

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	:	May 20, 2014
LITIGATION	:	10:18 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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26 Proceedings recorded by electronic sound
27 recording; transcript produced by computer-aided
28 transcription service.

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1 (The following was heard in open court at
2 10:18 a.m.)

3 THE COURT: Good morning.

4 ALL: Good morning, Your Honor.

5 THE COURT: Please be seated. We have a full
6 agenda today for our case management conference. Thank
7 you for your cooperative efforts in putting this agenda
8 together.

9 I want to just note for our record who is
10 present. Lawrence Berman, Clay Millig and Gill Gaynor,
11 good morning, for the plaintiffs' steering committee.
12 Christy Jones, Allison Jones, good morning. David
13 Abernathy and Margaret O'Neil, right? I always do
14 that, don't I? Madeline Sherry, good morning. Stephen
15 Finley and Brandon Goodman, right?

16 ALL: Good morning, Your Honor.

17 THE COURT: And is David Buchanan available
18 on telephone or are we calling him later?

19 MR. BERMAN: He should be listening at this
20 point, Your Honor.

21 THE COURT: Okay.

22 MR. BERMAN: And then when the hearing
23 concludes to move onto the other issue we've arranged
24 for a new call in and Mr. Buchanan will be on that line
25 and Mr. Weinkowitz is expected to be on that line as

1 well.

2 THE COURT: Perfect. So, Mr. Buchanan is on
3 the line now?

4 MR. BERMAN: He should be, yes, Your Honor.

5 THE COURT: Okay. And is Mr. Weinkowitz on
6 the line as well?

7 MR. BERMAN: He is, Your Honor, yes.

8 THE COURT: Okay. Very good. Okay.

9 MR. BERMAN: Of course, they are in listen
10 only mode at this point.

11 THE COURT: Okay. Very well.

12 MR. BERMAN: Thank you.

13 THE COURT: I think it makes sense for us to
14 address the first item on the agenda last. So, we will
15 begin with item number two, which is the plaintiffs'
16 steering committee letter seeking substitution of a
17 case. Actually one of the Bellwether cases, right?
18 Good morning, Mr. Gaynor.

19 MR. GAYNOR: Good morning, Judge. Nice to be
20 with you this morning. Your Honor, quite simply at the
21 outset of the Bellwether selection by the plaintiffs'
22 steering committee I made an error in identifying one
23 of those cases. The cases which the committee had
24 selected were the Hague (ph) case, the Spiel (ph) case
25 and the Hayes case. What was communicated was the

1 Blake case, the Spiel case and the Hague case.

2 When this error came to light I did contact
3 Mr. Hughes and just to put this in context, and Mr.
4 Hughes was very understanding, in fact, he had some
5 very kind things to say to me which I appreciated.

6 Shortly before the date that we were to
7 identify the Bellwether cases my mother had a stroke
8 and it was a serious one. 87 years of age and has had
9 dimensia for a couple of years. So, it was a major
10 setback for us.

11 With the Tylenol work, other obligations and
12 that basically not only filled my plate, but my plate
13 was a bit overflowing. Mr. Hughes was very
14 understanding and directed me to Ms. Jones, Ms. Allison
15 Jones, as she was more in charge of the Bellwether
16 selection than he, and offered to pass along what I had
17 told to him.

18 So, similarly the next day I did contact Ms.
19 Jones. She, likewise, was very courteous and very
20 understanding. That said, she obviously had to speak
21 with her clients and I understood as well that she
22 would have to do as her clients directed and as they
23 thought best.

24 So, a couple days following that the
25 objection was filed to our replacement. So, I want to

1 go over essentially the substance of those positions.
2 Your Honor, the first thing is that it was an
3 inadvertent error. It was a mistake on my part.

4 It was brought to the attention, if you will,
5 of the defendants at a point very, very early, almost
6 pre-discovery if you will. There was a reference in
7 their letter that they had employed a vendor to obtain
8 records of those cases identified in the Bellwether
9 selection process.

10 But, clearly too as was appropriate for them
11 to do, they had already employed the vendor and
12 obtained the records, begun review of the records and
13 so forth in order for them to make their own selections
14 of the Bellwether cases.

15 And according to, I think it is item four in
16 our agenda, they had obtained roughly 80 records prior
17 to our identification of the Bellwether cases. Whether
18 Blake was among those or not is really not important,
19 it is just to say that that process was begun well
20 before April 8th.

21 Secondly, the Blake case, to the extent that
22 time and effort and energy have been expended to obtain
23 those records, it is not a waste. That case very well
24 could come up in this process.

25 It is not a case to be dismissed by any

1 means, and so we would submit that those efforts, to
2 the extent they took place before identification were
3 not wasted efforts.

