IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

* *	MDL NO. 13-2472S
IN RE: *	
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*	DECEMBER 13, 2016
LOESTRIN 24 Fe *	
ANTITRUST LITIGATION *	
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* *	PROVIDENCE, RI

BEFORE THE HONORABLE WILLIAM E. SMITH
CHIEF JUDGE

AND

MAGISTRATE JUDGE PATRICIA A. SULLIVAN

(STATUS CONFERENCE)

ATTENDEES:

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13 DECEMBER 2016 -- 2:00 P.M.

JUDGE SMITH: Again, welcome everyone. And so I do understand you had a good, productive conversation with Judge Sullivan, and that's good; and so I haven't gotten a full briefing on that, but maybe some of the things that you wanted to talk about today, maybe some of that has been short-circuited a little bit with the conversation with Judge Sullivan.

So I guess what brought you here is this letter that I received from Plaintiffs' counsel suggesting that discovery wasn't moving along quite as well as it should be. So who is going to speak?

MS. JOHNSON: Your Honor, Kristen Johnson for the Direct Purchaser Plaintiffs.

JUDGE SMITH: All right.

MS. JOHNSON: I think all of the Plaintiffs share the same perspective on these issues; and with respect to the End Payors, if they disagree and want to chime in, I have no doubt that they will.

So I thought what we might do, your Honor, is address three categories: First, what the parties have done since we were here last, which is considerable; second, where we go from here; and then third, in anticipating what the Defendants' position may be, why Plaintiffs are of the view that discovery should start

now or soon rather than wait for an order on the motion to dismiss.

So in terms of what we've accomplished. All of the parties have served initial disclosures. The parties have also served RFPs. They are the largest RFPs that I have ever seen in any antitrust generic delay case. They are thorough and comprehensive. They give, I think, a very fair picture of what discovery will entail in this case.

The Plaintiffs have responded to RFPs, meaning have served written objections and responses. We've not produced documents. And we have consistently held that Defendants need not produce documents yet but that we would raise that with the Court at the conference.

The parties have also -- I thought we had completely agreed on custodians, and I was advised this morning that as to the Direct Purchasers there may be a percolating issue related to the relevant market and downstream discovery issues that may potentially pull in an additional custodian or two. Of course in my view it doesn't, but the Defendants wrote that. But my understanding is except for that and perhaps an issue of the retail, we are far and large done with custodial (inaudible).

The parties largely agreed on search terms.

There are a handful, I think about a dozen that we addressed with Judge Smith this morning -- excuse me -- with Judge Sullivan this morning, and the parties are going to meet again next week with Judge Sullivan to try and finish that discussion.

The Plaintiffs have also served subpoenas on generic manufacturers to collect both data and documents relating to the generic's readiness, willingness and ableness to launch earlier in time than they did, as well as to collect their sales data, which is relevant to damages in this case. Our economists want that.

The Defendants have teed up the market power and downstream discovery issue with the Magistrate. We addressed that this morning with Judge Sullivan, and the path forward is anticipated to be full briefing, your Honor, which we can certainly visit. But we talked about scheduling with the notion the Defendants would move to compel on both relevant market and downstream discovery before the January 13th conference in the hopes that Plaintiffs would then respond quickly and it would be teed up soon.

JUDGE SMITH: All right.

MS. JOHNSON: Then we get into an area of some additional discovery that Plaintiffs have served. On

none of this, your Honor, have we required responses or taken the position that documents need to be produced, but much of it is preventative.

Plaintiffs served interrogatories, as we thought that might help the parties understand what discovery is to be done over the next couple of months.

Plaintiffs also served, as I said, our written responses and objections to RFPs to give the Defendants a better sense of where disagreements may lie.

Plaintiffs have also subpoenaed some nonparties. We did that primarily out of preservation concerns, your Honor. During a meet and confer with the Magistrate, the Defendants informed us that some of our key custodians were in fact former employees and that the Defendants weren't sure what they had or had access to for those individuals.

So out of that recognition, we served subpoenas on three former employees, who include some of the chief negotiators of the agreement at issue in this case. And we did serve subpoenas for documents and depositions, but we put in a deposition date into next year, made clear we would negotiate when the time is right and according to the Court schedule in terms of dates, and also reiterated documents may not be produced now but we were serving it preemptively and

will work with the court's schedule on that.

We also subpoenaed two predecessors-in-interest to Warner Chilcott, that's Warner-Lambert and Parke-Davis, and that was stemming from preservation concerns as well as at the time the parties were in a dialogue as to how documents Warner Chilcott may possess from its predecessors would be searched.

Now the parties have resolved the question how Warner Chilcott will address documents in the possession from its predecessors, so I think that's not a live issue the Court needs to be concerned with.

And, finally, we subpoenaed Eastern Virginia Medical School, which was the institution where Dr. Hodgen worked at the time. Dr. Hodgen sought the patent that Warner Chilcott maintains covers Loestrin 24, and those documents are quite old; again, stemming from a preservation concern mostly.

The Defendants objected to some if not all of those subpoenas. They can certainly explain their own position. But the Plaintiffs' understanding was that the Defendants view CMO-4 that the Court had entered did not explicitly permit the Plaintiffs to serve subpoenas. The Plaintiffs thought given preservation concerns, the federal rules, it was appropriate to do so, so long as they weren't demanding they be responded

to contemporaneously.

That's what we have done, your Honor. You'll note in the letter we provided to the Court some other discovery things that the Plaintiffs thought we could do and potentially get done before the status conference, but in the Defendants' view those didn't make sense and so those were not accomplished.

So I think then, your Honor, the question becomes where do we go from here, and I thought it may make sense to preview for the Court the Plaintiffs' view of what discovery looks like in this case.

JUDGE SMITH: Okay.

MS. JOHNSON: So the Direct Purchaser Plaintiffs have two counts, two claims, two causes of action. The first is a reverse payment agreement between Warner Chilcott and first generic Watson. The second is an overarching anticompetitive scheme claim. Now, that claim includes several pieces, each of which we say is enough to be anticompetitive on its own, but we have pled one count alleging one scheme that includes a Walker Process patent fraud type claim, type allegation, as well as a sham litigation allegation; meaning that we allege that Warner Chilcott's litigation against first generic Watson was a sham in the sense that Watson would have won at the end of the

day if it had actually proceeded to decision on the merits.

We also then allege a hard product hop, meaning that Warner Chilcott launched a tweaked version of Loestrin 24, called Minastrin 24, and then pulled Loestrin 24 off the market. Product hops have been found by courts to be anticompetitive by virtue of the fact that it prevents generic substitution. So if generic Loestrin 24 manufacturers make it to the market, say they lunch a product, but Loestrin 24 is no longer on the market, a pharmacist can't fill a Loestrin 24 product with a generic Loestrin 24 product. And I won't launch into a further discussion of case law, but some courts have sustained that as an antitrust allegation. That's our scheme claim.

