

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

**IN RE: TYLENOL
(ACETAMINOPHEN) MARKETING,
SALES PRACTICES AND
PRODUCTS LIABILITY
LITIGATION**

§ **MDL NO. 2436**
§
§
§ **2:13-md-02436**
§
§ **HON. LAWRENCE F. STENGEL**
§

This Document Relates to:

Rana Terry, as Personal Representative
and Administrator of the Estate of Denice
Hayes, Deceased,

Plaintiff,

vs.

McNEIL-PPC, Inc., McNeil Consumer
Healthcare, and Johnson & Johnson, Inc.,

Defendants.

Civil Action No. 2:12-cv-07263

ORDER

AND NOW, on this 25th day of May, 2016, upon consideration of the defendants’
Motion to Strike the Declaration of William Lee, M.D. (March 10, 2016)(Doc. No. 214) and
all responses thereto, it is hereby **ORDERED** that the defendants’ motion is **DENIED**.¹

¹ The defendants argue that Dr. Lee’s declaration contains errors. Dr. Lee’s attorney voluntarily disclosed during his deposition that there were two errors in his declaration: 1) he used the word “median” instead of “mean” in paragraph 14; and 2) he conceded that paragraph 41, which stated that the FDA had seen the 19 low-dose case forms, should have been removed during final edits. See W. Lee Dep., Apr. 14, 2016 at 155-60 (Doc. No. 216, Ex. 3)(disclosing errors in declaration). I granted the plaintiff leave to file an amended declaration on behalf of Dr. Lee to correct these two errors. See Doc. No. 219; William Lee, M.D. Dec., May 10, 2016 (Doc. No. 220)(filed under seal). The filing of the amended/corrected declaration moots the defendants’ argument on this point.

The defendants also argue that the declaration should be stricken because it was drafted by plaintiff’s counsel and then adopted by Dr. Lee. There was nothing untoward about the procedure used to prepare Dr. Lee’s affidavit. See Walker v. George Koch Sons, Inc., No. 2:07cv274 KS–MTP, 2008 WL 4371372, at *5 (S.D. Miss. Sept. 18, 2008)(explaining how affidavits are generally prepared by counsel and then reviewed by affiants as part of litigation); Ford Motor Co. v. Edgewood Properties, Inc., 257 F.R.D. 418, 422 (D.N.J. 2009)(explaining how attorneys often prepare affidavits for third-

BY THE COURT:

/s/Lawrence F. Stengel
LAWRENCE F. STENGEL, J.

party fact witnesses). In fact, the defendants themselves used a similar process when they prepared another declaration by Dr. Lee on the ALFSG data. See Doc. No. 215, Ex. C.

As Dr. Lee testified at his deposition, plaintiff's counsel contacted him through his attorneys, when the defendants filed their ALFSG motion on January 29, 2016. At Dr. Lee's and his attorney's request, the plaintiff's counsel sent his attorneys the supplemental reports of defense experts. Dr. Lee reviewed these materials and re-reviewed the ALFSG data. After conducting his own investigation and independent review of the reports, Dr. Lee met with plaintiff's counsel, Christopher Tisi, Esq. and William Gainer, Esq., for a full day in mid-February. The plaintiff's counsel asked Dr. Lee questions, in order to conduct their own investigation of the ALFSG issue. They recorded his answers and drafted the declaration for Dr. Lee to review. As shown by evidence provided by the defendants, multiple drafts were exchanged between Dr. Lee/his counsel and plaintiff's counsel. After a final review, Dr. Lee signed and adopted the declaration.

Dr. Lee made extensive changes, including a request to remove statements that the FDA was provided with the case report forms. See Doc. No. 214, Ex. D. Plaintiff's counsel, admittedly, neglected to make this edit before submitting the final draft to Dr. Lee for his signature. From what has been provided, this appears to have been an oversight. I see no prejudice to the defendants, especially now that the record has been corrected. Striking the declaration from the record seems a harsh and unwarranted sanction.

The other arguments the defendants offer are either irrelevant to whether Dr. Lee's declaration warrants exclusion or are unpersuasive. I will deny the defendants' motion to strike Dr. Lee's declaration. See U.S. v. Rocky Mountain Holdings, Inc., 782 F. Supp. 2d 106, 115 (E.D. Pa. 2011)("[M]otions to strike are disfavored and usually will be denied 'unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties, or if the allegations confuse the issues in the case.'" (internal citations omitted)).

After the plaintiff filed the amended declaration by Dr. Lee, the defendants also made an epistolary request for the court to order the plaintiff to amend her other filings, claiming that these included "misstatements" based on the errors in Dr. Lee's declaration. This is unnecessary. I have read the plaintiff's filings, all other filings on this issue, and will consider only Dr. Lee's amended declaration in deciding the ALFSG motions. I have no problem recognizing the appropriate facts to consider in light of the corrected declaration. I will also deny this request.