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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE ANTHONY J. BATTAGLIA, JUDGE PRESIDING

)	CASE NO. 13-MD-02452-AJB
IN RE INCRETIN-BASED THERAPIES,)	
PRODUCTS LIABILITY LITIGATION)	
)	
)	
)	SAN DIEGO, CALIFORNIA
-----)	OCTOBER 23, 2014
)	3:05 P.M.
AS TO ALL RELATED AND MEMBER CASES)	
=====)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
RE: STATUS CONFERENCE

APPEARING TELEPHONICALLY: HONORABLE WILLIAM F. HIGHBERGER

OFFICIAL REPORTER: JEANNETTE N. HILL, C.S.R.
U.S. COURTHOUSE,
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REPORTED BY STENOTYPE, TRANSCRIPT PRODUCED BY COMPUTER

OCTOBER 23, 2014

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8 TELEPHONIC APPEARANCES
FOR DEFENDANTS:

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1 SAN DIEGO, CALIFORNIA; THURSDAY, OCTOBER 23, 2014; 3:05 P.M.

2 **DEPUTY CLERK:** CALLING MATTER FOUR ON CALENDAR, CASE
3 NUMBER 13MD2452, IN RE INCRETIN MIMETICS PRODUCTS LIABILITY
4 LITIGATION, ON FOR A STATUS CONFERENCE.

5 **THE COURT:** WELL, GOOD AFTERNOON TO ALL. THIS IS
6 JUDGE BATTAGLIA.

7 AND LET'S SEE. JUDGE HIGHBERGER, HAVE YOU JOINED US
8 AT THIS POINT?

9 **JUDGE HIGHBERGER:** I HAVE, INDEED, AND MY LAW CLERK
10 IS ALSO JOINING US BY PHONE.

11 **THE COURT:** GREAT. WELL, GOOD AFTERNOON TO YOU.
12 AND THEN I HAVE A LIST OF 61 LAWYERS WHO ARE
13 REPORTEDLY ON THE PHONE. AND AS I STARTED TO DO OF LATE, WE'LL
14 ATTACH THIS LIST AS THE COURT'S EXHIBIT TO THE HEARING TO NOTE
15 EVERYONE'S APPEARANCE, IN THE INTEREST OF TIME.

16 AND THEN AS ANYONE DOES SPEAK IN RESPONSE OR AT THE
17 INVITATION OF JUDGE HIGHBERGER OR MYSELF, PLEASE INDICATE YOUR
18 NAME SO WE CAN KEEP TRACK.

19 SO I'M LOOKING AT THE LAST JOINT REPORT FOR THE
20 CONFERENCE THAT WE PUSHED OUT, AND THOUGHT SINCE NOTHING
21 ADDITIONAL IN TERMS OF AN OVERALL STATUS WAS SUBMITTED, WE
22 COULD USE THAT AS THE AGENDA. I WILL NOTE, OF COURSE, WE HAVE
23 YOUR JOINT MOTION FOR MODIFICATION OF THE SCHEDULING ORDER THAT
24 HAS BEEN FILED. AND WE'LL ADDRESS THAT, AS WELL.

25 JUST READING DOWN THE LIST, AS TO STATUS OF

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1 DEPOSITIONS, WHO WOULD LIKE TO TELL US WHERE WE ARE ON THAT?

2 **MR. HOERMAN:** SURE, JUDGE. TOR HOERMAN. HOW ARE YOU
3 TODAY?

4 **THE COURT:** I'M FINE. THANKS. AND HOPE YOU'RE THE
5 SAME.

6 **MR. HOERMAN:** I'M DOING WELL. WE HAVE OVER 35
7 DEPOSITIONS WE'VE NOTICED. WE WITHDREW 14 OF THE NOTICES.
8 WE'VE TAKEN 18 DEPOSITIONS TO DATE. AND THERE ARE THREE MORE
9 LEFT TO TAKE THAT WERE CONTINUED FOR HEALTH REASONS OF
10 WITNESSES OR OTHER VARIOUS REASONS. AND THEY WERE, BY
11 AGREEMENT, POSTPONED UNTIL AFTER THE DEADLINE DATE, BUT THEY
12 WILL TAKE PLACE IN THE NEXT, I BELIEVE, WEEK OR SO.

13 THERE IS, JUST TO ALERT THE COURT -- THERE IS ONE
14 DEPOSITION, A LILY DEPOSITION, A DEPONENT NAMED BRODERICK THAT
15 IS STILL A BIT AT ISSUE. LILY HAD HAS ASKED US WHY WE STILL
16 WANT TO TAKE IT. WE ARE WORKING WITH LILY TO COME TO AN
17 AGREEMENT TO TAKE THE DEPOSITION. IF WE CAN'T COME TO AN
18 AGREEMENT, WE'LL, OBVIOUSLY, BRING IT TO THE COURT'S ATTENTION
19 VERY QUICKLY. BUT THE SUM AND SUBSTANCE OF THE DEPOSITION
20 PROCESS, THE PLAINTIFFS -- AND I'M SURE THE DEFENDANTS, AS
21 WELL -- HAVE NOTHING NEGATIVE TO REPORT.

22 **THE COURT:** GREAT. AND ANYONE FROM THE DEFENSE SIDE
23 WANT TO JUST CONFIRM THAT THAT IS THE STATUS QUO OR TELL ME IF
24 IT'S NOT?