So I think the question then, the Defendants suggested that we ought to hold off discovery until we have a decision on the merits. But having thought long and hard, and I'd mention -- I don't want to leave End Payors out.

The End Payors and I think the retailers have a third claim, which is that the agreement as between Warner Chilcott and Lupin, the second generic, also includes a payment and is anticompetitive.

So the Plaintiffs sat down and thought

through -- well, let me start with this observation. In the Plaintiffs' view, it is unlikely that the Court will dismiss the reverse payment claim, and that's not because we're trying to predict what you might do, Judge Smith, but rather in light of the First Circuit's decision in *Loestrin* and then the First Circuit's recent reiteration of that principle in its *Nexium* decision. So given that background, we think it is likely that the reverse payment claim will remain.

Given that, we sat down and tried to think about, okay, well, so what is there in terms of discovery on the reverse payment claim and how might that differ from discovery on the overarching scheme claim; because we would concede if discovery on the overarching scheme claim was radically different and included substantial burdens, right, we should have a conversation about whether or not now is the time.

So discovery on the reverse payment claim: The first bucket of materials that we're looking for are the agreements between Warner Chilcott and the generics themselves, literally, the agreements. We have copies of those. We don't have drafts. We've asked for drafts. So that's one bucket.

The second bucket would be documents and testimony about the parties' views and positions when

they sat down at those negotiation tables, meaning what did Warner Chilcott perceive to be the strengths and weaknesses of the patent case; what did Watson perceive to be the strengths and weaknesses; what were the parties' position at the time; were there threats that either were facing that would have pressed them to settle.

We think the First Circuit in *Nexium* suggested -- and let me clarify, because a lot of us are involved in the petitions for rehearing filed in that case, so let me say that on the record. But the First Circuit in *Nexium* suggested that you may need evidence about the patent merits in order to bring a reverse payment claim, because the patent merits go to both potentially what a competitive settlement, a no-payments competitively negotiated settlement would have looked like in terms of a generic entering earlier, what the terms would have been.

Also, patent merits evidence goes to whether the generics would have won the litigation, which is another way that Plaintiffs might get a generic on the market earlier in time. And it also goes to whether or not a generic may elect to launch at risk.

All of those are ways that a generic could get to the market earlier, that the *Nexium* court referred

to, all of which have underlying them the necessity to develop some record about what the patent merits look like, what the strengths and weaknesses of the patents were and what the parties perceived them to be.

The third bucket of discovery for the reverse payment claim would be market power.

JUDGE SMITH: Stop there and let me ask you a few questions about this, because one thing that seems pretty straightforward is the patent file and all the records that exist with respect to the patent litigation, and I don't remember how far that litigation had gotten before there was a settlement, so I don't know how much of a record there is; but that seems fairly straightforward.

But beyond that -- and I also understand what you're saying about the agreements, although you suggested both documents and testimony. So you're suggesting there that you want to take depositions with respect to the people who were involved in the negotiation of the agreements, to get their perceptions of what the value of those agreements were at the time they were negotiated?

MS. JOHNSON: Yes, your Honor, among other things. But it is customary in these reverse payment cases that those who negotiated the agreements are

often lawyers, not always, are in fact deposed; and to the extent that the attorney privilege is asserted, it's asserted on a question-by-question basis which, of course, allows the Defendants to carve out the scope of their assertions of that privilege.

JUDGE SMITH: Yes.

MS. JOHNSON: Now sometimes, right, Defendants also assert an advice of counsel defense, in which case there is no attorney-client privilege, and you're entitled to delve into that. We've not gotten to that point in the case.

JUDGE SMITH: I understand. I just want to make sure I understand what the scope of the discovery should be you're suggesting.

So we come to the patent documents, and I understand the case file, but delving into the strength and weakness of the patent case, doesn't that necessarily involve some pretty extensive expert testimony about -- I mean it stopped; right? So you have to have some kind of testimony from somebody who is going to evaluate strengths and weaknesses, and other than the lawyers saying we think we had a great case and we think you had a lousy case, whatever, don't you need somebody who is going to explore that? So is that what you're referring to when you talk about

evidence, you know, that probes strengths and weaknesses?

MS. JOHNSON: So it would be a number of things. Sometimes there are experts that review materials and may offer opinions as to who they think would have won or lost or what the odds may be, the probability of winning or losing.

But before we get to experts, your Honor, what our RFPs have asked for is communications within each party reflecting their views of the patent merits; right? So, for example, what we're trying to get at would be an e-mail of people internal at the company saying, well, I read that reply and that really seems devastating to me, we really ought to settle, or this expert came in, I'm concerned about the expert, here's what we'd like to do.

Now, I recognize -- because I want to be straightforward about it -- very often those things we would like to have are in fact privileged and Defendants list them on a privilege log and I don't get them.

What I do get though often is reflecting discussions going on at the company about some of these things, which can be helpful at a deposition.

But just the pleadings, for example, unsealed

pleadings from the patent infringement case, the expert reports from the patent infringement case talking about the issues that they thought, the unsealed fact proffers and exhibits at summary judgment; all of those materials would be things that we would be looking for as well that would get into the patent merits.

MR. PERWIN: Scott Perwin for the Walgreen Plaintiffs.

We're not suggesting we (intelligible) of experts before fact discovery, but we're just trying to get the predicates in fact discovery.

MR. CARNEY: Peter Carney for the Warner and Watson Defendants.

JUDGE SMITH: I don't want to stop you, and I'll give you full opportunity, but I want to go ahead and let her lay this out and let me ask a few questions and then get the Defendants' perspective.

And you obviously are a lot more up on the case law than I was, but I thought there was suggestion in *Actavis* -- and it's a long time since I've gotten my head into this case and so now I have to get back into it obviously -- but I thought there was a suggestion in *Actavis* that relitigation of the patent case was not something that we should be doing in evaluating the sort of the baseline of the, you know, measure of the

unreasonably large payment.

I have to look at the cost of the defense, the cost of litigation, I should say, of the patent case, but not -- I thought they were suggesting not getting into the underlying merits and try to make those kinds of assessments.

You have your hand up.

MR. BUCHMAN: Yes, your Honor. Michael Buchman for the End Payor Plaintiffs, and that was a note I made to respond to your question, which is that in *Actavis* the Supreme Court said that the size of the payment can serve as a surrogate for the weakness or strengths of the validity of the patent and that there is not necessarily a need to redo patent validity in connection with an antitrust case such as this. So the size of the payment can serve as a surrogate.