4 To that end as well, Your Honor, no
5 depositions have yet been taken of the Bellwether
6 plaintiffs. The letter did reference, that is, the
7 letter from Ms. Jones, Ms. Christy Jones, that at that
8 point they had not received dates.

9 But, again, a lot is going on and I am quite
10 sure it was an inadvertent oversight on her part that
11 earlier in the day we had, in fact, provided multiple
12 dates for four of the six plaintiffs. All three of
13 those identified by the PSC, one of the plaintiffs
14 identified by the defense.

15 The fifth, or I will say selection number two
16 of the defendants, it was communicated to Ms. Davidson
17 is that plaintiff, very elderly, very poor health,
18 wheelchair bound and was not going to be available this
19 month or June, but perhaps later, but not at the
20 present.

21 We also communicated that on the sixth case,
22 and that was Mr. and Ms. Burton, which was another
23 defense selection. While we hadn't obtained the dates
24 at that point we felt we would soon and, in fact, we
25 did. And the next day on the 16th we provided those

1 dates.

2 So, five of the six plaintiffs dates have
3 been provided but, however, those depositions have not
4 yet been taken. Again, we would submit that that all
5 demonstrates clearly that there is not significant harm
6 as a result of what was my mistake.

7 The letter also referenced that the Blake
8 case was filed outside the statute of limitations.
9 Once again, Your Honor, there is an awful lot going on
10 getting ready for trial in New Jersey and so forth.
11 And so once again I think it was completely without
12 intent and was oversight on the part of the defense,
13 but the Blake case had, in fact, been filed timely.

14 To put it in context, Ms -- I am sorry, Ms.
15 Hayes was filed timely. Ms. Hayes died August of 2010
16 in the State of Alabama. Alabama has a two-year
17 statute of limitations. So, the statute would run in
18 August of 2012. The claim was timely filed in the
19 Court of Common Pleas of Philadelphia County on January
20 12th of 2012.

21 So, consequently that claim was filed since
22 seven plus months before the statute ran. So, again, I
23 think it was just a matter of oversight on their part.
24 But, collectively, Your Honor, this was very early in
25 the process. It was an inadvertent error and mistake.

1 We would ask, as the plaintiffs' steering committee,
2 that we be allowed to correct that mistake and
3 substitute the Hayes case for the Blake case. Thank
4 you.

5 THE COURT: Thank you. Ms. Jones?

6 MS. C. JONES: May I be heard just briefly,
7 Your Honor?

8 THE COURT: Yes.

9 MS. C. JONES: Your Honor, we have responded
10 to this request and certainly understand Mr. Gaynor's
11 personal position and would not wish in any way to
12 affect that or to make it any worse.

13 In short, I think this is a matter within the
14 discretion of the Court. We filed the objection in
15 large part for two reasons. One, because the case
16 management order does not, in any way, provide for this
17 type of unilateral substitution.

18 In fact, it provides very clearly that either
19 if the case is settled or may be dismissed in the event
20 that it is first identified. It was about five weeks
21 after it had actually been identified as a Bellwether
22 before we were advised of the mistake.

23 In any event, discovery will, to some extent,
24 be delayed if there is a substitution only in order to
25 get whatever medical records and so forth we may have

1 to get and follow up with the newly designated
2 plaintiff.

3 The real issue, Your Honor, is that going
4 forward that regard to what Your Honor decides to do
5 today in terms of the substitution, and I certainly
6 understand under the circumstances if the Court wishes
7 to allow the substitution, but going forward,
8 substitution at a later date is not something that is
9 contemplated by the case management order.

10 In fact, the case management order clearly
11 contemplates dismissal of the case in the event that
12 the plaintiffs choose not to go forward with it. So,
13 as much as anything, Your Honor, we think it is
14 important that we not set a precedent here that allows
15 unilateral substitution, particularly after discovery
16 has been done.

17 THE COURT: Right. Okay. I think that makes
18 sense. We have three Bellwethers on the plaintiffs'
19 steering committee side?

20 MR. GAYNOR: Yes, Your Honor.

21 THE COURT: And two on the defense side?

22 MS. C. JONES: Three.

23 THE COURT: Okay. And you have each
24 identified those three. There has been no issue since
25 they've been identified?

1 MR. GAYNOR: Correct.

2 THE COURT: Okay. All right. Yes, I looked
3 at your papers. It seems to me that we're early enough
4 in the process that there is no dramatic prejudice. I
5 mean, there certainly is some prejudice in that there
6 have been efforts to identify documents.

7 You all have been working very diligently and
8 getting to these issues as you need to, so when the
9 Bellwether cases were identified you began the process
10 of identifying documents.