25 **MR. MARVIN:** YOUR HONOR, THIS IS DOUGLAS MARVIN. MY

1 UNDERSTANDING IS THAT IS CORRECT. AND TO MY KNOWLEDGE, THERE
2 IS NOTHING FURTHER TO ADD.

3 **THE COURT:** OKAY. GREAT. THE SECOND ITEM YOU FOLKS
4 HAD LISTED A FEW WEEKS BACK WAS STATUS OF DISCOVERY. IT HAD
5 THREE SUBPARTS: SAS FILES, DISCOVERY UPDATE, AND PRIVILEGED
6 LOGS.

7 WHO WANTS TO TAKE US THROUGH THAT, AT LEAST IN THE
8 FIRST INSTANCE, AS TO WHAT'S HAPPENING ON THOSE FRONTS?

9 **MR. JOHNSON:** YOUR HONOR, GOOD AFTERNOON. THIS IS
10 MIKE JOHNSON ON BEHALF OF THE PLAINTIFFS, AND I WILL BE HAPPY
11 TO TAKE THIS SECTION.

12 **THE COURT:** GO AHEAD.

13 **MR. JOHNSON:** YOUR HONOR, AS TO THE SAS FILES, SAS
14 FILES, AS YOU WILL RECALL FROM OUR LAST STATUS CONFERENCE, WAS
15 ONE OF BIG-TICKET ITEMS ON THE SO-CALLED TOP TEN LIST, THAT HAD
16 BEEN UNRESOLVED.

17 SINCE THAT STATUS CONFERENCE, WE HAVE HAD NUMEROUS
18 MEET AND CONFERS WITH THE DEFENDANTS. IT APPEARS THAT WE HAVE
19 REACHED AN AGREEMENT WITH RESPECT TO PRODUCTION OF THE SAS
20 FILES. SPECIFICALLY, THOSE SAS FILES, AS I UNDERSTAND, ARE
21 GOING TO BE PRODUCED TO THE PLAINTIFFS NO LATER THAN
22 DECEMBER 1.

23 AND I THINK, AS YOU WILL HEAR IN A LITTLE BIT HERE,
24 YOUR HONOR, WHEN WE TALK ABOUT THE COURT'S SCHEDULING ORDER,
25 SOME OF THE DEADLINES IN THERE ARE CONTINGENT UPON THE

1 DEFENDANTS' OBLIGATION TO, IN FACT, GET US THOSE FILES BY THE
2 DEADLINE.

3 SO TO SUM THAT UP, THE WAY I WOULD DO IT IS TO SAY
4 THAT WE HAVE AN AGREEMENT WITH RESPECT TO PRODUCTION AND THAT
5 AGREEMENT REQUIRES PRODUCTION BY DECEMBER 1ST.

6 AND BEFORE I GO ON, I DON'T KNOW IF ANY OF THE
7 DEFENDANTS -- IF YOU WANT ME TO COVER ALL THREE OR IF --

8 **THE COURT:** WHY DON'T YOU GO THROUGH ALL THREE AND
9 THEN WE'LL SEE IF THE DEFENDANTS ARE IN AGREEMENT OR IF THERE
10 ARE SOME ADDITIONAL COMMENTS THEY HAVE GOT?

11 **MR. JOHNSON:** OKAY. THE SECOND ITEM IS THE DISCOVERY
12 UPDATE. OBVIOUSLY, THIS IS A LITTLE BIT GENERAL, YOUR HONOR,
13 BUT MAYBE THE EASIEST WAY TO BREAK IT DOWN IS TO TALK ABOUT TWO
14 ITEMS. AT THE LAST STATUS CONFERENCE WE HAD OUR TOP TEN LIST.
15 THE MAJORITY OF THOSE ITEMS WITH RESPECT TO SAS DATA, WHICH WE
16 JUST TALKED ABOUT, HAVE NOW BEEN RESOLVED EITHER THROUGH MOTION
17 PRACTICE OR BY AGREEMENT OF THE PARTIES.

18 AS YOU WILL REMEMBER FROM THE SECOND STATUS
19 CONFERENCE, WE HAD A LIST OF ADDITIONAL 40 ITEMS THAT WE HAD
20 IDENTIFIED TO THE DEFENDANTS THAT WERE STILL POTENTIAL
21 OUTSTANDING DISCOVERY ISSUES. WE HAVE MADE SOME GOOD PROGRESS
22 WITH RESPECT TO THAT LIST AND REACHED AGREEMENT ON A NUMBER OF
23 ITEMS, AND ARE CONTINUING TO TALK ABOUT THE REMAINDER OF THE
24 ITEMS.

25 WE ARE NOT AT A POINT, WITH RESPECT TO THAT

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1 ADDITIONAL 40 ITEMS, WHERE ANY COURT INTERVENTION IS REQUIRED
2 AT THIS TIME. AND IT'S MY ANTICIPATION, WITH RESPECT TO THE
3 UNRESOLVED ONES, THAT WE'LL CONTINUE, AS WE HAVE BEEN, TO MEET
4 AND CONFER AND SEE IF WE CAN GET THE REST OF THOSE POUNDED OUT.

5 **THE COURT:** OKAY.

