

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

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IN RE: : MDL NO. 13-2436
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TYLENOL (ACETAMINOPHEN) :
MARKETING, SALES PRACTICE : Philadelphia, Pennsylvania
AND PRODUCTS LIABILITY : March 18, 2014
LITIGATION : 10:05 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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1 (The following was heard in open court at
2 10:05 a.m.)

3 THE COURT: Good morning.

4 ALL: Good morning, Your Honor.

5 THE COURT: Please be seated. This is our
6 case management conference and I want to just note for
7 our record who is present. We have Lawrence Berman for
8 the plaintiff, good morning.

9 MR. BERMAN: Good morning, Your Honor.

10 THE COURT: Michael Weinkowitz, good morning.

11 MR. WEINKOWITZ: Good morning, Your Honor.

12 THE COURT: Diane Nast, good morning.

13 MS. NAST: Good morning.

14 THE COURT: Allison Jones for the defense,
15 good morning.

16 MS. A. JONES: Yes, Your Honor.

17 THE COURT: David Abernathy.

18 MR. ABERNATHY: Good morning, Your Honor.

19 THE COURT: Good morning. Madeline Sherry.

20 MS. SHERRY: Good morning, Your Honor.

21 THE COURT: Stephen Finley.

22 MR. FINLEY: Good morning, Your Honor.

23 THE COURT: Good morning. Brandon Goodman.

24 MR. GOODMAN: Good morning, Your Honor.

25 THE COURT: Good morning. And Margaret

1 O'Neill.

2 MS. O'NEILL: Good morning, Your Honor.

3 THE COURT: Good morning. And are we on --
4 we have some people on the telephone as well, is that
5 right?

6 MR. BERMAN: We do, Your Honor.

7 THE COURT: Okay. Very good. Okay. I have
8 reviewed the materials that you submitted in advance of
9 the conference and I thank you for the agenda, and I
10 would just like to work our way through the agenda at
11 this time.

12 The first item is the (disk malfunction) to
13 do that?

14 MR. BERMAN: From plaintiffs' perspective,
15 yes, Your Honor.

16 THE COURT: Okay.

17 MS. A. JONES: As well as defendants.

18 THE COURT: Okay. Good. How will you
19 communicate that? Will you file something or send me a
20 letter? How do you propose to do that?

21 MS. A. JONES: The case management order
22 states that it is by letter and that can --

23 THE COURT: I think that works.

24 MS. A. JONES: -- at your preference be filed
25 with the Court or just submitted.

1 THE COURT: I think a letter is great.

2 MR. BERMAN: Okay.

3 THE COURT: Good, thank you. And the update
4 on the New Jersey litigation, I understand there has
5 been a continuance from April 14 to July 16. Anything
6 else to report with respect to the New Jersey case?

7 MR. BERMAN: No, Your Honor, other than the
8 fact that as mentioned in the agenda, the parties are
9 still negotiating a formal pretrial schedule to bring
10 the case up to the trial date.

11 THE COURT: Right.

12 MR. BERMAN: Which would include briefing of
13 areas, motions and identification of exhibits,
14 identification of witnesses, et cetera.

15 THE COURT: Okay. Are you still engaged in
16 discovery in the New Jersey case?

17 MR. BERMAN: Yes, Your Honor.

18 THE COURT: Okay. I thought so. Good.
19 Thank you. Then with respect to the protective order
20 and motions regarding highly confidential data, as I
21 understand these are the call back requests for certain
22 documents that have been produced, but have been
23 requested to be returned, is that right?

24 MS. A. JONES: Yes, Your Honor. And these
25 are defendant's motions that's underneath the specific

1 provision in the amended protective order.

2 THE COURT: Right.

3 MS. A. JONES: And the parties are working
4 together to prepare an order that will -- it will
5 cover, really, a delay in the review by the plaintiffs
6 of the documents we've requested back.

7 THE COURT: Okay. We have at least some of
8 those documents under seal in our chambers currently.

9 MS. A. JONES: Correct.

10 THE COURT: They have been provided to us.
11 So, I guess I have a note here to ask you if you've
12 worked anything out on this. So, where are we with
13 that?

14 MR. BERMAN: The parties are working on that,
15 Your Honor. I wanted to go back to agenda number two.

16 THE COURT: Okay.

17 MR. BERMAN: Just to mention so Your Honor
18 will be familiar. We have understood that Judge Higbee
19 will preside over the first trial in July, but
20 thereafter she may take an appointment to the appellate
21 bench for New Jersey and may not preside thereafter.

22 THE COURT: Oh, okay. Wonderful.

23 MR. BERMAN: So, this is just an
24 informational comment that I am making at this point in
25 time.

1 THE COURT: Right.

2 MR. BERMAN: But, it would be in the state
3 court appellate system. Then, with respect to the
4 number three, the call back, similar motions have been
5 filed in New Jersey as well, and during the last
6 conference Judge Higbee had commented that there really
7 wasn't a need to continue to file these motions simply
8 for the purpose of protecting the record with respect
9 to the deadline, to do so under the amended protective
10 order.

11 My recollection of her discussion is that she
12 said once the exhibit lists and the actual use would be
13 made of these various documents she can address it
14 later as to whether anything would be called back.

15 But, at the moment they are being handled on
16 a highly confidential basis and she didn't want
17 additional motions filed that are essentially
18 repetitive other than the identification of the Bates
19 numbers of the documents.

20 Subsequent to that we had conversation with
21 defendants about reaching a similar arrangement for
22 this Court so that additional motions would not have to
23 be filed, but without waiver of the right that they
24 would have otherwise had to file within a certain
25 number of days. And that's what we're working on, I

1 believe, for joint orders.

2 THE COURT: Okay. That seems to make sense.

3 MS. A. JONES: Yes, Your Honor. If I could
4 just add that the production of documents on that topic
5 is complete. So, there wouldn't be any additional
6 motions to be filed that would identify documents.

7 And as to Mr. Berman's notification of Judge
8 Higbee's appointment, I would also note for the Court
9 that she is taking a temporary assignment beginning in
10 the middle of April up until June that she will be
11 serving on the appellate court.

