15-2245

Miscellaneous Docket No. ____

United States Court of Appeals for the Third Circuit

IN RE REBECCA ALEXANDER, SHARON ANDERSON, EDMUND ANDRE, KIM BRANSCUM, DORIS BRUST, CRAIG CHARLESTON, MARK ENDRES, YVONNE ENGLISH-MONROE, DARREN GRIGGS, CAROLYN JEAN GROVER, JOHN GROVER, KATHLEEN GUNN, MARK HARRELSON, ALAN HORRIDGE, TAMMY JACKSON, GLENDA JOHNSON, DIANE KESSLER, GEAROLD LEDSOME, STEVEN LUCIER, TED MANN, ANNETTE MANNING, MARY MCPARTLAN-HURSON, ROBERT MURRAY, CARMELA NORCROSS, YOLANDA PEREZ, CAROLYN SAMPSON, CHRISTOPHER SIMEONE, WILLIAM TYLER III, COLLEEN VAN VLEET, EDWARD WORTHAN, AND PHILLIP YEATTS,

Petitioners.

Petition for a Writ of Mandamus to the U.S. District Court for the Eastern District of Pennsylvania in Case No. 2:11-cv-05782-PD and all related cases Judge Paul S. Diamond

PETITION FOR WRIT OF MANDAMUS

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I. INTRODUCTION

Petitioners are 31 plaintiffs who at the end of fact discovery stipulated to, or moved for, voluntary dismissal of some or all of their claims with prejudice. Yet absent intervention from this Court, all 31 of them will be subject to interrogation by the District Court's designee, no later than June 30, 2015, about why they agreed to dismiss their claims. These *sua sponte* interrogations are without precedent or any basis in law or fact, will impinge on opinion work product and attorney-client communications, and have been constructed without adequate protections for that information. The District Court has exceeded its jurisdiction, and Petitioners have been forced to seek relief from this Court now because all of the damage will be done before the District Court issues any final order that Petitioners could appeal as of right.

The voluntary dismissals at issue have not drawn any objection from any party in this case, and no party has claimed that the dismissals would harm them in any way. It is clear that the District Court has no jurisdiction to investigate stipulated dismissals under Rule 41(a)(1)(a)(ii), and that its authority of inquiry for dismissals under Rule 41(a)(2) is strictly limited and does not allow for this *sua sponte* investigation.

Yet the District Court's designee has made clear that he intends to interrogate all 31 Petitioners on topics that include each Petitioner's understanding of their claims, and what each Petitioner was thinking when they decided to dismiss their claims. In addition, the District Court's designee has made it clear that he intends to rule on any objections to questions that he asks, and that he will also allow defense counsel to participate and ask questions.

The District Court and its designee cannot demand testimony about opinion work product or communications protected by the attorney-client privilege, and the fact that they have appointed themselves as both investigators and judges in these interrogations is a violation of Petitioners' due process rights.

Petitioners have made every possible request to the District Court and its

designee to abandon, or at least reasonably restrict, the ordered interrogations. The District Court and its designee have refused. Petitioners therefore ask this Court to terminate the interrogations and direct the entry of the voluntary dismissals.

II. JURISDICTIONAL STATEMENT

This Court has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a).

III. STATEMENT OF THE ISSUES

1. When a plaintiff submits a voluntary, stipulated dismissal of her claims pursuant to FED. R. CIV. P. 41(a)(1)(A)(ii), does a district court lack jurisdiction to *sua sponte* order a special master to interrogate the plaintiff about why the plaintiff entered into the dismissal?

2. When a plaintiff moves for voluntary dismissal for some or all claims pursuant to FED. R. CIV. P. 41(a)(2), with prejudice, and no party objects to the dismissal, is it an abuse of discretion and an act in excess of jurisdiction for a district court to refuse to grant the motion and *sua sponte* order a special master to interrogate the plaintiff about why the plaintiff entered into the dismissal?

3. Is it improper, and a violation of due process, for a district court to *sua sponte* order a special master to interrogate a plaintiff, under threat of contempt, on topics that implicate opinion work product, and to appoint itself or the special master as the entity to rule on any objections from counsel on work-product grounds?

4. Is it improper, and a violation of due process, for a district court to *sua sponte* order a special master to interrogate a plaintiff, under threat of contempt, on topics that implicate attorney-client communications, and to appoint itself or the special master as the entity to rule on any objections from counsel due to that privilege?

IV. RELIEF SOUGHT

Petitioners seek a writ of mandamus directing the District Court to grant the pending motions for voluntary dismissal and abandon its investigation of Petitioners'

stipulations for voluntary dismissal and unopposed motions for voluntary dismissal.

V. STATEMENT OF RELATED CASES AND PROCEEDINGS

There is a tangentially related appeal currently pending before the Court: *Debra Johnson v. GlaxoSmithKline LLC, et al.*, No. 15-2086. That appeal concerns the merits of the District Court's summary judgment order in that individual case. The case involves the same District Court and the same counsel, but the Plaintiff/Appellant in that case is not subject to the orders at issue in this petition.

VI. STATEMENT OF CASE AND FACTUAL BACKGROUND

A. Petitioners Have Alleged Defendants Manufactured or Distributed Thalidomide, Which Caused Petitioners' Birth Defects.

All of the Petitioners are plaintiffs who suffer from congenital birth defects and the lifelong consequences of those defects. All of the petitioners have alleged that their birth defects were caused by thalidomide ingested by their mothers in the 1950s or 1960s, and have further alleged that they were unable to trace their defects to the drug until recent years. *See, e.g.,* Dkt. No. 1-1[1] (*Glenda Johnson, et. al. v. SmithKline Beecham Corp., et. al.*, complaint; roughly representative of all complaints).

The Defendants in this case are: Grünenthal GmbH ("Grünenthal"), which manufactured thalidomide during the relevant time period; GlaxoSmithKline LLC and GlaxoSmithKline Holdings (Americas) Inc. ("GSK"), whose predecessor was the initial distributor of the drug in the U.S.; and Sanofi-Aventis U.S. LLC ("Sanofi"), whose predecessor distributed the drug in the U.S. during a later time period. *See id.*

[1] "Dkt. No." refers to a docket entry in the case of *Glenda Johnson, et. al. v. SmithKline Beecham Corp., et. al.*, No. 2:11-cv-5782. The District Court has consolidated these cases for pretrial purposes, and has filed all relevant orders into the consolidated action.