6 **MR. JOHNSON:** PRIVILEGED LOGS, YOUR HONOR, THIS IS ON
7 THERE. AND AGAIN, OUR AGENDA IS ABOUT TWO WEEKS OLD. AT THE
8 TIME WE HAD CREATED THIS, AS A RESULT OF YOUR HONOR'S ORDER
9 WITH RESPECT TO PRIVILEGED LOGS, WHICH I THINK WAS ENTERED
10 SOMETIME AROUND THE MIDDLE OF AUGUST, THE FIRST PRIVILEGED LOGS
11 IN THIS CASE STARTED TRICKLING IN ABOUT THE TIME THAT THIS
12 AGENDA WAS PUT TOGETHER. AND SO I THINK THAT THE INTENT OF
13 THIS AS AN AGENDA ITEM, AS JUST NOTICED BY THE COURT, THAT
14 THOSE ARE NOW -- THE PRIVILEGED LOGS ARE NOW STARTING TO BE
15 PRODUCED, AS WELL, AS PART OF THE DISCOVERY PLAN.

16 SO I THINK FROM THE PLAINTIFFS' PERSPECTIVE, THAT IS
17 PROBABLY A GOOD SUMMARY OF THE THREE SUBTOPICS WE HAVE UNDER
18 DISCOVERY STATUS.

19 **THE COURT:** OKAY. AND THEN LET ME JUST TURN TO THE
20 DEFENSE COUNSEL AND SEE IF ANY OF THEM HAVE ANYTHING ELSE TO
21 ADD AS TO THOSE THREE THINGS.

22 **MS. LAURENDEAU:** YOUR HONOR, THIS IS AMY LAURENDEAU
23 ON BEHALF OF AMYLIN. I WOULD JUST LIKE TO BRIEFLY ADDRESS THE
24 COMMENTS ON THE SAS DATA FILES PRODUCTION. WE ARE CONTINUING
25 TO MEET AND CONFER WITH PLAINTIFFS' COUNSEL, AS MR. JOHNSON

1 INDICATED, ON THE SCOPE AND FORMAT OF WHAT WE WILL PRODUCE IN
2 RESPONSE TO PLAINTIFFS' REQUEST FOR ADDITIONAL SAS DATA FILES.
3 WE ARE OPTIMISTIC THAT WE WILL BE ABLE TO REACH AGREEMENT ON
4 THAT. IN THE EVENT THAT WE ARE NOT, THERE COULD POTENTIALLY BE
5 ISSUES THAT THE COURT NEEDS TO WEIGH IN ON. AND THE OUTCOME OF
6 THOSE ISSUES MAY IMPACT WHEN THAT DATA IS PRODUCED.

7 I KNOW MR. JOHNSON NOTED THAT THE SCHEDULE THAT WE
8 HAVE AGREED TO IS CONTINGENT ON PRODUCTION OF EVERYTHING BY
9 DECEMBER 1ST. IT'S DEFENDANTS' EXPECTATION THEY WILL BE ABLE
10 TO PRODUCE EVERYTHING BY DECEMBER 1ST, BUT WOULD JUST NOTE, AT
11 LEAST FROM AMYLIN'S PERSPECTIVE, IT IS NOT OUR VIEW THAT IF THE
12 SCOPE IS BROADENED BEYOND WHAT WE ARE CURRENTLY ANTICIPATING,
13 AND IF THE SCHEDULE FLIPS BEYOND DECEMBER 1ST, THAT WE WOULD
14 NECESSARILY AGREE THAT THAT DEADLINE SHOULD BE IMPACTED BY
15 THIS.

16 HOPEFULLY, THIS IS AN ISSUE THAT NEVER NEEDS TO COME
17 TO THE COURT'S ATTENTION, BUT I JUST WANTED TO NOTE THAT WE
18 MIGHT NOT BE EXACTLY ALIGNED ON HOW WE VIEW THAT ISSUE AT THIS
19 POINT.

20 **THE COURT:** OKAY. AND AS TO THE OTHER TWO ITEMS, ANY
21 FURTHER COMMENT ON THOSE? APPARENTLY NOT.

22 ANY OTHER DEFENSE COUNSEL HAVE ANYTHING THEY WOULD
23 LIKE TO ADD ON ANY OF THOSE TOPICS?

24 HEARING NONE, WHY DON'T WE TURN TO THE SCHEDULING
25 ORDER, WHICH I AM INCLINED TO GRANT, BUT I HAD A COUPLE OF

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1 QUESTIONS. ONE OF WHICH WAS THE PREEMPTION PORTION. YOU HAVE
2 A MULTI-STEP APPROACH, AND THEN INDICATE AT A FUTURE CONFERENCE
3 WE ARE GOING TO SCHEDULE EXPERT DISCOVERY AND THE HEARING AND
4 BRIEFING FOR THE REQUISITE MOTION.

5 SO I GUESS I'M NOT CLEAR ON WHAT THAT MEANS. ARE WE
6 TALKING ABOUT SCHEDULING TIMING FOR DEPOSITIONS OF THE EXPERTS
7 AND THAT'S THE SO-CALLED EXPERT DISCOVERY, OR SOMETHING ELSE?