JUDGE SMITH: That's exactly what I'm getting at.

And so it seems to me, I thought that the measuring stick and, you know, and I'm being overly simplistic maybe, but I thought the measuring stick suggested was you look at the cost of litigating, not the likely, you know, not the likelihood of success or not success, but what's the cost of litigating the patent case, and then you measure the payment against

that.

MS. JOHNSON: That's exactly --

JUDGE SMITH: So why do you need to get into all of this deeper background about the patent case? That's what I'm getting to.

MS. JOHNSON: So your Honor is absolutely correct that *Actavis* says the size of the payments serve as a proxy for patent merits, so that makes the size of the payment important in discovery as well.

What the First Circuit has suggested now in *Nexium* is that there still needs to be evidence that allows you to allege that a generic would have gotten to market earlier than they in fact did. And --

MR. PERWIN: Private cases.

MS. JOHNSON: And private cases, that the Plaintiffs need to show causation and injury, which means they need to make a showing that a generic would have actually been able to get to market earlier than it did.

Now, we can argue about exactly what is required in that showing to make that showing, but what I think it is suggested in the First Circuit's recent *Nexium* decision is that there needs to be some evidence about the patent merits in order to substantiate the showing the generics could have gotten to market earlier;

whether that is by winning or whether the patent was a sham from the beginning, never should have existed, but different pathways to get generics there, but underlining many of those requires some information about the status of the patents.

JUDGE SMITH: So you're saying that that suggestion necessarily brings back into it the merits of the patent case?

MS. JOHNSON: At least, your Honor, we think to be diligent in prosecuting our case requires us to take discovery on those issues.

Now, what discovery shows, this may be a nonissue; right? There may have been six generics in the wings ready to go and sitting on our hands for 12 months. I don't know that. We haven't done that discovery yet.

But at least it's something that we feel obligated to inquire into in light of the First Circuit's *Nexium* decision.

JUDGE SMITH: All right. So keep going.

MS. JOHNSON: So then I would say that the third bucket of discovery that we will be looking at to litigate this reverse payment claim would be related to market power, and that's either, of course, direct evidence of market power or evidence of relevant

market; what products compete in this market, what do the economics tell us about the market.

That's the subject of a motion to compel that the Defendants --

JUDGE SMITH: That was my question. Isn't the scope of that discovery really determined by the motion to compel outcome? I mean I guess there's a, you know, you could define -- everybody could agree on the Loestrin and Minastrin. Everybody can agree on that; right?

MS. JOHNSON: Yes.

JUDGE SMITH: But the rest, isn't that up in the air until the motion to compel is resolved?

MS. JOHNSON: Yes and no, your Honor. So the Direct Purchaser Plaintiffs have agreed to run, I had forgotten, either nine or 10 search terms, and the Defendants agree that we ought to run those terms. So in that sense we've agreed to some universe; right?

And the Plaintiffs, I would suggest, are prepared to run with those terms and do those searches. I'll speak for the Directs. We hate to go back to the well, but if we had to go back to the well we would do that and run additional terms. So there are some significant universe we've agreed to run.

And I'll say, your Honor, and I'll try to stop

myself from arguing it, that's eight more search terms than I've agreed to run in any other case, and that's the specifics of the facts here. So we're running a large universe, from the Plaintiffs' perspective.

So, yes, so it's certainly the case the motion to compel will have bearing on that.

I'll note, however, that in every other generic delay antitrust case I have done where there have been disagreements on relevant market and motions to compel, they're generally dealt with a little later on in the case. Oftentimes plaintiffs run their search terms, return their documents, and those documents include, by the way, information about the other products that the defendants are seeking as hits. Those will come back as hits, given the search terms we're running. Defendants take a look at those and tell us if they think they need more, and at that point we tee up motions to compel.

So in the ordinary course, so to speak, while everyone tries to deal with the issue early, it has not stopped the process, so to speak; it's sort of dealt with, and if we have to go back to the well we do.

JUDGE SMITH: Okay.

MS. JOHNSON: The fourth bucket involves some discovery from the Defendants, but it's really from the

generic companies. So the fourth bucket would be evidence showing the generics were in fact delayed by the Defendants' anticompetitive acts.

And we have served subpoenas on some generics. I think we've got another ready to go out shortly. We held that; we didn't want to do that until after the status conference.

But that's discovery that comes from the generics themselves, although it will require in this case discovery from the Defendants relating to the authorized generic, because that's a generic that we say would have been on the market but for the anticompetitive act and then, of course, to the extent that there's some search terms we've agreed to that get at this, your Honor. So I don't think this is a live percolating discovery issue.

And we have had some favorable initial conversations with the (unintelligible). We've received subpoenas, we've received some data -- I think only data from generics. I don't think we've received documents from generics, but they're willing to work with us here, your Honor. Subpoenaing the generics has become rote in these cases and they understand what we're asking for and we tend to work together pretty well on it.

JUDGE SMITH: Okay.

MR. PERWIN: Scott Perwin for the Walgreen Plaintiffs.

What my clients would like the Court to do today is to rule that the pendency of the motion to dismiss is not a bar to going forward with the discovery.

There may be discovery-related issues like the motions to compel that have to be resolved in order for things to happen. My clients would prefer not to run searches twice, so we may -- and this may vary from group to group -- but the last time we were here we were under the impression that these motions were going to be argued in August of 2016, and now they're going to be argued in January of 2017, and so we just think the motions to dismiss should not preclude going forward with discovery.

If there are discovery disputes that have to be resolved in order for things to happen, Magistrate Judge Sullivan can handle those issues. And as I said, it may be individual to the three Plaintiff groups.

But we don't think that there should be -- this case is several years old, the pendency of a second round of motions to dismiss, after all this time should preclude going forward with discovery. That's what we're asking for.

JUDGE SMITH: Sure.

MS. JOHNSON: And so I think, your Honor, it might be helpful -- I'm sorry, Michael.

Let's get to brass tacks and talk about what's different or additional discovery would be required for the overarching scheme claims. I think that may help crystallize some of the issues.

So I think about it as what else would we need, right, to prove the overarching scheme plan. So there's basically two components there. You can talk about the Walker Process and sham litigation, which requires discovery of the same universe of documents, and you can talk about the hop piece.

So on the Walker Process and sham litigation, as we just talked about, your Honor, just on the reverse payment claim we still have to prove, under *Nexium*, the generics would have gotten to the market earlier, and that requires some discovery of the patent merits.

Now, how much, right, how deep we have to get into the weeds may be a topic of debate, but at least the notion that we'll have to get into that is, is embedded in the reverse payment plan itself.