B. The District Court Has Granted Two Summary Judgment Rulings Which Indicate It Will Rule Similarly Against All Petitioners.

Since all of the Petitioners were born in the 1950s and 1960s, a key issue for each Petitioner's claims is the statute of limitations. Petitioners believe the statute was tolled, but the District Court has already granted summary judgment on grounds that indicate the District Court will rule similarly against all Petitioners.

On October 16, 2014, the District Court ruled that Petitioner Edmund Andre's claims were time-barred. Dkt. No. 371. Petitioner Andre's primary argument on the statute of limitations was that he could not have proven until less than two years before he filed suit that his injuries were caused by thalidomide because until recently, experts in the field did not believe thalidomide could cause Mr. Andre's particular defects. *See id.* at pp. 12-13. Mr. Andre argued alternatively that the statute was tolled by Defendants' fraudulent concealment. *See id.* at pp. 18-20. The District Court ruled that both these arguments were incorrect, and that the opinion of Petitioners' expert (which was not opposed by any other expert) was unreliable.[2]

The District Court has also granted summary judgment against Debra Johnson, who is not a Petitioner here. Dkt. No. 487. The undisputed evidence in Mrs. Johnson's case is that she never suspected, until less than a year before she filed suit, that thalidomide could have caused her birth defects. She had never heard of the drug, there is no notation of the drug in her childhood medical records, and her mother had never told Ms. Johnson that she took a drug while pregnant until her mother's 80th birthday party. The District Court ruled that Ms. Johnson failed to exercise reasonable diligence in attempting to determine what caused her defects. *Id.* at pp. 13-14. The District Court

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[2] This case is not on appeal before this Court because the District Court has refused to grant a final judgment under FED. R. CIV. P. 54(b) until Mr. Andre undergoes an investigation into why he dismissed one of his claims. Dkt. No. 497. Petitioners wish to be clear: Mr. Andre has been ordered to undergo an investigation about dismissal of a claim even though the District Court ***granted summary judgment*** on that claim.

refused to credit expert opinion regarding the evolution of science on thalidomide-induced injuries, even though Defendants presented no contrary expert evidence, and rejected Mrs. Johnson's theory of fraudulent concealment. *Id.* at pp. 14-19.[3]

The claims and arguments of each Petitioner share similarities with those of Mr. Andre and Mrs. Johnson, and will involve extremely similar arguments on the statute of limitations. While Petitioners believe that the District Court erred in its summary-judgment rulings, the clear implication of the *Andre* and *Johnson* rulings is that the District Court does not believe any of Petitioners' claims are timely. Yet as described below, the District Court has ordered an investigation into why Petitioners have voluntarily dismissed some of those same claims.

C. As Fact Discovery Came to a Close, Some Petitioners Dismissed Their Cases Entirely, and Others Dismissed Some of Their Claims.

The parties engaged in extensive factual discovery, and the cutoff for fact discovery was set as November 30, 2014. Dkt. No. 270. As that cutoff neared and eventually passed, and as the District Court issued the *Andre* ruling discussed above, some Petitioners voluntarily dismissed all of their claims, and some Petitioners voluntarily dismissed their claims against only one Defendant, GSK. The specific circumstances for each of the Petitioners are discussed below.

1. Petitioner Alexander stipulated to dismissal of all of her claims against all Defendants following the close of discovery, but the District Court has refused to recognize the dismissal.

Following the close of discovery, Petitioner Rebecca Alexander requested that her counsel dismiss all of her claims against all Defendants. Dkt. Nos. 468 and 480-1. On February 19, 2015, Petitioner Alexander entered a dismissal to which all parties to her complaint stipulated pursuant to FED. R. CIV. P. 41(a)(1)(A)(ii), although GSK and Grünenthal reserved their rights to seek fees and costs. *See* Dkt. No. 468.

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[3] This decision is now on appeal to this Court.

On February 24, 2015, the District Court indicated it would require an inquiry into whether Alexander voluntarily entered into this agreement. Dkt. No. 471. Petitioners objected by indicating that Alexander had requested the dismissal, that the District Court had no jurisdiction, and that the inquiry would infringe on protected communications. Dkt. No. 480. However, the District Court refused to abandon its investigation. Dkt. No. 485. The details of the investigation are described in § VI.D.

2. Petitioners Anderson, Mann, and Manning filed an unopposed motion to dismiss against all Defendants as a part of a court-ordered process, but the District Court has refused to grant the motion.

Petitioners Anderson, Mann, and Manning moved to dismiss all of their claims against all Defendants pursuant to a court-ordered process under which Petitioners' counsel were ordered to review the related thalidomide cases and dismiss them as appropriate. Dkt. No. 268. Petitioners' counsel complied with that order, and as a result of their review and consultation with their clients, a number of cases were dismissed, and the District Court honored most of those dismissals. *See, e.g.,* Dkt. Nos. 284, 285, 305, 325, 326, 327, 328, 332, 362, and 374. Anderson, Mann, and Manning sought dismissal pursuant to this same court-ordered process. *See* Dkt. No. 451-1.

On January 5, 2015, Petitioners Anderson, Mann, and Manning moved to dismiss their claims under FED. R. CIV. P. 41(a)(2). Dkt. No. 440. This was not a stipulation because one plaintiff who shared a complaint with Anderson, Mann, and Manning was unrepresented by counsel, and did not respond to a request to stipulate. *See id.* However, every Defendant joined the motion for voluntary dismissal, *see id.*, and no party has objected to the dismissal or claimed that it would harm them.

Yet on January 6, 2015, the District Court indicated that it would require an inquiry into whether Petitioners Anderson, Mann, and Manning had voluntarily entered into this agreement. Dkt. No. 472. Petitioners objected by indicating that these dismissals were pursuant to the court-ordered review process, that Rule 41 did not allow the District Court to perform its inquiry, and that the inquiry would infringe on

protected communications. Dkt. No. 451. The District Court refused to abandon its investigation. Dkt. No. 472. The details of the investigation are described in § VI.D.

3. The other 27 Petitioners filed an unopposed motion to dismiss against Defendant GSK near the end of discovery, but the District Court has refused to grant the motion.

All of the other Petitioners filed an unopposed motion for voluntary dismissal of only their claims against GSK, while they continued to pursue their other claims.[4] These Petitioners filed their motion to dismiss against GSK on November 14, 2014, roughly two weeks before the discovery cutoff of November 30, 2014. Dkt. No. 409.

