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1 (The following was heard in open court at
2 10:20 a.m.)

3 THE COURT: Nice to see you all. Do we have
4 some people on the phone?

5 MR. BERMAN: We should, Your Honor.

6 THE COURT: Okay.

7 MR. BERMAN: I have received some e-mail
8 notices that people are able to hear.

9 THE COURT: Okay. Perfect. Okay. And Laura
10 has indicated who is present. Mr. Berman, Mr. Millig,
11 Mr. Buchanan and Ms. Jones, Ms. Jones, Mr. Swerigan
12 (ph), Mr. Abernathy, Ms. O'Neill (ph) and Ms. Sherry,
13 so good morning and welcome.

14 Thank you for submitting the agenda and less
15 of a thank you for submitting the deposition
16 designations. But, I think what we will do is work
17 through the agenda and talk, first of all, about the
18 choice of law issue.

19 And as I understand it we have general
20 agreement about the -- well, maybe we don't.

21 MS. C. JONES: Well, we may.

22 THE COURT: Right. We are talking about
23 Alabama law for the substantive products law, is that
24 right?

25 ALL: Yes, Your Honor.

1 THE COURT: And we agreed that Alabama law
2 applies. Okay. All right. And I have been over the
3 standard jury instructions for Alabama and doing some
4 looking at their substantive product liability law.
5 But, we have a dispute about New Jersey law as it
6 applies to damages, is that right?

7 MS. C. JONES: The issue, Your Honor, is
8 frankly what law governs as to punitive damages,
9 whether it is New Jersey or Alabama, and because the
10 wrongful death statute in Alabama applies or provides
11 only for punitive damages, whether or not New Jersey
12 law should govern us to that as well.

13 THE COURT: Right. Okay.

14 MR. BERMAN: I don't know if you want me to
15 respond as comments are made, Your Honor, but if I may?

16 THE COURT: Let me just hear your position on
17 the choice of law that dispute at this point.

18 MR. BERMAN: Okay. Our position on the
19 choice of law, do you want my full discussion or just
20 the comment to Ms. Jones' comment?

21 THE COURT: No, I want to hear your position
22 about what applies.

23 MR. BERMAN: Okay. All right. Thank you.
24 All right. I guess, you know, where this sort of
25 originated was in preparation for the last conference

1 which was held on April 8.

2 And if Your Honor will recall for that
3 conference one of the agenda items was a discussion of
4 certain claims in plaintiffs' short form complaint and
5 as to whether they might or might not be viable under
6 Alabama law.

7 The parties met and conferred with respect to
8 that and we had agreed that Alabama law will apply to
9 the substantive claims, and as a result of that, in my
10 discussions with Ms. Alyson Jones, we spoke about the
11 willingness of plaintiffs to either dismiss or
12 recharacterize some of the counts that were at issue
13 that were the compensatory, substantive underlying
14 claims.

15 During the discussion what was raised was
16 that the defendants, however, were not agreeable that
17 Alabama law should apply to the wrongful death claim
18 and any punitive damages claim and asserted that New
19 Jersey law would be the law to apply for those items of
20 the case, and therein lies the sharp dispute that the
21 parties have.

22 As a result of that, and we reported that to
23 the Court, and Your Honor asked the parties to submit
24 short five-page letter briefs on the issue, which they
25 did, and they set out the respective positions that the

1 parties have.

2 Ms. Jones, in her opening comment, did make
3 this appear as though it is a choice strictly between
4 Alabama law or New Jersey law. And while the
5 plaintiffs' position is that it is Alabama law for the
6 wrongful death claim and that if the Court accepts
7 Alabama law for the wrongful death claim, there would
8 not be an independent claim for punitive damages
9 because that essentially would be the equivalent of a
10 double dipping.

11 Were the Court not to accept the plaintiffs'
12 position for Alabama law for the wrongful death claim,
13 that we think that under Pennsylvania choice of law
14 principles, the choice really is more between
15 Pennsylvania and Alabama and not New Jersey, and New
16 Jersey, for this particular issue, is an outlier.

17 How I get there, Your Honor, is -- and let me
18 back up a second. I do think the parties have both
19 agreed in their letter briefs that it is Pennsylvania
20 choice of law --

21 THE COURT: Right.

22 MR. BERMAN: -- that will apply. So, I will
23 not address that unless Your Honor has any particular
24 questions about that.

25 That being the case, and as we had set forth

1 in our letter brief, there are several steps that the
2 Pennsylvania choice of law approach adopts, but
3 essentially it all boils down to which state has the
4 most quantitative and qualitative contacts with the
5 issues in the case, and therein lies a factual inquiry
6 that we believe the Court would make.

7 In addition, the Court would look to
8 determine whether the application of the law of one
9 state versus another might frustrate the state's law
10 which has the most significant contacts.

11 What the defendants argue mostly is that New
12 Jersey law should apply and they rely on the argument
13 that most of the contacts all occurred in New Jersey.
14 They are New Jersey corporations and Judge Johnson in
15 the Lyles case had ruled in their favor and that should
16 be essentially binding on this Court.

17 To the contrary, the plaintiffs argue that
18 all of the essential facts occurred in Alabama other
19 than all of the corporate conduct which occurred in
20 Pennsylvania, not in New Jersey, in Fort Washington,
21 Pennsylvania.

22 And maybe just a very simple item to mention
23 to the Court to emphasize one issue there is the
24 repeated footnotes that appear on the agenda month
25 after month after month wherein the defendants add to

1 the agenda that further, "Johnson & Johnson submits
2 that it does not design, manufacture, market,
3 distribute or sell any products including any product
4 alleged to be at issue in this MDL."

5 The plaintiffs don't really dispute that. I
6 mean what is at issue here is the conduct of McNeil.
7 Now, while McNeil is a New Jersey corporation, their
8 principal activities occur in their Fort Washington,
9 Pennsylvania facility.

10 And bringing Your Honor back a moment to one
11 of the earlier documents we submitted back in February,
12 Your Honor had asked the parties to submit witness
13 guides, and it was submitted under seal, so I am not
14 going to state anything that would be confidential.

15 But, in the witness guide we pointed out a
16 key witness would be Anthony Temple. He is a McNeil or
17 was a McNeil employee in Fort Washington. The second
18 witness, Edward Cuffner (ph) who we are going to
19 discuss today, Pennsylvania witness.

20 The third witness, Lynn Haluski (ph),
21 Pennsylvania witness. The fourth witness, Ashley
22 McEvoy, Pennsylvania witness. The next witness, Cathy
23 Fallon, Pennsylvania witness. Kenneth Quang (ph) was a
24 McNeil employee, although his tenure there was somewhat
25 short-lived. Edward Nelson, Pennsylvania McNeil

1 witness. Patricia Gussicks, Pennsylvania witness.

2 Stephen Silver, Pennsylvania witness.

3 I won't bore Your Honor with this, but the
4 point obviously being that this is a McNeil operation
5 and although McNeil is incorporated in New Jersey, the
6 activities here all occurred in Pennsylvania. So,
7 throwing New Jersey's ideas, concepts into this dispute
8 I think is sort of a red herring.

9 The difference between this case and Lyles
10 might be, though, that in that case Judge Johnson had
11 to apply the New Jersey choice of law principles and he
12 was a New Jersey court, he was sitting as a New Jersey
13 court.

14 Your Honor, as we have already agreed, is to
15 apply Pennsylvania and you are sitting as a
16 Pennsylvania court, this case having originated in the
17 Court of Common Pleas before removal to the federal
18 court and then the creation of this MDL.

19 Aside from all of the witnesses being at
20 McNeil in Fort Washington is the document production.
21 The documents are all housed in Pennsylvania. So, I
22 guess to sum up this point, it is a red herring, in our
23 view, to be thinking about New Jersey as having the
24 significant qualitative and quantitative contacts with
25 this case because this case is not Lyles.

Now, the defendants suggest well, the plaintiffs made certain argument, plaintiffs' counsel made certain arguments in Lyles and, therefore, that should be binding against the Terry (ph) case.

Counsel advocate positions and they represent different parties and they do their advocacy based on the circumstances that they think might be best for the particular party.

I don't subscribe necessarily to what the defendants say about what was said in Lyles, but regardless of what may have been said in Lyles by plaintiffs' counsel, it is not binding on Ms. Terry. We were counsel in that case for one purpose. We are counsel in this case for another purpose.

And contrast that to the defendants, they are the same parties in both cases. And while they argued in New Jersey for the application of New Jersey law to Judge Johnson, in cases pending in Pennsylvania they have argued that under Pennsylvania choice of law principles the Court is to apply, even for punitive damages claims, the law of the home state of where the plaintiff was injured.

So, in our letter brief we include citation to the Wolf case decided by Judge DuBois in this court and that was McNeil arguments, the same McNeil that is

1 in this case.

2 The fact that it involved Motrin as compared
3 to Tylenol really is a difference without any meaning.
4 It is still a Fort Washington activity by McNeil, and
5 the defendants there argued for the application of
6 Maine law.

7 We cited to Your Honor the Maya (ph) case,
8 which is a Court of Common Pleas case decided by Judge
9 Quinones who is now an Eastern District of Pennsylvania
10 judge, and in that case the defendants, McNeil, argued
11 for the application of Tennessee law.

12 In that case the judge found that
13 Pennsylvania law should apply and ultimately whether
14 that would have been an error or not, it had no meaning
15 because the jury didn't find punitive damages under
16 whatever standard was applied. So, there was no harm
17 to the defendants.

18 But, the point being that in Maya the same
19 McNeil argued for the application of the foreign state
20 law, the Tennessee law, not Pennsylvania law, not New
21 Jersey law.

22 And we think the difference being that when a
23 party is making the argument, the same party, there is
24 a concept of judicial estoppel that applies, because
25 they should be estopped from making different arguments

1 just to suit their means in a particular case, and
2 that's what is happening here.

3 It is a cherry picking to try to bootstrap
4 into New Jersey based on Lyles, based on advocacy by
5 plaintiff lawyers which is not binding on Ms. Terry,
6 who is a completely different plaintiff.

7 Now, I noted that in their letter brief they
8 mentioned the Risperdal case, a recent case decided by
9 Judge Gnu (ph) in the Court of Common Pleas and
10 applying New Jersey law, but McNeil was not in that
11 case. That is a Janssen Pharmaceutical case and a
12 Johnson & Johnson case.

13 And Judge Gnu, therefore, did not have to
14 assess or analyze the question of McNeil's involvement,
15 which is a Fort Washington, Pennsylvania defendant. I
16 might add that, you know, Janssen is located in
17 Horsham, PA, but the position that the defendants have
18 taken in the Risperdal case is that the activities
19 there are not that extensive, but I don't have to get
20 into Risperdal, it is not at issue here.

21 THE COURT: Right. So, your preference would
22 be --

23 MR. BERMAN: It is clearly Alabama law, I
24 want to get that on the record.

25 THE COURT: Right.

1 MR. BERMAN: And were Alabama law applied for
2 the wrongful death claim, there is no need to address
3 separate punitive damages, because that measure of
4 damages is the type of damages that is used to
5 compensate a person who suffers a wrongful death under
6 Alabama law.