12 THE COURT: Okay.

13 MS. A. JONES: It is a temporary assignment.

14 THE COURT: To the appellate court?

15 MS. A. JONES: That's right, then to be
16 decided whether permanent or not.

17 THE COURT: Okay. So, as to agenda item
18 three we are still really working on some sort of an
19 agreement?

20 MR. BERMAN: Yes, Your Honor.

21 THE COURT: Okay. All right.

22 MR. WEINKOWITZ: I think what we intend, Your
23 Honor, is we will come up with a case management order
24 in New Jersey.

25 THE COURT: Right.

1 MR. WEINKOWITZ: And mirror it here and
2 submit it if acceptable to the Court.

3 THE COURT: Okay. That's perfectly fine. I
4 do talk with Judge Higbee from time-to-time, that's
5 probably something that we will cover. Okay. So, item
6 four, which I take it is the main event, the cross
7 noticed corporate designee depositions on the marketing
8 and public relations issues.

9 We received, I believe, right, it was with an
10 e-mail of March 7, an amended notice of the deposition
11 for a defendant's corporate designee. Is this the
12 revised, most up-to-date notice?

13 MR. BERMAN: It is, Your Honor. It was
14 served after Judge Higbee had ruled that the discovery
15 could go forward. There was a meet and confer with
16 defendants relating to some of the issues, that has not
17 yet been resolved in terms of the scope and, therefore,
18 the amended notice was served to at least get on the
19 record a more narrow and focused notice that the
20 plaintiffs were satisfied to go forward with.

21 THE COURT: Okay. So, I did read the
22 transcript of the most recent, I think it was the most
23 recent case management conference with Judge Higbee
24 where she directed you to meet and confer about the
25 scope of these depositions. Is that process still

1 ongoing?

2 MR. BERMAN: Yes, Your Honor.

3 THE COURT: Okay.

4 MR. BERMAN: There was a meet and confer. We
5 did not reach agreement. We then prepared and served
6 the amended notice and although Mr. Weinkowitz may be
7 more familiar with the day-to-day on that, I believe
8 there is intended to be additional meet and confer on
9 that.

10 MR. WEINKOWITZ: We met and we had a meet and
11 confer, we amended the order and now we are just
12 waiting to see what defendants want to do about it. I
13 mean we cut the notice back. I heard what this Court
14 said and I heard what Judge Higbee said about my prior
15 notice, so we've cut it back significantly.

16 It was amended -- the context of the
17 amendment was we had the April trial date and you read
18 the transcript and Judge Higbee said let's get some of
19 these done. Plaintiffs, go back and see if we can pull
20 out the most important things and then we will deal
21 with it later. So, that's what this is. We're just
22 waiting to hear back from the defendants on whether or
23 not there is any dispute.

24 THE COURT: Okay. All right. In terms of
25 whether this information is discoverable and to what

1 extent, I mean, are we still contesting the
2 discoverability? I think you are, right?

3 MS. A. JONES: Yes, Your Honor.

4 THE COURT: Okay. And that's what we want to
5 talk about at this point?

6 MS. A. JONES: Yes, Your Honor.

7 THE COURT: Okay. Are you going to address
8 that?

9 MS. A. JONES: I am.

10 THE COURT: Okay. All right. Why don't we
11 hear from you about that?

12 MS. A. JONES: Your Honor, on behalf of the
13 defendants the specific question at issue before this
14 Court per the Court's request at our last case
15 management conference is to what extent, if at all, the
16 plaintiffs' topics in the PSC's 30(b)(6) notice
17 pertaining to marketing are relevant to the plaintiffs'
18 claims in this MDL.

19 As we have just discussed, there is a
20 background in the New Jersey litigation that the New
21 Jersey court has ruled on. The New Jersey court, when
22 we went before Her Honor gave us guidance based on the
23 recommendations of Mr. Berman as to what the plaintiffs
24 considered the most relevant or the most pertinent in
25 the notice, if you will.

1 And for those topics, defendants at that time
2 were ordered to identify and produce a witness on the
3 narrowed areas which focused mainly on a public
4 relations -- a witness to talk about public relations
5 in a narrow context as well as marketing and research
6 related to consumer behaviors.

7 And so in the context of that order the
8 defendants prepared an order that outlined those
9 subjects and were willing to work with plaintiffs,
10 identify and produce the witnesses.

11 At that point the trial date had moved and
12 the trial date had moved and Your Honor has the benefit
13 of the transcript because of nine newly identified
14 third party witness for which the plaintiffs intended
15 to have the benefit of their depositions before trial,
16 so the trial date was moved from April until July.
17 There was no discussion regarding the marketing
18 30(b) (6) and the context of the movement of the trial
19 date.

20 So, defendants came to plaintiffs with an
21 order that outlined those narrow topics and the
22 defendants were prepared to put a witness up on those
23 areas.

24 Now, certainly the judge did order us to meet
25 and confer and plaintiffs have now submitted an amended

1 30(b)(6) notice which if we go back a month or six
2 weeks is what the defendants requested at the outset,
3 was an amended 30(b)(6) but limited the areas.

4 So, we have that before us and we are
5 considering it. We still remain ready and will produce
6 someone on the narrow area of the public relations and
7 the consumer and marketing research which was outlined
8 by Mr. Berman to the New Jersey court.

9 THE COURT: But, plaintiffs' first amended
10 notice of the corporate designee (disk malfunction)
11 then the public relations and marketing research
12 relevant to consumer behavior topics?

13 MS. A. JONES: It is, Your Honor, in several
14 different contexts.

15 THE COURT: Okay.

16 MS. A. JONES: The first being -- the first
17 being that it still contains the numerous subsections
18 under various topics.

19 THE COURT: Right.

20 MS. A. JONES: And it also goes into specific
21 advertising sections related to whether there was a
22 liver warning and it is broader than public relations
23 and consumer marketing, which defendants would submit
24 would still be two different witnesses, the consumer
25 behaviors and the public relations.

1 THE COURT: Right.

2 MS. A. JONES: And then advertising may be
3 additional witnesses.

4 THE COURT: But, that's not a problem, right?
5 I mean you would expect that there would be different
6 people to speak to those.

7 MS. A. JONES: That's right. I would just
8 mention that there were different areas and --

9 THE COURT: Right.

10 MS. A. JONES: -- the notice still contains
11 various different areas.

12 THE COURT: Right.

13 MS. A. JONES: If we turn to, then, what the
14 question is before the Court, whether the topics in the
15 30(b)(6) are relevant to the plaintiffs' claims, I am
16 going to walk through four areas, and the first being
17 what are the claims before this Court in the MDL, how
18 are those claims relevant in a prescription drug
19 context, because I think that's important to set the
20 background.