The motion was also filed approximately one month after the District Court granted summary judgment on October 16, 2015, in favor of all Defendants against Petitioner Andre. Dkt. No. 371. That order, as explained above in § VI.B, foreshadowed how the District Court will likely rule on all Petitioners' claims.

At the time, there were six more summary judgment motions pending before the District Court that raised similar issues, and Defendants were prepared to file more. Petitioners requested that the District Court stay the cases pending a ruling on the other summary judgment motions, so that the parties could review the District Court's rulings on all pending motions before deciding the best course of action to take with the remaining cases. Dkt. No. 388. The District Court denied that request. Dkt. No. 389.[5]

Following the order in *Andre*, and in light of all discovery in the case, 28 of the Petitioners decided to dismiss their claims against GSK, with both sides agreeing to

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[4] Petitioner Rebecca Alexander was part of this motion for voluntary dismissal of her claim against GSK, but she later filed a stipulated dismissal of all of her claims.

[5] Plaintiffs also requested a stay of summary judgment briefing in December 2014, since the District Court had received yet more motions for summary judgment and had not ruled on the earlier motions. Dkt. No. 423. The District Court immediately denied the motion. Dkt. No. 424. Defendants kept filing motions, and Plaintiffs kept responding, until the District Court ultimately entered a *de facto* stay by denying all of the summary judgment motions (except one) without reaching the merits, and indicating Defendants could refile them later. Dkt. No. 474.

bear all fees and costs. As part of the agreement, Petitioners agreed to drop their pending motions for sanctions against GSK, and GSK agreed to drop their pending motions for sanctions and not to file any additional motions. *See* Dkt. No. 394. Petitioners who entered into this agreement continued to pursue their claims against other Defendants.

Petitioners who were parties to this agreement moved to dismiss their claims against GSK under FED. R. CIV. P. 41(a)(2). Dkt. No. 409. No party opposed this motion or claimed that the voluntary dismissal of the claims would harm or prejudice them. Yet even before Petitioners were able to file their motion, the District Court indicated it would direct an investigation into the circumstances under which Petitioners had agreed to dismiss their claims against GSK. Dkt. No. 396. In response, GSK and Petitioners demonstrated that the District Court's order was based on a misunderstanding of the facts, and Petitioners further explained that any such inquiry was improper and would infringe on protected communications. Dkt. Nos. 397, 400. Petitioners also submitted the sworn declaration of counsel, which made plain that all Petitioners were aware of the terms of the agreement with GSK and had consented. Dkt. No. 400-1. However, the District Court directed an investigation into whether Petitioners knowingly, intelligently, and voluntarily agreed to the GSK dismissals. Dkt. No. 420. The details of the investigation are described in § VI.D, below.

D. The District Court Has Refused to Recognize or Grant Any Dismissals Until Its Designee Interrogates 31 Petitioners About Those Dismissals.

1. The District Court has appointed the Special Master to investigate all dismissals that followed the *Andre* summary judgment order.

On June 27, 2014, the District Court appointed William D. Hangley, a Philadelphia attorney in private practice, to act as a discovery master in the consolidated thalidomide cases, with the parties sharing the cost of his appointment (Mr. Hangley is referred to throughout this petition as "the Special Master"). Dkt. No. 256. The District Court has since repeatedly expanded the scope of his appointment to include an

investigation into the dismissals. *See, e.g.,* Dkt. Nos. 420, 472, 485.

2. The Special Master has ordered interrogations of all 31 Petitioners about areas of opinion work product and attorney-client privilege.

On May 6, 2015, the Special Master ordered Petitioner's counsel to propose a schedule under which all 31 Petitioners would be produced for interviews to take place no later than June 30, 2015. Dkt. No. 498. On May 8, 2015, in response to Petitioner's request for details about the ordered process, Dkt. No. 499, the Special Master ordered that the interrogations will have the following characteristics:

- Counsel for all parties will be allowed to participate in these phone calls and ask questions of the plaintiffs.
- The Special Master will interrogate the plaintiffs on the following:
    - Their understandings of their claims.
    - Their understanding of the consequences of dropping their claims.
    - The facts and circumstances that Petitioners took into account in deciding to drop their claims.
- Objections will be resolved by the Special Master but may in some instances be referred to the District Court.

Dkt. No. 501. The Special Master will not restrict himself to specific questions. *Id.*

3. No party to this litigation has requested, or supported, the ordered interrogations.

The Special Master has ordered these interrogations even though not a single party to this litigation has requested an investigation or even indicated support for the investigation. Petitioners have objected, on numerous occasions, to the Special Master and the District Court. *See, e.g.,* Dkt. Nos. 400, 451, 480, 499, 502. Defendant GSK believes that no investigation is necessary. Dkt. Nos. 450, 503. The other Defendants, Grünenthal and Sanofi, have stated that "justice is served by a process that permits the prompt dismissal of claims against all Defendants." Dkt. No. 452. And no plaintiff has supported the interrogations.

4. The Special Master has refused numerous attempts at compromise, and has refused to stay the interrogations.

In addition to ordering interviews *sua sponte*, the Special Master and the District Court have rejected offered compromises which would make it clear that Petitioners were aware of the terms of the dismissals, but also avoid unnecessary interrogations that will involve questions infringing on opinion work product and attorney-client communications. For example, both Petitioners and GSK suggested that Petitioners provide sworn declarations that do not disclose protected information yet made clear that they understood the terms of the dismissals. Dkt. Nos. 450, 451. Petitioners also suggested questions to which the Special Master could limit himself, which would not risk the disclosure of protected information. Dkt. No. 499. The Special Master refused, without explanation.[6] Dkt. No. 501.

The Special Master refused to stay the interrogations pending resolution of objections or this petition. Dkt. No. 500. Petitioners also requested that the District Court stay the interrogations pending resolution of objections or this petition, Dkt. Nos. 502, 504, but the District Court has not responded to that request or ruled on Petitioners' objections, despite the impending deadlines set by the Special Master.

5. The District Court has not responded to numerous requests to stay the interrogations pending resolution of objections or this petition.

Petitioners filed objections to the Special Master's orders with the District Court on May 11, 2015, in which they requested a stay of those orders pending resolution of those objections and any petition to this Court. Dkt. No. 502. Petitioners requested another stay on May 15, 2015, and indicated that absent a ruling they would have to file this petition. Dkt. No. 504. The District Court has not responded in any way.

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[6] To be clear, Petitioners offered these alternative methods as a way to avoid having to file this petition. Petitioners do not, however, believe that any further inquiry is appropriate, and seek a writ ordering the voluntary dismissals.