11 I don't think we've gone so far down that
12 road that there is prejudice through the substitution,
13 and I certainly think there are legitimate,
14 understandable reasons for the mistaken designation and
15 so I will allow the substitution with the understanding
16 that Ms. Jones' point is very well taken, that we want
17 to stay with these Bellwether cases and now that we're
18 in the process of discovery and I don't think there
19 really is a system here for the unilateral
20 substitution.

21 So, let's go forward then with the Estate of
22 Hayes case substituting for the Estate of Blake case.

23 MR. GAYNOR: Thank you, Your Honor.

24 THE COURT: All right. And we will do an
25 order that confirms that. Thank you for those

1 presentations. Item number three is the request from
2 defendants for depositions of plaintiffs in Bellwether
3 matters. Where are we with these?

4 MS. C. JONES: Your Honor, I think that's
5 moot. We now have all of those things.

6 THE COURT: Okay. Those have been worked
7 out. Okay. Thank you.

8 MS. C. JONES: Yes, Your Honor.

9 THE COURT: And number four, the MDL cases
10 subject to a dispositive motion, and that's based upon
11 the review of the plaintiff fact sheets. Wants to talk
12 about that?

13 MS. C. JONES: Your Honor, I am not sure
14 frankly it is ripe for action here.

15 THE COURT: Okay.

16 MS. C. JONES: It is more of an advisory type
17 of situation.

18 THE COURT: Okay.

19 MS. C. JONES: We have, in fact, advised
20 plaintiffs that based upon our review of the fact
21 sheets and the medical records before plaintiffs it
22 does not appear that there is a viable claim for one of
23 various reasons.

24 What we would like to do, the plaintiffs have
25 not yet responded to that, but our intent is to move

1 forward with dispositive motions on those matters, so
2 that we can then begin to limit and streamline this MDL
3 as to the cases that are and should be in front of it.

4 No doubt the plaintiffs may wish to -- they
5 may concede those issues or they may ultimately wish to
6 contest them. We just wanted to advise the Court that
7 it is our intent to move forward with those motions.

8 THE COURT: With those motions. Okay. It
9 seems to me that 80 motions for summary judgment or
10 motions to -- I guess they would be motions for summary
11 judgment at this point?

12 MS. C. JONES: These would be motions for
13 summary judgment, but I think that we have identified
14 specifically four to move forward on.

15 THE COURT: Right. Okay. And I am just
16 interested in saving some time and paper on your part
17 and ours. I mean, I guess each case would be an
18 individual case, so you would have to brief it
19 individually. Unless there is some -- I am
20 contemplating maybe a motion filed and then a response
21 from the plaintiff as to whether they really contest
22 that motion.

23 MS. C. JONES: We would be happy to look at
24 that, Your Honor, and see if we can do something. We
25 actually sent the letter to plaintiff's counsel first

1 as a courtesy hoping we might be able to work something
2 out, if they could look at them and then if it is
3 unnecessary to file the motion, we could have a
4 stipulation of dismissal or something.

5 THE COURT: Okay.

6 MS. C. JONES: And I think we have not yet
7 responded or plaintiffs have not moved forward to
8 moving on. But, if the Court is amenable to us filing
9 a single motion we can be happy to do that. The only
10 concern I have is that you have individual case numbers
11 and I am concerned about the record.

12 THE COURT: Right.

13 MS. C. JONES: So, we will look to see what
14 we can do to make it easier.

15 THE COURT: Probably in those cases where
16 there is going to be a contested motion we should have
17 individual motions and at least, I mean, you can
18 incorporate certain sections of the brief in each, I
19 guess, but I think we should probably have separate
20 motions and briefings. Okay.

21 MS. C. JONES: Thank you, Your Honor.

22 THE COURT: Thank you. Mr. Berman?

23 MR. BERMAN: Good morning, Your Honor.

24 THE COURT: Good morning.

25 MR. BERMAN: With respect to this issue, the

1 PSC and the plaintiffs would oppose embarking on some
2 process at this point of time that would permit the
3 defendants to begin filing dispositive motions.

4 Just to back up a bit, the letter that Ms.
5 Jones referred to was an April 7 letter which was sent
6 to us prior to the date on which we were to make our
7 Bellwether selections.

8 In the letter four plaintiffs were identified
9 and without any elaboration the letter stated we have
10 reviewed, meaning the defendants, records and indicate
11 at best these plaintiffs did not suffer an injury from
12 a Tylenol product. Given the lack of connection to
13 these defendants we requested you voluntarily dismiss
14 these plaintiffs without delay. So, there is no
15 substance in the letter to which we have not responded
16 and it preceded the date on which the Bellwether
17 selections were made.

18 Frankly, we thought that if the defendants
19 felt that there were strong reasons why these
20 plaintiffs should be dismissed they would have selected
21 these plaintiffs as their three choices, so that the
22 plaintiffs could then proceed through CMO-15, which
23 governs the Bellwether process.