Another way is, one option to get generics on the market earlier is to say suppose there had been no payment, but suppose the same parties on the same day

and same circumstances had set down to negotiate a competitive arm's length agreement with no payment tipping the scales, so to speak. What would the conditions at the time have dictated be the competitive outcome as between those parties?

That again requires understanding the parties' negotiating positions, what they thought of their case, what the other side thought of their case, what the tipping points and the pressure points were. So we think all of that is embedded already.

The only potential additional discovery that would be needed on the Walker Process or the sham litigation claim would be some information about the Warner Chilcott executives' role in acquiring what became the Loestrin 24 patent, when they acquired it, what the terms of the license were.

Now, I say that may be additional because the reality is the same executives who were involved at Warner Chilcott executing -- negotiating the agreement to settle the patent litigation was challenged, those executives were the same executives who were involved in obtaining the license to the Loestrin 24 patent much earlier in time.

So those executives are likely going to be deposed. Their documents are being searched or are the

subject of disputes that we're putting before the Magistrate; but it's largely the same universe of individuals.

So that brings us to the hop piece of this scheme, and on the hop, there's really two pieces to our hop claim. The first involves the repeated filing of an NDA for Minastrin with the FDA, then settlement of litigation with generic, and then pulling the Minastrin NDA, meaning withdrawing it from FDA consideration.

That serial filing, settling, withdrawing the Minastrin happened at least twice, if not three times. I'll stick with twice. That's one piece of it, of the hop claim.

The second piece has to do with the fact that this is a hard switch, meaning the brand launched Minastrin 24, converted prescriptions from Loestrin 24 to Minastrin 24, and then pulled Loestrin 24 off the market a few months later, interfering with the ability to have generic substitutions for Loestrin 24. And again, courts have found that is an anticompetitive violation.

So if you think about it, what would be needed for the hop claim that's not already part of the discovery that we're seeking for the agreements claim?

And it's very little, if anything.

What we're really looking for here would be corporate documents, internal documents that show what Warner Chilcott was trying to do with Minastrin both in terms of the filings and the withdrawing and then just the general goals for that product.

And then information about how those products differ, how Minastrin 24 differs from Loestrin 24; and I think the Defendants have conceded that information about the differentiators between those products and other birth control products as part of the relevant market discovery that we're already doing.

In terms of the corporate documents, one of the things that's interesting here is the timing of this filing and withdrawing of the NDA. One reading of that is that the NDA was filed. That could have presented a threat to a generic at the time, understanding that they may all of a sudden lose their valuable generic Loestrin 24 launch position because there weren't going to be prescriptions for which it could be substituted.

So at the time the parties sat down at the table to negotiate, the existence of that NDA may have been a threat to the generic that would put further pressure on them to settle and/or accept the payments that we allege. So we think that's implicit in the agreement

claim.

Let me say -- because I want to make sure I'm not misleading the Court or the Defendants on this -- I don't know whether the generics were aware of the NDA being filed. The timing of the filing and the withdrawing suggests they may have been, I don't know that to be the case, but it's certainly something we'd like to take discovery about.

So at the end of the day, your Honor, we see very little, if anything, that we would need for discovery of the scheme claim that we wouldn't be entitled to anyway to pursue our agreement claim.

And without trying to make predictions about what your Honor might do, we do think that the First Circuit's decision on reverse payment are pretty telling here, and given that and given, as Mr. Perwin pointed out. The pendency of time, we're three-and-a-half-years in, we would really like to get started with serious discovery.

JUDGE SMITH: Okay. Thank you.

So, yes, Michael Buchman.

MR. BUCHMAN: I echo the comments just made, but I have one very succinct point to make.

As counsel involved in the *Twombly* case, we're all familiar with the plausibility standard established

by the Supreme Court in that case. But notably that case afforded the Supreme Court an opportunity to say that the discovery in antitrust cases would be stayed pending resolution of a motion to dismiss.

It did not do that in *Twombly*. There's no rule to that effect. There's nothing barring discovery from proceeding in an antitrust case pending resolution of a motion to dismiss. And discovery, with all due respect, given the 3.5 years that has passed so far in this case with regard to at least the reverse payment claim should go forward.

Thank you.

JUDGE SMITH: Okay. Thanks. All right.

MR. CARNEY: We disagree about the merits of the motion. We believe there is a strong motion. There are, as the Plaintiffs acknowledged, new claims brought that were not before your Honor on the first go around.

But putting that aside, on the point that went up to the First Circuit, the First Circuit remanded back down, basically acknowledging we had other points to address. They include statute of limitations, they include market power and whether or not this was a large and unjustified payment; and we had argued at the prior motion to dismiss and briefed those and done so again, and we think they're very good arguments on

that.

You have an almost half-hour list, maybe 20 minutes, of what we have been doing to date, and there has been a lot going on. We have a team of lawyers that have to respond to everything that's going on. It's expensive. It costs tens of thousands of dollars. This is not a case where nothing has been going on.

Your Honor ordered four things to happen under the CMO: The initial disclosures, SI protocol, search terms and sales data. We've basically done all those things, spent a lot of time trying to do them, and with Magistrate Sullivan are getting close on the search terms. That shown the burden.

There are other steps that were mentioned that were not ordered by the Court but the parties proceeded with in the interim, which included the Rule 502(d) order.

We've pretty much hammered out an expert stipulation on the scope of expert testimony.

Defendants proposed a HIPAA-qualified statement to the Plaintiffs.

And maybe the biggest thing is we started negotiating custodians, which is a huge amount of time. Dozens of letters have gone back and forth. Both sides

complained about the endless number of letters. It's a lot of work.

Our client agreed to 35 individual custodians, five departmental custodians.

I think Lupin is largely done.

Plaintiffs' custodian is in progress.

As was mentioned, there are going to be issues around the product market issue. To us it's not just a matter of common sense that these oral contraceptives all compete with each other.

There's two or three federal court decisions that they acknowledge (unintelligible) highly competitive, the *Yaz* decision, the *Ovcon* decision, and the *Loestrin* decision. All of those, frankly, go to the implausibility of the market they have proposed. We think it's a quick way to dismiss on a motion to dismiss, but if that's not the result, that's going to be a significant area.

The *Doryx* decision, the *Doryx* decision, which was decided recently, many of the lawyers in the room were involved with, and that was a grant at summary judgment on an oral tetracycline product used to treat acne. And the district court there found based on the evidence that tetracycline is basically competed, and when you looked at the math, the market share, the

brand dropped to 18 percent; it wasn't a monopoly.