7 However a jury might award those damages, it
8 is that damages that occur and it is the totality of
9 the damages that the -- that are awarded for the
10 wrongful death decedent.

11 I didn't mean to interrupt Your Honor, I was
12 afraid you might be jumping to the idea that I am
13 advocating Pennsylvania, and I am not. I am advocating
14 Alabama law, but clearly I think the dispute is between
15 Alabama and Pennsylvania, not New Jersey law, and I
16 think under the cases that we cited, Pennsylvania
17 choice of law would point to the application of Alabama
18 law and not Pennsylvania law.

19 And I mentioned Wolf and Maya. There is also
20 the Knight case, the Beard case. They are all cited in
21 our brief and they are all pharmaceutical cases where
22 the court, this court has applied the law of the home
23 state of where the injured person occurred.

24 THE COURT: All right.

25 MR. BERMAN: I didn't know if you had a

1 question. I interrupted you.

2 THE COURT: No, I think I understand your
3 position.

4 MR. BERMAN: There is some sort of anecdotal
5 comments in the defendant's letter I would address if
6 they are of interest to Your Honor. They mention the
7 question of standing. I don't think that's a real
8 problem there at capacities.

9 So, under Rule 17(a) of the Federal Rules it
10 relates back and I could provide the Court a number of
11 citations and I forget the other points that they
12 raised, but if there is other points in their letter
13 that you would want me to address.

14 Mr. Millig wanted to supplement a few
15 comments, if I could defer to him, Your Honor?

16 THE COURT: Yes, Mr. Millig?

17 MR. MILLIG: Good morning.

18 THE COURT: Good morning.

19 MR. MILLIG: I am sort of an outsider on this
20 issue, but as I hear it, what the defendants are saying
21 is we want to apply Alabama law to everything, but we
22 really just don't like Alabama's wrongful death scheme
23 because Alabama has a unique measure of compensatory
24 damages that are, in essence, based on the conduct of
25 the defendant. They don't like that, so let's not

1 apply that.

2 Just as a lawyer from Georgia, and my
3 counterparts here are from Mississippi, we all practice
4 in the State of Alabama, and I would be hard pressed if
5 any of us have gone into an Alabama state court and
6 said we shouldn't apply this Alabama law for this
7 wrongful death case that I am either prosecuting or
8 we're defending, because we just don't like it.

9 This is what Alabama law is. It is what it
10 is and you know, in essence, as an outsider listen, the
11 defense is trying to split the baby and say have it all
12 Alabama, but because of the way that the legislative
13 scheme works down there in every court in Alabama,
14 don't apply it here. And that's what I think it boils
15 down to. Thank you.

16 THE COURT: All right. Thank you. Ms.
17 Jones? Good morning.

18 MS. C. JONES: May I respond, Your Honor?

19 THE COURT: Yes.

20 MS. C. JONES: Let me start first of all with
21 what Mr. Millig just raised. We are not talking about
22 splitting the baby at all, as indeed the Third Circuit
23 recognized in the Berg Chilling decision, which is
24 before the Court.

25 The choice of law provisions recognize a

1 principle called depechage that basically recognizes
2 that the choice of law analysis provides for different
3 state laws to govern different claims or different
4 issues and, therefore, it is perfectly appropriate to
5 recognize that Alabama state law governs on certain
6 issues, but that as to punitive damages and on other
7 issues another law is, in fact, applicable. So, it is
8 part of the analysis in and of itself of the
9 application note which was the law.

10 When I stood up earlier I said that the
11 question before the Court actually is, and I believe it
12 to be true, what state's law applies to determine
13 whether and at what amount the plaintiff may recover
14 punitive damages. That's really the only issue that is
15 out here.

16 And that applies only because the Alabama
17 wrongful death action is the only statute, so far as we
18 know in the country, that clearly provides that the
19 damages recoverable under that statute are punitive in
20 nature.

21 And it is for that reason that we have taken
22 the position that, and that a wrongful death statute
23 does not apply, but is inconsistent with the New Jersey
24 law and the principals admitted in fact New Jersey law
25 has the greater interest here, certainly over Alabama.

1 What I would like to address first, and
2 frankly a little bit out of order, is the plaintiff
3 argues first that Pennsylvania law ought to apply, I
4 have to say I am a little bit, more than a little bit
5 surprised at that.

6 The Court asked for briefing on the
7 applicable law and there is really no briefing on why
8 Pennsylvania law should govern as to the issue of
9 punitive damages in this case at all. And, indeed, it
10 is inconsistent with four recent decisions of this
11 court in the Eastern, not Your Honor, but four other
12 judges here.

13 THE COURT: Right, but in this -- right.

14 MS. C. JONES: Who have all concluded that
15 the principle place of business for McNeil is the State
16 of New Jersey. And those are the cases that we cited
17 to Your Honor. It is the Moore case, the Arm (ph)
18 case, the Circuit case and the Brown case, all of which
19 looked very specifically as to where the principle
20 place of business is and, that is, indeed, Your Honor,
21 consistent with the representations made and
22 concessions made by plaintiffs' counsel in the Lyles
23 case that all of the decisions applicable to the issue
24 of punitive damages were made in the State of New
25 Jersey.

1 It has never been briefed or suggested
2 otherwise that they were made here in the State of
3 Pennsylvania, and that would be inconsistent with
4 several rulings, not only of this Court, but also Mr.
5 Berman mentioned the In Re: Risperdal decision, and I
6 would need to correct one point.

7 Janssen is a New Jersey corporation
8 headquartered with its principal place of business in
9 New Jersey, in fact, it is in Titusville, New Jersey,
10 and not -- I am sure it is just a simple mistake, but I
11 don't want the Court to think that that decision by
12 Judge Gnu was something different.

13 In fact, what Judge Gnu did was to look at
14 the Pennsylvania choice of law rules, conclude that New
15 Jersey punitive damages law applied and, therefore,
16 that the plaintiffs filed here in Pennsylvania were not
17 entitled to punitive damages.

18 At one other point that I think is worth
19 making just briefly, and there was a suggestion that
20 McNeil is taking different positions, attached is
21 Exhibit A to the plaintiffs' position letter, is a
22 brief that was filed by the defendants in the Wolf
23 case.

24 And contrary to Mr. Berman's suggestions, it
25 was argued there on page 11 very clearly that should

1 the court consider the place of the alleged punitive
2 conduct and the location of the defendants to be
3 (inaudible) in New Jersey law and not Pennsylvania law
4 should be applied to plaintiffs' punitive damages
5 phase, and then it goes on to discuss that. So, it is
6 not an inconsistent position being taken here.

7 What is clear, Your Honor, is that although
8 there are some cases that have gone both ways, frankly,
9 in terms of looking to the place where the injury
10 occurred is being the sight of punitive damages.

11 Clearly the Tripp (ph) and more cases
12 recognized that the place where the corporate conduct
13 that is alleged to be reprehensible, the source of the
14 alleged punitive conduct governs here and that those
15 states have the greater interest.

16 THE COURT: Right.

17 MS. C. JONES: And in that case that would be
18 the State of New Jersey here. I think --

19 THE COURT: What about compensatory damages,
20 though? What state's law would apply to that claim?

21 MS. C. JONES: Well, that is what gets
22 confusing about this case.

23 THE COURT: Because Alabama doesn't have
24 compensatory damages, right?

25 MS. C. JONES: That's right. Under normal

1 circumstances compensatory damages would be governed
2 presumably by the substantive law of the state that is
3 at issue.

4 In this case, the unique factor here is that
5 the New Jersey -- I mean not the -- Alabama wrongful
6 death statute provides only for punitive damages, which
7 are unavailable in the State of New Jersey.

8 And it gets confusing, but I think ultimately
9 that what you have to do is to reduce the issue to
10 punitive damages and what would govern under punitive
11 damages, and if the Court were to conclude that New
12 Jersey law applies as to the issue of punitive damages
13 and as to the wrongful death claim, then the
14 compensatory or pecuniary damages, which New Jersey law
15 provides in a case with a wrongful death action would
16 apply.

17 So, in that case what you have here is you
18 have New Jersey's law that recognizes as a matter of
19 public policy which is a governmental interest clearly
20 to be considered by the choice of law, in encouraging
21 the production of pharmaceuticals and protecting
22 pharmaceutical manufacturers in a situation where they
23 have produced a product recognized as safe and
24 effective and approved by the FDA as protected against
25 the imposition of punitive damages.

1 THE COURT: Right.

2 MS. C. JONES: That's clearly a governmental
3 interest. That would be completely abandoned if, in
4 fact punitive damages of the Wrongful Death Act in
5 Alabama were to be implemented.

6 THE COURT: Okay. Laura says we need you
7 closer to the microphone.

8 MS. C. JONES: Oh, I apologize.

9 THE COURT: That's okay. Under Alabama law
10 is there a standard of proof for those punitive
11 damages? For example, in Pennsylvania products or
12 negligence law we would have to have a finding of
13 outrageous conduct.

14 MS. C. JONES: That's right, and that's part
15 of -- that's part of the issue that frankly gets to
16 almost a little bit beyond choice of law, but let me
17 ask you this. There is no specific standard applicable
18 to the wrongful death punitive damage claim.

19 There is no limitation, there are no
20 standards, there is no preliminary finding, if you
21 will, of negligent conduct or of a lesser standard.
22 Nor is there any requirement of outrageous conduct or
23 proof by clear and convincing evidence, and because of
24 that the constitutionality of that statute has been
25 challenged.

1 Plaintiffs correctly point out that the
2 constitutionality was upheld I think in 1927, but don't
3 hold me to the date, by the U.S. Supreme Court and then
4 subsequently as recently as 2011 or 2012 by the Alabama
5 Supreme Court.

6 But, what has not been done is that the
7 Alabama law has not been considered by the U.S. Supreme
8 Court, for example, since the pronouncement of the
9 various punitive damage requirements under BMW versus
10 Gillord (ph) and State Farm versus Campbell, a series
11 of cases that provides what constitutional protections
12 must be inherent in that.

13 And I think that is a little bit beyond the
14 subject of the choice of law, but it is also prediction
15 of some of the issues that we may face if, in fact,
16 this Court were to implement the use of or permit the
17 use of the wrongful death statute of Alabama.

18 THE COURT: Under case law in Alabama does
19 the wrongful death -- do the wrongful death damages in
20 Alabama, although they are characterized as punitive,
21 do they include a compensatory element?

22 MS. C. JONES: They do not.

23 THE COURT: They do not. Okay.

24 MS. C. JONES: And my counsel here are trying
25 to make sure that I am appropriately stating the law.

1 I thought I did, but they pointed out that Alabama law
2 does allow compensatory damages on other substantive
3 claims, and if the New Jersey wrongful death action is
4 applied you're still compensated, you just don't
5 receive punitive damages. It is just a different
6 standard for pecuniary loss, if you will, or what would
7 be the standard type of loss in the case for heirs.

