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APPEARANCES: (Continued)

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Proceedings recorded by electronic sound recording; transcript produced by computer-aided transcription service.

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1 (The following was heard in open court at
2 2:01 p.m.)

3 THE COURT: We have before us a hearing
4 specially listed on the advisory plaintiffs' steering
5 committee motion for a rule to show cause. I know that
6 you all signed in with my deputy, but I would like to
7 ascertain precisely which counsel and which parties are
8 present.

9 I'm going to start with the moving party,
10 that's the plaintiffs' steering committee. Dianne
11 Nast.

12 MS. NAST: Dianne Nast here, Your Honor, on
13 behalf of the Avandia advisory committee.

14 THE COURT: Thank you.

15 MR. CORR: Stephen Corr on behalf of the
16 advisory committee.

17 MR. ZONIES: Joe Zonies, Your Honor, on
18 behalf of the advisory committee.

19 THE COURT: Hello.

20 MR. CARTMELL: Tom Cartmell on behalf of the
21 advisory committee.

22 MR. AYLSTOCK: Bryan Aylstock, Your Honor, on
23 behalf of the advisory committee.

24 THE COURT: And?

25 MR. ANDRUS: Vance Andrus on behalf of the

1 advisory committee and, Your Honor, Dr. Zonies, who I
2 think you know, one of our consultants, not a lawyer,
3 but we would ask permission if the Court would let him
4 sit by me if that's all right.

5 THE COURT: He certainly has that permission.
6 Thank you, counsel, good to see you and you, too, Dr.
7 Zonies. Who do we have on the respondents' side,
8 please?

9 MR. SACHS: Your Honor, Robert Sachs from the
10 law firm of Shrager, Spivey & Sachs on behalf of the
11 Heninger Garrison Davis, LLC firm from Birmingham,
12 Alabama. With me is my associate, Jason Tucker.

13 MR. TUCKER: Good afternoon.

14 THE COURT: Good afternoon. Would your
15 clients happen to be here?

16 MR. SACHS: They are not, Your Honor.

17 THE COURT: Were they not intending on
18 coming?

19 MR. SACHS: Mr. Garrison was intending to
20 come, Your Honor, as the most knowledgeable witness on
21 behalf of the law firm, but as we stated in our motion
22 his father was hospitalized last week with a brain
23 bleed.

24 As I understand, he is either about to or
25 just has been transferred to a nursing home with, as I

1 understand it, fairly advanced problems related to a
2 brain bleed. Mr. Garrison felt he had to stay close to
3 his father at this time.

4 THE COURT: I will express first of all my
5 concern for his father. This is a difficult time for
6 him.

7 On the other hand, I think if this is a
8 fact-finding hearing where the Court needs to entertain
9 testimony I would assume that your client would be a
10 necessary and indispensable witness.

11 As a party, somebody from his law firm should
12 be here. I know that you are representing him, but you
13 can't give testimony on his behalf.

14 MR. SACHS: I can't.

15 THE COURT: And I don't have an affidavit
16 from him.

17 MR. SACHS: I have an affidavit to present to
18 the Court from Mr. Garrison, and another affidavit from
19 his referring lawyer, who is the lawyer whose cases are
20 at issue, Jesse Ferrer, and we would as part of our
21 presentation hope to submit to the Court.

22 Mr. Garrison was the one who was planning to
23 attend and his father's illness kept him from coming.
24 There really is no one else within his firm with the
25 same oversight of the entire piece of litigation who

1 would be as good a witness on the broad scope of issues
2 at issue here.

3 THE COURT: Well, I'm afraid that that may be
4 true, although Mr. Heninger certainly is involved in
5 this matter, as well.

6 MR. SACHS: There are other attorneys who
7 have been involved, Your Honor, but Mr. Garrison has
8 represented to us that he is absolutely the one who is
9 captaining the effort on the Avandia litigation within
10 his firm and felt that it would be most appropriate for
11 him, and he really was the only person with the broad
12 knowledge of all the issues that could potentially come
13 up here.

14 THE COURT: All right. Were the plaintiffs'
15 steering committee members made aware that he would not
16 be present?

17 MS. NAST: Your Honor, Mr. Spivey informed me
18 yesterday, either afternoon or evening, I don't
19 remember which, that he would not be here.

20 THE COURT: All right. Are you prepared to
21 proceed in any event, or would you have a position to
22 the contrary?

23 MS. NAST: Well, we talked about that. I
24 mean, whatever Your Honor prefers obviously would be
25 our first answer.

1 MR. ZONIES: Joe Zonies, Your Honor. We
2 received an affidavit of W. Lewis Garrison, Esquire via
3 e-mail an hour and a half ago, Bryan?

4 MR. AYLSTOCK: Yes, Your Honor, about an hour
5 and a half ago.

6 MS. NAST: We can't cross-examine the
7 affidavit.

8 MR. ZONIES: We cannot cross-examine the
9 affidavit. We believe that there are representations
10 in the affidavit that need to be tested.