Very similar case to here. It was our client that was involved in that. And we see that as a very important issue. We teed that up early in the case, that in itself as a result of the custodian issues, because we want to get information once we get going on this as to formularies that the court in *Doryx* said when they went to the market, basically, you have insurers, some of whom may be plaintiffs, make a living and it's their business to have their members substitute from an expensive brand to a cheap generic that may not be AB-rated, but if it's sufficiently safe, and they have PT committees that make those decisions and say it's safe to do it, and that saves everybody money. When they do that, though, they're making this judgment they are a substitute, and that's one of the things that *Doryx* pointed to.

So we would like to get from some of the companies here, like Kroger, for instance, maintains a formulary, CVS does, whose areas we were told downstream discovery are too far broad. But we're seeing in *Doryx* that that's exactly what tipped the decision.

JUDGE SMITH: But you got a motion on that. I've read your --

MR. CARNEY: Yeah, yeah, and I had --

JUDGE SMITH: One at a time.

MR. CARNEY: Yeah. And --

JUDGE SMITH: Hang on. So when I say "one at a time," that means I go.

(Laughter)

JUDGE SMITH: I read your letter. It was thorough and clear that there's going to be a very fulsome briefing on this point, and that will probably be referred to Judge Sullivan, but maybe not, maybe we'll collaborate on it because it seems to me it's a very important decision about what the scope of the case is going to be, what the scope of the discovery is going to be.

So you've got that teed up and you've got a schedule set for that.

MR. CARNEY: Yes, your Honor. And frankly we weren't looking to tee that up or get going on that before the motion to dismiss. It's just that it comes up with the search terms, because they've basically said only search for nine drugs, and there's a range of other things, so we put that in on the search terms. And when we brief fully, I think we need to have to get into the custodian.

So to almost raise that as example of all the

work that we've had to do in this time where we're told that discovery is not going in earnest; those have been going on.

The Court allowed certain subpoenas to be issued for data in certain circumstances. The Plaintiffs saw fit to serve additional individuals for preservation purposes for the generics, and apparently may be getting not just data but documents back. But I mean things have kind of ballooned, and there may be good reasons they did that, and I'm not actually here to complain about those things. I'm just saying there's a lot going on.

And you're going to see us again in 30 days for the oral argument. We think just doing the things that are already on the docket in terms of the custodians, getting through the motions, the product market and those things puts a lot on everybody's plate as it is.

JUDGE SMITH: Let me just sort of pause for a minute and just talk to you a little bit about kind of my view of the case from a higher level, and I just have a couple of thoughts about it.

First of all when it comes to the delay that has occurred in the processing of the Complaint, frankly I don't feel guilty about that. I mean that's just the way it goes. I didn't write *Actavis*. The Supreme

Court wrote *Actavis*, and they said all the stuff they said; and I got a legitimate motion to dismiss and I decided that, you know, I knew when I decided it it was a decent chance it would get reversed, but I thought it was a close call, and I was working with what the Supreme Court gave us. So that happens.

It takes the circuit -- how long did it take the circuit to decide this case? Must have taken them a year, I would guess at least a year; probably more than that.

MR. PERWIN: Nobody is criticizing you.

JUDGE SMITH: I know. I'm not saying this because I feel, you know, that I'm sensitive. I'm not sensitive, believe me. It's not why I'm going through this.

I'm just telling you that the delay, if you want to call it a delay, the time that's occurring here has just been the way that cases like this go in the cutting edge area of law and that's just the way it is.

So most of that was taken up with the motion to dismiss and the appeal, and now we're back. So that's point number one.

Point number two is when I had you in for the case management conference that we had, the goal of that was to try to walk and chew gum at the same time.

There was going to be an additional motion practice challenging the new complaint, and we knew that, but the idea also was to try to get moving on discovery so that the case was moving along; and I think we set some pretty limited goals or limited areas where discovery would occur. But the idea has always been to move on parallel tracks, so, and I think you all have done all the things that were in the Case Management Order and more.

Point three is then there have been some delays associated with getting the second motion to dismiss fully briefed and scheduled for argument, and some of that I think was the time that you all wanted to file the very, very, very lengthy briefs that you have filed, thousands of pages that I'm going to end up spending my whole Christmas holiday reading, right; and some of it was my schedule which had a lot of issues come up, so we had to kick out the argument. And that's what brought us here.

So I think it is legitimate for the Plaintiffs to say it's time to take another look at what is being done and what can be done so that we can keep this case moving; because my fourth point is really, you know, and I say this having not read your briefs yet on the motion to dismiss. We're working on getting that all

prepared.

But you have to admit there's a reasonable chance the Plaintiffs are going to survive this motion to dismiss; and so if that's the case. We have to be looking down the road to getting this case managed and processed into an eventual trial.

And you've got a lot to do between now and then, a lot of discovery that needs to happen. Is there going to be a summary judgment process that will happen? I imagine there is going to be extensive expert both, you know, expert discovery, but also I imagine some *Daubert* challenges eventually.

And I want this case to move; I want it to, I want it to get moving. I have no interest in seeing this play out one procedural step at a time, and I felt that was clear from the original Case Management Order which did contemplate that you would be working on getting the discovery going at the same time you were working on these dispositive motions.

So that's a high-level overview of how I look at this. If we don't do that, this case is going to go on for years and years, and I really don't want to see that happen.

So the question becomes -- and this is a very comprehensive overview of what needs to be done, what

could be done in terms of discovery -- and the question becomes why can't we move forward, you move forward on all or some of this discovery? I mean I'll just give you a couple of examples.

I can't see any reason why you couldn't produce the entire record of the patent case now. What could be the holdup for that?

I can't see any reason why you couldn't produce all of the agreements that relate to the settlement, with appropriate protective orders.

MR. CARNEY: We've produced the agreements. I'm hearing now it's kind of all drafts basically. So we have produced the documents and the Watson patent litigation file in 2014.

MS. PAPENHAUSEN: Everything in the whole patent.

JUDGE SMITH: Well, I was under the impression that you haven't received the patent.

MS. JOHNSON: We have pleadings, many of the pleadings. We don't appear to have all of the pleadings, and it's unclear to us that we have the expert materials or the discovery produced in exchange between the parties. And we can go back and certainly have a discussion if Warner Chilcott's position is they think we have everything.

JUDGE SMITH: Do that.

And the final agreements, I don't see any --

MR. CARNEY: That we've done.

MS. JOHNSON: We did that. We don't have the draft agreements, but we have the final.

MR. PERWIN: Don't have documents involving negotiations.

JUDGE SMITH: All right. We'll get to that. And what about that? Let's talk about that.

In terms of documents -- I'm not talking about the depositions -- but documents, what about producing documents associated with the negotiations? I mean there may be attorney-client privilege issues that we need to deal with, but you deal with those.

MR. BLAD: Your Honor, Leiv Blad for Lupin.