8 THE COURT: Okay.

9 MS. C. JONES: So, it is not that damages
10 would not otherwise be available, it is that the
11 punitive damages would not be available.

12 THE COURT: Okay.

13 MS. C. JONES: And I am perfectly willing --
14 we set out -- you know, we did this in seven pages
15 which is relatively short, to set forth the arguments
16 and I am perfectly happy to go through them. I don't
17 think there is any question that there is a true
18 conflict between Alabama and New Jersey law.

19 THE COURT: Right.

20 MS. C. JONES: I don't think there is any
21 real question that New Jersey law is the applicable law
22 as to McNeil and the question is Alabama versus New
23 Jersey.

24 I don't think that there is any question that
25 New Jersey has a greater interest in seeing that its

1 citizens are protected in the furtherance of that
2 public policy of being protected in the case of a drug
3 manufacturer, one, so that they don't have punitive
4 damages when they manufacture what has been approved as
5 a state -- an effective drug, and two, that its
6 citizens are not subjected to punitive damages in the
7 absence of the constitutional protections inherent and
8 either finding first a standard of negligent conduct,
9 or having there be a higher burden of whatever.
10 Clearly New Jersey has an interest in that. So, when
11 you weigh the interest of the State of New Jersey
12 versus the State of Alabama we believe that the State
13 of Alabama, I mean the State of New Jersey's law
14 clearly governs as to the issue of punitive damages
15 and, therefore, also on the Alabama wrongful death
16 action.

17 THE COURT: But, doesn't Alabama have an
18 interest in the availability of remedies to its injured
19 citizens?

20 MS. C. JONES: It does, Your Honor. There is
21 no question that it does and there is a balancing.
22 But, I think one thing that is telling here on how
23 Alabama itself measures or values its interest.

24 The Alabama wrongful death statute, which is
25 40 -- I can't remember these by number, but the Alabama

1 wrongful death statute specifically provides that cases
2 for wrongful death -- here, the statute is 65410.

3 The language of the statute itself says "A
4 personal representative may commence an action and
5 recover such damages as the Court, they assess," and
6 here is the key language, "in a court of competent
7 jurisdiction within the State of Alabama where provided
8 for in Subsection E," which is a venue statute on what
9 counties, "and not elsewhere."

10 Now, I suggest to Your Honor that what that
11 is saying is the State of Alabama has an interest in
12 providing the wrongful death punitive damages action
13 within the State of Alabama, but that where the Alabama
14 citizen chooses a different forum, that the State of
15 Alabama by the language of its statute has recognized
16 that it has a lesser interest in ensuring that that
17 same level of punitive damages is applicable.

18 I mean, I will say to Your Honor that I
19 cannot represent to Your Honor that nobody in New
20 Jersey has ever enforced a wrongful death action from
21 Alabama, I can't, and I don't know the answer to that,
22 I couldn't find it.

23 When I first read this statute it appeared to
24 me on its face that it didn't provide for relief
25 elsewhere, and I will say that there are states other

1 than New Jersey. I just don't know that New Jersey,
2 which had said, well, they can't deprive them of a
3 remedy elsewhere by saying you must file it here in the
4 State of Alabama.

5 In other words, you can't dictate it, but I
6 do think that what we have here is perhaps a little bit
7 unusual where the state has very clearly said it is my
8 interest to provide this when you file suit in the
9 State of Alabama, and I think that is a very -- I think
10 that's important to us in analyzing which state has a
11 greater interest in the choice of law determination
12 here.

13 THE COURT: Right.

14 MS. C. JONES: I mean, we have cited to Your
15 Honor and there are many cases which have faced very
16 similar issues. We cited to Your Honor the Kelly
17 versus Ford case which was followed more recently by
18 the Campbell versus Stauber (ph) case in which
19 essentially the same issue was before the Court.

20 Those are cases against Ford and General
21 Motors where the Michigan law protected car
22 manufacturers against the imposition of punitive
23 damages and applying the Pennsylvania's choice of law
24 as the courts have consistently held that Michigan law
25 had a greater interest and, therefore, Michigan law

1 would be applied in those cases. You have a couple
2 cases that are cited.

3 I would like to say to Your Honor, I mean Mr.
4 Berman cited the Knight case and the Bearden (ph) case
5 and I will acknowledge to Your Honor that certainly on
6 face value they would appear to come to a different
7 conclusion.

8 However, there is some distinguishing factors
9 there, one of which is that neither of those cases
10 involved the diametrically different and opposing laws
11 such as Alabama and New Jersey and here, where the
12 provision -- particularly where a statute contains a
13 provision, much like the one in Alabama, and also where
14 unlike in this case, Knight and I believe Bearden also
15 involved claims of actions directly by sales
16 representatives and so forth in the state where the
17 plaintiff lived and the injury occurred, converted that
18 there is no proof at all of any action directly in a
19 past sales representative affecting any doctor, for
20 example, and the State of Alabama in this case. So,
21 there are some distinguishing factors.

22 The other issue that is mentioned prominently
23 in the plaintiffs' letter brief, and I think Mr. Berman
24 referred to is the interest of comity and where they
25 cite Your Honor to the McConus (ph) case, which is a

1 case -- McConus versus the Bridge Commission, and it is
2 a case where there is a bridge that actually connects
3 New Jersey and Pennsylvania and the Bridge Commission
4 operated that. It was not funded by taxes on any
5 state, but instead by toll road, and there was an
6 accident involving a Pennsylvania resident on the
7 Pennsylvania side of the bridge.

8 They sued the commission and the commission
9 raised sovereign immunity that was provided under New
10 Jersey law. And the Court looked at that and under the
11 circumstances said Pennsylvania has the greatest
12 context here and that the commission itself operated in
13 the State of Pennsylvania. It did not include or refer
14 at all to the issue of punitive damages.

15 THE COURT: Right.

16 MS. C. JONES: And the plaintiffs cite that
17 for the purpose that basically let's look at delicti as
18 the -- said there is an assumption or presumption that
19 it would apply.

20 But, he is pretty clear and I think frankly
21 even Your Honor has recognized in the Hanover, I think
22 it is the Hanover Insurance Company case that under the
23 Griffith case in Pennsylvania, the Pennsylvania Supreme
24 Court abandoned that as being the sole presumptive
25 factor and that, in fact, you look at the provisions,

1 the restatement and then the governmental interest
2 provision.

3 We have gone through all of them. I believe
4 if you would add all of those together you will find
5 that clearly New Jersey law has the most connections
6 and the greater governing interest on the issue of
7 punitive damages.

8 THE COURT: Thank you. Okay. Let me take a
9 look at those cases that you've cited and then we will
10 get a decision to you. Mr. Berman?

11 MR. BERMAN: May I have an opportunity to
12 reply, briefly, Your Honor?

13 THE COURT: Sure.

14 MR. BERMAN: Thank you. You know, the
15 premise of the argument by the defendants', though, is
16 essentially putting a rabbit in a hat, continuously
17 arguing that it is New Jersey that has all of the
18 contacts.

19 And as Your Honor, I hope, has learned, and I
20 am sorry that we have over-burdened you with all of the
21 deposition transcripts, all of the relevant evidence,
22 facts, documents, witnesses were based in Pennsylvania.

23 So, you know, I do think it is a rabbit in
24 the hat argument to say well, simply because the
25 defendants are incorporated in New Jersey that is a

1 reason to apply New Jersey law or that New Jersey law
2 even is involved in the conflict analysis.

3 Ms. Jones spoke about the fact that, yes, the
4 Alabama statute has survived constitutional challenges
5 both in the United States Supreme Court and in Alabama,
6 and that it actually survived an Alabama tort reform.

7 What I think she is really asking you to do,
8 though, is to pass on the constitutionality of that
9 statute through a choice of law mechanism argument. If
10 that is the law and that is the manner by which Alabama
11 has chosen to compensate its citizens who are injured
12 in its state, it is not, I think, for this Court to not
13 apply that law on the notion that it might not survive
14 constitutional muster if challenged on a constitutional
15 muster if challenged on a constitutional basis at some
16 point in time.

17 If the defendants want to challenge the
18 constitutionality of that, well then let's apply that
19 law to this case and they will have their appellate
20 issue that go to a court to determine whether that is
21 still constitutional in light of the Gore and BMW case.

22 But, I don't think constitutionality is a
23 reason why you don't apply the law of a state which has
24 decided that that is the manner in which to compensate
25 its citizens.

1 And I think it is also a misnomer to say it
2 is a punitive damages statute. It is the measure of
3 the damages that are awarded to a person who suffers an
4 alleged wrongful death in Alabama.

5 So, Alabama doesn't really distinguish it
6 between whether it is compensatory or it is punitive.
7 What Alabama says is you look at the conduct of the
8 defendant and you award damages based on the conduct of
9 the defendant.

10 So, it is not a more traditional compensatory
11 damages scheme where you look at pain and suffering.

12 THE COURT: But, that's clearly a punitive
13 system, isn't it?

14 MR. BERMAN: But, it --

15 THE COURT: If it is a compensatory system
16 you are looking at the loss to the plaintiff.

17 MR. BERMAN: It is, but it is the law of
18 Alabama, and that is the way they chose to address
19 wrongful death claims in their state.

20 THE COURT: Right.

21 MR. BERMAN: The fact that it may be unique
22 amongst other states, it is still their law and it
23 still has the right to choose how to frame the issue
24 for its citizens.

25 Ms. Jones mentioned the statute about whether

1 that law can be applied outside of the State of
2 Alabama, and there is no cases to interpret that. To
3 me I read that as strictly a venue issue, that you need
4 to be in the appropriate venue in order to claim those
5 damages if you are suing in Alabama.

6 But, I don't read that to be a preclusion of
7 the application of Alabama law under choice of law
8 principles when a case is brought in federal court. If
9 this case had been initiated in Alabama and transferred
10 here through the MDL that would have deprived that case
11 from the application of the Alabama law on the issues.
12 So, I think that's really a false argument as well.

13 THE COURT: All right. Thank you, Mr.
14 Berman. Go ahead, Ms. Jones.

15 MS. C. JONES: Oh, I am sorry.

16 MR. MILLIG: I was just going to say one
17 thing, Your Honor. I know I am jumping up, like we
18 shouldn't do this. But, I just want to make sure that
19 we talk about the concept of punitive damages.

20 As I have learned through my practice, and I
21 think everybody here understands there is a first level
22 of damages and then there is punitive damages. The
23 scheme in Alabama is that for wrongful death damages
24 the first level, which we in the country call
25 compensatory damages, is the way their public policy is

1 set up that the jury is to award damages based on the
2 defendants' conduct.

3 But, it doesn't mean you get damages and it
4 doesn't mean you get outrageous damages. If a driver
5 is going through a stoplight and the driver sneezes and
6 kills somebody and there is a lawsuit, there may be no
7 damages awarded based on the conduct, because the jury
8 may find the conduct was not even worthy of causing a
9 wrongful death.