8 **MR. MARVIN:** YOUR HONOR, THIS IS DOUGLAS MARVIN.
9 THAT IS PRECISELY CORRECT. WE ARE TAKING IT IN STEPS. WE ARE
10 NEARING COMPLETION OF FACT DISCOVERY AND NOW ABOUT TO EMBARK ON
11 EXPERT DISCOVERY. AND THE SCHEDULE IS MINDFUL OF THE COURT'S
12 STATEMENT THAT ENCOURAGED THE PARTIES TO FOCUS EFFORTS FIRST ON
13 PREEMPTION, AND THE SCHEDULE DOES THAT.

14 SO WHAT IS ANTICIPATED, ACCORDING TO THE SCHEDULE, IS
15 DECEMBER 8TH THERE WOULD BE A SIMULTANEOUS EXCHANGE OF EXPERT
16 REPORTS. AND THEN JANUARY 16TH THERE WOULD BE SERVICE OF ANY
17 REBUTTAL REPORTS.

18 AND YOU ARE CORRECT, YOUR HONOR, WHEN WE SAY THAT THE
19 COURT WILL SET A SCHEDULE FOR ANY EXPERT DISCOVERY. THAT WOULD
20 BE WITH RESPECT TO ANY DEPOSITIONS. RIGHT NOW I DON'T THINK
21 EITHER PARTY IS AWARE OF WHAT THE OTHER PARTY WOULD INTEND TO
22 ELICIT FROM THEIR EXPERTS. BUT ONCE WE KNOW THAT IN JANUARY,
23 THEN WE WOULD BE IN POSITION TO COME TO THE COURT AS TO WHETHER
24 WE SHOULD HAVE ANY DEPOSITIONS. MOST LIKELY WE PROBABLY WOULD,
25 BUT WE THOUGHT THAT WE WOULD DEFER THAT ISSUE UNTIL THAT TIME

1 WHEN WE HAVE MORE INFORMATION.

2 SO YOU ARE CORRECT THAT THE SCHEDULE, THEN, WOULD BE
3 FOR DEPOSITIONS OF EXPERTS AND THEN FOR A HEARING AND BRIEFING.

4 **THE COURT:** OKAY. AND SO IT WOULD SEEM LIKE WE ARE
5 TALKING ABOUT THAT STATUS CONFERENCE BEING SOME TIME AFTER
6 JANUARY 16TH, WHEN YOU HAVE GOT EVERYBODY'S REPORTS IN
7 EVERYBODY'S HANDS. IS THAT --

8 **MR. HOERMAN:** THIS IS TOR HOERMAN ON BEHALF OF THE
9 PLAINTIFFS. I THINK THAT IS A GOOD IDEA, YOUR HONOR.

10 **THE COURT:** OKAY. AND I WAS GOING TO GET THE
11 PLAINTIFFS' WEIGH-IN ON THAT.

12 AND, MR. MARVIN, IT SOUNDS LIKE YOU WOULD AGREE IT
13 WOULD NEED TO BE AFTER THE 16TH OF JANUARY.

14 REALLY, THAT WAS BOTH OF MY QUESTIONS: WHEN DO WE
15 SET THE CONFERENCE, AND THIS QUESTION OF WHAT --

16 (PAUSE/PHONE INTERRUPTION)

17 I AM AFRAID TO TRY AGAIN. (LAUGHTER)

18 OKAY. MY TWO QUESTIONS WERE WHEN SHOULD WE CONFER ON
19 THIS ISSUE; AND SECOND, WHAT DOES EXPERT DISCOVERY MEAN. AND
20 YOU NOW HAVE ALL ADDRESSED THAT.

21 AND I RECOGNIZE THAT THERE MAY BE A DIFFERENCE OF
22 VIEW, BUT WE WILL ENTER THIS MODIFICATION WITH THE
23 UNDERSTANDING THAT IT'S SUBJECT TO FURTHER MODIFICATION IF
24 THINGS DON'T GO AS PLANNED RIGHT NOW, WITHOUT ANYONE HAVING TO
25 WORRY ABOUT THEIR ABILITY TO OBJECT TO A CHANGE. WE WILL

1 CERTAINLY HEAR YOU OUT AS THINGS GO ON.

2 SO I WILL NOTE THAT AS PART OF THE ORDER, PUTTING IN
3 THE DATE -- PUTTING IN A DATE AND TIME WHEN WE NEED TO TALK
4 ABOUT IT.

5 **MR. HOERMAN:** MAY I MAYBE MAKE A SUGGESTION? AS WE
6 SAID BEFORE, THESE STATUS CONFERENCES ARE VERY HELPFUL TO MOVE
7 THINGS ALONG AND GET THINGS DONE. BUT IT MIGHT BE A GOOD IDEA,
8 WITH THAT IMPORTANT DEADLINE OF DECEMBER 1ST, WHICH TRIGGERS A
9 LOT OF OTHER THINGS, THAT MAYBE WE SET SOMETHING FIRST FOR
10 EARLY DECEMBER, AND THEN SET SOMETHING AGAIN FOR THE MIDDLE OR
11 LATE JANUARY. BUT IT MIGHT BE A GOOD IDEA TO COME IN ON A
12 STATUS ON THE PRODUCTION OF THE DATA THAT WE'VE TALKED ABOUT.

13 **THE COURT:** OKAY. WELL, THAT DOES SOUND LIKE A
14 PRETTY GOOD NOTION.