21 How are the topics irrelevant and not
22 relevant to the claims in this MDL in the
23 over-the-counter context, and then lastly address the
24 scope that was not addressed by the New Jersey court
25 that I think is pertinent to this Court.

1 The claims at issue in this MDL are
2 essentially strict liability, failure to warn in a
3 negligence context and design defect. The short form
4 complaint also contains warranty claims as well.

5 The plaintiffs in their response, and I will
6 focus on this case for a minute, because it is a large
7 part of the PSC's response is the Lance case, and in
8 that case the plaintiffs specifically disowned or
9 stated out front that they were not pursuing a claim of
10 failure to warn. So, at that outset that case is not
11 comparable to the case here.

12 The specific issue in the Lance case was
13 whether the plaintiffs could proceed in a negligent
14 marketing claim, and specifically it was negligence in
15 this marketing meaning the sale of the drug.

16 There is no mention in that opinion of the
17 word advertising, the word public relations or consumer
18 marketing behaviors. And so that case -- in that case
19 is a prescription drug context.

20 And so at the outset I want to distinguish
21 that case because what the plaintiffs would be trying
22 to do here is to attach relevance to the marketing or
23 the advertising discovery that they are seeking to a
24 new claim that would somehow give rise to liability to
25 the defendants for its marketing in an over-the-counter

1 context, which is not present here.

2 THE COURT: Well, as I understand it, there
3 is no stand alone negligent marketing claim, right?

4 MS. A. JONES: Correct. In the advertising
5 context, correct.

6 THE COURT: Recognized in Pennsylvania law or
7 New Jersey law or any other state law?

8 MS. A. JONES: Correct.

9 THE COURT: As I understand where that fits
10 into this case, and maybe you can help me understand
11 this, we have a failure to warn case. So, we have
12 certain recognized possible problems with
13 acetaminophen, liver damage and the like, and an issue
14 in this case is the sufficiency of the warnings that
15 are on the bottle or the package that I would purchase,
16 right, or the consumer would purchase.

17 As I understand the marketing, it seems like
18 negligent marketing is maybe a bad thing to call it,
19 but for want of a better term that the negligent
20 marketing fits into the case in a context where the
21 aggressive and robust marketing campaign, however you
22 describe it, sort of obviates or overtakes the warning,
23 right? Isn't that the hook that we hang that on in
24 this case?

25 MS. A. JONES: Let me tell you why we submit

1 that is not where we hang the hook.

2 THE COURT: Okay.

3 MS. A. JONES: It is because there is no duty
4 for defendants in an over-the-counter context, in an
5 over-the-counter drug, to market in accordance with any
6 statutory law.

7 THE COURT: Right.

8 MS. A. JONES: There is in the prescription
9 context. In the prescription context, marketing or
10 advertising is relevant to a failure to warn.

11 THE COURT: Right.

12 MS. A. JONES: In the context of defeating
13 the learned intermediary doctrine or with direct to
14 consumer advertising, which is all governed under the
15 Food and Drug Act in the USC that is applicable only to
16 the prescription drug context.

17 THE COURT: Which is why when I watch TV at
18 night they have those ads of prescription medications
19 and they have the parade of horrors that can happen
20 to you.

21 MS. A. JONES: That's right, and they are --

22 THE COURT: Who would want to take that
23 medication.

24 MS. A. JONES: They are required to do so.

25 THE COURT: Right.

1 MS. A. JONES: And so those manufacturers of
2 prescription products have a duty.

3 THE COURT: Right.

4 MS. A. JONES: In the over-the-counter
5 context that duty does not exist.

6 THE COURT: Right.

7 MS. A. JONES: Because the FTC governs the --
8 the Federal Trade Commission governs advertising and
9 there is no affirmative duty. So, it cannot create a
10 cause of action.

11 THE COURT: But, doesn't -- go ahead.

12 MS. A. JONES: I am happy to answer the
13 questions.

14 THE COURT: But, doesn't it go to the
15 ultimate issue of whether the warnings are adequate?

16 MS. A. JONES: There is no duty to warn in
17 the advertising for over-the-counter products. So, it
18 will not be at the end of the day a question on the
19 verdict form was the defendant negligent in its
20 marketing. It will rise and fall on whether the
21 defendant was negligent in its failure in its warnings,
22 in its labeling.

23 THE COURT: Well, it is not necessarily a
24 negligent concept at that point, right? It is --

25 MS. A. JONES: It is --

1 THE COURT: -- is the product defective.

2 MS. A. JONES: -- under the Product Liability
3 Act.

4 THE COURT: Is the product defective because
5 you couldn't design or manufacture out the problem, so
6 you have to warn if that were the case, right?

7 MS. A. JONES: That's right. And as I
8 appreciate the plaintiffs argument that this marketing
9 and advertising is relevant in the failure to warn
10 context --

11 THE COURT: Right.

12 MS. A. JONES: -- which would be in that
13 product liability context.

14 THE COURT: Right.

15 MS. A. JONES: If you try to expand that to
16 negligence you still have to have a duty, and that duty
17 has to be created.

18 THE COURT: That's why I am saying that maybe
19 negligent marketing is --

20 MS. A. JONES: Is not -- that is not
21 applicable here.

22 THE COURT: The wrong concept, yes.

23 MS. A. JONES: That's right, and I would
24 submit that the plaintiffs claim that there is some
25 type of negligent marketing that this would attach to

1 and make it relevant does not exist.

2 THE COURT: Okay.

3 MS. A. JONES: The cases that plaintiff cite,
4 as I mentioned, are prescription drug context where
5 there is a learned intermediary defense and there are
6 also phrases in which you would see relevance of
7 marketing or advertising with respect to off-label use
8 whereas I mentioned direct to consumer, and those are
9 all in the context of the prescription drugs and not
10 applicable here.

11 In our litigation there is no duty in
12 marketing and where the FTC does set a floor, not a
13 ceiling, that does not make defendants liable in that
14 context.

