IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: AVANDIA MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	**MDL No. 1871** **07-md-01871**
THIS DOCUMENT APPLIES TO: **ALL ACTIONS**	

PRETRIAL ORDER 115

AND NOW, this 15th day of September, 2010, upon consideration of correspondence from parties' counsel dated August 26, 2010 (Attachments A-1 & A-2) and September 8, 2010 (Attachments B-1 & B-2) regarding the scope and structure of the upcoming *Daubert/Frye* hearings; and correspondence from parties' counsel dated September 7, 2010 (Attachment C-1) and September 8, 2010 (Attachment C-2) requesting the Court's guidance on pretrial deadlines and scheduling for the Initial Trial Pool; and after telephone conference on September 14th, 2010 with PSC counsel Vance Andrus, Thomas Cartmell, Stephen Corr, Dianne Nast and Joseph Zonies, GSK counsel Nina Gussack, Sean Fahey and George Lehner, Special Master Jerome Shestack and Bruce Merenstein, it is hereby **ORDERED** that:

1. The *Daubert/Frye* hearings scheduled for September 20-22, 2010 shall commence on Monday with oral argument on general causation by GSK counsel, followed by oral argument on general causation by PSC counsel. If deemed necessary and as requested by the Court, oral argument will be followed by presentation of live expert witness testimony for Plaintiffs on Tuesday, followed by live expert witness testimony for Defendant on Tuesday and Wednesday, as required. As previously scheduled by the Court's Order dated August 25, 2010 (Doc. No. 770), an MDL status conference will be held immediately following the conclusion of

the *Daubert/Frye* hearings on Wednesday, September 22, 2010.

2. Oral argument on the parties' motions to exclude expert witness testimony offered regarding "specific causation" and other regulatory and liability issues shall be held on **Friday, October 29, 2010**.

It is further **ORDERED** that:

3. The "Initial Trial Pool" commencement date of October 5, 2010, set by Pretrial Order 100 (Doc. No. 678) is hereby **CONTINUED**. The first trial shall be ***Burford v. Smithkline Beecham Corporation*** **(No. 07-cv-5360)**, a case selected by the PSC; the *Burford* trial shall be followed immediately by the trial of a case to be designated by GSK. Counsel for GSK shall report to the Court and to the PSC which case it has selected for this initial pair of trials **by Friday, September 17, 2010**. Trial dates and pretrial deadlines for the initial pair of trials shall be set by separate order.

4. Defendant's Motion to Defer Trial Listings (Doc. No. 797) is hereby **DISMISSED as MOOT**.

It is so **ORDERED.**

BY THE COURT:

CYNTHIA M. RUFE, J.

A-1

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A LITIGATION PRACTICE

Joseph J. Zonies, Esq.
jzonies@rplaw.com

August 26, 2010

Via Facsimile and U.S.Mail

The Honorable Cynthia M. Rufe
U.S. District Court Eastern District Pennsylvania
601 Market Street, Suite 12614
Philadelphia, PA 19106-1797

RE: Avandia Litigation

Dear Judge Rufe:

The PSC has met and conferred with Defendant's counsel a number of times regarding the scope and substance of the upcoming *Daubert/Frye* hearing. The parties have agreed to each provide the Court with a letter outlining their respective positions. The PSC submits the following for the Court's consideration and remains available to discuss these issues with the Court.

The Joint *Daubert/Frye* hearing is set for three days – September 20, 22 and 22. The PSC believes that it would be very beneficial for all of Judges present and all of the parties if the hearings focused on "general causation" -- that is, whether Avandia can cause or contribute to myocardial ischemic events, including heart attacks. By focusing on general causation, the Court will accomplish two significant things: (1) it will aid the Court in managing the remaining cases on its docket; and, (2) it will ensure that, if and when cases are remanded from the MDL, the transferor courts have clear guidance on the issue of general causation as it applies to all Avandia cases.

During the meet and confer process, Defense counsel has indicated that they would prefer the upcoming *Daubert/Frye* hearing be limited to the issue of whether the PSC's case specific expert in the first MDL trial, Dr. DePace, can pass *Daubert* muster. That is, the Defendant wants to focus, not on *whether* Avandia can cause heart attacks, but whether a single expert, in a single case, about a single plaintiff, in a single venue passes *Daubert* muster. This is both inappropriate and inefficient.