15 ANYBODY ON THE DEFENSE DISAGREE ON THAT NOTE OF
16 HAVING SOMETHING EARLY DECEMBER TO CHECK ON HOW WE HAVE DONE ON
17 THESE OTHER MOVING PARTS, AND THEN HAVE SOMETHING TO FOLLOW IN
18 THE NEW YEAR, AFTER THE EXCHANGE OF REPORTS, TO TALK ABOUT THE
19 FURTHER STEPS FORWARD?

20 **MR. MARVIN:** YOUR HONOR, THIS IS DOUGLAS MARVIN. I
21 THINK THAT WOULD BE FINE.

22 **THE COURT:** AND HEARING NO OBJECTION, HOW ABOUT
23 SOMETHING LIKE DECEMBER 11TH? THAT WOULD BE TEN DAYS AFTER
24 THAT CRITICAL DATE. I NOTICE THE WEEK BEFORE YOUR CRITICAL
25 DATE IS THANKSGIVING WEEK, SO THAT'S NOT GOOD. AND I'M IN A

1 PRETTY LENGTHY TRIAL STARTING DECEMBER 1.

2 WOULD DECEMBER 11TH -- THAT IS ANOTHER THURSDAY --
3 ABOUT THIS SAME TIME, SAY, 3:00, WORK FOR EVERYONE ON A STATUS
4 OF THE COMPLETION OF THE DISCOVERY, THE DISCLOSURES, ETC.?

5 **JUDGE HIGHBERGER:** JUDGE HIGHBERGER LIKES THE DATE
6 AND TIME.

7 **THE COURT:** GREAT. THANK YOU, JUDGE.

8 **MR. HOERMAN:** IT WORKS FOR THE PLAINTIFFS. AND MIGHT
9 I SUGGEST THE COURT MIGHT FORCE US TO COME OUT TO SAN DIEGO?

10 **THE COURT:** I WOULD BE HAPPY TO FORCE YOU TO COME TO
11 SAN DIEGO. SO WE'LL ORDER EVERYBODY OUT, ALTHOUGH IF
12 CIRCUMSTANCES DICTATE OTHERWISE, YOU CAN HAVE LEAVE TO JUST
13 CALL IN, TOO. THAT WAY YOU ARE OUT OF THE SNOW OR WHATEVER IS
14 GOING ON, IF YOU NEED TO BE.

15 OKAY. SO WE'LL SET THE MATTER FOR DECEMBER 11TH, AT
16 3:00, FOR THE NEXT STATUS CONFERENCE IN GENERAL. YOU CAN, ONCE
17 AGAIN, SUBMIT A COUPLE DAYS IN ADVANCE YOUR PROPOSED AGENDA OF
18 ITEMS. AND, OF COURSE, THIS IS WITHOUT PREJUDICE TO SEEKING
19 THE COURT'S INTERVENTION ON SOME OF THESE CONTINUING ISSUES AS
20 WE'RE GOING AHEAD, SO WE CONTINUE TO MAKE FORWARD PROGRESS.

21 THEN AS FAR AS PUTTING DOWN A DATE AND TIME TO
22 CONFER, ASSUMING ALL GOES WELL IN DECEMBER -- OR BY DECEMBER,
23 THE DATE TO CONFER ON SETTING A FURTHER SCHEDULE TO ADDRESS
24 PREEMPTION, HOW ABOUT -- OH, LET'S SEE. GOSH. BOY, I HAVE A
25 REAL BAD JANUARY. WOULD SOMETHING LIKE FEBRUARY 2ND WORK?

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1 THAT WOULD BE A MONDAY. WE COULD DO IT AT 2:00 OR 3:00, AGAIN,
2 DEPENDING UPON EVERYONE'S AVAILABILITY. THAT WOULD BE TWO FULL
3 WEEKS, APPROXIMATELY, AND A COUPLE DAYS AFTER YOU HAVE GOT THE
4 MATERIAL IN YOUR HANDS.

5 **MR. HOERMAN:** I THINK THAT IS FINE, JUDGE. I THINK
6 THE PARTIES CAN TRY TO WORK TOGETHER WITHIN THOSE TWO WEEKS TO
7 SET UP DEPOSITIONS. SO I THINK THAT IS FINE FROM THE
8 PLAINTIFFS' SIDE.

9 **THE COURT:** HOW ABOUT JUDGE HIGHBERGER?

10 **JUDGE HIGHBERGER:** IT IS OKAY WITH JUDGE HIGHBERGER.
11 BUT IS THIS, THEN, GOING TO BE YOUR PREEMPTION MOTION OR JUST
12 ANOTHER MDL CONFERENCE?

13 **THE COURT:** THIS WILL BE A CONFERENCE ON SETTING THE
14 MOTION HEARING DATE, A CUTOFF FOR ANY OF THESE DEPOSITIONS THE
15 FOLKS ARE WORKING ON OF THE EXPERTS ADDRESSING PREEMPTION, ANY
16 MODIFICATIONS TO THE STANDARD BRIEFING SCHEDULE.

17 **JUDGE HIGHBERGER:** ANY TIME FEBRUARY 2 IS FINE. SO
18 FAR I DON'T KNOW WHETHER I'M GOING TO SEE SUCH A MOTION, BUT I
19 DECIDED TO MAKE IT YOUR PROBLEM, NOT MINE.