24 The Bellwether process governs the
25 commencement of case specific discovery and the

1 depositions and the selection of -- acquiring of all of
2 the medical records, et cetera.

3 I mean, what we were confronted with the
4 April 7 letter was simply a request, please dismiss
5 these plaintiffs and no other explanation. These
6 plaintiffs did not go through any core discovery and
7 now have not been selected to go through the core
8 discovery by the defendants as their Bellwether
9 plaintiffs.

10 The purpose of the Bellwether selection plan
11 and the core case specific discovery is to enable all
12 of the parties to develop a full record about the cases
13 that are selected, which in this case are six, so that
14 the parties and the Court will be better informed as to
15 the information about the various cases, whether
16 dispositive motions may be appropriate with respect to
17 those specific cases.

18 If you take in the abstract cases that are
19 not going through that discovery and a motion is going
20 to be filed, you know, actually the plaintiffs would be
21 responding with a Rule 56(f) affidavit that we haven't
22 even had any discovery in the cases, we haven't had
23 depositions. They are not part of the core discovery
24 that is permitted by CMO-15.

25 If the suggestion is that the defendants have

1 80 cases of medical records and they now want to file
2 motions or dispositive motions on a great number of
3 those, it is going to be a distraction to the mode that
4 the Court has established for handling the Bellwether
5 cases. We are going to be moving in different tracks
6 at the same time, which is completely contrary to all
7 cases that have adopted a Bellwether process.

8 So, we would encourage the Court not to open
9 sort of this pandora's box at this time and permit a
10 separate track of cases to proceed on a dispositive
11 motion basis where there is no mechanism for any of the
12 discovery.

13 We would also oppose opening the discovery to
14 those cases at this point where the Bellwether process
15 contemplated the work up of six cases fairly
16 extensively during the period of May 1, which is when
17 core discovery started through August 1, 2014, which is
18 I guess approximately four or five months and are six
19 cases involved which will involve not only the
20 depositions of the core witnesses, but the Bellwether
21 order does permit discovery and depositions of the
22 plaintiff, the spouse, two treating physicians or
23 healthcare providers per side.

24 So, if you take four or five depositions
25 times six plaintiffs we're looking at a minimal of 24

1 or 25 depositions occurring over the course of the
2 summer.

3 So, just in sum, the plaintiffs would oppose
4 any modification of the Bellwether order, CMO-15, to
5 permit some parallel track to work up cases. We would
6 also oppose the filing of dispositive motions on a
7 scant record at this time. Thank you, Your Honor.

8 THE COURT: Yes. Ms. Jones, I think Mr.
9 Berman has a good point, that we're talking about
10 dispositive motions on the basis of the fact sheets,
11 and I am just wondering what kinds of issues you would
12 identify on those fact sheets or in those medical
13 records that would lend themselves to dispositive
14 motions?

15 MS. C. JONES: Well, I think first of all,
16 Your Honor, we did not write that letter lightly. My
17 recollection is that there is a failure to show product
18 identification in some cases. There is no
19 documentation of liver injury in some cases.

20 I mean I would have to go back and look at
21 more specifically the information, but if the
22 information that we have suggests that there is no
23 valid claim properly before this Court then certainly
24 we ought not to be forced to go through discovery on
25 those cases.

1 In fact, in all candor, I am not intending to
2 set up a separate track if you will but, in fact, when
3 Mr. Berman suggests we should have selected these as
4 Bellwether cases suggests to Your Honor that the whole
5 purpose of the Bellwether process is to select
6 plaintiffs who are representative, if you will, of all
7 of the plaintiffs.

8 THE COURT: I agree with that.

9 MS. C. JONES: -- and, therefore, we would
10 get information. And where we've got four plaintiffs
11 that we don't believe have a valid claim, whether it is
12 because of the statute of limitations or something
13 else, most courts, most MDL courts would say it is not
14 appropriate to identify those plaintiffs as Bellwether
15 plaintiffs because they end up being dismissed after
16 great judicial expense and result in delay.

17 So, all I am suggesting is that in those
18 cases that for whatever reason we believe there is no
19 question of fact that has been demonstrated, and maybe
20 the way we can do it is to simply send a more detailed
21 letter and response to the plaintiffs that say these
22 are the facts on each one of these individual cases,
23 and if they, in fact, have something that would suggest
24 that we are wrong we don't file the motion. But, I
25 don't think it is necessary at this point, and we

1 certainly were not contemplating in these cases
2 additional discovery would be necessary.

3 In fact, we wouldn't have asked them to
4 voluntarily dismiss the cases had we thought that was
5 necessary.

6 THE COURT: Okay. So, there are some cases,
7 then where with the limited information available to
8 you, these plaintiffs' fact sheets and some medical
9 records that you have either statute of limitations or
10 product identification or some other clear reason to
11 seek their dismissal?