First, limiting *Daubert* to one expert in one case will not inform any other cases in the MDL or any other court in the country. It will necessarily be a narrow ruling based upon the unique facts, circumstances and medical records of a single person. Such a ruling would do nothing to create a framework for the transferor courts should cases be remanded from the MDL.

Moreover, focusing *Daubert* on the narrow issue of specific causation is literally putting the cart before the horse. It is impossible to determine the narrow issue of

specific causation without having the background and understanding of general causation. In fact, general causation is a necessary predicate to specific causation.

The PSC is acutely aware that there are many experts and *Daubert/Frye* briefs. As GSK has stated in the past, many of these experts address the same issues. Hence, the PSC believes it would be appropriate to limit the number of experts to be discussed at the *Daubert/Frye* hearing. Clearly, the best way to address this would be for each side to identify for the Court one expert from each field at issue -- a cardiologist, a biostatistician/ epidemiologist, an endocrinologist and an FDA expert. This will allow the Courts and the parties to focus on the most relevant opinions from each scientific field and the briefs from one expert in that field. This will also provide the Court with a complete overview of the entire general causation case for all Avandia cases. The materials and rulings from such a hearing would be invaluable to any other court in the country who must handle an Avandia case.

Finally, to ensure the most efficient and comprehensive presentation of the scientific evidence to the Court, the PSC believes it would be appropriate to have the hearings be primarily presentations from counsel. This will allow a well-controlled presentation of all of the evidence in a very focused, concise manner.

Having eight live witnesses testify and be cross-examined is inefficient and wasteful. *All* of the experts already have clearly stated their opinions in their expert reports, supplements and at their depositions. Moreover, they have already been subjected to extensive cross-examination regarding those opinions. In fact, this is the evidence that makes-up the bases of the *Daubert* challenges and upon which the hearing should focus. Requiring additional testimony and cross-examination of all of these experts would be duplicative and may seriously confuse issues that are well-defined and fully briefed.

The PSC fully understands that, after reading the reports and briefs, the Court may have additional questions for some experts. If that occurs and the Court requests it, clearly it would make sense to call those specific experts for limited live testimony.

Accordingly, the PSC requests that the *Daubert* hearings in this consolidated mass tort action be comprehensive hearings on the issues most relevant to the entire Avandia litigation – general causation. To avoid duplication, each party should be required to identify by Monday, August 30, 2010, a single expert from each area of focus – no more than four per side. The Court can then focus its review to those particular experts. Finally, the hearing should consist of focused presentations from counsel for each party that can and should include presentations from expert reports, supplements and depositions. If, after review of the pertinent materials, the Court desires to hear testimony from a given expert on any given topic, the expert shall be produced for live testimony.

The Hon. Cynthia Rufe
August 26, 2010

In addition, during our discussions with defense counsel concerning *Daubert*, the parties discussed preparations for the October 5, 2010, trial setting. The PSC believes it would aid in the efficient preparation for trial if the Court would assist the parties in establishing appropriate pre-trial obligations and deadlines.

We look forward to discussing these issues with the Court.

Sincerely,

Joseph Zonies, Esq.
Thomas Cartmell, Esq.
On behalf of the PSC

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August 26, 2010

HAND DELIVERY

The Honorable Cynthia M. Rufe
United States District Court
Eastern District of Pennsylvania
US Courthouse
601 Market Street, Suite 12614
Philadelphia, PA 19106

Re: GSK's Proposal For Scope and Structure of the Initial Daubert Hearing

Dear Judge Rufe:

GSK and the PSC have reviewed each other's Daubert/Frye briefing, and met and conferred on the structure and scope of an initial Daubert/Frye hearing. Even though the parties have differing views on how the Court may approach the Daubert proceeding, we, nonetheless, agreed it would be helpful at this time to begin a dialogue with the Court over an approach to addressing the significant expert issues. We are writing to outline GSK's views on how the Court can structure a Daubert hearing in a way that will help advance both the MDL and coordinated state court proceedings.

The PSC has presented twelve expert witnesses, often with overlapping opinions.[1] GSK has lodged Daubert challenges to each of plaintiffs' experts. As the Court is already aware, the Daubert issues in this case are complex and the briefing alone on these motions is substantial. A hearing with live witnesses, coupled with attorney argument, on all issues, which would likely take at least 7 full days, is not practical, and will not lead to the just, speedy and inexpensive resolution of these cases, if there is a fair alternative. Fed. R. Civ. P. 1.