11 We also received this morning an affidavit of
12 Jesse Ferrer, which similarly we believe requires
13 testing if these were to put into evidence.

14 We fundamentally would object to entry of
15 these because of first of all, they are late admission
16 or late notice to us, and also as hearsay in Mr.
17 Ferrer's affidavit, which appears was executed
18 yesterday. We only received it this morning.

19 Mr. Ferrer's presence here I'm sure -- I
20 don't know whether or not Mr. Ferrer could have come
21 here yesterday, flown in to be at the hearing rather
22 than sending us an affidavit.

23 THE COURT: If I'm not mistaken, Jesse Ferrer
24 hails from Florida.

25 MR. ZONIES: Texas.

1 MR. SACHS: Texas, Your Honor.

2 THE COURT: Texas, okay.

3 MR. SACHS: Dallas, Texas.

4 THE COURT: That's right, there's another
5 Ferrer firm from Florida, and we went through that
6 exercise some time ago for other reasons.

7 MR. ZONIES: Yes. In any case, Your Honor,
8 we are prepared to proceed on the argument portions on
9 this. However, to have a full and fair hearing I
10 suspect we would need testimony from at least these two
11 gentlemen.

12 THE COURT: I would suspect so. Would you
13 not agree, Mr. Sachs?

14 MR. SACHS: Your Honor, I would, and candidly
15 that's why we presented the Court with our motion for
16 the continuance based on the ill health of Mr.
17 Garrison's father. We agree that his presence is very
18 important here, as would be that of Mr. Ferrer.

19 THE COURT: Well, time marches on, of course,
20 and the motion did not actually give me the information
21 I needed to grant it, which is why we denied it.

22 We read it and it asked it for two grounds.
23 One of the grounds was discovery, and the other was Mr.
24 Garrison's father. We did not really know about his
25 father's condition, age, anything else. We have no

1 concept of whether it was imminent surgery, death, even
2 what the health problem was.

3 On that kind of information there was no way
4 that I could grant it. It seemed to me that the sooner
5 we had all parties face the music here the better it
6 would be to get to a resolution of this.

7 Knowing the background, reviewing the
8 documents that were filed in Alabama, speaking to the
9 judge there, not about the substance but about the
10 history procedural, we thought that it had gone long
11 enough.

12 We set a time and date, and I'm not
13 inflexible. I know that there were attempts to contact
14 the Court on behalf of Mr. Garrison by the plaintiffs'
15 steering committee for his own personal benefit.

16 It just seemed to me Mr. Garrison needs to do
17 more himself. I don't have that information in this
18 motion that you just gave me. Brain bleed, I would
19 have seen brain bleed and knew what to do.

20 Nursing home transfer, if he's got power of
21 attorney he better be there. Otherwise, how many
22 siblings does he have? You see, I'm a caretaker of an
23 aging parent and I know this stuff.

24 So, I want somebody to be square with me, Mr.
25 Sachs.

1 MR. SACHS: Okay.

2 THE COURT: I didn't think I was being dealt
3 with that position.

4 MR. SACHS: Your Honor, I understand full
5 well the breadth of information that would be more
6 appropriate for the Court to recognize the gravity of
7 the issue.

8 I e-mailed with Mr. Garrison this morning and
9 asked him, you know, is he going to plateau, what's
10 going to give you confidence to be able travel to
11 Philadelphia so we can go forward with this?

12 He said, you know, every day that he is
13 stable I'm going to be somewhat more confident. So, I
14 can't answer with specificity. He did offer, by the
15 way, to obtain some of the medical records so that we
16 can make a clear record about how very grave his
17 father's condition was, and I said I may yet take you
18 up on that.

19 THE COURT: Well, it's not that I mistrust
20 counsel's representations, or even Mr. Garrison's.
21 It's that a judge makes rulings based on what is
22 presented to her.

23 MR. SACHS: Understood, Your Honor.

24 THE COURT: I didn't feel that the
25 combination of those two reasons was supported. I'm

1 not doubting that he is involved in this, but it is not
2 lost on me that there was no continuance request of the
3 Alabama court proceeding last week.

4 It was the judge who continued that, not Mr.
5 Garrison. The judge continued that in favor of the
6 court, the MDL court, the federal court assuming
7 jurisdiction. So, you know, there comes a time when
8 end runs don't work.

9 MR. SACHS: If I may, Your Honor, to address
10 that. What Mr. Garrison did express to me last week is
11 there's a big difference for him now being a plane ride
12 away from his father versus being an hour or two away
13 from his father at home in Alabama.

14 Of course, Your Honor, we should have
15 expressed all that in the motion for a continuance to
16 make clear why he saw his participation here somewhat
17 differently because of the proximity issue.

18 MR. ZONIES: Your Honor --

19 THE COURT: I'm concerned about how he sees
20 his position here. I am also concerned about his
21 father and his family situation. Please let me make
22 that clear.