15 There is no learned intermediary, there is no
16 claim by the plaintiffs for off-label promotion, and
17 there is no requirements placed on the defendants in
18 the law apart from what the FTC mandates, and that does
19 not provide a private right of action. In fact, the
20 plaintiffs now agree that the Lanham Act is not at
21 issue here in these cases.

22 The one other area that's addressed in the
23 notice that I want to talk to briefly is each section
24 has a subsection related to financial data or other
25 expenditures and budgets and financial data that would

1 be pertinent only to the punitive damage context, and
2 certainly that issue has not been briefed before this
3 Court. That discovery could be deferred and defendants
4 and the PSC can brief the issue of punitive damages at
5 the time and that discovery can be deferred.

6 THE COURT: Is that in this notice, financial
7 information for the company?

8 MS. A. JONES: It is.

9 THE COURT: Okay.

10 MS. A. JONES: It is in each subsection --
11 each category has a subsection related to expenditures
12 and the budgets and the effect of that.

13 THE COURT: Right. Okay. Well, the
14 expenditures on marketing would be a different concept
15 from the financial condition of the company, right?

16 MS. A. JONES: Correct.

17 THE COURT: The financial condition of the
18 company is more a punitive damages problem, right?

19 MS. A. JONES: Correct. That's right.

20 THE COURT: Okay.

21 MS. A. JONES: And so to the extent that the
22 notice seeks expenditures and data related to
23 individual marketing concepts, that could be addressed
24 in the context of the section. However, the notice is
25 broader and actually does point to sales figures and

1 financial data. So, for that part, that's relevant to
2 only the punitive damages it can be carved out.

3 THE COURT: All right. My practice is
4 normally to defer punitive damages discovery until we
5 get beyond the motions stage in the case.

6 MS. A. JONES: And defendants would agree
7 with that practice.

8 THE COURT: Okay.

9 MS. A. JONES: The scope of the notice, and
10 let me address briefly why it should be limited even
11 more in this court, and I think it is important to note
12 that the New Jersey rules are different than the
13 federal rules.

14 We are here before this Court and we are with
15 the same plaintiffs' lawyers in New Jersey and we do
16 have coordination. So, it is recognized that this
17 Court is aware of those, the deposition that will go
18 forward and the topics to be covered.

19 But, the New Jersey courts did not adopt the
20 2000 amendment rules to the federal rules, and so there
21 is reason for more limitation here. Specifically, I
22 want to look at the time period because the court upon
23 Mr. Berman's representations -- the New Jersey court
24 limited it to 1985.

25 But, here in this MDL there is no reason to

1 go back before, for example, 2000. The majority of the
2 cases would still be within five to eight years past
3 that time period from marketing.

4 Certainly, a marketing campaign, even if we
5 bought into the brand essence that had been over
6 decades marketed a certain way, if marketing was one
7 way in 1985 then changed to put in effect in 2000 these
8 plaintiffs in the MDL would not -- the 1985 marketing
9 would not be relevant, and certainly we can -- and it
10 would assist the defendants in putting up a witness
11 that could cover a time period more efficiently and, in
12 fact, witnesses would be present that we could prepare
13 if the time period was more closely related to the
14 cases in this MDL.

15 We recognize that the New Jersey court has a
16 trial schedule and that's a reason that does not exist
17 in this court, as well as the fact that this Court has
18 case management orders put in place to effectively run
19 its MDL including case management order 14 that
20 designates a limit of 20 depositions and has other
21 certain limitations.

22 And so for those reasons we would ask the
23 Court to the extent that the Court finds relevance to
24 the marketing, which we submit there is not in these
25 claims, it would not be relevant to these claims, that

1 the subsections be carved out or that the defendants
2 move forward with the topics enumerated by Mr. Berman
3 for the New Jersey court.

4 The defendants are prepared to put a witness
5 up on preliminary, recognizing there may be additional
6 discovery and/or limit the time period scope for this
7 MDL.

8 THE COURT: With respect to the time period,
9 do you have a sense or is there some agreement here as
10 to when the plaintiffs in this case would have ingested
11 Tylenol?

12 MS. A. JONES: Yes, over 90 percent of the
13 use is after 2008. There is one outlier child case
14 that is before 2000, it is in 1997, but certainly there
15 is no use prior to that date.

16 THE COURT: Is it 90 percent --

17 MS. A. JONES: 90 percent.

18 THE COURT: -- after 2008?

19 MS. A. JONES: Yes.

20 (Pause in proceedings.)

21 THE COURT: All right. Anything else?

22 MS. A. JONES: No, Your Honor, not at this
23 time.

24 THE COURT: Thank you, very much. Mr.
25 Berman?

1 MR. BERMAN: Thank you, Your Honor.

2 (Pause in proceedings.)

3 MR. BERMAN: May it please the Court,
4 Lawrence Berman for the plaintiffs, Your Honor. I
5 wanted to start out with discussing what is at issue
6 here today, because the argument that Ms. Jones
7 presented is one that sort of blurs and blends
8 different issues as though they are what is at issue
9 here.

10 What is at issue today is a discovery issue
11 which is defined by what is relevant to one of the
12 claims that the plaintiffs may have in their case. So,
13 to the extent Ms. Jones discussed questions of the FDA
14 and FTC regulations and what the specific elements
15 might be under a particular cause of action, that's not
16 really under attack here today.

17 What defines the relevancy is the complaint.
18 For the Court's convenience I did bring copies of the
19 master complaint. I don't know if the Court has that
20 available, but if I may approach the bench I could
21 provide that to you --

22 THE COURT: Sure.

23 MR. BERMAN: -- and to defense counsel of
24 course. I have two copies for the Court, one for Your
25 Honor, one for your clerk.

1 (Pause in proceedings.)

2 MR. BERMAN: The reason I wanted to present
3 the complaint, I guess, as an exhibit here this
4 morning, Your Honor, is that as you leaf through the
5 complaint there will be many, many references to claims
6 based on marketing and over-promotion and advertising.

7 And just by way of example, we can start out
8 page two, paragraph eight where the plaintiffs
9 introduced right up front that the defendants were in
10 the business of marketing their products.

11 Skipping again to paragraphs nine, ten and
12 11, as a background, again it speaks about the
13 defendants being involved in marketing their products.
14 The same with paragraph 12.