12 MS. C. JONES: That's correct, Your Honor.

13 THE COURT: Okay. All right. What is gained
14 by doing that now and not waiting until later in the
15 case?

16 MS. C. JONES: What is gained by doing that
17 now is that we then know or begin to identify what the
18 proper pool of plaintiffs is in this case, excuse me,
19 this MDL proceeding, and we begin to eliminate those
20 cases who are not properly before the Court.

21 THE COURT: All right. Okay. Would it be --
22 just trying to think through this, but if you file such
23 a motion would it be a legitimate response from the PSC
24 that there is a need for additional discovery as to
25 this particular plaintiff, whoever that is?

1 MS. C. JONES: Let me say this, Your Honor.
2 We anticipate that based upon the information that we
3 have there is no genuine issue of material fact.

4 THE COURT: Okay.

5 MS. C. JONES: So, there would be no reason
6 for the plaintiffs to say we need additional discovery.
7 If, in fact -- I mean these are the types of
8 information that you would have expected plaintiffs to
9 have at the time they filed the lawsuit.

10 If, in fact, they have information that we
11 don't have, if for example they have some information
12 that's --

13 THE COURT: And that comes out in the
14 response.

15 MS. C. JONES: It comes out in the response
16 or they just won't call us and say Christy, you know,
17 we've got right here in this piece of paper
18 documentation of product ID, I would be glad to send it
19 to you, then we won't file it. That's not -- I am
20 not -- I don't want -- I don't want the Court to have
21 to go through anything unnecessarily --

22 THE COURT: Right.

23 MS. C. JONES: -- nor do I want -- you know,
24 if these are not ironclad cases and the plaintiffs
25 have, in fact, can say to us we have misunderstood or

1 we missed some fact or something then, you know, we're
2 happy either not to file the motion or to withdraw the
3 motion or to defer it pending additional discovery.

4 THE COURT: Okay. I think in theory I am
5 inclined to let that process go forward, to have you
6 seek dismissal of those cases where on the basis of the
7 plaintiff fact sheets and medical records you think
8 that there is no viable claim.

9 Maybe the thing to do is to, as you
10 suggested, send a more detailed letter with the reasons
11 that you would seek the dismissal of those plaintiffs
12 and see if you can get some agreement as to some of
13 them.

14 MS. C. JONES: I would be happy to do that,
15 Your Honor.

16 THE COURT: I think the goal of pairing down
17 the universe of plaintiffs is a good one. I don't see
18 any reason to wait to do that. Okay.

19 MS. C. JONES: We would be happy to do that.

20 THE COURT: All right.

21 MS. C. JONES: Thank you, Your Honor.

22 THE COURT: Thank you, Your Honor.

23 MR. BERMAN: Your Honor, if I may just
24 respond one more time on the issue? I understand your
25 ruling. We do fear a slippery slope being created here

1 and requiring opening up discovery for all of these
2 cases.

3 Certainly if there are a very small selection
4 of cases that Ms. Jones has identified, that she feels
5 warrants this kind of relief we can take a look at
6 that.

7 But, we really do not want to waive that
8 right subject to CMO-15, nor any rights with respect to
9 opposing motions and requesting full discovery, and we
10 don't want to go on a slippery slope of having to
11 embark in extensive discovery to deal with these
12 motions if they're filed.

13 THE COURT: Well, I don't hear that this is a
14 request for additional discovery on cases that the
15 defense has identified as --

16 MR. BERMAN: It is not so much as their
17 request for discovery, it is what the plaintiffs would
18 have to do in terms of the discovery they would respond
19 with in order to oppose the motion.

20 THE COURT: Right.

21 MR. BERMAN: So, if the record is scant and
22 the plaintiffs need to develop a more elaborate record
23 in order to respond to the motion that becomes the
24 slippery slope and a dilution of effort and
25 concentration of how this has been established, Your

1 Honor.

2 Again, I do go back and I apologize for
3 saying this. The original letter was very ambiguous in
4 saying that the plaintiff did not use or at best did
5 not suffer an injury. And we don't even really know
6 what that means in terms of the request to dismiss the
7 four plaintiffs.

8 THE COURT: Well, I think you are going to
9 get some clarification.

10 MR. BERMAN: Yes, Your Honor.

11 THE COURT: Okay.

12 (Pause in proceedings.)

13 THE COURT: The next item on the agenda is
14 the status of the Wye (Ph) case.

15 MR. BERMAN: Your Honor, if you recall, the
16 plaintiffs had represented Mr. Wye and the estate of
17 his daughter at a point in time and we had moved for
18 permission to withdraw as counsel, which the Court
19 granted. That was by an order dated January 27, 2014,
20 filed in that specific case which was docket number
21 12-CV-7260 as document number 29.