10 But, that is the public policy of the State
11 of Alabama and we respectfully ask the Court to uphold
12 the public policy of the State of Alabama where these
13 plaintiffs are from in this particular case.

14 And the second thing, I just have to say it
15 because I have been the one, as I think the Court has
16 noticed from the depositions and Mr. Teasey (ph) taking
17 these depositions.

18 To hear Ms. Jones say there is no question
19 that New Jersey has a greater interest, every corporate
20 decision in this case, every document produced in this
21 case, every witness with the exception of one in this
22 case, worked on the second floor in Fort Washington,
23 Pennsylvania.

24 The product was manufactured in Fort
25 Washington, Pennsylvania. That's where the line is.

1 Nobody with the -- even Patricia Gusson who was
2 president of (inaudible) way back in the 70s who then
3 moved to Johnson & Johnson said I kept my office in
4 Fort Washington, Pennsylvania.

5 Every decision was made in Fort Washington,
6 Pennsylvania. Even Ed Kuffner (ph), as we will see,
7 had to travel to New Jersey to go to the SATAC (ph)
8 meeting we are going to talk about today. He was based
9 in Pennsylvania.

10 And so, again, to hear this continual
11 discussion of New Jersey being thrown into the mix as
12 the lawyer who has been discovering the facts and where
13 all of the decision-making was done and where the
14 science people were or where the marketing people were,
15 where the regulatory people were, and where the
16 (inaudible) were, they all worked in Fort Washington,
17 Pennsylvania.

18 THE COURT: All right. Go ahead.

19 MS. C. JONES: I want to clear up a couple
20 things. First, responding to Mr. Millig first in
21 reverse order. I would ask Your Honor to look at the
22 opinion of Judge McLaughlin in the Moore case, a case
23 involving Tylenol and McNeil of which there are three
24 other judges who have reached identical decisions to
25 that, that clearly look at the place of corporate

1 decision-making in McNeil and come to the place that
2 New Jersey and Skillman, New Jersey is clearly the
3 principal place of business where corporate decisions
4 are made at McNeil.

5 Two, I would point out to Your Honor that
6 this morning is the first time that plaintiffs have
7 ever taken the position that Pennsylvania law governs
8 on these issues.

9 Three, I don't want to be misunderstood as I
10 think perhaps Mr. Berman misunderstood. I did not mean
11 to suggest to Your Honor that the constitutionality or
12 lack of constitutionality of Alabama law was part and
13 parcel with the choice of law issue.

14 In fact, I think it follows after the choice
15 of law issue, that it just points to some of those
16 issues that may be out there should the cause of the
17 absence of guidelines and so forth, should that law be
18 applied.

19 And finally, I think that -- and I think we
20 have cited the cases to Your Honor, but if Your Honor
21 would look at either the model jury instructions on
22 wrongful death or the cases, there is no question that
23 the Alabama Supreme Court states repeatedly these are
24 punitive damages.

25 And so you really can't muddle it and suggest

1 that it is something else, it is punitive, and that's
2 what the Alabama court contends, and that's the basis
3 for the significant difference and the true conflict
4 between New Jersey law and Alabama law under these
5 circumstances.

6 THE COURT: Okay.

7 MS. C. JONES: So, we would be happy to
8 supply Your Honor with other things --

9 THE COURT: Let me work with the --

10 MS. C. JONES: -- but I think you got the
11 citations here.

12 THE COURT: -- these letter briefs. I really
13 heard enough about this issue, but thank you, Mr.
14 Berman.

15 MR. BERMAN: Okay.

16 THE COURT: I would like to move to the
17 deposition designations, but I have, I guess, a basic
18 question --

19 MR. BERMAN: Your Honor, if I may interrupt
20 you one second.

21 THE COURT: Yes.

22 MR. BERMAN: And I really apologize. Mr.
23 Buchanan was here as the New Jersey liaison and he
24 didn't know whether you wanted to have a report about
25 that, and he has another meeting to attend shortly, and

1 I was hoping if you wanted information about that you
2 could entertain that.

3 THE COURT: We could certainly take that out
4 of order. Go ahead.

5 MR. BUCHANAN: I am sorry, Your Honor, I
6 didn't know whether you want an oral report or not.
7 You have our letters, and there is nothing really to
8 add beyond the letters.

9 If you had questions I wanted to, you know, I
10 was available. I certainly didn't want to lose the
11 Court in terms of sequence, and I just have a 2:00
12 hearing in New York.

13 THE COURT: Okay. Melissa, do we have any
14 questions about -- okay. I think we are fine. Thank
15 you, very much.

16 MR. BERMAN: I apologize, Your Honor. Thank
17 you.

18 THE COURT: Thank you, very much.

19 MS. C. JONES: Your Honor?

20 THE COURT: I have been through the Kuffner
21 deposition from April 30th and May 1st of 2014, and
22 certainly the objections that are framed in these
23 depositions I think can be put in certain categories,
24 and I think you have referred to the anticipated
25 motions in limine regarding some of these issues.

1 What I would like to do is talk about these
2 issues in the context of this deposition. I am sort of
3 unsure of whether I want to go line-by-line or
4 objection-by-objection and make a ruling at this point.
5 I think I would like to open the discussion about the
6 relevance of some of these issues and see where we go.

7 But, I have a more basic question. Is it the
8 plaintiffs' intention in presenting your case during
9 the bellwether trial to present your case through
10 deposition designations?

11 MR. MILLIG: Yes, Your Honor, to a large
12 extent. And I will tell you that I wanted to
13 apologize, because it was also our intent to shorten
14 the deposition designations because these are too long,
15 but we intend to, as the case -- I think these MDL
16 cases to present the corporate testimony through video
17 and also to present treating physician testimony
18 through video. There will be a significant amount of
19 videos played to the jury.

20 THE COURT: Yes, I was afraid you were going
21 to say that. I mean, my experience has been it is hard
22 for a jury to stay with a case through a 60-minute,
23 90-minute doctor's deposition in a personal injury
24 case.

25 I mean, to present your case in chief on the

1 TV I think presents enormous challenges for the jury to
2 follow it, frankly, and to pay attention to it. I
3 mean, why not call these people live? You know what
4 they are going to say.

5 MR. MILLIG: Well, many of these people --
6 well, the framework was that these depositions would be
7 taken for all MDL cases, the generic cases. And as I
8 said before, it would be to take Dr. Kuffner just down
9 to -- right now we have provided Your Honor with far
10 more than we would ever play the material.

11 Cut Dr. Kuffner down to what we need and then
12 we have our experts --

13 THE COURT: So, I am looking at deposition
14 transcripts to make rulings on points of law on
15 testimony that you may not even present? So, why am I
16 wasting my time?

17 MR. MILLIG: I apologize. Certainly we did
18 not mean to do that. However, what we did want to do,
19 I think on both sides, with the length of this, is to
20 make sure you had a full understanding of using Kuffner
21 as to the issues that are going to be presented.

22 Once we understand your ruling, for example,
23 and I think a great way to go through it would be to
24 look at the repetitive objections to advisory committee
25 meetings, FDA pronouncements to the federal register,

1 things of that nature, once we know those rulings then
2 we will cut this down for our jury.

3 But, if we were just to play -- to provide
4 Your Honor with 30 pages of Kuffner, we thought it was
5 very difficult for Your Honor to understand how he fits
6 into the plaintiffs' theme.

7 THE COURT: Well, when we talked about this a
8 couple of months ago, and you were advocating that we
9 get an early start on the discussion of the deposition
10 designations and get some rulings, in advance of the
11 anticipated onslaught of motions in limine I thought
12 that made some sense.

13 But, it seems to me that these transcripts
14 are over-inclusive and I am really not sure that I want
15 to go point-by-point, when particularly, you know, I
16 don't understand some of these questions that are put
17 to these witnesses. It is very unclear, it is
18 rambling, it is a lot of quibbling, and I really don't
19 know where it gets you.

20 So, I am very happy to hear that you are
21 going to pare them down. I would like the opportunity
22 to make rulings on substantive objections once I know
23 what you are going to present to the trier of fact.

24 I mean, I don't really get the point of the
25 exercise of going through rulings on objections to

1 argumentative questions, counsel interrupting the
2 witness, foundation, assumes facts, just to pick out a
3 typical objection.

4 I know there are substantive areas, and maybe
5 this is a way to frame those substantive areas, but it
6 seems to me that it is an awful -- there has got to be
7 an awful lot of excess here, and I am really frankly
8 not inclined to, you know, make rulings on portions of
9 testimony that aren't ever going to be presented to a
10 jury in a courtroom. Ms. Jones? Let me just hear from
11 Ms. Jones.

12 MS. C. JONES: I was just going to make a
13 suggestion, and I am doing it on the fly right now, but
14 I think in a little bit we got the cart before the
15 horse in that I think that if we, in fact, instead have
16 rulings on various motions in limine to cover things
17 like is the advisory committee (inaudible) coming in,
18 that then the parties could probably meet and confer
19 and strike a significant amount of testimony that the
20 Court would never have to consider in this format, if
21 that makes sense.

22 And so what I frankly would suggest, although
23 Mr. Swerigan is here prepared to go line-by-line if
24 Your Honor wants to is that perhaps what we ought to do
25 is to set aside some time or day or whatever it is

1 after the Court has an opportunity to see and rule on
2 the motions in limine, or at least hear the arguments
3 on the motions in limine so that I think as to those
4 substantive objections then it will make sense, and
5 the parties may be able to help Your Honor by striking
6 out a fair amount of the testimony because Your Honor
7 has said this testimony is irrelevant and is not coming
8 in.

9 I would suggest you might want to consider
10 just postponing it until that time.

11 MR. MILLIG: And I guess, Your Honor, where I
12 was coming out, I had never thought we were going to go
13 line-by-line. My understanding was when you picked the
14 Kuffner deposition it re-enforced something I think you
15 had said before, you said by watching this I will have
16 a feel for what the case is about. I can give you my
17 gut reaction on where this case is heading in terms of
18 the evidence.

19 And what I saw in the Kuffner deposition as I
20 was looking through it in preparation for today, was
21 repeated objections of the same caliber and us saying,
22 if we did Dr. Temple first we incorporate, we
23 incorporate, we incorporate.

24 So, I thought today -- I sort of came today
25 thinking we were going to have a discussion about the

1 big picture items that are raised throughout this
2 deposition and every deposition so that we can have an
3 understanding as a general proposition what this case
4 kind of looks like and then we can start slicing.
5 That's how I understood what we were going to do today.

6 THE COURT: Right. Although, I mean the
7 substantive objections here essentially all refer to
8 anticipated motions in limine, right?

9 MR. MILLIG: Well, they all refer to a
10 distinction between whether what is being discussed is
11 notice to the company with an issue being how did the
12 company react to it or whether the issue being
13 discussed is somehow a hearsay document that should not
14 come in.

15 If I would be so bold as to say I think every
16 objection relates to a piece of evidence in which
17 somebody is writing or talking about something negative
18 about the therapeutic range of Tylenol.