VII. SUMMARY OF ARGUMENT

The actions of the District Court and the Special Master are in excess of their jurisdiction and discretion under FED. R. CIV. P. 41, and they have made clear that they intend to interrogate all of the Petitioners no later than June 30, 2015, on topics which directly implicate opinion work product and attorney-client communications. These actions are unprecedented, without basis in law or fact, and the interrogations will violate due process because the District Court and the Special Master are acting as both investigator and judge. Mandamus is the proper method of addressing the District Court's actions, given that absent intervention from this Court, the interrogations and compelled disclosures of protected information will happen well before the District Court enters an appealable order.

VIII. ARGUMENT

A. The District Court's Extraordinary Course of Action Satisfies the Criteria for a Writ of Mandamus.

There is no doubt that mandamus is an extraordinary remedy, which is rarely invoked. Petitioners do not seek it lightly, and have only filed this petition after exhausting all alternative avenues with the District Court and the Special Master. But there are cases when "the issuance of the writ is the 'obvious' remedy." *See In re Chambers Dev. Co., Inc.*, 148 F.3d 214, 224 (3d Cir. 1998). This is such a case.

A writ of mandamus is appropriate when a petitioner demonstrates (1) he has no other adequate means to attain the requested relief, and (2) his right to writ is clear and indisputable. *See, e.g., id.* at 223 (quoting *Hahnemann Univ. Hosp. v. Edgar*, 74 F.3d 456, 462 (3d Cir. 1996)). Both elements are met here.

First, Petitioners have no other adequate means to attain review of the Special Master's plan to interrogate Petitioners about matters that directly implicate the attorney-client privilege and opinion work product. If this Court does not intervene, all 31 Petitioners will have undergone questioning no later than June 30, 2015. The

District Court will have exceeded its jurisdiction, the Petitioners will have spoken on the record and in front of defense counsel about the most sensitive areas of communication a client could have with her counsel, and Petitioners will likely have been compelled to disclose protected information. Any review after the fact, once Petitioners were able to secure an order appealable as a matter of right, would be meaningless. The interrogations, conducted without any jurisdiction, would be beyond meaningful review.

This Court has repeatedly found that petitions for writs of mandamus are appropriate where a court's order implicates work product or attorney-client communications because:

> [w]hen a district court orders production of information over a litigant's claim of a privilege not to disclose, appeal after a final decision is an inadequate remedy.

Bogosian v. Gulf Oil Corp., 738 F.2d 587, 591 (3d Cir. 1984).[7] The same is true here, where the Special Master has made clear that he intends to ask questions about protected areas, and rule on any objections to his questions. While the District Court and the Special Master have not yet specifically ordered any Petitioner to testify about protected information, the topics for interrogation (and the refusal to limit the inquiry to non-privileged questions) guarantee that Petitioners will be compelled to at least

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[7] *See also, e.g., Mohawk Indus. v. Carpenter*, 558 U.S. 100, 111 (2009) (orders implicating attorney-client privilege are appropriate subject for writ of mandamus); *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.,* 32 F.3d 851, 861 (3d Cir. 1994) (work product and attorney-client; "We find that the petitioners have no other adequate means to attain relief from the district court's order that compels the disclosure of privileged information and work product"); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 89 (3d Cir. 1992) (attorney-client privilege; "[u]nless this Court issues a writ of mandamus now, it will be too late: the [information] will be released and it will be impossible to rectify the harm"); *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414 (3d Cir. 1991) (work product and attorney-client); *Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985) (work product).

indirectly reveal what their attorneys have told them about their claims and the basis for those claims. And Petitioners cannot wait to see what questions are asked, and what they are ordered to answer over objection – by then, it will be too late.

In addition, a writ of mandamus is appropriate when necessary "'to confine an inferior court to a lawful exercise of its prescribed jurisdiction....'" *In re Chambers*, 148 F.3d at 223 (quoting *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978)). Thus, Circuit Courts issue writs of mandamus when district courts refuse to recognize a stipulated dismissal, and when they refuse to grant an unopposed motion for voluntary dismissal with prejudice. *See, e.g., In re Wolf*, 842 F.2d 464, 465-66 (D.C. Cir. 1988); *Gardiner v. A.H. Robins Co.*, 747 F.2d 1180, 1189-90 (8th Cir. 1964); *In re IBM Corp.*, 687 F.2d 591, 603-04 (2d Cir. 1982); *Smoot v. Fox,* 340 F. 2d 301, 303 (8th Cir. 1984). If Petitioners cannot obtain review now, the issue will evade effective review because all possible benefits of dismissal will evaporate before a final order issues.

Petitioners have no other means available for review of the orders of the District Court and the Special Master. And, as set forth below, they are clearly entitled to relief under the law. The Court should issue a writ of mandamus.

B. The District Court Has Exceeded Its Jurisdiction under Rule 41(a).

The District Court has exceeded its jurisdiction simply by ordering any investigation into Petitioners' voluntary dismissals. All of the dismissals were by agreement between Petitioners and Defendants, thus it is improper for the District Court to investigate the terms of those agreements, and why Petitioners entered into them. As this Court has unequivocally stated, federal courts do ***not*** have

> the authority ... to review and approve the settlement of every case brought in the federal court system. There are only certain designated types of suits, for instance consent decrees, class actions, shareholder derivative suits, and compromises of bankruptcy claims where settlement of the suit requires court approval. *Cf. United States v. City of Miami*, 614 F.2d 1322 (5th Cir. 1980), *reh'g granted* 625

> F.2d 1310, *aff'd in part, vacated in part*, 664 F.2d 435 (5th Cir. 1981) (en banc): "In what can be termed 'ordinary litigation,' that is, lawsuits brought by one private party against another private party that will not affect the rights of any other persons, settlement of the dispute is solely in the hands of the parties. If the parties can agree to terms, they are free to settle the litigation at any time, and the court need not and should not get involved."

Caplan v. Fellheimer Eichen Braverman & Kaskey, 68 F.3d 828, 835 (3d Cir. 1995).[8] Yet in this case the District Court has embarked upon a full investigation of, and ordered sworn testimony about, the terms of the agreements that resulted in voluntary dismissals. This is in direct contravention of FED. R. CIV. P. 41(a).

1. The District Court ceased having any jurisdiction over Petitioner Alexander once she filed her notice of stipulated dismissal.