22 Subsequent to that we offered to try to
23 facilitate a voluntary dismissal of the case for the
24 defendants. Mr. Wye has not been cooperative, has not
25 responded to us. It is one of the reasons why we have

1 requested permission to withdraw.

2 So, in terms of the ability for us to
3 facilitate that we have sort of reached the end of the
4 road. We have contacted him about the possibility of
5 this case will be dismissed or a motion will be filed,
6 but we have not gotten any response and there is
7 nothing more that we're really able to do as best as we
8 have tried.

9 THE COURT: Okay. So, what do you suggest at
10 this point?

11 MR. BERMAN: I think the defendants wanted
12 permission to file a formal motion to dismiss for
13 failing to provide a fact sheet or maybe on another
14 basis. I am not sure.

15 We have tried to convey that to Mr. Wye and
16 told him the case is at risk of being dismissed by a
17 motion in lieu of doing it voluntarily, but we have no
18 cooperation from him and I would suggest that
19 defendants take what action they think is appropriate
20 under the circumstances.

21 THE COURT: Okay. So, you will file a
22 motion?

23 MR. JONES: We would be happy to, Your Honor.

24 THE COURT: Okay. All right. Very good,
25 thank you.

1 (Pause in proceedings.)

2 THE COURT: Item six is the plaintiffs'
3 steering committee's request for cross-noticing and
4 coordination with respect to expert's depositions.

5 MR. BERMAN: Yes, Your Honor. And I
6 apologize, do you prefer me to be at the podium?

7 THE COURT: You're fine right there.

8 MR. BERMAN: All right. Thank you, very
9 much. As Your Honor is aware, the New Jersey
10 litigation that is ongoing and the plaintiffs have
11 recently served expert reports in the New Jersey
12 litigation.

13 In connection with that we drafted a proposed
14 order in New Jersey whereby there would be certain
15 limits on the depositions that the defendants could
16 take of the generic experts, such that there would not
17 be a second deposition of the same expert on the same
18 issues on which he had been previously deposed and only
19 with respect to any new information that might occur
20 after the trial of the first case.

21 We desire to have some coordination with
22 respect to that in terms of the MDL. What I mean by
23 that is if there is going to be a deposition in New
24 Jersey of the generic expert we would like it to be
25 cross-noticed for purposes of the MDL, so that that

1 same expert is not deposed a second time on the very
2 same report in the MDL when we reach the point of
3 expert disclosures in the MDL.

4 We haven't yet reached the point of a
5 proposed order for that in the MDL and an order has not
6 yet been entered in New Jersey with respect to these
7 issues. As I said, there was a proposed order and we
8 have a red line that was returned to us by Ms. Jones.

9 We are going to work with her on the red line
10 for entry in New Jersey, but we wanted to bring to this
11 Court's attention the idea that we would also like to
12 have some coordination to cross-notice things, so we
13 would have the same protection for the experts and not
14 have them repeatedly deposed from the same report and
15 only on new information.

16 THE COURT: Okay. Ms. Jones?

17 MS. C. JONES: I am not sure to what extent
18 we have a real disagreement. Let me tell you what the
19 issue may be.

20 THE COURT: Okay.

21 MS. C. JONES: We certainly would agree that
22 experts who have been cross-examined on a particular
23 subject ought not to be recross-examined on that same
24 subject and we are certainly willing to work with
25 plaintiffs' counsel on that.

1 The issue that is before or that is causing
2 us some problems is that in the case that is set for
3 trial in New Jersey it involves a 14 year old with very
4 specific issues. The generic reports of these experts
5 address issues far beyond that relevant to that
6 individual plaintiff.

7 It is unlikely that those experts will be
8 cross-examined on all of the opinions set forth in
9 their report, because they're simply not relevant to
10 the issues before the court in New Jersey at this time.

11 And because we are faced with an early trial
12 setting it obviously is important to restrict that
13 cross-examination of those experts at their deposition
14 to the issues before the Court.

15 THE COURT: Right.

16 MS. C. JONES: So, to the extent that we
17 address certain issues in those expert depositions, and
18 I am sure the plaintiffs would agree as to ours,
19 generically we don't have any intent to go back and
20 recover plowed ground.

21 On the other hand, if for example there are
22 issues that are not relevant in the New Jersey case,
23 such as alcohol for example, or certain labels for
24 example. then if those issues are important in the
25 subsequent MDL cases we would anticipate being able to

1 cross-examine the expert witnesses on those issues.

2 Not to redo what has been done before.

3 THE COURT: Right.

4 MS. C. JONES: But, not to be foreclosed from
5 taking another deposition on the pertinent issues. I
6 think that's the only real issue that we have.