23 MR. SACHS: Thank you, Your Honor.

24 THE COURT: Okay.

25 MR. ZONIES: Your Honor, we as the committee

1 are prepare to move forward today, and we believe the
2 factual record that has been developed in part through
3 the Alabama pleadings, demonstrating Mr. Garrison's
4 execution of PTO 10 certainly answers the question
5 regarding the jurisdiction in this case, and we can
6 move forward with that based upon the evidentiary
7 record we have.

8 Mr. Garrison's affidavit primarily seems to
9 attack whether or not this PSC in fact conferred
10 benefit upon Mr. Garrison and his clients. We are also
11 prepared to proceed on that front, as that is primarily
12 evidence from our side.

13 So, we're ready to move forward. We think we
14 can, even absent Mr. Garrison. Again, it's their
15 burden. This is an order for Mr. Garrison and his firm
16 to show cause.

17 It is their burden to show some cause why
18 this Court does not have jurisdiction and why the PTO
19 70 assessment is not appropriately assessed against Mr.
20 Garrison and his clients' cases.

21 We don't believe that they will be able to
22 meet that burden, and we are prepared to demonstrate
23 that the evidence that we have already captured
24 establishes that there both are jurisdiction in this
25 Court is appropriate, and that the assessment is due

1 and owing.

2 THE COURT: Thank you, Mr. Zonies. Is it the
3 plaintiffs' steering committee's position that the
4 order of production of evidence is not as important as
5 the burden of proof?

6 In other words, if you are prepared to move
7 forward you really do not have to go first. But,
8 knowing what you now know, what is your position on
9 that?

10 MR. ZONIES: We would be happy to push
11 forward, Your Honor, and go first.

12 THE COURT: All right. What is your position
13 as to the admissability of the affidavits, both of
14 them?

15 MR. ZONIES: At this time, Your Honor, our
16 position is that those are not admissable affidavits.
17 However, we would be fine with discussing the contents
18 of those to the extent that -- but, they are not
19 admissable in evidence in this Court.

20 THE COURT: All right.

21 MR. ZONIES: Both as hearsay and because of
22 the untimeliness with which they were delivered to us.

23 THE COURT: All right.

24 MR. ZONIES: They primarily address, and the
25 important fact there, Your Honor, is they primarily

1 address issues which were clearly enunciated in our
2 opening motion a month and a half or two ago.

3 It certainly could have been attached to any
4 response, the response that HGD in fact filed, and they
5 chose not to support that with affidavits.

6 Certainly, as with the motion for a
7 continuance, it appears to be a repeated behavior to
8 not attach affidavits to establish the factual
9 predicates in any brief.

10 THE COURT: All right. Did you want to speak
11 to that, Mr. Sachs, as to the admissability of the
12 affidavits, either or both?

13 MR. SACHS: I think it is up to the Court
14 there. At least with affidavits that are sworn before
15 a notary public licensed in the states where they were
16 sworn there is an element of reliability that goes with
17 the affidavits because of the nature of the affidavit
18 itself and bearing the seal of a notary public.

19 In terms their ability to cross-examine the
20 witnesses, of course we understand their argument with
21 regard to that.

22 THE COURT: While I could reserve ruling on
23 it, it seems to me appropriate to make it clear at this
24 time that affidavits do not substitute for the actual
25 party or witness to be present.

1 That party or witness is Mr. Garrison,
2 someone else knowledgeable from his law firm, and/or
3 Jesse Ferrer, the allegedly referring attorney of some
4 of these cases.

5 We want them present, and we also think that
6 affidavits themselves that purport to provide facts to
7 the Court that is trying to conduct fact-finding, a
8 Court that needs to assess credibility can't be done on
9 paper.

10 So, regardless of how there may be some
11 benefit and information from these affidavits, the
12 Court would prefer not to rely on them in any way and
13 defer ruling on any ultimate decision until such time
14 as the PSC has had an opportunity to fully and finally
15 cross-examine and impeach if necessary, if appropriate,
16 the representations and the persons that are providing
17 affidavits.

18 I will not admit them in this testimony.
19 They do not satisfy a burden of proof. They may
20 provide a basis to move forward, but they could not
21 seal the deal.

22 MR. SACHS: Understood, Your Honor. With
23 that, Your Honor, may I respectfully renew our motion
24 to continue this hearing then based on Mr. Garrison
25 having represented through counsel that he is the most

1 knowledgeable witness on behalf of the Heninger
2 Garrison Davis Law Firm, and his unavailability because
3 of a family emergency that required him to remain in
4 Alabama?

5 THE COURT: Well, had the Court had the
6 courtesy of hearing from you, Mr. Spivey, or Mr.
7 Garrison himself about this, we would have done this
8 last week and not had all of these fine lawyers come in
9 from all over the country. It has been expensive.

10 The Court prefers at this time to start the
11 hearing, but we will not conclude the hearing. I will
12 not draw a negative inference against Mr. Garrison,
13 although I think I could for being a missing witness, I
14 will not under the circumstances do that.