Your Honor, we're 30 days away from a motion to dismiss argument, and we are hopeful that we can get some relief, maybe all of the relief we're seeking.

We're willing to compromise in light of your comments here today, but we really would like to avoid the scope of the discovery that the Plaintiffs have suggested here, including just discovery going forward completely.

Lupin spent a lot of money in discovery so far and would like to avoid as much cost as it can. But to

the extent we can compromise with the Plaintiffs, we would be willing to produce documents, like the patent records to the extent it hasn't been, the file, to the extent it hasn't been provided, drafts of the agreements.

But we would ask the discovery that's allowed before at least the argument, once you've had a chance to go through the briefs -- and I would suggest you start with Lupin's brief. It's only 10 pages and you can get through it quickly.

MR. PERWIN: You need to read the response though, Judge.

(Laughter)

MR. BLAD: That we do have documents in those categories in advance of the hearing on the 13th.

JUDGE SMITH: Well, that's not an unreasonable suggestion. We can take this in steps. But frankly that's what I'm driving at with my comments is that at least the document discovery, that could be done, it seems to me. We're not talking about depositions at this point. I think a lot of that could be done even prior to the 13th.

And so now we can move on with some of the things in the list that you went through and can see what else can be produced.

MR. CARNEY: If I might, for the Warner Defendants on the documents. If there are targeted sets of documents like that, like the negotiation documents, we hear you on that.

What I think we want to avoid and echo with what Leiv Blad is a situation we have got to load up all the custodians, all the processing, all the data defines, and say here is everything that has to deal with the negotiation.

If what we're talking about instead is a strategic look at who were the negotiators basically and, you know, what do we know about the correspondence and producing that, that sounds like a doable interim step consistent with your Honor's idea of taking it in steps.

It might be later as the case goes on, you know, wind up popping up some e-mails that, you know, has a draft or something like that, yes.

But in terms of taking it step by step, that is something we could focus on.

MR. PERWIN: Judge, what you say, what may be the thing to do is to rule that the pendency of the motion of dismiss not bar it, and deal with the discovery with the Magistrate Judge Sullivan.

I didn't hear Mr. Carney give any reasons why

the pending motion to dismiss should prevent discovery. I heard all about the material he wants from us, the downstream and product market. Well, we can work that out with Magistrate Judge Sullivan.

I didn't hear any reason why after three-and-a-half-years we shouldn't be moving forward with the discovery, subject to the rulings that have to be made on discovery issues. But those are not issues necessarily that are part of the motion to dismiss.

JUDGE SMITH: Well, the way I read the civil rules and particularly the recent amendments and the chief justice's comments are that district judges should be actively involved in managing cases, administering the discovery process and avoiding motion practice that you just referred to.

So I actually think it's my role along with Judge Sullivan, and that's why we built that process into the Case Management Order that you had to meet and confer and consult with her.

But it's our job, frankly, to try to do this sort of thing and anticipate the problems and stage the discovery so that we don't end up bogged down in motions about, well, we want this and we don't want to give it to you.

MR. PERWIN: I didn't mean to suggest otherwise.

I think you should manage the case by lifting the stay on discovery and letting us move forward.

JUDGE SMITH: And they think I should rule in their favor on the motion to dismiss.

MR. PERWIN: We should move forward with the discovery, and I think there's a motion pending that's probably going to get denied in part.

JUDGE SMITH: I understand your position. I'm inclined to do it in a little more piecemeal basis.

MR. PERWIN: Yes, sir.

MS. JOHNSON: If I may, your Honor. Two other categories occurred to me as things that may be relatively easy, I don't know, for the Defendants to address before the January 13 status conference, and I put them out there by way of discussion.

One would be to the extent there's a need to secure consent from any of the parties in the patent infringement action, to have materials produced by that party or filed by that party, produced, we'd like the Defendants to work with us, or on their own, depending on how the productive order is written, to attain that consent or get the process started.

The second would be it would be nice, but I put it that way intentionally, to have at least written responses to the Plaintiffs to the RFPs that the

Plaintiffs served on the Defendants before the status conference.

And I don't say that in any sense because I want to ruin the Defendants' Christmas vacation, but rather it seems to me that by the time we're back here in January we may be further discussing where we go next, and I think having those written responses would be very helpful for the parties to continue to have that conversation.

MR. CARNEY: We can do both of those things, your Honor, yes.

JUDGE SMITH: Okay.

MR. CARNEY: Consistent with the piecemeal approach.

JUDGE SMITH: Let's recap where we are. So the Defendants and I guess the parties will confer about the patent file and whether the entire file has been produced or not, and if it hasn't we'll get the full file produced.

Do you see any problems with anything that's in the patent file not being produceable? Expert reports, depositions, anything?

MR. CARNEY: I think the bottom line is that we will be able to produce all those things, and it's a question of just what if there's a privilege review

that has to be done and the issue of the consent to figure out. But that is something we can do, yes.

MS. JOHNSON: I think the privilege review for the patent file, meaning the litigation materials is what -- I want to make sure I understand what the Court is referring to. I understand that to be the litigation materials, discovery, depositions, pleadings, expert reports.

MR. CARNEY: If that's what it is, then there shouldn't need to be any real -- that's all we're talking about, yeah, yeah.

But there may be a consent issue about the protective order and we'll work with the Plaintiffs as getting through that, as we do in other cases.

JUDGE SMITH: All right. And then the second thing we talked about was the agreements, a review of the agreements, and you say all the final agreements have been produced.

Now, what about drafts?

MR. CARNEY: We've not produced drafts yet.

JUDGE SMITH: Can those be searched for and reviewed for -- I imagine you have to do a privilege review with respect to the drafts; right?

MR. CARNEY: Yes. We can do that.

JUDGE SMITH: You can get that process moving.

MR. CARNEY: We can start that process. I don't know the answer how long it takes to find them all, but we can start that process.

JUDGE SMITH: Okay. So can you -- I think that's something you can confer on and try to come up with once you figure out how long it will take and confer on what will be the end product on that.

You'll have your search terms done hopefully with Judge Sullivan's help; get this finished, right, soon?

MR. CARNEY: That's our goal, subject to whatever is outstanding on the motions.

JUDGE SMITH: So then what happens when you, you begin the -- do you do anything with the search terms? Do you begin the running of the searches, or what?

MR. CARNEY: That would be the next step in occurring significant cost of uploading custodians and data. We agreed on the custodians and begun the process of laying out what is hundreds of thousands of dollars basically for 35 individual custodians and five departmental custodians, sucking that all into a machine and running analytics and doing it.

So that's kind of the area where we would like to put that off, and I think I heard Lupin saying the same thing, until after the -- get a sense of what the

motion to dismiss ruling is.

JUDGE SMITH: Uh'huh. Okay.