7 THE COURT: Is there one plaintiff going
8 forward in New Jersey?

9 MS. C. JONES: Just one plaintiff.

10 THE COURT: And that's a 14 year old?

11 MS. C. JONES: Yes, Your Honor.

12 THE COURT: Okay. All right. I see your
13 point. I think what we would want to avoid here is
14 some duplication in the depositions.

15 MS. C. JONES: I understand that. And we're
16 certainly in agreement with that on both sides, but
17 what I think is while we may -- while we agree that we
18 would be foreclosed from recovering the same ground,
19 the fact is that some of their reports address issues
20 that are simply irrelevant in this case, and I don't
21 want to be foreclosed and I am sure plaintiffs don't
22 want to be foreclosed from redeposing our experts as to
23 issues that are not explored in the New Jersey
24 litigation.

25 THE COURT: All right.

1 MS. C. JONES: Or that may be more relevant
2 to whatever the Bellwether cases are before this Court.

3 THE COURT: Okay. I think under those
4 circumstances it is hard to fashion a rule today as to
5 how far you can go in a deposition of an expert
6 somewhere down the road in this case on the basis of
7 what happened in the New Jersey litigation this summer.
8 Right? Mr. Berman?

9 MR. BERMAN: Yes. There have been orders
10 addressing this issue in other MDLs, and I have for
11 example, but it has not yet been shared with Ms. Jones,
12 an order that was entered in the Gatalitti (ph), where
13 Judge Polster (ph) crafted an accommodation for
14 redeposing experts who had already been deposed and
15 with limitations on only as to new opinions that are
16 offered and requiring a new written report that may be
17 offered to express the new opinions.

18 I guess the concern that we have here is that
19 with the immediacy of the New Jersey case coming to
20 trial we have just provided the dates for the experts
21 to be deposed.

22 And for example, one expert is scheduled to
23 be deposed towards the end of this week and there will
24 be other experts who will be discussed next week and
25 then the following week.

1 And we wanted to get on the table that those
2 reports, to the extent they are generic reports, not
3 the case specific reports, that those generic reports
4 are broad reports and the defendants, when they depose
5 those experts on the generic issues, they should not
6 have an opportunity to go back and redepose on the same
7 generic issues at a later date if there is no update to
8 the reports.

9 THE COURT: Can you give me an example of a
10 generic issue, what you're talking about?

11 MR. BERMAN: The question of the dose of
12 which acetaminophen causes acute liver failure. If an
13 expert expresses an opinion, a certain gram dosage and
14 that is in their generic report, there is an
15 opportunity to depose, it is clearly on paper in that
16 report that the defendant can question the expert about
17 that opinion.

18 Why should the expert be subject to another
19 deposition later on if he never changes his opinion via
20 a subsequent or updated report.

21 THE COURT: All right.

22 MR. BERMAN: I mean, there is generic issues
23 relating to the adequacy of the labeling, the language
24 of the warning, the type of marketing that was done.
25 All of these have been expressed thus far in generic

1 reports by the plaintiffs and those reports have four
2 corners to them and the experts shouldn't be deposed a
3 second time with the four corner report.

4 THE COURT: What is the product involved in
5 the New Jersey case?

6 MR. BERMAN: I believe it is a Tylenol Extra
7 Strength product, Your Honor, the Tylenol Extra
8 Strength, the 500 milligram.

9 THE COURT: Okay.

10 MR. BERMAN: But, if I may say, the reports
11 do not necessarily confine themselves to discussing
12 only Tylenol Extra Strength. They do talk more broadly
13 about other kinds of Tylenol products.

14 MS. C. JONES: And therein lies the issue,
15 Your Honor, because these reports deal with issues that
16 are not at issue in the Lyles (ph) case in New Jersey.

17 THE COURT: Right.

18 MS. C. JONES: For example, they deal with
19 alcohol or they deal with labels other than the one
20 that is applicable there. There is no reason at this
21 point in time for us to cross-examine the witnesses on
22 all of those extraneous opinions here.

23 THE COURT: It seems to me if we look towards
24 some, you know, you ask it now or you are precluded
25 from asking it later or you take the deposition now and

1 you are precluded from asking questions, generic
2 questions of the expert later, that you're really
3 promoting a very long deposition of an expert in a case
4 involving one plaintiff and one product, right?

5 I mean, it seems to me that that forces the
6 defendant to expand the scope of the deposition beyond
7 what they really need for this trial.

8 MR. BERMAN: Well, the reports again, as I
9 said, have four corners to them, Your Honor, and the
10 witnesses, the expert witnesses may testify, as I
11 understand them, under New Jersey law, to what's in
12 their reports.

13 And, you know, they may be subject to a
14 relevancy objection at the time of trial, but the
15 reports are written to be the generic reports to be
16 utilized not only in that one case, but any subsequent
17 cases that may be tried in New Jersey as well as in the
18 MDL. And with the time constraint of preparing those
19 reports for the New Jersey trial they've had to
20 necessarily be comprehensive.