20 **THE COURT:** LET'S GO WITH FEBRUARY 2ND AT 2:00. THAT
21 IS ALSO SUBJECT TO CHANGE, DEPENDING ON WHAT ELSE HAPPENS. IF
22 YOU FOLKS COME TO AN AGREEMENT ON A PERIOD OF TIME TO GET THE
23 NEEDED DEPOSITIONS TAKEN, I WOULD BE AMENABLE TO YOUR JOINT
24 PROPOSAL.

25 LOOKING AHEAD AT THE MOTION PRACTICE, IF YOU FEEL YOU

1 ARE GOING TO NEED MORE THAN THE PRESUMPTIVE 25-PAGE BRIEF LIMIT
2 OR MORE THAN THE 28-, 14-, AND 7-DAY SCHEDULING PROTOCOL -- IN
3 OTHER WORDS, YOU WANT TO AGREE TO A LITTLE MORE TIME OR A FEW
4 MORE PAGES, I WOULD ALSO BE PERSUADED BY ANY JOINT MOTION THAT
5 WAS REASONABLE. SO FEEL FREE, IN THE WEEKS BETWEEN THE
6 COMPLETION OF THE EXPERT REPORTS AND OUR CONFERENCE, TO TALK
7 ABOUT A PLAN THAT EVERYBODY LIKES AND FEELS IS REALISTIC. SO
8 WE HAVE GOT THOSE MATTERS NOW TAKEN INTO ACCOUNT, AND I'LL
9 INCLUDE THAT WHOLE DESCRIPTION IN YOUR ORDER.

10 AND THE LAST THING I HAD ON THE ISSUES FROM LAST TIME
11 WAS THE COMMON BENEFIT ORDER -- THAT ISSUE BOTH IMPORTANT TO
12 JUDGE HIGHBERGER AND MYSELF, AS WELL -- ON GETTING, I THINK IT
13 WAS, EXHIBIT A COMPLETE.

14 AND WHO WOULD LIKE TO TELL US WHERE WE STAND ON THAT?

15 **MR. HOERMAN:** YOUR HONOR, THIS IS TOR AGAIN. DO YOU
16 MIND IF I BACKTRACK? I JUST WANT TO MAKE ONE THING CLEAR.

17 **THE COURT:** I DON'T MIND. GO AHEAD.

18 **MR. HOERMAN:** YOUR HONOR, THERE WAS A LOT OF
19 CONVERSATION AND A LOT OF TIME SPENT ON TRYING TO COME TO AN
20 AGREEMENT ON THIS. AND I APPRECIATE ALL THE WORK THAT THE
21 DEFENSE DID ON IT TO COME TO AN AGREEMENT, AND THEY ACTED IN
22 GOOD FAITH. I DO WANT TO MAKE CLEAR, IN MY CONVERSATIONS WITH
23 LOREN BROWN AND WITH DOUG MARVIN, THAT IT WAS THE ASSUMPTION
24 THAT THE DATA WOULD BE COMPLETED BY DECEMBER 1ST. AND IF NOT,
25 WE WOULD REVISIT THE SCHEDULE.

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1 SO THAT WAS UNDERLYING IT. I CAN UNDERSTAND WHY ANY
2 MIGHT HAVE A MISUNDERSTANDING OF THAT, BUT I DO WANT TO MAKE
3 CLEAR TO THE COURT, FROM THE PLAINTIFFS' PERSPECTIVE, THAT THAT
4 WAS -- AND AGAIN, WE, AS WELL AS THE DEFENDANTS, ASSUME AND
5 HOPE IT WILL NOT BE AN ISSUE. SO I DON'T WANT TO MAKE A HUGE
6 ISSUE TODAY, BUT I DO WANT TO MAKE CLEAR ON THE RECORD THAT
7 THAT WAS SOMETHING THAT WAS UNDERLYING ALL OF OUR CONVERSATIONS
8 COMING TO THE AGREEMENT.

9 **THE COURT:** AND I APPRECIATE THAT. AND I UNDERSTAND
10 THAT THE PLAINTIFFS BUYING INTO THE SCHEDULE IS, IN THEIR VIEW,
11 PREDICATED ON THIS. SO I UNDERSTAND. AND THERE MAY BE
12 DIFFERING VIEWS AS WE GET TO THAT DATE, AND DEPENDING ON WHAT
13 PLAYS OUT. AND I WILL ENTERTAIN THEM ALL AT THAT TIME, BUT I
14 UNDERSTAND WHAT THE PLAINTIFFS ARE THINKING AT THIS POINT. SO
15 THAT IS NOTED.

16 AND LET'S, THEN, IF WE CAN, TURN TO THE COMMON
17 BENEFIT FUND ORDER. AND WHO CAN ADDRESS THAT?

18 **MR. PLATTENBERGER:** GOOD AFTERNOON, YOUR HONOR. THIS
19 IS JACOB PLATTENBERGER ON BEHALF OF THE PLAINTIFFS, AND I CAN
20 SPEAK TO THAT FOR OUR SIDE. I KNOW THAT AT PREVIOUS STATUS
21 CONFERENCES, YOUR HONOR HAD WONDERED WHY THIS WAS APPEARING ON
22 THE AGENDA, CONSIDERING THAT YOU HAD ALREADY ENTERED THE ORDER,
23 AND I CAN SPEAK TO THAT BRIEFLY.