15 Mr. Sachs, you are left holding the bag here,
16 and you will do as well as you can. But, there will
17 not necessarily be another opportunity for the
18 respondents here to present evidence through Mr.
19 Garrison.

20 He will be here to answer, but I'm not sure
21 how and in what capacity he will be able to testify.
22 This is problematic and I will not have anyone,
23 regardless of the reasons, disregard a court order.

24 There is no other court to decide these
25 issues. That is clear from Judge Brown's order that he

1 also agrees that this Court maintains the jurisdiction.

2 Part of this hearing was to see if the Court
3 could rightfully and legally establish such
4 jurisdiction, which your client has never acceded to,
5 even though the judge that he has in Alabama does not
6 agree with him.

7 So, there seems to be a lack of recognition
8 that things need to be dealt with here. That is what I
9 am seeing.

10 So, I would like to ask the plaintiffs'
11 steering committee to proceed as far as they are
12 comfortable with, and if they agree to a continuance I
13 will be happy to grant it, but it seems to me you are
14 here, you have done work.

15 I would like to know what your position is
16 and whether or not you would like to move forward in
17 some way.

18 MS. NAST: Your Honor, yes, we have been here
19 for days. So, we are -- I won't say we are totally
20 prepared, because we found many things just last
21 evening and this morning that we had not seen
22 beforehand and not been informed about before.

23 But, what we plan to do, Mr. Zonies is going
24 to be our chief trial counsel and present argument, we
25 are going to call several other members to testify, and

1 that's where we are ready to go.

2 THE COURT: All right. A transcript can be
3 provided to Mr. Garrison so he can understand what he
4 is facing when he does get here, and that is how we
5 will proceed.

6 I see Mr. Zucker here. I'm sorry that we
7 started a little earlier than you anticipated. Mr.
8 Zucker on behalf of GSK. You don't have an active role
9 here, but you may participate if you would like.

10 MR. ZUCKER: Thank you, Your Honor.

11 THE COURT: Would you like to sit at counsel
12 table?

13 MR. ZUCKER: Yes, why not.

14 MR. ZONIES: Your Honor, one of the issues of
15 having a bunch of attorneys be your --

16 THE COURT: Just a minute. I have a third
17 counsel table for these situations.

18 MR. ZUCKER: Okay.

19 MR. ZONIES: One of the issues associated
20 with having a bunch of attorneys as clients is I would
21 like to take a few moments, discuss everything that the
22 Court just informed us of, and insure there is
23 consensus of moving forward for the committee.

24 THE COURT: All right. Let's take a brief
25 recess.

1 MR. ZONIES: Thank you, Your Honor.

2 (Recess, 2:21 p.m. to 2:38 p.m.)

3 THE COURT: Good afternoon again. Please be
4 seated.

5 MR. SACHS: Thank you.

6 THE COURT: Have counsel had a chance to
7 discuss options?

8 MS. NAST: We have, Your Honor, and no one
9 was injured during the discussion.

10 THE COURT: Always a good thing.

11 MS. NAST: This is good news.

12 MR. ZONIES: Physically, Your Honor. There
13 was some psychic injury, however.

14 MS. NAST: We also discussed briefly with Mr.
15 Zucker, even though he's not really a participant, but
16 we wanted to make sure that everything is okay.

17 We understand that this is something that
18 really should be concluded in one proceeding with
19 testimony, so we would be certainly willing to stay
20 another evening and come in tomorrow for the hearing
21 with video testimony.

22 THE COURT: And how could we facilitate that,
23 Mr. Sachs?

24 MR. SACHS: I would have to --

25 THE COURT: We're on the receiving end here,

1 we have got the capability.

2 MR. SACHS: That's what I needed to just
3 assure myself. I was fairly certain that most federal
4 courtrooms could. I've tried calling and e-mailing Mr.
5 Garrison to see if he could get to another place with
6 equipment that would be able to communicate with this
7 courtroom.

8 I have not been able to reach him at this
9 time. I can not imagine that in a city like Birmingham
10 that there would not be a facility that would have
11 that.

12 THE COURT: Including his law firm.

13 MR. SACHS: I would hope, although I can't do
14 it from mine. But, I would hope that he should have
15 fairly ready access to something like that.

16 So, it's a question of when Your Honor would
17 like us to reconvene tomorrow.

18 MS. NAST: I don't know, Your Honor, if we
19 have done that here, but I have been in some courtrooms
20 where a witness has not had access to public facilities
21 but has gone to the federal courthouse, an arrangement
22 worked out between the judges, and the testimony has
23 then been provided in that federal courthouse. So,
24 maybe that's an option, I don't know.

25 THE COURT: All right. Let's reach him

1 first, though. It does no good to do all of that if we
2 don't think he's going to appear, even by video. I
3 think you need to determine that, Mr. Sachs.

4 MR. SACHS: I will try him once again, Your
5 Honor. With the Court's indulgence for another brief
6 break I am happy to keep trying him, or his firm
7 actually.