15 When we get to Count 1, the strict liability
16 count, which is on page six and it is paragraph 28
17 subsection B, so that is page six, 28B, "Defendants
18 fail to properly market."

19 Paragraph 28C, "Defendants over-promoted."
20 Paragraph D, "Defendants failed to properly warn."
21 Paragraph F on the following page, "Defendants fail to
22 market a feasible alternative design."

23 Next we move onto the implied warranty of
24 merchantability. Paragraph 32, again, speaks about
25 marketing. When we get to the negligent failure to

1 warn count, which appears on page ten, paragraph 49,
2 "Defendants fail to warn adequately and properly, but
3 instead over-promoted the Tylenol products including
4 but not limited to over-promotion of its safety and
5 efficacy.

6 Count 5, negligent design defect, paragraph
7 53 marketing again is mentioned. Paragraph 54,
8 "Marketing and promoting Tylenol which was a defective
9 and presented an unreasonable risk of harm to
10 consumers."

11 Same type of allegation in paragraph 60 of
12 the master complaint. The general negligence count,
13 which is Roman numeral VI on page 13 and paragraph 65,
14 "Defendants were negligent in the design, manufacture,
15 advertising, warning, marketing and sale of Tylenol by
16 a number of reasons."

17 Subparagraph D, "Failed to properly market."
18 Subparagraph E, "Over-promoted." And I don't -- maybe
19 I will mention one more count here. I don't want to go
20 through the entire complaint because --

21 THE COURT: I get the point, right.

22 MR. BERMAN: -- it becomes redundant, but I
23 would just call the Court's attention to negligent
24 misrepresentation in paragraphs 69 through say 73 or
25 74, and this goes on and on throughout the master

1 complaint.

2 My point about this is to the extent Rule 26
3 states that the scope of discovery is discovery that
4 relates to any claim in a case, the claims in this case
5 at this point in time are the claims that are asserted
6 in the master complaint.

7 There has been no motions dismissed. This is
8 not a summary judgment motion. This is not a Daubert
9 motion on the admissibility of expert opinion. It's
10 not an in limine motion on the eve of trial. It is
11 discovery and as long as the master complaint is
12 standing in the form that it is, it should define what
13 claims are in the case.

14 It may be there are no duties, there may be
15 somewhere along the line the defendants will argue that
16 the complaint over-states viable claims under the law
17 of the multitude of states that might apply once choice
18 of law is applied, but at this moment if we can keep
19 the focus to what the complaint alleges that defines
20 what the claims are.

21 Then I might add that the master complaint is
22 an MDL complaint. So, it needs to take into account
23 the law of all of the different states and there has
24 been briefing about Pennsylvania law, briefing about
25 New Jersey law and maybe some of the other states.

1 But, by our last reconciliation there were 35
2 states represented by the master complaint. There may
3 have been some plaintiffs who have filed from other
4 states not yet accounted for.

5 But, the law of the varying different states
6 will recognize in different forms these various counts.
7 Plaintiffs have to do their discovery as an MDL
8 steering committee to account for all of those
9 possibilities in order to discharge their leadership
10 role.

11 And I guess to add onto this point there has
12 been a lot of focus on failure to warn as being the
13 limit of the scope of the case, and it is true that in
14 the January conference that we had when this was first
15 raised without the full briefing and there was a letter
16 brief, the parties all focused a bit on failure to
17 warn, but now I am trying to bring everybody's
18 attention back to the complaint the case is a larger
19 scope than the failure to warn.

20 THE COURT: Of course, the defense disagrees
21 that there is this negligent marketing or that a number
22 of these claims that you have asserted in the master
23 complaint are really valid under the law, right?

24 MR. BERMAN: But, they haven't been
25 challenged formally.

1 THE COURT: Right.

2 MR. BERMAN: And the way to challenge them is
3 not through a discovery dispute. If defendants chose
4 to make that challenge they had the opportunity under
5 case management order number seven to file a motion to
6 dismiss any or all of the counts of the complaint once
7 the master complaint was filed. They have not done
8 that and the time for a motion to dismiss is expired.

9 They may have an opportunity to file a motion
10 for summary judgment at some point in time, but right
11 now that's not the lay of the land, if you would, as to
12 what claims are pending before the Court.

13 There was also mention about what had
14 occurred before Judge Higbee with respect to the
15 similar notice that was discussed during the February
16 28 conference.

17 To give some more context, and I am not sure
18 if it comes through from the transcript, but there were
19 a number of issues pending at that time. Possibly the
20 most important was whether it was going to be possible
21 to complete all of the discovery from February 28th in
22 anticipation of an early April trial date.

23 And Judge Higbee did say well, I think that
24 marketing discovery is relevant, but it would be
25 impossible to complete all of the discovery that might

1 be contemplated by this notice in such a short period
2 of time, can you give me some examples of what is the
3 most important.

4 And this was a telephone conference. Judge
5 Higbee had a reasonably short amount of time to devote
6 to it. I think she had taken an intermission or a
7 recess during a trial, and I was the one who spoke and
8 I will admit that I spoke about public relations and
9 marketing research and a few other items and mentioned
10 I didn't want to necessarily go through the entire
11 list, but I wanted to make a point of what we thought
12 was important.

13 But, it wasn't intended to be to the
14 exclusion of other areas that were contemplated by
15 marketing discovery. And Judge Higbee said fine, let's
16 try to memorialize this by an order, but the context at
17 the time was that there was still going to be an April
18 trial.

19 And my recollection is she even said we can
20 address further later on at a later date, but let's get
21 through this for purposes of the trial preparation. As
22 that hearing went forward another 20 minutes or 30
23 minutes the whole dynamic changed.

24 Judge Higbee commented I think I put too much
25 pressure on both sides, I squeezed both sides too much

1 and I think we need to relax this and have a July trial
2 date.

3 Now, we didn't go back and say well, what
4 does that mean about the marketing deposition because
5 we had moved on, but it was at least understood by
6 plaintiffs that we were writing a new slate for the
7 pretrial order that would govern bringing the case to
8 trial and, in fact, we haven't even completed the
9 writing of that new pretrial order.

10 As a result we filed an amended notice, we
11 tried to do a meet and confer and that's sort of where
12 we are now. And I guess my point is I don't want the
13 comments that were made under that circumstance held
14 against plaintiffs as to the scope of the discovery
15 because of what the circumstance was when I mentioned
16 public relations or marketing research or consumer
17 prospectus without going through the remainder of the
18 notice.