24 DUE TO AN ADMINISTRATIVE ERROR, THE PLAINTIFFS
25 ATTACHED, AS EXHIBIT A TO THE MOTION FOR THE COMMON BENEFIT

1 ORDER, THE PARTICIPATION AGREEMENT, WHEN WE SHOULD HAVE
2 ATTACHED AS EXHIBIT A THE PROPOSED ORDER.

3 SO THAT WENT THROUGH THE COURT'S PROCESS WITH NO
4 OPPOSITION FROM THE DEFENDANTS BECAUSE THEY HAD NO OBJECTION TO
5 THE PARTICIPATION AGREEMENT. ONCE WE REALIZED WHAT HAD
6 HAPPENED, THERE WAS SOME BACK AND FORTH BETWEEN YOUR HONOR'S
7 CHAMBERS AND PLAINTIFFS' LIAISON COUNSEL. WE GOT THE PROPOSED
8 ORDER TO CHAMBERS AND THAT WAS ENTERED. AND THEN WHEN
9 DEFENDANTS SAW THAT, THEY CONTACTED ME AND SAID WE DON'T HAVE A
10 MEETING OF THE MINDS ON THE PROPOSED ORDER; WE NEED TO ADDRESS
11 THIS.

12 SO WE STARTED TO DO THAT IMMEDIATELY. AND WHERE WE
13 ARE NOW IS THAT THERE ARE TWO VERY NARROW INSTANCES THAT THE
14 PARTIES DISAGREE ON. I CAN EXPLAIN WHAT THOSE ARE, IF YOU'D
15 LIKE. BUT THE PLAINTIFFS ANTICIPATE THAT WE CAN GET OUR
16 MOTIONS ON FILE VERY QUICKLY, AND THEN THE DEFENDANTS CAN HAVE
17 AN OPPORTUNITY TO RESPOND. AND THEN YOUR HONOR CAN RULE ON THE
18 PAPERS.

19 **THE COURT:** OKAY. AND ANYONE FROM THE DEFENSE WANT
20 TO COMMENT ON WHAT MR. PLATTENBERGER JUST SAID, OR HAVE
21 ANYTHING TO ADD?

22 **MS. GUSSACK:** YOUR HONOR, NINA GUSSACK FOR ELI LILY.
23 THAT IS CORRECT. THE PROPOSED ORDER WAS ERRONEOUSLY SUBMITTED.
24 APPARENTLY, WE HAVE TWO AREAS OF DISAGREEMENT, AND THEY WILL BE
25 THE SUBJECT OF MOTION PRACTICE.

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1 **THE COURT:** OKAY. AND I TAKE IT THAT JUDGE
2 HIGHBERGER HASN'T SEEN ANY OF THIS YET BECAUSE YOU WANT TO GET
3 IT FINALIZED HERE FIRST, OR IS SOMETHING GOING ON IN HIS COURT,
4 TOO?

5 **JUDGE HIGHBERGER:** IT HASN'T COME TO MY ATTENTION.
6 HIGHBERGER SPEAKING.

7 **THE COURT:** SO IT SOUNDS LIKE WE'LL DO WHAT WE NEED
8 TO DO HERE AND THEN WE CAN PROCEED ACCORDINGLY. OKAY. WELL,
9 CONTACT US WHEN YOU'RE READY AND WE'LL SET UP A PROCESS FOR
10 THAT.

11 AND THAT COMPLETES THE LIST OF FOUR ITEMS OR
12 CATEGORIES THAT I HAD. AND OTHER THAN ANOTHER ITEM THAT I WANT
13 TO TALK TO MIKE JOHNSON ABOUT BRIEFLY, IS THERE ANYTHING ELSE,
14 FIRST, WE SHOULD DISCUSS?

15 **MR. JOHNSON:** NO, YOUR HONOR.

16 **THE COURT:** SO, MR. JOHNSON, WE HAVE GOT THAT FOYE
17 ISSUE, THE REQUEST TO BE GIVEN LEAVE TO WITHDRAW. AND I THINK
18 IT WOULD BE HELPFUL, BECAUSE I HAVE GOTTEN, JUST LOOSELY
19 SUBMITTED NOW FROM THE FOYES, A COUPLE DOCUMENTS THAT I CAN
20 DESCRIBE OR WE CAN FAX TO YOU. I THINK IT WOULD BE USEFUL FOR
21 US TO HAVE A BRIEF TELEPHONE CALL. IT WOULD BE MY INTENT TO
22 GRANT YOUR MOTION, BUT I THINK I WOULD LIKE TO MAKE SURE THERE
23 IS NO QUESTIONS OR CONFUSION ON THE PART OF YOUR CLIENTS.

24 AND SO I WAS GOING TO ASK YOU, SIR, IF MAYBE
25 NOVEMBER 10TH YOU WOULD BE AVAILABLE FOR A CALL. IT WOULD JUST

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1 BE YOU, THE FOYES, AND ME, TO TALK ABOUT THE ISSUE A BIT BEFORE
2 I GO AHEAD AND GRANT THE MOTION.

3 WOULD YOU BE AVAILABLE THAT NOVEMBER 10TH DATE, SAY
4 ABOUT 10:00, PACIFIC TIME?

5 **MR. JOHNSON:** YOUR HONOR, I WOULD BE AVAILABLE AND,
6 OBVIOUSLY, HAPPY TO PARTICIPATE IN THAT.