19 And so that is really, if we -- I think they
20 all relate to that.

21 THE COURT: Right. I mean I made an outline
22 of just what appeared to me to be the major issues.

23 MR. MILLIG: Sure.

24 THE COURT: The adverse event reports, the
25 advisory committee documents, the advisory committee

1 meetings, the evidence of McNeil sales and financial
2 information, the therapeutic and toxic ratio, right.

3 So, those are all -- and it goes on. I mean
4 that doesn't necessarily limit them. But, those are
5 substantive issues that it seems to me you are going to
6 want to brief, right?

7 MR. MILLIG: Either I think the defense is
8 going to want to brief them. I think what the point of
9 this was so that the Court understands the evidence and
10 understands what an advisory committee is, understands
11 how all of this evidence works.

12 And so the Court can give us whether they are
13 rulings today or advanced rulings or even it is gut
14 reaction, we can begin to then tailor this trial to
15 that.

16 What happened last time was we ended up with
17 a situation where we heard 56 motions on one day, and
18 quite frankly, I am not sure that everybody in the
19 courtroom, because it was new, really understood, for
20 example, what is an advisory committee meeting, who
21 participates.

22 You know, is McNeil even present. Was this
23 document a document that was really discussed and to
24 which people have actually agreed or disagreed and
25 taken positions on.

1 It is a lot of information, so I think from
2 the plaintiffs' perspective and I think from all
3 perspectives, if you have thoughts on these issues as
4 to whether you think they are coming in or not coming
5 in, we would certainly like to know as far in advance
6 as possible, and that was the genesis of the idea to
7 begin to let you see the testimony and see how these
8 witnesses respond to the questions and to the documents
9 being presented.

10 THE COURT: And I think as a general
11 principle I agreed with that. In the practical
12 application of it, you know, even this Kuffner
13 deposition is time consuming to read, understand, to
14 consider the legal issues raised in the objections, and
15 I think what you are asking to do today is to go
16 through the sort of big picture, the adverse events
17 reports or the relevance of the advisory committee
18 process and to give you an advisory ruling, a
19 preliminary ruling, that is preliminary to what,
20 preliminary to my ruling on a fully briefed and argued
21 motion in limine, which seems to me the more I look at
22 these the proper context to make that decision.

23 So, I mean, I am trying to use your time and
24 my time in the most efficient way and I am feeling
25 frankly very not efficient in having to go through

1 these transcripts and coming up with rulings that are
2 really shooting from the hip without a chance for you
3 to brief those motions.

4 So, I fully appreciate the need and the
5 desire to get these issues teed up before the motion in
6 limine process, but it seems to me there is so much
7 involved in the motions in limine that we may want to
8 just get those filed, take a look at them, and if that
9 pushes our trial back that pushes our trial back.

10 You know, I am getting that the problem with
11 the motion in limine process is that it is on a tight
12 schedule before trial and it is, I think the experience
13 you had in New Jersey, from what I am gathering, was a
14 lot of rulings in a short period of time and that
15 created some issues for you, you meaning both sides,
16 that could have been avoided if there was more time put
17 into the discussion or argument of these various
18 motions.

19 But, I mean if it means we push the trial
20 back we push the trial back. It is not like we are
21 inconveniencing any witnesses, right? They are all on
22 tape.

23 MR. MILLIG: When I said they were all on
24 tape that was --

25 THE COURT: Who is coming in live? I will

1 have dinner for them.

2 MR. MILLIG: What's that?

3 THE COURT: Who is coming in live? I will be
4 thrilled to see them.

5 MR. MILLIG: Oh, all of the experts are
6 coming in live.

7 THE COURT: Okay.

8 MR. MILLIG: From both sides. All of the lay
9 witnesses are coming in live. Perhaps the treating
10 doctor is coming in live. I suspect we may, one of the
11 witnesses who have been deposed is local here, works at
12 Children's Hospital.

13 We may call certain witnesses that are
14 Pennsylvania residents and close by who have been
15 deposed live during our case. So, it is not going
16 to be that way, however, I would say, and I am sure
17 Ms. Jones has seen this, the nature of these
18 pharmaceutical trials is there is a substantial amount
19 of video.

20 THE COURT: It sounds like it. But, I mean
21 you have 58 pages of print that I can hardly read, and
22 75 pages in another day of print that is very hard to
23 read, and issues, you know, that are framed in
24 exchanges between counsel that, you know, it makes it
25 very hard to make rulings on a number of these

1 exchanges and areas of questioning and then to hear
2 that, you know, half of it is not even going to be
3 presented, I am not sure why I am spending my time
4 doing that.

5 I mean, do you disagree with that? I mean,
6 it seems to me that we are looking at sort of a
7 preliminary look at the motions in limine without the
8 motions in limine.

9 I mean, I can tell you right now what I think
10 of the advisory committee and the adverse events
11 reports just from the research that Melissa has done,
12 our discussions about these cases and my looking at
13 these depositions and, you know, 25 years of trying
14 products cases. I can give you a sense of where that
15 might be going, but I think that it is probably -- if
16 they are going to want to exclude some things, you
17 might, right?

18 MS. C. JONES: Yes.

19 THE COURT: Then I think I owe it to the
20 parties to look at your legal authority and hear the
21 arguments.

22 MR. MILLIG: I can't disagree, Your Honor.

23 THE COURT: Yes.

24 MR. MILLIG: And I am certainly not going to
25 disagree. We all came to a -- we had a discussion, we

1 thought that this was a good plan and quite frankly I
2 do hope at some level Your Honor --

3 THE COURT: I mean, a designation to me
4 suggests that there is a portion of this enormous
5 deposition, a small portion, relevant, highly relevant
6 to the issues that the jury is going to consider that
7 you hope to play to the jury. Not two days of, you
8 know, lawyers arguing over foundation and form and
9 those kinds of things.

10 So, I mean, I understand there are
11 substantive objections in here as well, but it is hard
12 to pick them out. Let me talk to Melissa for a minute
13 because I have gone way off script here.

14 (Pause in proceedings.)

15 THE COURT: All right. I think despite all
16 of the best intentions of sort of getting these issues
17 on the table in advance of the motions in limine, or
18 more accurately well in advance of trial, I am
19 concerned that since so many of these objections refer
20 to motions in limine to exclude evidence, other motions
21 in limine, that I am going to be making preliminary
22 rulings on these transcripts that would be rulings that
23 would be appropriately addressed to motions in limine,
24 which at that time I hope would be fully briefed and
25 argued.

1 And I don't see the efficiency in making
2 comments on areas where I am not even sure that the
3 testimony is going to be presented. So, I think we are
4 going to have to adjust our approach to these. And, I
5 mean, I simply don't have the time to give thorough
6 consideration to so much deposition testimony.

7 I mean, I am happy to make a ruling in the
8 trial context, but I am reminded of why it was such a
9 good idea to become a judge and not take depositions
10 for a living, but that's another story.

11 But, I really think -- I just don't see
12 the point, and I am going to -- I think I am just
13 going to wait until we see motions in limine on these
14 issues.

15 MR. BERMAN: Your Honor, the genesis of this
16 that I think came from the case management order 18A,
17 where actually the date by which the parties were to
18 identify the witnesses live and via deposition was
19 Tuesday, May 26th and was actually the day before the
20 in limine motions were to be filed.

21 And I think the idea was to try to present to
22 the Court a context so that both we could -- so that
23 the parties could both meet the in limine deadline date
24 as well as the trial witness list date deadline.

25 THE COURT: Well, it seems to me by reading

1 through these objections that you have a pretty good
2 idea of where the motions in limine are going to come
3 in, right?

4 I mean, I think the plaintiffs' steering
5 committee suggested that we do this format and it
6 seemed to me to be a good idea at the time. But, I am
7 I guess rethinking that, and I just don't see the point
8 in going through these issue-by-issue when I am going
9 to revisit them again on a motion in limine.

10 So, do we need to adjust the motion in limine
11 schedule? I mean I am happy to move the schedule
12 forward a little bit to give us more time.

13 MS. C. JONES: Your Honor, I think we will
14 be guided by whatever Your Honor wants to do. We do
15 have a series -- I think we chose that date because you
16 have got a series of Daubert motions and dispositive
17 motions --

18 THE COURT: Before that.

19 MS. C. JONES: -- that will come right before
20 that and I --

21 MR. MILLIG: I think we were back filling
22 dates based on the trial date, Your Honor, and then it
23 sort of squeezed.

24 MS. C. JONES: I think the truth of the
25 matter is, we ended up with a much more squeezed,

1 compressed schedule than perhaps any one of us would
2 have liked, just by the way it fell out.

3 But, I think frankly the real lawyers that do
4 the real work putting together these briefs and all
5 would prefer not to move the motion date, the motions
6 in limine --

7 THE COURT: Forward.

8 MS. C. JONES: -- forward, if we can avoid it
9 just because there will be some pretty extensive
10 Daubert motions and some dispositive motions and I know
11 that just yesterday at a deposition the plaintiffs
12 indicated, I am told by one of my partners, that they
13 intended to file a supplemental report on an expert
14 that has already been deposed and he would have to be
15 deposed again, and Your Honor has already given some
16 leeway on the filing of those Daubert motions. So, we
17 will certainly do whatever the Court asks.

18 THE COURT: Well, are we on too ambitious of
19 a schedule to get this tried beginning June 22nd with
20 all of the motions practice? I mean we are really
21 talking about making substantial trial rulings
22 pretrial, which is what happens frequently in civil
23 cases.

24 But, I am just -- I am questioning, I guess,
25 whether we are on too ambitious a schedule to pick a

1 jury on June 22nd given the Daubert motions, the
2 dispositive motions, and then the motions in limine,
3 which really involve an in-depth discussion of trial
4 issues pretrial.

5 So, I don't want to get into a point where we
6 are compressing all of that just to meet a trial date
7 that we have chosen. We can choose another one,
8 frankly.

9 MS. C. JONES: I think Your Honor, in large
10 part, that is dependent upon Your Honor's preferences
11 and I think you are going to have -- there is a point
12 in time which we don't get the work done and then
13 unfortunately you are going to have a series of that
14 and it will be a -- I think it will be a full month
15 between the filing of the motions and getting all of
16 those things accomplished.

17 THE COURT: Right.

18 MS. C. JONES: And from my standpoint we will
19 do whatever Your Honor wishes, but I think there will
20 be a substantial amount of time that's involved if we
21 are going to go through an argument like that.

22 THE COURT: Right. And I want to do the
23 right thing by all of these motions, and that's --

24 MR. MILLIG: Your Honor, obviously it is your
25 call. I was just going to throw out, and I don't know

1 if this is something that Ms. Jones would be agreeable
2 to, but in terms of preparing the testimony and some of
3 the major issues and as Your Honor has noted, the
4 repetitive nature of the motions in limine, I am
5 wondering if it is not possible for us to identify the
6 evidentiary issues, forgetting about the experts,
7 Dauberts and dispositive motions, but they are going to
8 be evident.