Go ahead. So I understand you're close to finish on the custodians; right?

MS. JOHNSON: I thought we were done until today. So I think we're very close, yes.

MR. CARNEY: Yeah, we are largely. I think there are some issue from the product market aspect, but, yes.

JUDGE SMITH: All right. So let's put that as a question mark to running the searches.

The fourth thing was the responses, written responses to the RFPs, and you said you can get that done by the date of the argument.

MR. CARNEY: We will do that, your Honor.

JUDGE SMITH: You've got the market power. I'm just going to put this on my list. The market issue is teed up, so that will be resolved by that process.

Then you mentioned some discovery on the generics, including some discovery with respect to the authorized generic. So what's involved with that?

MS. JOHNSON: What is involved with that, your Honor, would be -- well, let me say this. What would be helpful, your Honor, would be some indication from the Court that discovery is open and now is the time to

deal with these matters. That will then get us in a position with the generics to talk about actually producing materials.

The generics have not, to be clear, resisted production. They've sort of understood there was a status conference coming where we would talk about discovery deadlines and the like, so I think informal indication from the Court is appropriate for us to continue those discussions and have documents be produced would be helpful, but that's well under way.

JUDGE SMITH: All right. So why not go forward with that?

MR. PERWIN: It would be helpful if we could tell, it would be helpful -- (unintelligible).

MR. BLAD: That's not us, so I'm not going to say they can't go forward; so long as we are under no obligation at that point to engage in that discovery. If they want to seek production of documents from those third parties, you know, we're fine with that.

MR. CARNEY: I think we're fine with that as well. We have former employees to carve out from that.

But as to the generics, if we're going down that road and looking for things to do in that category, which Defendants necessarily were not, but since we're there, the two other areas of third-party subpoenas

that the Defendants need to do in the case is to the competitors, the makers of these products to show when you look in their files, just like in the *Doryx* case, they were talking about Loestrin as a competitor and what they were taking from Loestrin.

So we want to issue third-party subpoenas to those companies.

And then the other category --

MS. JOHNSON: Before you leave, to whom are you issuing those?

MR. CARNEY: Branded competitors, so the makers of Yaz, Yasmin, big producers who have as much as 10 percent share and 1 percent share of the market or less.

The other category, and this ties into the product market motions -- we've had this in the *Doryx* case and others -- third-party subpoenas to the three largest wholesalers who purchase 90 percent of the markets. They are absent members of the class, so we'll have a dialogue when this comes up. But they are -- for example, McKesson is an assigner in this case and assigned its claims to one of the Plaintiffs' AFC and a couple of the other retailers.

And another case that courts such as the *Doryx* case and the *Aggrenox* case held that as such these

wholesalers have sort of their hat in the ring like a party, and so we go to them for their documents on product market. Many of them administer the coupon programs, and those coupon programs will change the volume of sales that a company has, and they have data on that.

This is very relevant to the product market motion that we'll be filing because one of the arguments that always comes up is that the data that the Plaintiffs have is a very small part of the total data and so it's not robust, it's not useful.

Our position is it's part of the full set of data. If you take 90 percent of the data from the big three wholesalers, plus what they have, you have a more robust picture.

Just when we approached these big three wholesalers and have the discussion about discovery, what we normally hear is we won't give you anything than what you're getting in party discovery; we want the court to tell us, you know, are you really getting discovery to all these product? And *Doryx* got an order for nine products were in basically, and we went after the big three wholesalers for that.

So that's something we'd like to get the subpoenas out, put them on notice. I don't think we

would pursue getting the discovery, because it will lead to motion practice, until the Court has had equities in balance and whatnot, but that would be another area that we could advance.

JUDGE SMITH: I think that's fine. I mean it seems to me with those understandings if it makes sense for you to get those subpoenas out at the same time we'll be dealing with the motion to compel, and I really don't think it will take all that long for us to kind of get you some kind of a decision on that and then be able to move forward or not.

MR. CARNEY: Yes, your Honor.

JUDGE SMITH: So that makes a lot of sense.

MS. JOHNSON: Your Honor, just to confirm, Plaintiffs have no objection to that. Because they are absent class members, though, we would ask we be copied on the communication about the scopes of their productions, and I think that's par for the course these days.

MR. CARNEY: We do that in other cases. We're happy to do that here.

JUDGE SMITH: Okay. What about discovery on the authorized generic. What are you're seeking there?

MS. JOHNSON: We are seeking --

JUDGE SMITH: Is that included in your RFPs?

MS. JOHNSON: Yes.

JUDGE SMITH: So you're already off and running on that.

MS. JOHNSON: That's correct, and we've negotiated search terms that try to get at those, the information about the authorized generic.

I'll say this. To the extent the Defendants have an easily accessible universe of documents that describe their plans to launch an authorized generic or evaluation of the authorized generic, we would happily take those. I don't know whether that exists.

MR. CARNEY: That's what I was weighing is what is the sort of -- and we can take this step by step if there's sort of a discrete file that exists on something and just go get it. That seems piecemeal. Whereas the RFP about authorized products has search terms and see what you get back; that sort of gets into that line of loading up the data and do the searches.

But we can look on the authorized generic. That I don't know off the top of my head.

JUDGE SMITH: Maybe you'll agree that you'll confer on the authorized generics; you'll take a look and see what you have. But short of initiating the electronic discovery and running the search terms, you can at least look for what is available with respect to

the authorized generic, you can respond to the RFPs and begin that response on that.

MR. CARNEY: Yes.

Another issue I mentioned was getting a HIPAA-protected order in place. We proposed that. That should be just a procedural thing.

JUDGE SMITH: Okay. HIPAA-protected orders, any problem in getting that done?

MS. JOHNSON: I wouldn't think so, your Honor.

MR. PERWIN: I'm not sure what Mr. Carney is talking about, and I apologize for that. But if he's suggesting that the retailers would be producing sales data on their patients, we can't do that by law, and I don't believe the Court can enter a protective order that absolves us of liability of doing that.

So if he's talking about the named Plaintiffs who are End Payors, or individual human beings, that's fine, we don't care about that.

But our information that has to do with the patients who get the prescription filled at our pharmacies is protected by HIPAA. We cannot disclose it.

We can produce aggregate data, but we cannot produce individualized patient base.

MR. CARNEY: It's a bit of all of that. It's a

HIPAA order that we've done in some other cases; to the extent we've got to produce information that may have HIPAA information in it, that we're covered from that angle. I think in some of our cases the EPPs have required that.

JUDGE SMITH: How would you provide something that has HIPAA information?

MR. CARNEY: I think where it's come up is you may have, for example, in the NDA, there may be an individual, or the New Drug Application may have information about patient testing that was done on the drug, for instance, and so that may have information about individualized patients.