8 I can reach somebody at his firm to see if
9 they have the facility, because if I find out they have
10 the facility, you know, then we will --

11 THE COURT: Then it's a no-brainer.

12 MR. SACHS: Then we will instruct our client
13 appropriately.

14 THE COURT: Then it's a matter of time.

15 MR. CORR: Your Honor, before we go -- I know
16 we're going to take a break, but just that if I could
17 be excused tomorrow?

18 I have a funeral to attend tomorrow, and I
19 know that Mr. Aylstock probably also can't make it
20 tomorrow.

21 MR. AYLSTOCK: My wife is entertaining all of
22 my many relatives at home without me there.

23 THE COURT: I worry about travel
24 arrangements. It is, after all, a holiday week for a
25 lot of people. I have forgotten what holidays are

1 like, but I respect that, I really do, and if you need
2 to do that, that's fine.

3 MR. AYLSTOCK: Thank you, Judge.

4 THE COURT: That's fine.

5 MS. NAST: He was threatened repeatedly, but
6 did not respond.

7 THE COURT: Obviously, he is impervious to
8 psychic injury.

9 MR. SACHS: Your Honor, I understand the
10 Court's interest since counsel are all in town at this
11 time, having made the trip initially to try to proceed
12 as quickly as possible.

13 But, hearing that at least two have to leave
14 I feel fairly confident that a week from today I could
15 actually have Mr. Garrison here personally if the Court
16 would consider a continuance of that length, rather
17 than trying to work a video link-up.

18 MS. NAST: Your Honor, we think we are making
19 at the suggestion of the Court an accommodation, and we
20 would much prefer to go forward while everyone has
21 spent the time, and money, and effort to be here and
22 prepare.

23 THE COURT: That goes a long way with me.
24 Let's try this. Let's try getting him on the video
25 conference as a participant tomorrow. I do not want to

1 make a decision without his active involvement, his
2 personal presence, whether it be by video or in person,
3 and it may be that we are going to do both.

4 It may be that we need to have him tomorrow,
5 and I want to do this as early in the morning as we
6 can. If counsel are available at 9:30 tomorrow I would
7 like to start at 9:30.

8 MS. NAST: We are.

9 THE COURT: What time is that in Alabama,
10 however?

11 MR. SACHS: That's 8:30 in Alabama, Your
12 Honor.

13 THE COURT: Well, let's see if that is
14 workable.

15 MR. SACHS: I have -- Your Honor, I have a
16 personal appointment at 8:30. 10:00 or 10:30 would be
17 much more workable from my perspective. It's a
18 recurring appointment that I --

19 THE COURT: Okay. Mr. Andrus?

20 MR. ANDRUS: Your Honor, there are very few
21 non-stops between Denver and here. Enough is enough.
22 I'm supposed to be in a car at six a.m.

23 THE COURT: Will you be here tomorrow?

24 MR. ANDRUS: Yes, Your Honor.

25 THE COURT: All right.

1 MS. NAST: He is potentially a witness.

2 THE COURT: Well, I am tempted to just take
3 testimony today from Mr. Andrus so it is preserved, so
4 he can go.

5 MS. NAST: We should ask this. One of the
6 things that we are -- and maybe you won't know the
7 answer yet.

8 One of the things that we are prepared to do
9 if it will be helpful to the Court is to provide a
10 summary, and we really mean a summary, of the work that
11 the MDL has done so that it can be considered in terms
12 of, you know, what was common benefit, how much common
13 benefit work was done, how would that have assisted the
14 other persons in motivating the settlements of their
15 cases. That is what Mr. Andrus would be testifying to.

16 THE COURT: Okay. Anything can be taken out
17 of order here. That's normally summary evidence, but
18 it can be taken first as far as I'm concerned. He
19 should be able to go.

20 MR. ANDRUS: Your Honor, since I have rose
21 some personal recognition, I would like to stay and I
22 would like to be part of the ordinary process that my
23 trial team wants. I just think the earlier we start,
24 the better.

25 THE COURT: What time is your flight to get

1 home?

2 MR. ANDRUS: 6:00 tonight. Now, I am
3 scrambling to try to find one tomorrow, Your Honor, but
4 I know that there's a 2:00 tomorrow that I could be on.
5 If I miss that one I don't have another one until 6:00
6 tomorrow night.

7 THE COURT: Okay. Thank you. In any event,
8 whatever we do tomorrow morning Mr. Andrus goes first.

9 Tell me, would you like to talk to us at
10 sidebar or off the record concerning your appointment,
11 your standing appointment?

12 MR. SACHS: I would be happy to, Your Honor.
13 At sidebar, if I could.

14 (Sidebar discussion was held off the record.)

15 THE COURT: I think this is the point where I
16 am going to take a brief recess.

17 We are trying to find Mr. Garrison. We need
18 to know what he is going to be able to provide
19 tomorrow. Otherwise, we are taking testimony today.
20 That's all there is to it. Okay.

21 MR. SACHS: Will do. Thank you, Your Honor.

22 (Recess, 2:46 p.m. to 3:14 p.m.)