It should be beyond dispute that the District Court has no jurisdiction to order an interrogation of Petitioner Alexander, because she voluntarily dismissed her claims via stipulation of all parties, pursuant to FED. R. CIV. P. 41(a)(1)(A)(ii).

The text of the rule itself is clear:

> Subject to [rules not at issue here], the plaintiff may dismiss an action ***without a court order*** by filing … a stipulation of dismissal signed by all parties who have appeared.

FED. R. CIV. P. 41(a)(1)(A)(ii) (emphasis added). Thus, the right to dismiss a case via

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[8] *See also, e.g., Disabled in Action in Penn. v. SEPTA*, 224 F.R.D. 601, 607-08 (E.D. Pa. 2004) (refusing to scrutinize agreement between public entities in face of allegations of collusion by another party); *Forest Serv. Empls. for Envtl. Ethics v. U.S. Forest Serv.*, 2009 WL 1324154, at *3 (W.D. Pa. May 12, 2009) (citation omitted) ("the general rule of law ... is that settling parties retain the autonomy to fashion their own settlement terms free from the interference of the Court and non-settling parties" even where the settlement is allegedly illegal); *U.S. v. Altman*, 750 F.2d 684, 696 (8th Cir. 1984) ("Courts not only frown on interference by trial judges in parties' settlement negotiations, but also renounce the practice of approving parties' settlement agreements.").

stipulation is an "unconditional right," and "[a] court has no authority to disapprove or place conditions on any such dismissal." *Republic of the Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 81 n.21 (3d Cir. 1994).[9] Courts routinely hold that "a plaintiff's filing in the district court of a stipulation of dismissal signed by all parties pursuant to Rule 41(a)(1)(ii) divests the court of its jurisdiction over a case, irrespective of whether the district court approves the stipulation." *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 139 (2d Cir. 2004).[10]

Even the District Court has recognized in orders regarding Petitioners other than Alexander that a stipulation of voluntary dismissal signed by all Defendants is automatic even without court approval. Dkt. No. 420, p. 3. Yet the District Court has stated that it is empowered to investigate whether Alexander voluntarily entered into the agreement, citing three inapposite cases. *See* Dkt. No. 485. In one of those cases, the court actually concluded that it had no jurisdiction to investigate a stipulated dismissal that was not a consent decree. *See U.S. v. Mercedes-Benz of N.A., Inc.*, 547 F. Supp.

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[9] *See also In re Bath & Kitchen Fixtures Antitrust Litig.*, 535 F.3d 161, 165 (3d Cir. 2008) ("a filing under the Rule is a notice, not a motion. Its effect is automatic: the defendant does not file a response, and no order of the district court is needed to end the action."); *First Nat'l Bank v. Marine City, Inc.*, 411 F.2d 674, 677 (3d Cir. 1969) (quoting 2B Barron Holtzoff, *Federal Rules Practice and Procedure*, § 911 ("[t]he entry of such a stipulation of dismissal is effective automatically and does not require judicial approval")); *Kabbaj v. Am. Sch. of Tangier*, 445 F. App'x 541, 544 (3d Cir. 2011) (a stipulated Rule 41 dismissal "is automatic; it does not require judicial approval").

[10] *See also, e.g., Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381-82 (1994) (when dismissal is by stipulation, federal courts have no jurisdiction); *Marques v. Fed. Reserve Bank,* 286 F.3d 1014, 1018 (7th Cir. 2002) ("[A] judgment on the merits that is entered after the plaintiff has filed a proper Rule 41(a)(1) notice of dismissal is indeed void."); *Meinecke v. H & R Block,* 66 F.3d 77, 82 (5th Cir. 1995) (voiding grant of summary judgment after the parties stipulated under Rule 41(a)(1)(ii)); *Hinsdale v. Farmers Nat'l Bank & Trust Co.*, 823 F.2d 993, 995-96 (6th Cir. 1987) (dismissal pursuant to Rule 41(a)(1)(ii) "terminated the district court's jurisdiction...."); *In re Wolf,* 842 F.2d at 466 ("'[C]aselaw concerning stipulated dismissals under Rule 41(a)(1)(ii) is clear that the entry of such a stipulation of dismissal is effective automatically ....'").

399, 400-01 (N.D. Cal. 1982). In the other cases, there was evidence presented indicating that a particularly vulnerable plaintiff may not have agreed.[11] But there is no factual basis for an inquiry (as discussed further in § VIII.C, *infra*). In fact, counsel has sworn that Alexander requested the dismissal. Dkt. No. 480-1.

The District Court lacks jurisdiction over Alexander. This Court should therefore issue a writ ordering the District Court to honor her dismissal.

2. The District Court's role in considering an unopposed motion for voluntary dismissal is limited to determining whether the dismissal would harm a defendant.

The District Court has also abused its discretion, and exceeded its jurisdiction, by refusing to grant motions for voluntary dismissals with prejudice that are unopposed by any party. As this Court has made unequivocally clear:

> A … liberal policy has been adopted in the voluntary dismissal context. Rule 41 motions "should be allowed unless defendant will suffer some prejudice other than the mere prospect of a second lawsuit." 5 J. Moore, *Moore's Federal Practice* ¶ 41.05[1], at 41-62 (1988).

In re Paoli R.R. Yard PCB Litig., 916 F.2d 829, 863 (3d Cir. 2005).[12]

Thus, a court's inquiry into whether to grant a Rule 41 motion for voluntary

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[11] *See Moeller v. Weber*, 2012 WL 5289331, at *1-2 (D.S.D. Oct. 23, 2012) (dispute between death row inmate's various attorneys about whether he had agreed to drop his habeas corpus petition and thereby be put to death); *Green v. Nevers*, 111 F.3d 1295, 1301 (6th Cir. 1997) (stipulated dismissal affecting rights of minor who was a co-plaintiff was not signed by minor's attorney).

