We
15 would disagree with her commentary on the merits of the
16 litigation, Your Honor.
17 THE COURT: Sure.
18 MR. BERMAN: Certainly if there is a point
19 person with whom we should engage in discussions, and I
20 don't know if it's Ms. Jones or somebody else who might
21 represent the company, if that person is identified, we
22 certainly can consider the circumstances.
23 THE COURT: Okay. All right. I think that
24 answers my question. I wonder if I could speak briefly
25 just to one of the plaintiffs' counsel and a

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representative of defense counsel just off the record, just to further that discussion a little bit. Could we do that?

MR. BERMAN: Sure.

THE COURT: I'm mindful of the snow and plane schedules. What time is your flight?

MS. A. JONES: It's at 1:00.

THE COURT: 1:00?

MS. A. JONES: Yes, Your Honor.

THE COURT: I wonder if we could just go back into chambers just for five or ten minutes. Okay. Thank you. Anybody is welcome to come back. I thought maybe just a representative from each side. Thank you.

(Proceedings adjourned, 11:15 a.m.)

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CERTIFICATION

I, Brad Anders, do hereby certify that the foregoing is a true and correct transcript from the electronic sound recordings of the proceedings in the above-captioned matter.

1/28/14
Date

Brad Anders

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