[1] Ten different experts offer opinions concerning whether Avandia is capable of causing heart attacks (DePace, Lippman, Septimus, Jewell, Austin, Swirsky, Sniderman, Brinton, Guerigian and Parisian). Two experts offer opinions concerning whether Avandia caused Mr. Burford's heart attack (DePace, Melinek). Three of the ten experts offer opinions about GSK's interactions with regulators and interactions with the scientific community (Guerigian, Rost and Parisian). GSK has separate Daubert challenges to each of these experts on the merits of their qualifications, relevance (as some are just vessels to broadcast plaintiff's themes in the guise of expert testimony), methodology and fit under Rules 702 and 703

In GSK's view, there is a practical and logical way to structure the Daubert hearing in a way that would provide guidance to the proofs that will be required in all pending cases in the MDL, and in the coordinated State Court proceedings. Specifically, GSK urges an approach which will require the parties and allow the Court to focus on specific causation in the first instance. This approach will give the Court an opportunity to guide the parties as they move forward to deal with individual cases. Moreover, it is both practical and consistent with the Court's MDL role.

As the Court is aware, plaintiffs have the burden to present reliable evidence on two, independent, scientific questions:

(1) General Causation – Is Avandia capable of causing a heart attack? and

(2) Specific Causation – Even if capable of causing a heart attack in general, did Avandia cause a particular, individual plaintiff's heart attack?

GSK is challenging both prongs of plaintiff's proofs, but for purposes of a Daubert hearing, focusing first on specific causation in an individual case has many benefits. If plaintiffs cannot meet their burden of showing specific causation in a particular case with its two specific causation witnesses, then why would the Court utilize judicial and parties' resources over a fight of ten other witnesses? GSK believes the answer is that it should not.

In the MDL proceedings, the *Burford* case is now before the Court. The plaintiff has proferred a cardiologist, Dr. Nicholas DePace, and a pathologist, Dr. Melenik, to address specific causation. Dr. DePace is one of only two plaintiffs' experts who purports to address both general causation and specific causation. Of note, Dr. DePace performs a similar role in a lead case in the Philadelphia state court litigation, (*Buford v. GSK*). A hearing that focuses on the specific causation opinion of this witness will foster the coordination of a Daubert/Frye hearing sought by the Courts.

GSK believes that under the appropriate standard applied to expert testimony (whether Daubert or Frye), Drs. DePace and Melenik should be precluded from offering their opinions at trial. A ruling to that effect would end the inquiry as to the *Burford* (and the *Buford*) case. Equally important, a specific causation ruling in this case would provide guidance on what evidence, if any, of specific causation would be adequate in order for other cases to proceed to trial.

As GSK has described in it specific Daubert challenge, Dr. DePace does exactly what specific causation experts should not do. He simply assumes specific causation without

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offering an adequate methodology or any evidence to support his opinion. The plaintiffs, however, have turned this two step process into a one step inquiry, and want the Court to assume specific causation, based upon principles of general causation. This is exactly backwards, but it is exactly what Dr. DePace has done. Even if the Court were to conclude that there is general causation evidence sufficient to pass Daubert/Frye scrutiny – which GSK vigorously disputes – there should be no confusion that general causation evidence does not answer the specific causation question – namely, is there reliable evidence in an individual case to support a jury finding that Avandia caused a specific plaintiff's heart attack?

The issue of general causation is certainly relevant, which is why GSK submitted a backgrounder on this issue. GSK believes, however, that armed with the substantial briefing on the causation principles, the Court can and should address specific causation.

The PSC's remaining experts (Drs. Parisian, Guerigian and Rost), for the most part, are challenged because either: (1) they offer opinions well beyond their expertise; (2) offer personal commentary, not expert opinion, on issues for which expert testimony is not permissible (such as GSK's motive, as one example), and seek only to be advocates from the witness stand. GSK does not believe that additional testimony or hearing time need be spent to address its challenges to these types of experts, and these motions can be ruled upon based upon the substantial written record.

We remain available at the Court's convenience to discuss the structure of the scheduled Daubert hearing.

Respectfully submitted,

Nina M. Gussack

NMG/lf

cc: Jerome J. Shestack, Esquire
Vance Andrus, Esquire
Bryan Aylstock, Esquire
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Joseph Zonies, Esquire

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A LITIGATION PRACTICE

Joseph J. Zonies, Esq
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September 8, 2010

Via Facsimile and U.S. Mail
The Honorable Cynthia M. Rufe
U.S. District Court Eastern District Pennsylvania
601 Market Street, Suite 12614
Philadelphia, PA 19106-1797

RE: Avandia Litigation

Dear Judge Rufe:

During last week's conference with the Special Master, Mr. Shestack suggested that the parties notify the Court of those experts they anticipate will most inform the Court regarding *Daubert/Frye* issues. As the PSC noted in its letter of August 26, 2010 (attached), the PSC agrees with the Special Master's suggestion.