[12] *See also, e.g.*, *In re Innovative Commc'n Corp.*, 567 F. App'x 109, 112 (3d Cir. 2014) ("We have held that generally, motions to dismiss pursuant to Rule 41 … should be granted liberally."); *Hayden v. Westfield Ins. Co.*, 586 F. App'x 835, 842 (3d Cir. 2014) (same); *Westinghouse Elec. Corp. v. United Elec. Radio & Mach. Workers of Am.*, 194 F.2d 770, 771 (3d Cir. 1952) ("An order of dismissal entered pursuant to [Rule 41(a)(2)] ... should not be disturbed on appeal of the defendant except for arbitrary action which has subjected the defendant to plain prejudice beyond the prospect of subsequent litigation.")

dismissal properly focuses on just one thing: "the presence or extent of any prejudice to the defendant by the draconian measure of dismissing plaintiff's complaint." *Ferguson v. Eakle*, 492 F. 2d 26, 29 (3d Cir. 1974). *See also, e.g., In re Paoli R.R.*, 916 F.2d at 863. And there is absolutely no prejudice to any other party. The dismissals would be *with prejudice*, so Petitioners could not cause mischief by refiling their claims. No other plaintiff has claimed any prejudice. No defendant has claimed any prejudice. GSK joined in the motion to dismiss claims against GSK, and all Defendants joined in the motion by Anderson, Mann, and Manning to dismiss their claims against all Defendants. Nor has the District Court so much as suggested that it believes there is a risk of any such prejudice. These motions are the functional equivalent of a stipulated dismissal, even though they were not filed in the form of a stipulation. Courts faced with similar situations have concluded that it was an abuse of discretion for a trial court to refuse to grant an unopposed motion to dismiss with prejudice. *See, e.g., Smoot v. Fox*, 340 F.2d at 302 (issue writ directing court to grant motion to dismiss; "[n]o case has been cited to us, nor have we found any, where a plaintiff, upon his own motion, was denied the right to dismiss his case with prejudice"); *County of Santa Fe v. Publ. Serv. Co.*, 311 F.3d 1031, 1049 (10th Cir. 2002) (motion to dismiss with prejudice should be granted where no harm to parties or intervenors). The District Court has exceeded its jurisdiction and abused its discretion by refusing to grant the dismissals without interrogations of all 31 Petitioners.

Nor has the District Court made any factual findings that warrant its investigation, as explained in § VIII.C, *infra*. And while the District Court has cited two cases which supposedly provide precedent for its ordered investigation, *see* Dkt. No. 396 at p. 4, those cases do not support the District Court's orders.[13] The District Court has

[13] In *Kabbaj v. Am. Sch. of Tangier*, 445 F. App'x at 544, this Court held that a joint stipulation "did not conform to the requirements of Rule 41." The Court explained that "within two days of the filing of the stipulation, Kabbaj argued that he was not a party to the joint stipulation filed by the defendants." *Id.* There is no such evidence here.

abused its discretion and exceeded its jurisdiction under Rule 41.

C. The District Court's Inquiry Has No Basis in Fact.

The District Court and the Special Master have failed to specify a valid factual basis for their investigation and interrogations. Therefore, even if the District Court had jurisdiction to perform its inquiry, it has no factual basis to support it.

1. The District Court's initial stated basis for the inquiry was based on a misunderstanding of relevant facts.

The District Court first ordered inquiries into voluntary dismissals based on the agreement with GSK before those Petitioners had filed their motion. Dkt. No. 396. Because the District Court did not wait for a motion, it mistakenly believed the plaintiffs dismissing claims included individuals from whose cases Petitioners' counsel had sought to withdraw due to professional considerations. *Id.* at pp. 2-4. Petitioners and GSK made clear that the District Court was mistaken. Dkt. Nos. 397, 400, and 400-1. The District Court never explained why this factual showing did not undermine its inquiry. Dkt. No. 420, pp. 1-2. Instead, it simply changed course.

2. The District Court's second stated factual basis for the inquiry is inherently self-contradictory.

The District Court later stated that it was basing its factual inquiry into the dismissals on a recommendation from the Special Master that Petitioners' counsel should be sanctioned for failing to dismiss the claims of certain plaintiffs soon enough. Dkt. No. 420. As the District Court described the Special Master's order, the Special Master concluded that counsel had acted inappropriately by:

> litigating the claims of Petitioners Jack Merica, Lawerence

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And *Kramer v. Tribe*, 156 F.R.D. 96 (D.N.J. 1994), did not involve Rule 41 or the attorney-client privilege. Instead, it involved sanctions against a lawyer for "fil[ing] this law suit to extort a share of Appellate Counsels' fee and to embarrass the Defendants, specifically Laurence Tribe." *Id.* at 102. The court in *Kramer* listed thirty-six other cases in which that attorney engaged in improper conduct. It has no bearing on the ability to conduct an investigation of an unopposed motion for voluntary dismissal.

> Boiardi, and Roel Garza well after Defendants put the firm on notice that these claims were time-barred, meritless, or both. ... Mr. Hangley explained why the firm should have known from the outset that the claims were untimely.

Id. at p. 4. Thus, the sanctions were based an alleged failure to dismiss the claims of those three plaintiffs soon enough.[14]

Without explanation, the District Court claimed that these findings that counsel had been dilatory in dismissing allegedly time-barred claims suggested that the same counsel had now acted improperly in filing a motion to dismiss extremely similar claims of different plaintiffs. *See id.* at 5. The contradiction, and the lack of any such inference arising from the findings on sanctions, should be obvious. The District Court's stated factual reasons for conducting the inquiry is also further undermined by the fact that the District Court's summary judgment rulings strongly indicate that it does not believe that any of Petitioners' claims have merit. *See* § VI.B., *infra*. Yet the District Court has never provided any other basis for its *sua sponte* investigation. *See* Dkt. Nos. 420, 472, and 485.

3. The Special Master's possible factual basis is also incorrect.

The Special Master has never stated what he believes the factual basis for the inquiry is. On December 23, 2014, the Special Master suggested that there might be a conflict of interest in the GSK agreement that might justify the inquiry into the dismissals, and ordered briefing on the subject. Dkt. No. 430. Petitioners' counsel and GSK both responded that there was no conflict justifying or requiring any investigation. Dkt. Nos. 450, 451. *See also* Dkt. Nos. 502, 503. The Special Master never responded to these extensive factual and legal arguments, and has never concluded that there was an actual or potential conflict. There is no such conflict, as demonstrated below.

a. Petitioner's Counsel does not have a conflict of interest under

[14] Petitioners' counsel objects to these findings. However, no final order has issued on the sanctions, and thus Petitioners have not yet appealed them to this Court.

the terms of the GSK agreement.

The possible conflict that the Special Master inquired about allegedly arises from the fact that under the agreement with GSK, GSK agreed not to seek sanctions from Petitioners or Petitioners' counsel. But this does not give rise to a conflict. A conflict exists under Pa. R.P.C. 1.7(a)(2) only if "there is a significant risk that the representation of one or more clients will be materially limited by … a personal interest of the lawyer." While the terms of the GSK agreement implicated a "personal interest" of Petitioners' counsel, Hagens Berman, the firm's representation of the Petitioners was not materially limited by that personal interest, and there is not (and was not) a significant risk that the representation would be materially limited. And even if there were a material limitation, or a significant risk of one, Petitioners have provided informed consent that would waive any such conflict.