9 The defendants are going to move to keep out
10 any discussion of an advisory committee. The
11 defendants are going to move to keep out any discussion
12 of, essentially, as we have seen, and I don't want to
13 overstate it, but if there is something negative there
14 may be a motion attached, something negative that came
15 out about Tylenol, there may be a motion to try to
16 exclude it.

17 The question is whether -- the real question,
18 the big question, Your Honor addressed it at the last
19 conference when you said isn't the issue what was being
20 discussed and how you reacted to it, can we get those
21 motions in, which may already be done from the previous
22 case, and ruled on at an earlier junction before we get
23 to the Daubert motions, and so then we have an
24 evidentiary framework for what this case is going to
25 look like and what, if anything, the Court would

1 exclude on evidentiary grounds.

2 That being said, coming back to a trial date
3 and moving the schedule we can meet and confer, we
4 can talk to Your Honor, but that is completely your
5 call.

6 THE COURT: Well, how many motions in limine
7 do we expect?

8 MR. MILLIG: Not too many from us.

9 THE COURT: I am not worried about you.

10 MR. MILLIG: I know.

11 MS. C. JONES: Your Honor, I think that we
12 submitted like two months ago, I hadn't counted on
13 that, but we got what we submitted to Your Honor
14 as kind of an outline of what we knew would be
15 included.

16 (Pause in proceedings.)

17 MS. C. JONES: I think there are about 50
18 different issues, 30 different motions, but some would
19 be combined. I mean, that was the preliminary stuff
20 when we put it together probably at the time we were
21 talking about this, and I have got -- I mean, I have
22 got a copy I would give.

23 We have 30 and they have 15. We have 30, the
24 plaintiffs listed 15.

25 THE COURT: So, we are looking at 45 motions

1 in limine?

2 MR. MILLIG: Your Honor, we had 15 the last
3 time. The plaintiff, the young girl, had a lot of
4 psychiatric issues which are not applicable in this
5 case. That's why I said I believe it dropped
6 dramatically.

7 THE COURT: Okay. So, you think you will
8 still have around 30? Is that what you did in New
9 Jersey? You had about 30 motions, and the same kind of
10 evidence, essentially?

11 MS. C. JONES: Generally, Your Honor, yes,

12 THE COURT: All right. Okay. So, your
13 number won't be 15, but it might be --

14 MR. MILLIG: Mr. Berman tells me I may have
15 misspoken.

16 THE COURT: Okay.

17 MR. BERMAN: We had previously provided an
18 anticipated list and I haven't counted it. I have it
19 with me here.

20 THE COURT: Okay. I don't have it in front
21 of me.

22 MR. BERMAN: I don't want to be held to 15 or
23 not, but it certainly would be less than the number the
24 defendants would submit.

25 THE COURT: Right. Okay. Melissa, what's

1 the deadline for the motions, is it the 22nd of May?

2 MS. A. JONES: Motions in limine is May 27th.

3 THE COURT: Okay.

4 (Pause in proceedings.)

5 THE COURT: That's the filing deadline.

6 What's the responsive?

7 MS. A. JONES: June 10th.

8 THE COURT: June 10th. Okay.

9 (Pause in proceedings.)

10 THE COURT: All right. I think it is
11 unlikely that we will try this case June 22nd for
12 planning purposes. I am spending the week in
13 Washington around that June -- I think it is that week
14 of June 10th at the judicial conference committee
15 meetings and then I am just not sure that I can do 45
16 motions in limine in a week and do it any justice.

17 So, I guess we won't know in terms of the
18 length of the trial until dispositive motions, Daubert
19 motions and motions in limine are ruled on, right? So,
20 we could be looking at two weeks, we could be looking
21 at four weeks.

22 MS. C. JONES: Your Honor, I think we said
23 earlier two and the plaintiffs perhaps said three, but
24 I would think we would get it done within three weeks
25 anyway.

1 THE COURT: Okay. All right. Let me think
2 about that. I just don't -- I don't see in two weeks
3 being able to address 45 of those motions and do the
4 right thing. So, let me talk to Melissa, look at
5 our calendar and we will have to talk about a trial
6 date with all of you some time in the next couple of
7 weeks.

8 All right. Dispute over the 30(b)(6)
9 depositions. Tell me what is going on there.

10 MR. MILLIG: Your Honor, earlier on in the
11 year I was not part of this initial notice. We -- may
12 I approach, Your Honor?

13 THE COURT: Yes.

14 MR. MILLIG: We served an admittedly overly
15 broad 30(b)(6) deposition designation for issues that
16 we thought we needed to finish up before this next
17 trial that we did not finish before the Lyles trial.

18 Subsequent to that I reached out to counsel
19 for the defendant and I said -- well, specifically a
20 gentleman named Mr. Mayes (ph), and I said, "Mr. Mayes,
21 I realize that our 30(b)(6) is overly broad and I would
22 like to cut to the chase of exactly what it is I want
23 to understand from a corporate standpoint and be able
24 to articulate for the jury."

25 And it boiled down to two areas that we

1 discussed in the tutorial. The first area that I want
2 to talk to a corporate representative on, Your Honor,
3 and this is a lengthy document, but the categories, the
4 matters for examination are on page four.

5 The first category that I want to talk to
6 corporate designee on concerns physicians use and
7 recommendations and prescriptions for Tylenol at four
8 grams, which is the maximum daily dose.

9 And as we talked about in the tutorial, our
10 case is that the defendants have known for a long time
11 that there is evidence that at four grams this or close
12 to it this can be dangerous.

13 And so I said that's the first area that I
14 want to talk to you about because your slogan is the
15 number one recommended by doctors, yet we see documents
16 in your files that indicate that you have done surveys
17 where only 27 percent of doctors are recommending
18 Tylenol at the maximum recommended dose, and to the
19 plaintiff that means that doctors indicate this may be
20 dangerous, and that is notice, we believe.

21 The second category is the manner in which
22 McNeil communicates about literature in the -- that is
23 published to doctors, and we have multiple memoranda
24 going to sales force, for example, and I have given
25 Your Honor a copy of one from January, 2002, about

1 Tylenol and at the end of this memo after it is
2 explained to the sales force what the article is about
3 it says do not initiate conversations with physicians.

4 So, I had two categories and what I ended up
5 doing is when I went back to draft the notice I just
6 made it -- I noticed that there were three specific
7 documents that I wanted to -- types of documents that I
8 wanted to discuss that were related to category one.

9 So, as to physician usage there is a category
10 about what are called physician attitude and use of
11 surveys. And so this is an example of a summary of one
12 and it is attached to your packet.

13 And we want to explore with the defendant all
14 physician and attitude surveys that they have done,
15 what do they show, why were they done, and specifically
16 what do they show about what physicians think about
17 Tylenol at four grams which is where we say the product
18 is dangerous.

19 Then, I realized that there is a second
20 category which is the same topic, but there is a -- in
21 2004 internally a marketing campaign began that was
22 called Tylenol safety and efficacy at four grams per
23 day. I have attached that document.

24 That is the document in which in a marketing
25 meeting the research found that physicians state the

1 four grams a day is close to an unsafe dose and
2 recommend two and a half grams. So, I want to know why
3 was this done, what was the purpose, what was done once
4 you knew to do this.

5 And then the third document was what is
6 called protocol 85055 in which this document talks
7 about a pervasive problem that less than half of
8 healthcare providers recommend Tylenol at the maximum
9 recommended dose.

10 So, I just broke my first category into three
11 categories, and they all deal with what do doctors
12 generally think about our product at the four gram
13 maximum daily dose.

14 And then the second category is how do we
15 talk to sales professionals about our -- and do we tell
16 doctors -- talk to doctors about adverse literature or
17 do we instruct our sales representatives not to
18 initiate discussions.

19 I had a conversation with the defense and the
20 defense has agreed to produce a witness only on the
21 attitude and usage study, and the attitude and usage
22 studies and on the manner in which we talk to
23 salespeople, but they have said they will not produce a
24 witness on this Tylenol safety and efficacy campaign at
25 four grams, which is the same topic.

1 Nor will they produce a witness on protocol
2 98-055 which talks about how physicians are not
3 prescribing at four grams, which talks about the
4 financial impact and which talks about what we need to
5 do as a company is to create some safety research for
6 these doctors.

7 I think that this is a little bit -- I am not
8 really sure how we got to this point other than I was
9 told we are just not going to do these other two
10 categories, Clay.

11 I said well, there are two categories, I just
12 broke them into four very short categories. I could
13 take each of these depositions in two and a half
14 hours. I just want to know who was involved, what were
15 they thinking, why did they do it, what were the
16 results.

17 And then for each category, these four, I
18 have asked the defendants, Your Honor, to please
19 produce the relevant documents and the reason the PSC
20 asked for them to produce the relevant documents is
21 because the documents in this case, as the Court
22 knows, were produced electronically, and if I search
23 our database for a physician attitude and usage I
24 might get seven thousand documents, but I am not going
25 to get them and they are sitting in McNeil's

1 headquarters.

2 And so I was told by the defense I am not
3 producing the documents, it has been over 30 days and
4 you are not getting any documents, even though you
5 have sent us a valid document request with 30 days
6 notice.

7 And so bottom line is I have agreed to two of
8 these categories, they are very short and distinct
9 categories. I have sent exemplar documents so they
10 knew exactly what the categories were.

11 I simply want to know about each one of these
12 documents because they relate to physicians attitudes
13 about four grams, why was it done, what were the
14 results, what were the years that it was done, what did
15 you do about it? Did you tell anybody about it, what
16 was your thinking about it and I have only been given
17 two of these categories on May 19th.

18 And I would ask the Court, because this
19 obviously goes to one of the hearts of our case, which
20 is that if physicians believe that four grams a day is
21 even close to an unsafe dose, we are going to suggest
22 to the jury that that is something the consumer should
23 know, because that is part of the risk profile of this
24 drug and that is something that consumers should be
25 able to take into account when they decide how much

1 they want to use.

2 If they know that -- and so if McNeil knows
3 and has known for years that doctors are not giving the
4 maximum recommended daily dose, I want to explore it.
5 I can do it quickly and we just ask the Court to allow
6 us to have the last two categories.

7 THE COURT: So, what is the relevance of that
8 in the case?

9 MR. MILLIG: Oh, it is notice.

10 THE COURT: It is notice to McNeil.

11 MR. MILLIG: Notice to McNeil that the
12 medical profession at large, doctors across the country
13 are not giving patients four grams a day because they
14 as doctors believe that four grams a day puts those
15 patients at potential risk and that the maximum they
16 are giving is two and a half per day.

17 THE COURT: So, it is notice to McNeil of
18 what?

19 MR. MILLIG: Notice to McNeil that there may
20 be a risk, or it is an additional line of evidence that
21 points to a signal that there may be a risk to
22 consumers at or near four grams if doctors across the
23 country are routinely telling you we don't give four
24 grams.

25 Therefore, number one, we have to put that in

1 with all of our other evidence and decide what are we
2 going to do about it, should we investigate it, do we
3 correlate that data with what we see in our adverse
4 events with what other outside organizations are
5 saying?