The PSC believes that each party should identify three to four experts (one from each specialty) as the focus of the hearing. The PSC proposes as follows:

1. The hearing should be focused on general causation issues.
As the PSC noted in its letter of August 26, 2010, a focus on general causation will inform all courts and parties across the country of the critical general causation issues that will apply to *all* cases in any venue. This will also aid the parties and Court in determining the focus and scope of any inquiry on specific causation in each of the trial cases.

2. Presentation of evidence.
The PSC proposes that the hearing consist of presentations from the attorneys on broad scientific issues and principles applicable to general causation. In addition, each side should present live testimony from two or three experts. Presentations from counsel will permit the most efficient use of the Court's time and the parties' resources. In addition, live testimony from two or three of the most relevant experts from each side will allow the Court to ask questions and permit the full examination of the evidence. The PSC believes that experts whose opinions are being challenged should have the opportunity to discuss those opinions directly with the Court.

3. Order of proof.
As the PSC bears the burden of proof, the PSC proposes that the first day of the hearing involve presentations and testimony from the PSC. The second day will consist of

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presentations and testimony from the defense. The third day will consist of a short rebuttal from the PSC.

4. Specific causation to follow rulings on general causation.
After hearing the general causation evidence and issuing a ruling on general causation, the parties and the Court will be better able to assess the appropriate scope and format for a refined, focused resolution of the case specific causation issues in the first cases set for trial in the MDL and the MTP.

To facilitate the Courts' review, the PSC has prepared notebooks for each of the experts that it believes are most appropriate for consideration – one cardiologist, one endocrinologist and one epidemiologist/biostatistician. These notebooks contain: (1) expert reports; (2) *Daubert/Frye* Motions; and (3) *Daubert/Frye* Responses. In addition, the PSC has created a notebook containing GSK's Overview and the PSC's Overview. These can be delivered to the Court at a place of its choosing upon short notice.

We remain available to discuss these issues with the Court.

Sincerely,

Joseph Zonies, Esq.
Thomas Cartmell, Esq.
On behalf of the PSC

cc : The Honorable Sandra Mazer Moss
Jerome Shestack, Esq.
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September 8, 2010

VIA HAND DELIVERY

The Honorable Cynthia M. Rufe
United States District Court for the
Eastern District of Pennsylvania
James A. Byrne U.S. Courthouse
601 Market Street, Suite 12614
Philadelphia, PA 19106-1797

Re: **In Re Avandia Marketing, Sales Practices and Product Liability Litigation, MDL 1871, 2:07-MD-1871-CMR (E.D. Pa.)**

Dear Judge Rufe:

GSK previously wrote the Court on August 26, 2010 with a proposal for the Scope and Structure of an Initial *Daubert* hearing (a copy is attached for Your Honor's convenience). We have received guidance from Special Master Shestack to propose a structure that would focus on a more limited set of witnesses, and not require a hearing or argument on the more than dozen witnesses that currently face *Daubert* (and *Frye*) challenges.

We have set forth below a detailed proposal, which is consistent with the status of litigation, and the guidance received from the Special Master. We have met and conferred with the PSC and understand the PSC has a markedly different view as to the approach for the hearing. We, therefore, request a conference to bring resolution to the structure and scope of the *Daubert* hearing.

The issues presented by the *Daubert* and *Frye* motions will have critical implications in litigation, addressing significant and complex scientific issues that will guide judges within and outside of the MDL. The parties deserve the opportunity to make a presentation and preserve evidentiary issues, without unnecessarily burdening the Court, the parties or a large number of expert witnesses. The parties also need sufficient time to prepare for a hearing, as an evidentiary hearing with either a dozen witnesses or a yet to be disclosed subset of witnesses, less than two weeks away, will not allow an orderly presentation of argument and evidence.

The *Daubert/Frye* Hearing Should Focus on Specific Causation.