21 THE COURT: What has Judge Higbee done with
22 the possible use of the depositions for the upcoming
23 trial in relation to other pending New Jersey cases?

24 MR. BERMAN: I don't believe she has actually
25 addressed that yet, Your Honor. And Mr. Buchanan, who

1 cannot speak right now, may be able to shed light when
2 we open the line later. But, I don't believe she has
3 addressed that.

4 MS. C. JONES: She has not addressed that,
5 Your Honor. Frankly, if the plaintiffs' position is as
6 just stated, you're right, the depositions will be much
7 longer. It is unlikely that sufficient time has been
8 set aside for those depositions today and it is
9 unlikely that we will be able to finish those in time
10 for the July trial.

11 So, that is a matter that would have to be
12 raised with the Court if that is going to be their
13 position.

14 THE COURT: Right. I mean, I think what
15 you're asking me to do is allow cross-noticing of the
16 depositions in New Jersey for this case, right?

17 MR. BERMAN: Yes, Your Honor.

18 THE COURT: Okay. And if we do that, then I
19 think I am really expanding the scope of the deposition
20 taken in the New Jersey case for use in this case some
21 time later, and I think that intrudes a bit on the New
22 Jersey litigation.

23 But, I am not inclined to allow the
24 cross-noticing. Well, maybe I am using the wrong
25 terminology. I certainly think going back to where we

1 were ten minutes ago, I think if ground is covered in
2 the New Jersey case adequately it ought not to be gone
3 into again a year or two or three from now in this
4 case. Right?

5 MR. BERMAN: Well, I think that is one
6 concern we don't believe that there should be a
7 redeposition of the same questions and issues that are
8 adequately --

9 THE COURT: I don't think Ms. Jones is
10 disagreeing with that.

11 MS. C. JONES: I agree with that, Your Honor.

12 THE COURT: Okay.

13 MS. C. JONES: It is just that if, for
14 example, we don't cover certain issues that aren't
15 relevant to the New Jersey case I don't want to be
16 foreclosed about coming back and cross-examining the
17 witness on that later where they are relevant to the
18 MDL case.

19 THE COURT: Right. I agree with that. So, I
20 think you can cross-notice them to the extent that what
21 is gone into in the New Jersey deposition can be used
22 in this case, but I don't think that limits the scope
23 of what they can ask later on of the same expert in
24 this case.

25 Okay. I think that is just something we will

1 have to take up at a later time. Really, if there is
2 an expert that is going to be deposed in this case who
3 was deposed in the New Jersey case, then we have to
4 talk about the scope of that deposition if you can't
5 agree to it.

6 MS. SHERRY: Your Honor, Madeline Sherry
7 for --

8 THE COURT: Yes?

9 MS. SHERRY: May I be heard on this issue?

10 THE COURT: Sure.

11 MS. SHERRY: We're not a party to the
12 litigation in New Jersey. We haven't been served with
13 any of the expert reports. We haven't seen the notice
14 of deposition. We're not planning to participate. We
15 would like to preserve our rights with respect to the
16 MDL and be given the opportunity to cross-examine these
17 generic experts if and when the time comes for the
18 cases in which we're involved.

19 THE COURT: Okay. I think that makes sense.

20 MR. GOODMAN: Your Honor, Brandon Goodman for
21 Paragon. Paragon joins fully in the position expressed
22 by Ms. Sherry on behalf of --

23 THE COURT: Okay. Thank you. I think that
24 takes care of all of the items except for item one.
25 This is the agenda item whose name shall not be

1 mentioned. So, we have to adjust the set here and
2 invite our side table counsel to leave. Thank you very
3 much for being here.

4 ALL: Thank you, Your Honor.

5 THE COURT: And are we terminating this call
6 and then recalling back, to be redundant.

7 MR. BERMAN: Yes, Your Honor. I think the
8 process we established was to terminate this call and
9 we provided a new call in number that will permit Mr.
10 Buchanan and Mr. Weinkowitz to be able to participate
11 through the telephone.

12 THE COURT: Okay.

13 MR. BERMAN: They would be the only two
14 people participating.

15 THE COURT: Okay. So, let's terminate this
16 call and we will get them back on the line. Thank you.
17 Do we need a five minute break, folks, do you want to
18 take a break? We can do that.

19 MS. C. JONES: I don't think this -- I don't
20 think our hearing itself will take more than ten
21 minutes.

22 THE COURT: Okay. Stay put then.

23 (The sealed and impounded portion of the
24 transcript was not requested to be transcribed.)

25 (The proceedings concluded at 11:06 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.

9-19-14
Date


Brad Anders