I don't know that anybody is interested in that, and we would redact that normally if there's a name of a person.

JUDGE SMITH: Yes.

MR. CARNEY: And that may be the procedure we have. But to the extent there's some accidental disclosure or something like that, this is a protection to have.

And then some of the cases we had in the EPPs, and Mr. Perwin's suggesting needing this and asking for it now, you know, the issue about the retailers and that information, I haven't studied that. I don't know

if we need that, and that's something we ought to look at with the HIPAA order.

But that, there may be discussions about what the HIPAA order ought to look at. But that's the concept of the HIPAA order.

JUDGE SMITH: All right. Well, I think you all ought to confer on that and work it out.

I'm having a hard time thinking of any way that you would need data from anyone on the Plaintiffs' side that was individualized to the patients. I mean I can see maybe some aggregate data that you might request, but I can't see anything that involves individuals.

MR. CARNEY: I think it's unlikely, but we'll look at it from that angle, your Honor, yes.

MR. BUCHMAN: We represent the City of Providence and other End Payors in this case, and when we typically produce documents on behalf of the City and other clients of ours that involve personally-identifiable information, like city employees' names, contract numbers, all of that information is redacted.

So I would sort of echo what Mr. Perwin is saying; there's just no need of that information to be produced. And even with a Plaintiff like ours who is most relevant of the concern, we still don't produce

that information because of the HIPAA laws, and we always produce it on a redacted basis.

JUDGE SMITH: All right. Okay. I think that's fine.

John, weren't you involved in the Blue Cross case we did many years ago, Judge Silverstein and I?

MR. TARANTINO: I was not in that case, your Honor.

JUDGE SMITH: Maybe it was Steve Snow,

MR. TARANTINO: It was Steve.

JUDGE SMITH: All right.

Well, to the extent you ever get to that point where you think there is individual information, we worked out something in a class action case involving Blue Cross, which was probably 10 years ago, where we used an intermediary. And Blue Cross was very concerned about the personal information and HIPAA, and we were able to use -- and I forget the name of the intermediary -- but it seemed to satisfy everyone and we were able to use it. So I don't think you're --

MR. CARNEY: I don't think we're looking for that. It may have been a fallback for our client. If there is information, you know, we'd probably redact it, but if we miss something we don't want liability. If we have this order, you know, they're using it for

this purpose basically.

JUDGE SMITH: Okay.

So, let's see. You mentioned some additional discovery on the scheme and the sham litigation claim having to do with Warner Chilcott's role in acquiring the license, but you said those are the same executives. I mean don't you eventually get that when you get to the point of either documents or ultimately the depositions?

MS. JOHNSON: I think that's right, your Honor.

I also will note that we have separately addressed how Warner Chilcott is handling the Warner-Lambert and Parke-Davis documents, which likely includes that universe of materials. And Plaintiffs are happy to stick by what we negotiated with the Defendants there, which is those materials would be produced by the substantial completion date, whatever date the Court ultimately sets for that.

JUDGE SMITH: All right.

Well, this looks like a pretty good list, and if you add to that the couple of things that you said you're close on that you haven't finished, which is your expert stipulation -- and what is involved in that stipulation? If you could tell me that.

MR. CARNEY: Yes, your Honor. It's got a couple

of things in it. Partly it goes to how much discovery or deposition you can take of an expert on their work papers.

But the issue that we were hammering out is occasionally on these pharma cases the experts selected may have worked for one of our competitors; and so if the Plaintiffs were to name an expert, what we don't want is information that they get from this case helping them design a generic around one of our branded products, for instance.

So we, we've always been able to work this out --

JUDGE SMITH: Okay.

MR. CARNEY: -- through a process that just says we object, we raise the objections and get a ruling quickly so nobody spends a lot of time educating an expert that can't be used, and it has saved motion practice in the past.

JUDGE SMITH: All right.

MS. JOHNSON: Since this is taken down, your Honor, forgive me; I will note that the Plaintiffs object to the notion that we have to preclear our experts with Defendants, regardless of their backgrounds. Each side as an obligation to make sure the conflict checks are done. We take that very

seriously.

I do note here though in the interest of resolving this and getting it done we've agreed to a process. That process has implicit in it the notion that the Defendants will quickly raise an objection and the Court will quickly turn around a decision on that decision.

JUDGE SULLIVAN: I volunteered to do it, just so you know.

MS. JOHNSON: That's why I mention it.

JUDGE SMITH: As long as you don't volunteer me.

MS. JOHNSON: Judge Sullivan committed to doing that quick turnaround, and so with that in mind we've reached that compromise here, and we appreciate it.

JUDGE SMITH: Good.

So it looks to me like you've got plenty to keep you busy between now and January.

MR. CARNEY: We do, your Honor. Yes, we do.

JUDGE SMITH: So is there anything else that anybody else wants to do while we're on the record?

I mean the one other thing I want to talk about, and you can do this on the record, or we don't have to be on the record, is just to try to put all of this into perspective in kind of a big picture, long-range planning purposes and your long-range planning

purposes. I don't know we need to do that on the record.

But is there anything else anybody else wants to get at while we're here?

MS. JOHNSON: Well, I had two things I thought might be helpful to have that conversation, your Honor.

One is that we had prepared sort of a skeleton trial plan. The notion was to outline the steps that happened between now and trial -- what are some of the issues that are expected to be raised, what are topics experts might talk about -- and due to personal circumstances were not able to file that until this morning. And I didn't want to spring anything on the Defendants or the Court, but if the Court thinks that would be helpful, we would be happy to file that by the end of the week.

JUDGE SMITH: What would be the point of filing that?

MS. JOHNSON: I think it really was just a notion that it may be helpful for the Court to sort of have a projection for what to expect, how do we get this case from here to trial.

JUDGE SMITH: Why does it need to be filed?

MS. JOHNSON: It doesn't, your Honor, not at all. I think I default to that.

JUDGE SMITH: It's not a motion or anything that needs a ruling; right?

MS. JOHNSON: Correct. So we would be happy to submit it to the clerk. It's a question whether the Court would find something like that helpful. We can certainly run it by the Defendants first to try to do something --

JUDGE SMITH: We're just talking about it now, so that's what I'd like to do. I just don't know that we need it all on the record.

MR. PERWIN: We can go off the record.

JUDGE SMITH: So I just want to talk informally about it. We can go off the record.

(Discussion off the record.)

(Adjourned)

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

I, Denise P. Veitch, RPR, do hereby certify that the foregoing pages are a true and accurate transcription of my stenographic notes in the above-entitled case.

/s/ Denise P. Veitch
Denise P. Veitch, RPR

December 21, 2016
Date