6 Number two, it is do we inform consumers.
7 Number three, do we consider lowering the dose to be
8 more in line with what physicians feel is comfortable
9 or do we try and bring physicians to us.

10 The cases we have talked about is the -- the
11 plaintiffs' position is that Tylenol is a risk -- the
12 defective nature is only when this product is taken at
13 four grams. You take it for a headache all day long.

14 We showed the Court the tutorial, the data
15 going back to the 1970s and the medical articles and
16 the FDA's analysis and the databases all saying four
17 grams in some individuals on some days can result in
18 damage to your liver.

19 Now, as I have pointed out when you market
20 your product as the one most recommended by doctors,
21 but behind the scenes you know that at four grams
22 doctors aren't recommending your products, we would
23 suggest that is not being candid --

24 THE COURT: Is that notice of a defect or is
25 that notice -- or is that just some sort of marketing

1 issue?

2 MR. MILLIG: Oh, it is through their notice.
3 It is in essence a form of pharmacovigilance. It is
4 understanding in the real world what is happening with
5 your product. And in the real world the gentlemen with
6 the white coats are saying we are not comfortable
7 giving four grams.

8 To us and we think to a jury and to our
9 experts possibly more than individual article where a
10 doctor writes about a case, if doctors generally across
11 the country are unwilling to give four grams, only 27
12 percent, and McNeil is aware of that, the question is
13 what have they done with that information in terms
14 of analyzing in terms of the risk profile of their
15 drug. And then how have they communicated that to
16 consumers. In this case they continue to communicate
17 to consumers it is the number one most recommended.

18 THE COURT: All right. Mr. Abernathy?

19 MR. ABERNATHY: Your Honor, Mr. Millig
20 suggested a moment ago that he didn't understand how we
21 got to this point in terms of a dispute over the four
22 topics. Let me tell you exactly how we got to this
23 point.

24 This specific notice of these topics were the
25 subject of a meet and confer between Mr. Millig and Mr.

1 Mayes. And the outcome of that meet and confer was
2 documented by Mr. Millig. It is in the e-mail which is
3 document number 198-2 on the docket. It is Exhibit 2
4 to your agenda.

5 It covers two topics. And the two topics are
6 on the notice. They are topics one and topic four. My
7 point being very simple, there was a meet and confer
8 and an agreement.

9 Mr. Millig told you a lot about, you know,
10 expanding this topic or that topic, we are not
11 clarifying or expanding topics. We made a deal and he
12 is retrading the deal. And, Your Honor, that just
13 doesn't work.

14 There are a lot of discovery issues in these
15 cases. Your Honor expects the parties to meet and
16 confer and try to make agreements and that's exactly
17 what we did in this case.

18 If we get to retrade the deal after we make
19 the deal it just doesn't work and we can't resolve
20 things. And I know Mr. Millig, he wants to get up. He
21 wants to get up right now. Your Honor, just read the
22 e-mail and read topics one and four. Those are the
23 topics. That was what was agreed on.

24 THE COURT: Do I have that e-mail in these
25 papers?

1 MR. MILLIG: You do, Your Honor.

2 MR. ABERNATHY: It is Exhibit 2 to the
3 agenda, Your Honor. It was docketed as 198-2. Topic
4 one is "McNeil surveys of physician attitudes and uses
5 of acetaminophen the company or outside consultants
6 perform."

7 THE COURT: Yes. I don't have it. Do you
8 have a copy of it?

9 MR. MILLIG: I do, Your Honor.

10 THE COURT: Thank you.

11 MR. ABERNATHY: And that is topic one on the
12 notice which I think Mr. Millig gave you a minute ago
13 and I think was attached to the agenda. McNeil's
14 direction to its professional sales force regarding how
15 to discuss or if to discuss literature on acetaminophen
16 with physicians.

17 That is item number two on his e-mail, that
18 is topic number four on the notice. Those are the two
19 topics. We agreed to produce witnesses on those
20 topics. The notice as to topics that weren't agreed to
21 and weren't documented as agreed to in the e-mail, and
22 it is really as simple as that. But, there is a little
23 more context to this.

24 This is not a new topic, Your Honor, the
25 marketing and public relations and related topics.

1 Your Honor will remember that we spent a lot of time
2 discussing these subjects at earlier case management
3 conferences and there was a very broad notice early in
4 the case.

5 We had a fairly extensive debate about that
6 subject early in 2014 and ultimately the scope of that
7 notice was narrowed, but earlier in the case we agreed
8 to produce I believe it was six witnesses covering the
9 five primary subjects in the original notice on
10 marketing, public relations and related issues.

11 So, what ultimately happened is that the
12 plaintiffs took one of those witnesses, Ms. Fallon, for
13 two days, and they didn't take the rest of the
14 witnesses on the rest of the topics.

15 Now, at that time Your Honor will remember
16 that there was a trial coming up in New Jersey, the
17 Lyles trial and there was a lot of pressure on the
18 parties. That trial wound up getting pushed back and
19 ultimately that case got settled in September, 2014.

20 But, that is seven, eight months ago. And
21 none of the rest of this got done in the meantime. So,
22 now we are revisiting the subject of marketing related
23 depositions at the eleventh hour in this Bellwether
24 case where we also have to deal with Daubert motions
25 and expert depositions and all of this other stuff.

1 So, we reach an agreement on two topics and
2 now the two topics become four topics. Mr. Millig told
3 you a minute ago these topics go to the heart of their
4 case. If this is the heart of their case I am not
5 really sure why none of this was getting done in the
6 many months that have been passing when this deposition
7 could have been taken.

8 The two related -- the two added topics, the
9 ones that weren't part of our deal and are added in the
10 notice, one is described as -- let me look at the
11 notice, "Defendants' safe and effective at G campaign."

12 We did not have a safe and effective at G
13 marketing campaign.

14 The other added topic was the entirety of
15 protocol 98-055. Protocol 98-055 doesn't relate to a
16 marketing effort or activity. It was a dosing study
17 relating to acetaminophen. It is a whole different
18 topic than marketing or public relations. And by the
19 way it has not been unexplored in discovery.

20 The vice president, former vice president of
21 medical affairs at McNeil, Dr. Temple, who is the
22 person you would ask about that sort of thing, has been
23 asked about that sort of thing. He was just deposed on
24 it at length in his deposition, I think, last month.

25 So, the only other point I wanted to address,

1 Your Honor was --

2 THE COURT: Was Dr. Temple asked about this
3 protocol 98-055?

4 MR. ABERNATHY: Yes, he was deposed March. I
5 think it was March 20th. In his depositions starting
6 at page 232, there is a number of pages of questions
7 about this study. 2014, sorry.

8 THE COURT: Right.

9 MR. ABERNATHY: It was not last month, it was
10 2014. I had my months wrong. But, that study was the
11 subject of deposition testimony and it could have been
12 the subject presumably of a 30(b)(6) notice at any time
13 since then if that was something that the plaintiffs
14 felt they needed to do.

15 The only other topic that I want to address
16 is the documents. Your Honor, a 30(b)(6) notice is not
17 a do over on document production that has already
18 occurred and it is not a mechanism by which one party
19 can say you've produced a bunch of documents on these
20 topics but you now have to go search for me the
21 documents that you have already produced to me to find
22 the documents that I am going to want to use at
23 deposition. That is not how it works.

24 When we produce documents if you want to
25 depose my witnesses about those documents then get the

1 documents out of the production, review them, figure
2 out what you want to ask about it and then ask about
3 it. So, certainly we can't be required to not only
4 produce a 30(b)(6) witness, but also do their document
5 preparation for the deposition for them.

6 Again, Your Honor, to me the fundamental
7 point here, read the notice, read Mr. Millig's e-mail.
8 I know he has already argued and he is now going to get
9 up and argue a second time that it is not a change of
10 the deal, it is a change of the deal.

11 And if this is how we are going to proceed, I
12 can make an agreement with you on a meet and confer,
13 here are my two topics, and now I am going to change my
14 mind to do four, if that is how we have to proceed
15 that's how we have to proceed, but I don't know how we
16 are going to get anything resolved by agreement if that
17 is how we have to proceed.

18 THE COURT: But, would they be different
19 30(b)(6) people, I mean for these four topics?

20 MR. ABERNATHY: I don't know whether it would
21 be a different individual, but the point is that we
22 negotiated and reached agreement on the topics that
23 would be covered and we are prepared to produce
24 witnesses on those topics that we agreed to.

25 THE COURT: Mr. Millig?

1 MR. MILLIG: Your Honor, I was on the phone
2 call and respectfully counsel was not. And I wrote the
3 e-mail and I did. I stand by the e-mail. But, when I
4 went to grab the notice, because I want to talk about
5 research that McNeil or outside consultants has done
6 regarding physicians use at four grams the documents
7 that I had in front of me naturally, Your Honor,
8 concerned research.

9 One that I was talking to Mr. Mayes about,
10 one is consider attitudes. Here is research that says
11 "Market research indicates physicians use four grams a
12 day" -- "Market research and field observations state
13 four grams a day is close to an unsafe dose, currently
14 recommend 2.5 dose a day." That's the same topic.

15 And this protocol 98-055, there is a study in
16 the back, study 103, Your Honor may have seen it, but I
17 don't believe, and I may be wrong, but I took Dr.
18 Temple, that this protocol 98-055, which is also
19 research on physician usage page one, a pervasive
20 problem, less than half of healthcare providers
21 recommend the maximum daily dose.

22 All I did was, Your Honor, as I am drafting
23 the notice I thought it would be easier to put it into
24 four categories. If we want to have them in two
25 categories, all three of these documents fall under

1 category one. And that is why I was surprised when I
2 was told that I couldn't take the depositions.

3 THE COURT: All right. Who --

4 MR. ABERNATHY: And just to be clear, Your
5 Honor, I was not on the phone call. It was Mr. Mayes.

6 THE COURT: Okay.

7 MR. ABERNATHY: Mr. Mayes wrote a detailed
8 letter to Mr. Millig addressing these same issues. So,
9 I think Mr. Millig is trying to suggest to you well,
10 Mr. Abernathy doesn't really know because he wasn't on
11 the call.

12 What I am communicating to you is exactly
13 what Mr. Mayes has already communicated to Mr. Millig,
14 what the agreement was in their meet and confer.

15 THE COURT: Right. Do we know who the
16 30(b)(6) person would be to talk about these?

17 MR. MILLIG: The defendants have identified a
18 gentleman to talk about -- his name escapes me, to talk
19 about McNeil's correspondence and instructions to its
20 sales force as its sales force goes out to discuss
21 literature, and McNeil has identified a woman, I
22 believe, to talk about -- or maybe I have got them
23 backwards, their Tylenol attitude and usage studies.

24 And so I don't know if it would be a
25 different person. All I did was I had these documents

1 in front of me and they all to me talked about
2 research, about physicians usage at four grams. And so
3 when I wrote the notice I thought it would just be
4 easier and more simple to talk about them separately.