19 Ms. Jones spoke about a differentiation
20 between the New Jersey rules on the scope of discovery
21 and not having adopted the 2000 amendments in the
22 scope. I still think under the 2000 amendments of the
23 Federal Rules when we look at the complaint, and again,
24 we are the master of the complaint at this point and it
25 is what should govern the scope of discovery.

1 We have identified marketing claims in
2 numerous counts of the complaint which should permit
3 that discovery to be permissible. It is not a fishing
4 expedition, it is relevant to these claims in various
5 forms. It may not be admissible, but it is relevant.

6 This is an over-the-counter drug, and without
7 getting into distinctions between over-the-counter and
8 prescription drugs, we do have a situation where we do
9 not have a learned intermediary available to protect
10 the plaintiff and you do not have all of the
11 disclosures that Your Honor mentioned seeing on
12 television with respect to the advertising of
13 prescription drugs.

14 Our point is that through the type of
15 advertising, the type of marketing, the expenditures
16 that were spent by the companies for decades to create
17 this brand, this brand essence, is what framed and
18 formed the mind set of the plaintiffs and anybody else
19 who might come into this MDL as a plaintiff.

20 It is incorrect, we think, to look at the
21 date of the ingestion or immediately before the date of
22 the ingestion and state well that should be the limit
23 on the time frame.

24 We gave, I believe, an example in our papers
25 from the plaintiff fact sheet. Thank you, Mr.

1 Weinkowitz, he knew where I was going. It was the
2 plaintiff fact sheet answer by the Ersoy (ph)
3 plaintiff, and this appears on our amended briefing
4 which was filed on March 14, 2014 on page 19.

5 The standardized plaintiff fact sheet
6 question was "Have you ever seen or heard any
7 advertisements, e.g. in magazines, newspaper coupons or
8 television or radio commercials for
9 Tylenol/acetaminophen," and his answer was "Yes."

10 Then the question went on, "If yes, please
11 identify where you saw or heard the advertisements, et
12 cetera." The answer was "Exact dates are unknown,
13 however, repeatedly for many years plaintiff recalls
14 seeing commercials on television for regular, extra
15 strength and children's Tylenol. The ads always refer
16 to the Tylenol product being effective for pain and
17 fever reduction and that doctors and pharmacists
18 recommend and hospitals use Tylenol. Tylenol was the
19 most trusted pain reliever."

20 We think that this ties to our argument that
21 it is not the date of ingestion or a month before the
22 date of ingestion, but that the framework or the state
23 of mind of the plaintiffs in terms of their decisions
24 to use this product were cultivated years earlier
25 through the advertising that it appeared for many, many

1 years.

2 THE COURT: So, what's a reasonable time
3 frame limitation here, in your view?

4 MR. BERMAN: Well, our original notice, as I
5 recall, asked for witnesses from 1970 to the present
6 and the amended notice stated 1985 to the present. So,
7 we did cut 15 years off and that was mentioned with
8 Judge Higbee and she had approved of that.

9 If we were to cut this to a different time
10 frame, I guess it creates sort of an inconsistency in
11 terms of how the cross-notice, the notices of
12 deposition, because on the one hand there should be the
13 production of a witness prepared to speak from the 1985
14 to the present time frame, yet if this Court were to
15 state that the scope is from 1990 or whatever date the
16 Court may choose to select, does that mean the
17 testimony from 1985 to 1990 or whatever it might be is
18 not available to this Court even though it is testimony
19 that's being taken and presumably it may be the same
20 witness who is going to be proffered to present that
21 testimony.

22 And I don't think it's lost in the weeds, but
23 it also very well may be that while the defendants say
24 we may have to produce more than one witness or two
25 witnesses, there should be a continuity of some of the

1 witnesses who would be most knowledgeable who can span
2 a period of time that it would not be onerous or
3 burdensome to include the 1985 time frame that Judge
4 Higbee agreed to.

5 It may be that a witness would overlap to the
6 1982 to 1990 time frame and then another witness from
7 1990 or 1994 to a 2000 time frame. There has been no
8 showing of a burden that it was going to result in the
9 need to produce 20 or 30 witnesses.

10 That's not what we understand the record to
11 be and as we have reviewed the documents we believe
12 that there should be an ability to produce a reasonable
13 number of witnesses without it being burdensome and
14 still accommodating to the time frame that we were
15 looking to for purposes of the amended notice.

16 THE COURT: Okay.

17 MR. BERMAN: I am not sure if Your Honor has
18 any more questions. I didn't mean to dominate all of
19 the time here.

20 THE COURT: Well, no, I think you've covered
21 everything I wanted to cover. There are references in
22 the agenda to cross-noticed depositions of current or
23 former employees that are scheduled, some that have no
24 dates provided, some that have already been taken.
25 Where does that fit in?

1 MR. BERMAN: Well, one witness who was taken
2 is Ashley McEvoy who was a marketing witness.

3 THE COURT: Right.

4 MR. BERMAN: And she was able to provide some
5 testimony within a certain scope of time. As Your
6 Honor is aware, we are seeking to have the deposition
7 of Anthony Vernon who is a former executive who came
8 through the marketing department and he would cover I
9 believe the late 1980s to the early '90 time frame, it
10 may be a little earlier than that.

11 Judge Dowell in Chicago did grant an order
12 for the transfer of the motion to quash, however, we
13 have not seen it appear on the docket yet. We are not
14 sure what the delay might be. It may be an
15 administrative issue in terms of the clerk's office in
16 Chicago not forwarding it to you. When it does reach
17 you the plaintiffs would like an opportunity to brief
18 that.

19 THE COURT: All right. I think we just got
20 the motion to quash.

21 MR. BERMAN: Oh, okay. We haven't seen it on
22 the ECF yet.

23 THE COURT: So, we need to give you time to
24 respond. Okay.

25 MR. BERMAN: Okay.

1 LAW CLERK MAZUR: There might be an issue
2 with the numbering. They made it a miscellaneous, so
3 it --

4 THE COURT: Oh, so it is not on the docket of
5 this case. It may be in a separate miscellaneous.

6 LAW CLERK MAZUR: They gave it a separate
7 miscellaneous number. So, I will have to just --

8 THE COURT: Okay. Can you get that
9 information to counsel, Melissa?

10 LAW CLERK MAZUR: Absolutely.

11 MR. BERMAN: Yes, we haven't seen it on the
12 ECF notice that we would get for any filings related to
13 the actual MDL docket.