23 THE COURT: Good afternoon. Please be
24 seated. All right. The first question I have is Mr.
25 Garrison.

1 MR. SACHS: Your Honor, I did reach Mr.
2 Garrison. I spoke with him and told him that he will
3 be in front of a camera tomorrow morning at 8:30 local
4 time, and to find an appropriate video link so that he
5 can be on standby.

6 That's also with the understanding that
7 because of flight arrangements Mr. Andrus may need to
8 go first and be taken out of turn. I said you will
9 just wait, we will reach you when we reach you.

10 THE COURT: Well, he could participate by
11 being there and observing.

12 MR. SACHS: Sure.

13 THE COURT: That video conference works both
14 ways.

15 MR. SACHS: Okay.

16 MR. ZONIES: I think depending on flights it
17 is likely -- it is fine for them to go first and
18 attempt to meet their burden.

19 THE COURT: Okay. He needs to know that he
20 participates. This is our way of accommodating his
21 family situation, and I don't know how else to put it.
22 It is 8:30 or nothing. If he is available, he has got
23 to be there no matter who is testifying. I mean, I
24 don't know why he is not more interested.

25 MR. SACHS: For what it's worth, Your Honor,

1 I used stronger words than that.

2 THE COURT: I hope so, but I'm on the record,
3 and secondly, I try not to use that kind of language.

4 It really is important that he get it. He
5 has got to get it. So, 8:30 tomorrow morning in this
6 courtroom.

7 MR. SACHS: I'm sorry, 8:30 is for local
8 time.

9 THE COURT: No, he is 8:30. We are 9:30.

10 MR. SACHS: We are at 9:30, correct.

11 THE COURT: We start no matter what, and he
12 moves the ball forward as the respondent on the rule to
13 show cause. I think we should get the game plan right
14 now. The first order of business is what, he is going
15 to just testify?

16 MR. SACHS: We will put him on to testify,
17 Your Honor. Obviously, there is information that is
18 very important.

19 In terms of the timing, his view as to what
20 he signed, what he knew, and issues related to that I
21 am sure he will want to offer testimony about.

22 THE COURT: Okay. Is there some question
23 about Mr. Garrison's signing the pretrial order number
24 ten, or will he be admitting to that?

25 MR. SACHS: Your Honor, he will admit that he

1 stipulated to the entry of that in the Alabama
2 litigation, is what I believe he will testify to, that
3 his understanding was he agreed to a stipulation in the
4 Alabama -- in the Battle case in Alabama that allowed
5 that entry to be ordered in that litigation.

6 (Pause in proceedings.)

7 MR. SACHS: I believe the stipulation
8 approved by the Alabama trial court judge also said
9 that he stipulated that the endorsement was signed for
10 the Alabama litigation, as well.

11 THE COURT: Well, it's under the Battle
12 title.

13 MR. SACHS: Under the caption, which is
14 multiple cases, of course.

15 THE COURT: 2009. Yes, it was multiple
16 cases. It wasn't just that case, though.

17 MR. SACHS: I was referring to the Battle
18 caption, which in the case is included within there.

19 THE COURT: Is that one of the legal issues
20 that you are promoting here, because it says Shirley
21 Battle and that was a state case, that that didn't
22 represent a group of cases?

23 MR. SACHS: Your Honor, I think --

24 THE COURT: I'm just trying to understand the
25 position.

1 MR. SACHS: I will ask a question which will
2 allow Mr. Garrison to testify to his view as to that
3 which is, as I understand it, my role here.

4 THE COURT: Okay. There should be an
5 understanding as to what the legal issues are given the
6 allegations of facts, whether they could be proven or
7 not.

8 Legal positions and arguments rise or fall
9 based on facts that I would find, obviously. But, it
10 is nice to know if we are partly on the same page, and
11 I just need to know what the respondents' position is
12 here.

13 MR. SACHS: I think also with regard to the
14 tolling agreement cases Mr. Garrison will need to
15 testify in term -- just to create a factual record in
16 terms of which cases initially signed tolling
17 agreements and then were then filed in state court, his
18 understanding of what that meant in terms of the
19 tolling agreement once he -- despite the tolling
20 agreement filed in the state court. That's the
21 testimony I expect to elicit from his, as well.

22 In terms of the overall fairness issue which
23 we will ask the Court to consider, I hope to arrive at
24 morning with a stipulation. We had wanted to raise
25 this with the Court and perhaps we can do it off the

1 record.

2 It is our understanding through discussions
3 that happened prior to this hearing that there may have
4 been one other lawyer who had some sort of an
5 accommodation reached, and I don't want to say too much
6 on the record because I understand these were sealed.

7 THE COURT: But, that was never before me. I
8 had nothing to do with any of that. So, you know, I
9 don't know what I can do about that.