(1) Petitioners' counsel's representation is not "materially limited" by a personal interest.

All of the evidence points to one conclusion: Petitioners' counsel's representation of its clients in this matter has not been materially limited by risk of sanctions. Counsel has zealously represented the interests of Petitioners in the face of potential sanctions, and it has not refused to fully prosecute claims simply because of a threat of sanctions. There is no evidence that counsel failed to fully represent its clients in the face of possible sanctions. Counsel has pursued the interests of its clients to the fullest extent, even though it is apparent that Defendants, the District Court, and the Special Master have argued or ruled that many of its legal arguments are without merit. Indeed, it has done so even though the District Court has issued two summary judgment orders which strongly signal that it is ready to grant summary judgment against every Petitioner's claims. *See* § VI.B., *infra*.

Further, the mere existence of an attorney's personal interest does not in and of itself create a conflict under Rule 1.7(a)(2). "Finding a concurrent conflict requires not only that the lawyer have a personal interest, but also that the lawyer's personal interest

significantly risks materially interfering with the lawyer's professional judgment in representing his client." *U.S. v. Savage*, 2013 WL 6667744, at *3 (E.D. Pa. Dec. 17, 2013). And in making that determination, the "critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." Pa. R.P.C. 1.7, cmt. 8. *See also Jackson v. Rohm & Hass Co.*, 2008 WL 3930510, at *3 (E.D. Pa. Aug. 28, 2008) ("The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably would be pursued on behalf of the client.").

Moreover, mere speculation that there is such a risk or likelihood is not sufficient to establish a conflict; there must be evidence. As one court has explained:

> Because of the virtually limitless cases in which a "conflict" may theoretically arise when a lawyer's self-interest is implicated, there is a very real danger of analyzing these issues not on fact but on speculation and conjecture. Accordingly, when a conflict of interest issue arises based on a lawyer's self-interest, a sturdier factual predicate must be evident than when a case concerns multiple representation. Only by requiring a more specific articulation of the facts giving rise to a conflict situation can courts refrain from effectively "straightjacketing counsel in a stifling, redundant federal code of professional conduct." [] Supposition and speculation, therefore, will simply not do.

Essex Cnty. Jail Annex Inmates v. Treffinger, 18 F. Supp. 2d 418, 432 (D.N.J. 1998) (quoting *Beets v. Collins*, 65 F.3d 1258, 1271 (5th Cir. 1995)).[15]

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[15] *See also Savage*, 2013 WL 6667744, at *3; *In re L.J.*, 691 A.2d 520, 529 (Pa. Super. Ct. 1997) (dismissing claim that dual representation created Rule 1.7(a) conflict in part because of a lack of evidence to support allegations of risk of material

Here, the only possible basis for a concurrent conflict is the bare terms of the agreement with GSK. The terms of that agreement are that GSK abandoned possible awards of sanctions in favor of GSK against Hagens Berman and/or Petitioners, Petitioners abandoned their sanctions motions against GSK, and no party received any compensation. As GSK has pointed out to the District Court, absent this agreement, Petitioners could be personally liable to GSK for fees or costs. Dkt. No. 503. This agreement does not suggest, let alone prove, that counsel's representation of Petitioners was limited, or at risk of being limited, by the prospect of sanctions.

The agreement cannot be viewed in isolation from its context. At the time of the agreement, the parties had nearly completed fact discovery. The District Court had issued a damaging summary judgment ruling. Counsel knew what facts supported each of Petitioners' claims against each Defendant, and the strengths and weaknesses of each of those claims. In light of the evidence that supported or undermined Petitioners' claims against each Defendant, counsel was mindful of strategic aspects of pursuing certain Defendants. Just as counsel would have in any other case near the close of discovery, they assessed the situation and discussed it with their clients.

There is nothing unusual about this process. It is customary and desirable for plaintiffs and their counsel to make an honest appraisal of their cases, especially at the close of discovery, and abandon claims as appropriate.

In addition, all of the evidence demonstrates that Petitioners' counsel is dedicated to representing its clients zealously even though by doing so it has apparently placed itself at risk of sanctions from the District Court. ***First***, every Petitioner who dismissed claims only against GSK still has claims against Grünenthal, and the overwhelming majority also have claims against Sanofi. Not a single person's claims were dismissed entirely as a result of the agreement with GSK. This means, of course, that counsel

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limitation); *Rohm & Hass Co.*, 2008 WL 3930510, at *4 (no conflict found because party had "not produced any evidence of an egregious, irreconcilable conflict").

continues to represent all of the Petitioners in question even though counsel is subject to numerous demands for sanctions made by Grünenthal in cases brought by those Petitioners, and counsel remains exposed in most instances to possible demands for sanctions from Sanofi. There was also no agreement with GSK regarding possible sanctions in the Debra Johnson matter. Yet counsel continues to litigate against Grünenthal on behalf of every Petitioner who dismissed claims against GSK, against Sanofi on behalf of most of those Petitioners, and on behalf of Debra Johnson against GSK before this Court.

Second, Petitioners' counsel has repeatedly opposed motions for summary judgment where they concluded that they could do so in good faith, even though almost every one of those motions has included a demand for fees and costs, and even though the District Court has indicated that it will not accept Petitioner's good-faith arguments regarding the statute of limitations.

For example, on December 5, 2014, Grünenthal and Sanofi filed motions for summary judgment against Tammy Jackson and Phillip Yeatts, two Petitioners who dismissed their claims against GSK. Dkt. Nos. 415, 416. On December 4, 2014, the day before those filings, the parties received the report and recommendation on sanctions, which included an apparent finding that Petitioners' counsel had acted in bad faith simply by relying on the expert opinion of Dr. Trent Stephens. *See, e.g.,* Dkt. No. 414, pp. 17-18, 22-24. Yet counsel submitted Dr. Stephens' opinion again in opposition to Jackson and Yeatts, Dkt. Nos. 428-2, 429-2, despite the fact that counsel is at risk of sanctions for merely opposing these motions with Dr. Stephens' opinion. Counsel did so again in opposition to motions for summary judgment against Robert Murray and Doris Brust, Dkt. Nos. 465-2, 473-2. They did so because they are committed to prosecuting Petitioners' claims in good faith where they can, even when it appears that the Court and the Special Master may be poised to sanction counsel for doing so. Petitioners are under no illusions as to the Court's apparent views of their arguments

and claims. But counsel is extremely mindful of its duty to represent Petitioners to the fullest extent possible in good faith. Counsel's actions have consistently demonstrated that it is dedicated to its clients and its claims, even when doing so puts counsel at risk. *Cf. Rohm & Hass Co.*, 2008 WL 3930510, at *4 (no Rule 1.7 conflict because the litigation's history demonstrated counsel was acting in client's interests).