7 **THE COURT:** I DON'T ANTICIPATE IT WOULD BE LONG, BUT
8 I THINK IT WOULD BE IMPORTANT. WHAT I DID GET SUBMITTED BY THE
9 FOYES IS YOUR LETTER OF SEPTEMBER 22ND, A SURGICAL PATHOLOGY
10 REPORT OF MARCH 10TH, AND PART OF THE SHORT FORM COMPLAINT THAT
11 RELATES TO THE FOYES.

12 AND WOULD YOU LIKE US TO FAX THAT TO YOU SO YOU CAN
13 SEE EXACTLY WHAT CAME IN HERE?

14 **MR. JOHNSON:** IF YOU COULD, YOUR HONOR, I WOULD
15 CERTAINLY APPRECIATE THAT.

16 **THE COURT:** OKAY. I AM NOT GOING TO PUT IT ON AS A
17 MATTER ON FILE. ULTIMATELY, IT WILL GET FILED BUT FILED UNDER
18 SEAL BECAUSE OF THE ATTORNEY-CLIENT RELATIONSHIP ISSUE. BUT
19 WE'LL FAX THAT TO YOU. AND I WOULD SAY CALL IN
20 NOVEMBER 10TH AT 10:00 A.M. WE'LL DIRECT THE FOYES TO DO SO,
21 AS WELL. WE'LL CONFERENCE YOU ALL WITH ME. I JUST WANT TO
22 ADDRESS A COUPLE THINGS AND MAKE SURE THERE IS NO CONFUSION ON
23 THEIR PARTS. BUT AT THIS POINT I SEE NO REASON NOT TO GRANT
24 THE MOTION. I'M JUST TRYING TO WORK OUT SOME -- OR JUST
25 SATISFY MYSELF THAT THEY UNDERSTAND PRECISELY THE SITUATION.

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1 SO THANK YOU FOR THAT. AND WE'LL SET OUT A NOTICE ON THAT.

2 JUDGE HIGHBERGER, LET ME TURN TO YOU TO SEE IF YOU
3 WOULD LIKE TO TELL US WHERE YOU STAND IN YOUR CASE, OR OTHER
4 QUESTIONS YOU MIGHT HAVE OF THIS GROUP OF COUNSEL.

5 **JUDGE HIGHBERGER:** WELL, IT'S VERY MUCH SYMMETRICAL
6 WITH WHERE THINGS ARE WITH YOU. IT'S MORE LIKELY THAT YOU ARE
7 GOING TO SEE A PREEMPTION MOTION THAN I AM. THE PANCREATITIS
8 CASES, WHICH ARE PECULIAR TO MY DOCKET, SEEM TO BE TAKING THEIR
9 OWN PATH TOWARDS RESOLUTION, PERHAPS BY A TRIAL, PERHAPS BY
10 OTHER RULINGS. AND SO FAR, FROM WHAT WAS REPORTED TODAY, IT
11 SEEMS LIKE THINGS ARE PROCEEDING IN A COOPERATIVE FASHION WITH
12 COUNSEL, FOR WHICH I AM VERY GRATEFUL.

13 **THE COURT:** AND I AM, AS WELL. WE SHOULD NEVER LOSE
14 SIGHT OF THE FACT THAT WHILE WE HAVE TO RESOLVE MANY DISPUTES,
15 YOU FOLKS ARE RESOLVING THINGS OF YOUR OWN THROUGH YOUR GOOD
16 GRACES IN A MULTITUDE OF WAYS, AND WE APPRECIATE THAT.

17 SO UNLESS ANYBODY HAS ANYTHING ELSE, AND OTHER THAN
18 THE TALKING WITH MR. JOHNSON AND HIS CLIENT ON NOVEMBER 10TH,
19 WE ARE DOWN FOR THE DECEMBER 11TH STATUS AND ANYTHING ELSE THAT
20 COMES UP IN THE MEANTIME.

21 AND SO I WILL LET YOU ALL GO WITH A GOOD NIGHT AND
22 HAVE A GOOD REST OF THE WEEK. SO WE'LL BE IN RECESS. THANKS
23 VERY MUCH.

24 **MR. HOERMAN:** THANK YOU, YOUR HONOR.

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MR. JOHNSON: THANK YOU, YOUR HONOR.

CERTIFICATION

I HEREBY CERTIFY THAT I AM A DULY APPOINTED,
QUALIFIED AND ACTING OFFICIAL COURT REPORTER FOR THE UNITED
STATES DISTRICT COURT; THAT THE FOREGOING IS A TRUE AND CORRECT
TRANSCRIPT OF THE PROCEEDINGS HAD IN THE AFOREMENTIONED CAUSE
ON OCTOBER 23, 2014, THAT SAID TRANSCRIPT IS A TRUE AND CORRECT
TRANSCRIPTION OF MY STENOGRAPHIC NOTES; AND THAT THE FORMAT
USED HEREIN COMPLIES WITH THE RULES AND REQUIREMENTS OF THE
UNITED STATES JUDICIAL CONFERENCE.

DATED: OCTOBER 28, 2014; AT SAN DIEGO, CALIFORNIA.

S/N _____
JEANNETTE N. HILL, OFFICIAL REPORTER, CSR NO. 11148

OCTOBER 23, 2014