14 THE COURT: Okay.

15 LAW CLERK MAZUR: It just came through
16 yesterday.

17 MR. BERMAN: Okay.

18 THE COURT: Okay. So, it appears you have
19 gotten some of the information you are looking for from
20 depositions that have already been taken?

21 MR. BERMAN: Well, Mr. Weinkowitz may be more
22 familiar, but my understanding is that the primary
23 witness has been Ashley McEvoy.

24 THE COURT: Right.

25 MR. WEINKOWITZ: And Ashley McEvoy was not

1 produced as a 30(b)(6) witness. So, her testimony is
2 not binding on the company at all. So, they would take
3 that -- probably would take that position at trial,
4 they decided not to identify her as a corporate
5 witness.

6 THE COURT: I see.

7 MR. WEINKOWITZ: We got some testimony, but
8 we didn't get testimony on the topics set forth in the
9 notice, all of the topics set forth in the notice, Your
10 Honor.

11 THE COURT: Okay. All right. Thank you.

12 MR. BERMAN: If there is nothing else, I will
13 sit down, Your Honor.

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

16 MR. BERMAN: Thank you.

17 (Pause in proceedings.)

18 THE COURT: You look like you want to
19 respond?

20 MS. A. JONES: Just two to five minutes.

21 THE COURT: That's fine.

22 MS. A. JONES: Thank you, Your Honor. Your
23 Honor, if I could address the master complaint and
24 specifically refer Your Honor to several paragraphs
25 that Mr. Berman referred the Court to, and at the

1 outset say that we are not requesting a dismissal of
2 claims. What we are requesting is a determination that
3 the topics enumerated in the 30(b)(6) are not relevant
4 to those claims.

5 Certainly, the word marketing appears
6 throughout the master complaint. It is not a separate
7 designation in the short form complaint and if we look
8 at paragraph 47 for example under the count related to
9 negligent failure to warn, the reference to the duty is
10 to exercise reasonable care to warn end-users of the
11 dangerous conditions.

12 If we flip over under negligent
13 misrepresentation, which is Count 7, if we look at
14 paragraph 71 "The defendants have a duty to provide of
15 the warning and the known risks." This is not focused
16 on the advertising, but instead it is focused on the
17 actual warnings.

18 Your Honor, we have not submitted to the
19 Court our proposed order in New Jersey that started the
20 meet and confers again with plaintiffs' counsel, and we
21 are happy to do so.

22 If I could just mention briefly on the
23 30(b)(6) topic that came up at the end that we have not
24 put forth a witness as a 30(b)(6) to bind the company,
25 and that is the whole purpose for a narrower scope of

1 the notice, is because when, in fact, a 30(b)(6)
2 witness is put up the time period is relevant because,
3 to date back to 1985, we have a responsibility as
4 defendants to put forward somebody that would either be
5 educated on the entire history or present during that
6 time or have knowledge of it and, in fact, plaintiffs
7 will hold us to that, and the purpose of the 30(b)(6)
8 is to make representations of the company.

9 To do so, even if it is only four people, we
10 would still have to educate them of a history, and we
11 are talking decades from the use of the plaintiffs in
12 this MDL. We are not talking months. We are talking
13 years, in a span of five to ten years.

14 So, I would reference that this is a
15 different type of deposition than the fact witness
16 depositions that have taken place and it is because of
17 that that limitations are so imperative.

18 THE COURT: You agree that Judge Higbee has
19 established 1985 as the time frame for her case?

20 MS. A. JONES: I agree with that and I agree
21 that it wasn't arbitrary. There wasn't any argument.
22 She didn't entertain argument as to what would be the
23 relevant time period. That is set for, you know, what
24 she has granted in the limited context of the public
25 relations in the consumer marketing behaviors in which

1 it was discussed.

2 So, if the context is we are going to take a
3 limited deposition, defendants you are required to put
4 forth a witness on these subjects that were enumerated
5 by Mr. Berman, which include one on public relations
6 and one on consumer marketing behaviors and the time
7 period is 1985.

8 Now, there wasn't a 1985 will apply to every
9 notice that, you know, an amended notice that goes
10 forward, there wasn't a discussion in that context.

11 THE COURT: How many different iterations of
12 the warnings on the labels have there been since 1985,
13 if you know?

14 MS. A. JONES: There --

15 THE COURT: Has it changed from time-to-time?

16 MS. A. JONES: It has changed. And I will
17 backtrack the significant changes with respect to
18 what's relevant here would be in the context of adding
19 a specific warning about overdose or specific warning
20 about use with alcohol and then a specific warning with
21 overdose that is organ specific to the liver.

22 So, there has -- certainly, in the context of
23 the products being infants, children's, extra strength
24 Tylenol and Tylenol Cold, the numerous products, there
25 has been iterations beyond iterations of the products.

1 THE COURT: Right.

2 MS. A. JONES: But, in the context of the
3 warnings that are pertinent to the claims in this
4 lawsuit you are looking at approximately five
5 significant warnings over the history of the product.

6 THE COURT: And the history of the product
7 goes back to?

8 MS. A. JONES: It goes back to the 1970s.

9 THE COURT: The '70s, right. And as I
10 understand it there have been dosage recommendation
11 changes as well, right?

12 MS. A. JONES: There was a dose
13 recommendation change in 2009.

14 THE COURT: Right. Okay. Thank you, very
15 much.

16 MS. A. JONES: Thank you, Your Honor.

17 MR. BERMAN: If I may, Your Honor, to address
18 a couple of those additional points?

19 THE COURT: Yes, go ahead, Mr. Berman.

20 MR. BERMAN: Thank you. Just to start with
21 the last point in terms of changes in label. The point
22 that the plaintiffs have been making is that while
23 there may have been changes on the labeling, the
24 marketing and the advertising never changed. It always
25 says number one recommended, safest, the doctors'

1 trusted, and then a subscript "use as directed."

2 The question in terms of the marketing and
3 the promotion and the lack of a learned intermediary is
4 do plaintiffs see those subtle changes in the labels.
5 We submit that they do not.