First, GSK urges a hearing that focuses on specific causation. The first two of plaintiffs' trial picks (*Burford* in federal court, and *Buford* in the Philadelphia County) are ripe for specific causation challenge. GSK believes that specific causation is critically important. If the PSC cannot carry its burden on specific causation, then the *Burford* and *Buford* cases should be dismissed. *Guinn v. AstraZeneca Pharms. LP*, 602 F.3d 1245 (11th Cir. 2010) (affirming summary judgment for

defendant after exclusion of proposed specific causation testimony prior to addressing general causation). Both of these cases have the same specific causation expert, Dr. DePace. The PSC also has proffered a pathologist, Dr. Melinek, who offers specific causation opinions in *Burford*, and GSK will be prepared to address its *Daubert/Frye* arguments for this witness, as well.

Specific causation has broad implications for the litigation as a whole, and resolving whether specific causation opinions pass scrutiny under *Daubert* and *Frye* will provide clear direction as to the proofs necessary to take an individual case to trial.

A *Daubert* Hearing Should Focus on Witnesses That Will Testify in the First Set of Trials.

Second, GSK submits that the PSC should immediately identify the general causation witnesses it will offer in *Burford* and *Buford*. Promptly thereafter, GSK will identify its general causation witnesses for these two cases. The *Daubert* hearing then would focus on the specific and general causation experts in these cases.

On September 21, 2010, the parties would be prepared to provide legal argument on the *Daubert* motions for the witnesses identified. Since GSK is the moving party, GSK would present argument on its motions to exclude the PSC's specific and general causation witnesses that would be called in *Burford* and *Buford*. The PSC would then respond. GSK should be permitted to frame its motions for the Court before the PSC presents its argument in opposition. Otherwise, it is unlikely that those arguments will meet each other. This approach could be accomplished in a one or two day hearing.

GSK should have the ability to challenge as an initial matter the expert witnesses it will face first at trial. GSK has *Daubert/Frye* motions directed to individual experts, and blending the opinions of experts by allowing testimony from "representatives" experts does not help advance the issues that the Court is being asked to decide -- whether plaintiffs have carried their burden of adducing reliable evidence as to each challenged witness. While the general causation experts have certain common flaws, the question is not whether there is general causation for the litigation. Rather, the question is whether each expert should be permitted to testify based on his qualifications, methodology and conclusions.

A *Daubert* Hearing Should be Staged.

GSK has significant evidentiary challenges, which it needs to present and preserve. This does not mean, however, that the Court must hear from live witnesses in a vacuum. GSK proposes that the initial hearing be focused on counsel presentation (including demonstratives and deposition clips) and argument. After an initial presentation presented on September 21 or 22, the Court could direct which (if any) witnesses would be the subject of an evidentiary hearing. The parameters of the evidentiary hearing should be directed by the Court, and informed by the

presentations of counsel. Subject to the availability of the parties' respective expert witnesses, the hearing could occur during the week of October 5.

A process where the issues are framed by the parties, followed by a second hearing where the Court could direct which witnesses it wants to hear live, allows for an orderly presentation of evidence, and consideration by the Court of *Daubert* issues, prior to determining whether there are issues to be tried, or if so, any limits on the expert evidence.

Resolution of Other Experts Can Then Be Informed by This Process.

Resolution of GSK's motions directed to witnesses that the PSC does not identify for *Burford* and *Buford*, or witnesses that do not address general and specific causation issues, may then be deferred and informed by the Court's ruling on the motions directed to the experts identified in these cases. The parameters of the remaining challenges, and the structure of the hearing would greatly be informed by the above process, and presumably streamlined, understanding that GSK is preserving its rights to make an appropriate *Daubert* record.

We would welcome a conference with the Court to address these issues more completely.

Respectfully,

Nina M. Gussack

NMG/lis

cc: The Honorable Sandra Mazer Moss
Special Discovery Master Jerome J. Shestack
Joseph J. Zonies, Esquire
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September 7, 2010

Hon. Judge Cynthia Rufe
Eastern District of Pennsylvania
Courtroom 12A
James A. Byrne U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

RE: Avandia Marketing, Sales Practices and Products Liability Litigation, MDL 1871

Dear Judge Rufe:

The Plaintiffs' Steering Committee ("PSC") is writing to request a conference, either in person or by phone, to discuss the October 5, 2010, trial of *Burford v. Smithkline Beecham Corporation*, 070-CV-5360-CMR. The PSC has been and is currently preparing for trial. During recent conversations with counsel for GSK, the PSC learned that GSK does not believe that the *Burford* case is scheduled to begin trial on October 5, 2010.