10 MR. SACHS: I understand. May I just ask the
11 Court's indulgence to go off the record?

12 THE COURT: You have a motion for discovery,
13 and partly -- that's in your motion.

14 MR. SACHS: Right.

15 THE COURT: So, I don't know why we have to
16 go off the record on that.

17 MR. SACHS: Let me try to put this in a way
18 that won't put anyone in a bad position.

19 In discussions we learned there was an
20 attorney, a firm, I think it's the K & K firm I've
21 heard reference to in California, and I don't know what
22 K & K stands for, that did reach an agreement with the
23 court-appointed advisory committee regarding the common
24 benefit fee due on their cases.

25 There was disparate treatment for cases

1 within their -- you know, the K & K firm group. In
2 speaking with counsel before today's proceeding I said
3 I would like to see if we can stipulate that there was
4 such an agreement, there was such disparate treatment.

5 We really don't know any of the circumstances
6 or the facts. I have had a brief representation as to
7 those facts before we began today, but that's something
8 that we hoped to also put on the record, as we believe
9 that goes to the fairness issue.

10 THE COURT: There is an issue here that
11 everybody has to understand, in that not everything
12 that was worked out between counsel was approved by the
13 Court, and there is no ruling by the Court as to any
14 such contribution or gradation of contribution.

15 MR. SACHS: Oh, then we must have misheard,
16 because the representation was made to my partner,
17 William Spivey, that that agreement was approved by the
18 Court. So, forgive me if we misheard.

19 THE COURT: You know, I sign a great many
20 things, but I don't remember signing that. So, my
21 memory could be refreshed, but I am certainly aware of
22 when there are these matters that come up across the
23 country, because here we are, here is one in Alabama
24 and it is in my lap.

25 But, I don't think I remember at this point

1 any of the confidentiality provisions or any other
2 resolution of that. So, I can't use it as a guide. I
3 can't use it as something that is anything more than
4 instructive, if I could even had my memory refreshed on
5 it.

6 I'm being honest with you, there are things
7 that I just don't keep in my head. But, I think I know
8 what issue you are referring to, counsel.

9 There are a number of these matters that you
10 are asking for in your motion for expedited discovery
11 responses that somehow I can't understand the motion
12 because it is asking for expedited discovery, but past
13 the time of the hearing, and 20 days instead of 12.

14 I'm not sure where that gets you since we are
15 here during July 4th vacation week and we are
16 litigating. So, I am not sure that answers in 20 days,
17 even if they were to be granted, would be helpful to
18 you.

19 MR. SACHS: Sure. The 20 day time frame,
20 Your Honor, as I indicated I think in a footnote, was
21 really because it was filed as a parallel motion with
22 the motion for a continuance and recognition that we
23 were asking for some input in responses over a week
24 that would otherwise be a holiday week.

25 We were really simply trying to not ask

1 anybody to do anything that would put them at a
2 personal burden.

3 THE COURT: Although, this case has been,
4 this matter has been a personal sacrifice. I don't
5 know if burden is the word, but a sacrifice because of
6 a lot of reasons.

7 Mr. Zonies, would you like to respond? Would
8 anyone on the PSC like to respond to this matter?

9 MS. NAST: No.

10 MR. ZONIES: I don't think so, Your Honor,
11 we're fine.

12 THE COURT: Okay. I do at this time, since
13 we know we're coming back tomorrow, want to address the
14 motion for expedited discovery responses and try to
15 ascertain whether there is objections to any of the
16 production request that are being made here.

17 MR. ZONIES: On that I do have a response,
18 Your Honor. I may have misunderstood what the Court
19 was asking for.

20 THE COURT: Yes.

21 MR. ZONIES: I apologize. Your Honor, first
22 we also recognize the timing issue and felt that these
23 would largely be also substantively irrelevant to any
24 issue before the Court.

25 The way that we understand the Court's motion

1 to show cause is that it's a hearing on the factual and
2 legal predicates associated with first of all, this
3 Court's jurisdiction over the HGD firm and its clients.

4 Secondly, it's only because the work of the
5 PSC is being assailed as not providing benefit to that
6 firm, the factual predicates associated and legal
7 predicates associated with why the PSC did, in fact,
8 confer benefit on HGD and their clients.

9 As the Court's order said, the Court -- this
10 is from the Court's all writs order issued on June
11 25th, page two. "The MDL Court will hold a hearing on
12 the interpretation and application of PTO 70 to the
13 Heninger settlement on July 2nd, 2012.

14 "The hearing will include the development of
15 a factual record regarding whether any attorney with a
16 fee interest in the Heninger claims executed the
17 endorsement of the protective order attached to PTO 10
18 or the participation agreement attached to PTO 70."

19 As the Court has just had a discussion with
20 Mr. Sachs, I think it is fairly clear that not only Mr.
21 Sachs' client, but also one of the referring counsel
22 have executed PTO 10, and it appears that may be
23 admitted to in this courtroom tomorrow. So, we believe
24 the jurisdictional issue certainly is solved rather
25 quickly.

1 Then, the second issue becomes whether or not
2 this PSC conferred a benefit upon that firm and its
3 clients. We're prepared to go forward with the
4 evidentiary foundation for that.