6 In terms of the --

7 THE COURT: Could I interrupt you?

8 MR. BERMAN: Yes, sir.

9 THE COURT: In your -- if and when one of
10 these bellwether cases goes to trial will you have
11 expert testimony that talks about consumer perception?

12 MR. BERMAN: Yes, yes, we intend to have an
13 expert in that area.

14 THE COURT: Okay.

15 MR. BERMAN: Yes, Your Honor. In terms of
16 the case law that does support the argument that I was
17 making that the various claims in the master complaint
18 do support discovery for marketing, I mean we pulled
19 out of our brief all of the cases and, I mean, I could
20 give you the citations to a variety of them, they are
21 in the brief, but we feel that we demonstrated the
22 relevancy of the marketing discovery to the various
23 causes of action that we've had and our brief was set
24 out in that fashion. So, again, I don't want to sort
25 of burden the Court with a recitation of case law that

1 already appears.

2 In terms of the amended notice or even the
3 original notice, you know, an issue that the plaintiffs
4 always seem to have in doing a 30(b)(6) is that if you
5 are not specific enough and you ask questions of the
6 witness you may get the response well, this witness is
7 not prepared to answer that question or that's not
8 within the scope of your 30(b)(6), sorry.

9 And on the other hand when you're overly
10 specific, trying to be helpful, we are confronted now
11 with an objection, well, you are asking for the world.
12 There is a sense of reasonableness here, too, and we
13 outlined various topics to the best that we could to
14 give the defendants an opportunity to identify
15 appropriate witnesses who would have knowledge in these
16 areas and so that we would not be confronted with the
17 objection well, you didn't specify this and you've
18 burned one of the allotted 30(b)(6) witnesses that the
19 case management orders have allowed for.

20 So, again, we're trying to deal with a
21 reasonableness in this context.

22 THE COURT: All right. Thank you.

23 MR. BERMAN: Thank you, Your Honor.

24 THE COURT: Let me talk to my lawyer for a
25 minute.

1 (Pause in proceedings.)

2 THE COURT: I agree with Judge Higbee that
3 the marketing information is relevant to at least some
4 of the claims in the complaint. I think the point is
5 well taken that it helps to look at the posture of the
6 case at this time. There may well not be a negligent
7 marketing cause of action, I don't want to determine
8 that.

9 But, it seems to me that that's an issue for
10 summary judgment as to which of the claims set forth in
11 the master complaint survive for trial. But, I think
12 that certainly on the limited question of whether there
13 has been such a robust marketing campaign as to
14 overpower or otherwise render ineffective the warnings
15 on the package, I think that's a legitimate issue.

16 And I don't mean to just limit the liability
17 issue to that, but I think that's one that really
18 stands out and it makes the nature and the scope and
19 the extent and the length of the marketing campaign for
20 Tylenol relevant and certainly discoverable.

21 In terms of the expenditures, I also think
22 that the expenditures on marketing have a place in this
23 case and are certainly discoverable. That's separate
24 and apart from any discovery on financial worth of the
25 company or the financial condition of the company which

1 would be relevant to punitive damages claims.

2 I don't think we're there yet and I don't
3 think that you should be discovering that information.
4 But, in terms of what was spent on marketing and
5 whether that increased or decreased, I think that has a
6 place in this case certainly for discovery purposes.

7 What I would like to do also is be consistent
8 with Judge Higbee's time limitation of 1985 forward. I
9 understand Ms. Jones' point, and it is very well taken
10 that these plaintiffs did not ingest Tylenol back in
11 1985, but I think the history of the marketing of this
12 product is important and that's why I asked that
13 question about whether there were changes in the
14 packaging and the warnings on the packaging and how
15 that played against any marketing campaign.

16 I think that's possibly an important point in
17 this case, and I think it is certainly discoverable at
18 this time. So, what I would like to do is encourage
19 you to continue your meet and confer over the scope of
20 these 30(b)(6) deposition notices.

21 I am not really prepared to go line-by-line
22 and tell you what you should or shouldn't be asking,
23 you know the case better than I. I would like you to
24 go through those notices and see if you can't come to
25 some agreement and modify the notice if appropriate.

1 If you can't, then let me know and I will be
2 happy to go through what lines we have to go through on
3 the notice to give you guidance as to what can be
4 covered in these depositions. And I am assuming that
5 not every item in the notice of deposition will be
6 covered with every witness, I take it?

7 MR. BERMAN: Yes, Your Honor.

8 MR. WEINKOWITZ: I am assuming they will
9 identify multiple witnesses I believe.

10 THE COURT: Okay.

11 MR. WEINKOWITZ: That's their --

12 MR. BERMAN: That's their prerogative.

13 MR. WEINKOWITZ: That's their prerogative.

14 MS. A. JONES: Correct, Your Honor. We will
15 identify which witnesses will cover which topics.

16 THE COURT: Good. Okay. All right. Okay.
17 Does that give you sufficient guidance moving forward
18 with your meet and confer process?

19 MR. WEINKOWITZ: I hope so. I think so, Your
20 Honor.

21 MS. A. JONES: Yes, Your Honor.

22 THE COURT: Okay. All right. Okay. Is
23 there anything else you need me to address or rule on
24 or consider at this point?

25 (Pause in proceedings.)

1 THE COURT: I am not hearing anything.

2 MR. BERMAN: I don't believe there is
3 anything else in the agenda, Your Honor. With respect
4 to third party witnesses we did provide the recitation
5 of the status of issuances of commissions, which is
6 like a letter rogatory.

7 THE COURT: Right.

8 MR. BERMAN: And that is all being work --

9 THE COURT: Okay. And I will look forward to
10 getting your designations for the bellwether cases by
11 April 1st and we have another conference scheduled in
12 mid-April, is that right?

13 MR. BERMAN: I believe that's so, yes.

14 MS. A. JONES: Yes, Your Honor.

15 THE COURT: Is there anything else we need to
16 cover, Melissa?

17 LAW CLERK MAZUR: I don't think so.

18 THE COURT: Okay. All right. Okay. Thank
19 you, very much.

20 ALL: Thank you, Your Honor.

21 (Proceedings adjourned at 11:07 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.

3/21/14
Date

Brad Anders
Brad Anders