The PSC believes it would be beneficial to the parties, their counsel and the Court to have deadlines in place to assure efficient briefing of motions in limine, exchange of witness and exhibit lists, and other pretrial deadlines. The PSC raised this issue during a conference call last week with Mr. Shestack and Mr. Shestack recommended that we ask for the Court's guidance on these deadlines.

Very truly yours,

Thomas P. Cartmell

TPC/mg

cc: ***Via email and U.S. Mail***
Special Master Jerome J. Shestack, Esq.
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September 8, 2010

VIA HAND DELIVERY

The Honorable Cynthia M. Rufe
United States District Court for the
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Philadelphia, PA 19106-1797

Re: **In Re Avandia Marketing, Sales Practices and Product Liability Litigation, MDL 1871, 2:07-MD-1871-CMR (E.D. Pa.)**

Dear Judge Rufe:

We write to respond to Mr. Cartmell's letter of September 7 regarding the first trial in the MDL and join in the PSC's request for a conference at the Court's earliest convenience.

As an initial matter, we can confirm that we do not believe the Court has scheduled the *Burford* case for trial on October 5, 2010. The PSC focuses on language first appearing in PTO-100, which states that the "Initial Trial Pool will commence October 5, 2010." This generic language referring to a "trial pool" has been carried forward in all subsequent scheduling orders, including PTO-107. As Your Honor may recall, the parties were unable to agree on which case (a PSC trial pick or GSK trial pick) would be the first case tried in the MDL. The parties each had (and continue to have) strongly held views on this issue. After hearing these positions, the Court took the issue under advisement. The ordering of trials was raised again at the most recent in-person status conference, and Your Honor noted that a decision had not been made on the issue and might need to wait until after decisions were made on the various motions that would be filed, including *Daubert* motions. *See* April 1, 2010 status conference at pp. 18-19. To our knowledge, there has been no ruling that a plaintiffs' case (let alone the *Burford* case) will be tried first.

In addition, PTO-100 and all subsequent scheduling orders, state that "further pretrial deadlines" – which we understood to refer to things typically covered at Rule 16 Pretrial Conferences in this Court such as deadlines in specific cases for briefing of motions in limine, exchange of witness lists and exhibit lists, deposition designations, deposition counter-designations, establishing a reasonable limit on the time allowed to present evidence and the like -- "will be set by separate Order." Given the large number of rulings the parties will ask the

Court to make prior to the first trial, we believe such a pretrial order is critical to allow for the efficient briefing of motions in limine, objections to proposed exhibits and testimony, and rulings on deposition designations and counter-designations. GSK expects to file many important motions in limine that could have a substantial impact on the evidence permitted at any trial. While the parties will be able to resolve routine issues by stipulation, there will be significant evidentiary issues that need to be resolved by the Court. Based on Mr. Cartmell's letter, it would appear that the PSC is in agreement that such a pretrial order is needed to efficiently resolve these issues prior to the first trial. We also agree with the PSC that further guidance is needed from Your Honor to maximize the Court's ability to thoughtfully consider and resolve the pending *Daubert* motions, and have written separately on this issue.

Quite independently, GSK seeks a deferral of any trial listings in order to allow its current and ongoing settlement discussions to continue their progression. As Your Honor is aware, GSK has resolved more than 10,000 cases, and continues to be engaged in active negotiations with many other law firms. At the Court's urging, we have devoted considerable attention to these discussions and are continuing to make substantial progress. We are confident these discussions will continue to winnow the cases remaining in the MDL. For example, five of the six cases selected by the parties for the MDL's Initial Trial Pool have been resolved. As the Court is aware, Judge Moss has deferred any trial until January at the earliest in recognition of productive settlement activity.

As Your Honor recognized very early in this MDL, while the parties always start on a trial track, sometimes greater progress is made, individually and collectively, on the settlement track. In MDLs, the desire of an individual plaintiff to get to trial always needs to be weighed against the ability of many other plaintiffs to amicably resolve their cases. We know full well that there may come a time when a trial (or multiple trials) will be necessary to conclude cases that cannot be amicably resolved, but our hope is that the parties will be given sufficient time to resolve those cases that can be resolved by settlement and truly identify the cases that actually need to be tried. We firmly believe that a trial listing in October 2010 would derail these sensitive efforts.

We are prepared to further discuss all these issues in more detail at Your Honor's earliest convenience.

Respectfully,

Nina M. Gussack

cc: Special Discovery Master Jerome J. Shestack (via Hand Delivery and electronic mail)
Bruce Merenstein, Esquire (via electronic mail)
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