5 These discovery requests do not appear to
6 address either of those issues, particularly since the
7 first will be admitted.

8 The first request is to "Identify attorneys
9 with a financial interest in our cases," and I am not
10 sure how that goes to the issues before the Court that
11 the Court wishes to address.

12 "Produce documents in your possession that
13 relate to your Avandia claims," meaning the advisory
14 committee's.

15 "Produce all documents of court precedent
16 which supports your position." Those are already in
17 the briefs and more will come tomorrow.

18 "Produce all documents of court precedent
19 from any jurisdiction which supports your position that
20 the HGD cases which were never filed should be levied."
21 Again, I think that is the legal and factual argument
22 that we will have tomorrow.

23 "Produce all documents of court precedent
24 which support your position that Judge Rufe has subject
25 matter jurisdiction." Again, that is tomorrow's -- the

1 whole purpose of tomorrow's hearing.

2 "Produce all documents which pertain to the
3 decision by you or the PSC to request that you impose
4 an assessment." I'm not sure how that is relevant to
5 any of the issues before the Court about the benefit
6 conferred.

7 "Produce all documents which support your
8 position that HGD's settlement was a result of our
9 efforts." Again, we will put that evidence on
10 tomorrow.

11 "Produce all documents generated by any
12 member of your committee which in any way pertained to
13 discussions with their referring attorneys." Again, as
14 that is going to be admitted it sounds like largely,
15 the jurisdictional issue, it's not relevant.

16 I could continue through all of these, Your
17 Honor, but that's generally our position, is that the
18 discovery is late, the discovery responses would not
19 be due until after the hearing, and that none of them
20 seek relevant information that is not already in
21 briefing or going to be before the Court in an
22 evidentiary hearing.

23 THE COURT: Thank you, Mr. Zonies. Mr.
24 Sachs, I'll give you one last response as to why the
25 PSC should produce any information or documents as to

1 any attorney or any case in Avandia other than those of
2 your client.

3 MR. SACHS: This is mostly because of the
4 record on appeal regarding the fairness of asserting
5 common benefit fee assessment against cases filed in a
6 state court proceeding, where there were cases were
7 never filed in an MDL and were never filed in a federal
8 court, and were exclusively state court cases.

9 We believe that this issue is a fairness
10 issue in terms of whether a lawyer who has never filed
11 in federal court, never accepted any work product
12 prepared by the plaintiffs' steering committee, and has
13 a client who actually signed a tolling agreement before
14 PTO 70 was actually ever issued should be assessed at
15 the exact same level as a case for a client for
16 somebody who is on the plaintiffs' steering committee,
17 was filed in federal court, and received all the
18 benefit of the plaintiffs' steering committee's common
19 benefit work.

20 That is the essential fairness issue that we
21 think may, in fact, become an appellate issue for
22 regarding the assessment of a single level common
23 benefit fee.

24 In order to develop that factual record we
25 would need to know if there were other agreements with

1 disparate treatment ever reached between the
2 court-appointed plaintiff's committee and any other
3 firm.

4 THE COURT: Why don't we see what the
5 established jurisdiction is clearly on this record. We
6 believe we have jurisdiction enough to entertain this
7 inquiry and want to hear any evidence that is to be
8 presented on it to make that decision in the final
9 state, because we have not yet.

10 A Court is entitled to explore its own
11 jurisdiction, and apparently that's what we do in the
12 first instance.

13 Second instance is actually making findings
14 that your clients, and their firms, and their cases are
15 subject to the common fund assessment, and then we can
16 talk about fairness. Then we can talk about what that
17 assessment might be.

18 So, I take things in stages, because I try
19 not to jump to the end. I don't see that that is
20 problematic in any way.

21 So, what I'm going to do is deny your
22 discovery request for expedited discovery responses
23 without prejudice, because I think they all relate to
24 that fairness issue that you are talking about, and we
25 will see where we are. You may renew that at the

1 appropriate time.

2 MR. SACHS: Understood, Your Honor.

3 THE COURT: All right. Thank you. Is there
4 anything else to do right now?

5 (No response heard.)

6 THE COURT: Anything else you would like to
7 discuss?

8 MR. ZONIES: Nothing from the plaintiffs.

9 MR. SACHS: Not at this time, Your Honor.

10 THE COURT: All right. Thank you. We will
11 adjourn.

12 MR. ZONIES: Thank you.

13 MR. SACHS: Thank you.

14 (Proceedings adjourned at 3:30 p.m.)

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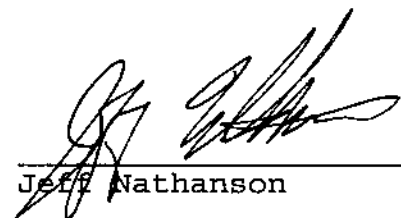
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CERTIFICATION

I, Jeff Nathanson, do hereby certify that the foregoing is a true and correct transcript from the electronic sound recordings of the proceedings in the above-captioned matter.

7-20-12
Date



Jeff Nathanson