5 But, three of the documents are category one
6 and one is category two.

7 THE COURT: It seems to me the scope of the
8 deposition is pretty focused, right?

9 MR. MILLIG: That's what I was trying to do,
10 make it very focused and tight. I said we could do --

11 THE COURT: And so it -- how long do you need
12 with these people?

13 MR. MILLIG: We are going to do two of them
14 easily in one day and I could easily do the other two
15 in two days. These are who, what, when, where, why
16 depositions. What did you do with this information,
17 why were you concerned, what did you think about it,
18 who was involved in the analysis, what was the impact
19 from a pharmacovigilance standpoint when you learned.

20 We have documents, we have one document back
21 to 1989 where doctors were not prescribing four grams.
22 Why have you continued to market this as the one
23 recommended by doctors, number one recommended by
24 doctors when you know doctors generally from your own
25 research may not be comfortable with your maximum

1 recommended dose.

2 THE COURT: Right.

3 MR. ABERNATHY: Your Honor, we designated a
4 witness named Christina Tonielli (ph) to testify on
5 topic one of Mr. Millig's notice exactly as he wrote
6 it.

7 I think it cannot fairly be said that, for
8 example, the issue of the entirety of protocol 98-055
9 falls within topic one, that is just wrong. And I
10 cannot tell you that that witness is going to be able
11 to address that topic in full. They are just not the
12 same thing at all.

13 We designated a gentleman named John Duke to
14 testify on the second item, which is topic four in the
15 notice. He will be produced and testify to topic four
16 in the notice, but in our view the other topics are not
17 subsumed within the two that are agreed to, and so you
18 know, maybe Mr. Millig is thinking these are exactly
19 the same and so these witnesses will have to be
20 prepared to testify on all four topics, but that is
21 just not so.

22 THE COURT: All right.

23 MR. ABERNATHY: There is no reference at all
24 to protocol 98-055 or the subject of that protocol in
25 Mr. Millig's e-mail to Mr. Mayes, and there is no

1 reference to the other topic in his e-mail to Mr.
2 Mayes.

3 So, the decisions that were made on which
4 witnesses to produce and on what basis were based on
5 those two topics that were agreed to and described in
6 the e-mail.

7 MR. MILLIG: But, respectfully, Mr.
8 Abernathy, I also said I was going to send documents to
9 help you and number two, there is research right on the
10 second page of protocol 98-055 that says "A pervasive
11 fact, less than half of healthcare providers recommend
12 the maximum daily dose and McNeil found out that only
13 23 percent of hospital residents would give it and 33
14 percent of office based physicians."

15 And so that is what we were talking about,
16 was discovering from the company as a general
17 proposition what did they want, what did they learn,
18 what did they think, what did they do when they found
19 out that doctors across the country would not give the
20 maximum recommended dose, which we say can cause in
21 some cases hepatotoxicity (ph).

22 A couple of other things, Your Honor, and I
23 know this is going on too long. First of all, the
24 e-mail -- this began back in January, the meet and
25 confer was in February, I have been offered a witness

1 May 19th.

2 And third it has been throughout this
3 litigation we have worked with Ms. Alyson Jones from
4 time-to-time when we said Ms. Jones, we have ten
5 million documents in a computer database that we cannot
6 see.

7 Can you identify or help us identify certain
8 Bates ranges so we can be sure we go in to depose
9 somebody on a specific issue that we have, for example,
10 all of the attitude and usage studies, because if we
11 type in attitude and usage studies to the database we
12 might get 50,000 hits that we would have to look at
13 individually in a web browser. And they have been very
14 cooperative with us, that's why I sent the request for
15 documents, again, for efficiency.

16 So, we can just really quickly talk about
17 these two issues which I broke into four after looking
18 at the documents.

19 THE COURT: All right.

20 MS. A. JONES: Your Honor, just to clear the
21 record, I have never pointed out specific deposition --
22 specific exhibits to be used at a deposition, certainly
23 on the context of a 30(b)(6).

24 THE COURT: I think his point was you helped
25 in a document search.

1 MS. A. JONES: I have always tried to be
2 helpful with document searches.

3 THE COURT: Right. I would hope so, yes.

4 MS. A. JONES: But, not in the context of a
5 deposition.

6 THE COURT: Thank you.

7 MR. ABERNATHY: These are broad document
8 demands covering broad subject areas in the deposition
9 notice. I mean, you know, these are pretty broad
10 categories and the notice purports to impose upon us an
11 affirmative obligation to produce all documents within
12 the scope of those descriptions and I don't think that
13 that is a reasonable use of a 30(b)(6) notice when the
14 documents have been produced. It is not a tool to
15 require the other party to cull the already produced
16 documents for you on a specific subject you want to
17 question about.

18 Obviously, we are happy to talk to them about
19 specific document issues and be as helpful if we can,
20 but I don't think they are entitled to enforce a broad
21 document demand that duplicates documents already
22 produced in the case.

23 THE COURT: All right. Well, it looks to me
24 like the objection -- essentially there is a
25 misunderstanding or a lack of understanding about what

1 was agreed to.

2 There is the e-mail of February 24, 2015.
3 There is the notice of deposition filed subsequent to
4 that and the defendants' position seems to be there was
5 an agreement and now the deposition notice expands on
6 that agreement.

7 It looks to me from a review of these
8 documents, while counsel are arguing, that there is
9 some -- there is certainly some relevance to the
10 documents and to the issues in the case.

11 And it does appear that the subject matter of
12 these 30(b)(6) depositions would be focused on those
13 specific issues. I am concerned about the request for
14 production of documents.

15 I think the defendant has a good point, that
16 that is perhaps a broader request than these documents
17 that you showed me that you want to question the
18 witness about.

19 I mean are these -- the documents you are
20 requesting in Exhibit B pertinent to these documents
21 you handed up?

22 MR. MILLIG: All right. So, if for example
23 if the Court was to look at the memo, the one-page memo
24 summarizing -- that starts in 2003 the Tylenol brand.

25 THE COURT: Right.

1 MR. MILLIG: So, that -- the bottom line is I
2 just want to make sure, Your Honor, before I take this
3 deposition that when I walk in I have all of the
4 consumer attitudes. If they are done at 15 years then
5 I would like to make sure that I have the 15 consumer
6 attitude uses studies that I have.

7 It is very difficult with ten million
8 documents in a hypothetical electronic database to
9 locate those attitude and usage studies. We know that
10 they have more because it says that this work was the
11 latest in a series of attitude and usage studies that
12 was once conducted on a bi-annual basis. Unfortunately
13 there was a five-year hiatus since the last one was
14 fielded.

15 All I am asking for is assistance and if they
16 would work with us as they have in the past to help us
17 either through the company, not the lawyers, the search
18 terms that would get us the attitude and usage surveys,
19 that's fantastic.

20 That's all. I just want to make sure that we
21 have what we need and it is very difficult when we get
22 to this narrow of a point, as you said, I am trying to
23 make this very efficient, to make sure I have the
24 documents and so we can just click through them.

25 THE COURT: All right.

1 MR. ABERNATHY: Well, I understand the
2 problem, Your Honor, but when you take discovery that
3 spans decades and you ask for and get millions and
4 millions of documents and then you say gee, it is
5 really hard for me to be sure I have everything, am I
6 now supposed to be responsible for making sure that he
7 found everything he wanted for his deposition because
8 it is a lot of work for him to find it in the document
9 production? I don't think we can be made responsible
10 for that.

11 I am not sure where we are, Your Honor, on
12 the scope of the deposition topics, but I am concerned
13 that, you know, Mr. Millig's view is oh, these are all
14 the same two topics, just elaborated on and expanded,
15 we don't think they are and I am concerned that we are
16 now going to go take the deposition and we are going to
17 wind up with issues about whether the witness is fully
18 responding to the scope, because if his interpretation
19 is two and three are just part of one and four, well we
20 are going to produce witnesses on one and four.

21 But, if he actually covers everything in two
22 and three, I think he is going to be asking a lot of
23 questions that those witnesses weren't designated for
24 and weren't prepared for.

25 THE COURT: All right. I will permit the

1 deposition on the four categories contained in matters
2 for examination. I will encourage the parties to
3 cooperate on the narrowing the search for the documents
4 that would be pertinent to these four exhibits. It
5 does seem reasonably focused.

6 I think we should probably get that
7 deposition done before May 19th. You are saying that
8 that is when the witness was offered?

9 MR. MILLIG: That's the date it was provided,
10 yes, Your Honor.

11 THE COURT: Okay.

12 MR. ABERNATHY: I don't know anything, to be
13 candid, about the witness's situations and availability
14 because Mr. Mayes was involved in that and I was not.
15 So, I don't really know why the date was chosen.

16 THE COURT: Okay. All right. Would these
17 depositions impact the dispositive motions or motions
18 in limine? Probably not the dispositive motions.

19 MR. MILLIG: Probably not the dispositive
20 motions. The defense may want to argue to keep this
21 information out. We have agreed, Your Honor, that
22 these depositions all, right now, are all going to be
23 taken at the Drinker Biddle office here in
24 Philadelphia. It has all been set.

25 When I saw May 19th I just thought I would

1 raise that it is kind of late, but in candor we are
2 taking experts throughout May 8. So, I am fine with
3 the date.

4 THE COURT: Work together on the date then.
5 If May 19th is the best you can do it is the best you
6 can do.

7 MR. MILLIG: Okay.

8 THE COURT: But, I will permit the 30(b)(6)
9 depositions on these four categories. Okay. We are
10 going to wrap it up at this point. And as I said, I
11 will confer with Melissa and we will give some thought
12 to whether we need to adjust the trial schedule.

13 Do we have another conference? What is the
14 date? Do we know? Do we know the date of the next
15 conference?

16 MR. BERMAN: I will look, Your Honor. I
17 thought it was maybe May?

18 MS. A. JONES: It is May 20th.

19 THE COURT: Okay. I think we should have a
20 telephone conference maybe in a week and talk about
21 scheduling issues. Okay. So, let me look at my
22 schedule and then I will ask Melissa to be in touch
23 with you as to when we can get together on the phone.
24 Okay?

25 MR. MILLIG: This may be premature, but there

1 was one more thing on the agenda. I just wanted to
2 know -- this is more from I think from both sides, we
3 had talked -- our respective paralegals had put
4 together an exhibit list last year for Lyles, and we
5 didn't know if there was somebody either in you alls
6 office or in the courthouse generally that they could
7 work with to find out how you like the exhibit list,
8 and to the extent there is a way to use some of the
9 format that was already generated. This is more of a
10 paralegal request that we talked about. I don't know
11 who to bring that to.

12 MS. A. JONES: I think we can talk about this
13 on the telephone conference if that suits Your Honor.

14 THE COURT: I am happy to do that.

15 MR. MILLIG: That would be great.

16 THE COURT: That's fine. Okay. Thank you.
17 All right. With that we are adjourned.

18 ALL: Thank you, Your Honor.

19 (Proceedings adjourned at 12:22 p.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.

6/8/15
Date

Brad Anders
Brad Anders