In summary, there is no evidence that there is a significant risk that Petitioners' counsel will limit their representation of Petitioners because of a threat of sanctions. If there were a concurrent conflict under Rule 1.7(a) on these facts, all that would be required to put opposing counsel into a potentially disabling conflict would be to move for sanctions against them. That is clearly not the rule, and there is no Rule 1.7(a) conflict here. The record demonstrates that Petitioners' counsel has carefully and appropriately balanced its duty to zealously represent Petitioners against its duty not to pursue claims or arguments that it cannot or should not pursue. There is no conflict. Thus the presence of a conflict cannot be used as a basis for the investigation.

b. Even if a Rule 1.7(a)(2) conflict existed, counsel obtained Petitioners' written and informed consent.

While Petitioners firmly believe that their counsel do not suffer from a concurrent conflict, even if they did, Petitioners have provided written and informed consent. Therefore any conflict is not disabling; as provided in relevant part in Rule 1.7(b):

> Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> …; and
>
> (4) each affected client gives informed consent.

As for subsection 1, as demonstrated above, Petitioners reasonably believe that their

counsel are able to provide competent and diligent representation to Petitioners. As for subsection 4, counsel has received informed consent from each client, as already explained to the District Court. Dkt. Nos. 400 and 400-1 and Dkt. No. 425.

D. The District Court's Inquiry Will Impermissibly and Unnecessarily Infringe on Protected Communications.

The Special Master has indicated that he will not limit himself to certain questions. He has also recognized that his questions will delve into areas of attorney-client privilege and work product. He specifically intends to ask whatever questions he deems necessary to discern the following:

- "Their understanding of their claims."
- "Their understanding of the consequences of dropping their claims."
- "The facts and circumstances that they, the plaintiffs, took into account in deciding to drop their claims."

Dkt. No. 501. All of these areas of inquiry clearly implicate attorney-client communications and opinion work product. And while the Special Master purports that he will protect against disclosure by entertaining objections, he will be ruling on those objections himself, thus providing no meaningful protection.

1. The topics of inquiry cannot be divorced from communications about their counsel's opinion work product.

The topics of inquiry can and will invade on both the attorney-client privilege and opinion work product. There is no way to divorce the Petitioners' understanding of their claims, their understanding of the consequences of the dismissal, or the facts and circumstances they considered in consenting to the dismissals from the conversations they have had with counsel. What they know about the legal and factual basis for their claims, the likelihood of success, the terms of any possible agreement, and the consequences of dismissing all have one common source: what their attorneys have told them. The Special Master cannot engage in an interrogation about these topics without asking the Petitioners, directly or indirectly, what their attorneys have told them

about these various topics. The Special Master apparently believes that by couching the questions as seeking their "understanding" of various points, he can seek the non-privileged testimony of the Petitioners, but those "understandings" have their direct roots in the extensive communications they have had with their counsel on those topics.

For example, there is simply no way that a Petitioner could testify about what his understanding of his claims are in any substantive or meaningful fashion without divulging what his attorneys have told him about relevant facts, the law on topics such as the statute of limitations, and how expert opinion plays into their claims. The fact that it has come from the client's mouth as an "understanding" does not change the fact that the understanding will necessarily reveal what counsel told them.

Moreover, what their attorneys have told them about these topics of inquiry constitutes opinion work product. As set forth in FED. R. CIV. P. 26(b)(3)(B), opinion work product is "the mental impressions, conclusions, opinions, or legal theories of a party's attorney … concerning the litigation." *See also, e.g., In re Grand Jury Investigation*, 599 F.2d 1224, 1231 (3d Cir. 1979) ("analyses or assessments of (the client's) position with respect to the various parties in the litigation" are core opinion work product); *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) (work product protections apply to both tangible and intangible forms of work product). That protection exists even if it is not the attorney himself who is testifying; it also applies to attempts to get a client or a counsel's agent to reveal those opinions indirectly. *See, e.g., In re Cendant*, 343 F.3d at 660-61, 667-68 (jury consultant present at meeting between client and attorney cannot be compelled to provide discovery about counsel's meeting); *Sporck v. Peil*, 759 F.2d at 313-14, 317-18 (discovery of testimony of client about documents he had reviewed was barred, because the documents were selected by his counsel, and testimony would reveal opinion work product); *Bush Dev. Corp. v. Harbour Place Assocs.*, 632 F. Supp. 1359, 1363 (E.D. Va. 1986) ("Counsel's statements concerning the claim's likely success, even when transcribed by the client, are

prime examples of the types of materials entitled to near absolute protection under Rule 26(b)(3)."). And as explained below in § VIII.D.2., opinion work product is provided nearly absolute protections from discovery.

Further, discussions Petitioners have had with their attorneys are also protected by the attorney-client privilege, regardless of who is testifying. *See, e.g., Gillard v. AIG Ins. Co.*, 609 Pa. 65, 88-89 (2011) (the "privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice"); 42 Pa. C. S. § 5928 (client cannot be compelled to testify about communications). The Special Master cannot require testimony about such communications, as discussed below in § VII.D. 3.

2. The District Court is barred from inquiring about opinion work product, which is subject to nearly absolute protection.

The interrogations of Petitioners would necessarily inquire into counsel's protected work product. Under federal law,[16]

> "core" or "opinion" work product that encompasses the "mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning the litigation" is "generally afforded near absolute protection from discovery." [FED. R. CIV. P. 26(b)(3)]; *In re Ford Motor Co.,* 110 F.3d 954, 962 n. 7 (3d Cir. 1997). Thus, core or opinion work product receives greater protection than ordinary work product and is discoverable only upon a showing of rare and exceptional circumstances.

In re Cendant Corp., 343 F.3d at 663.[17]

The reason for this protection is obvious. If an attorney's opinions were discov-

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[16] Federal law regarding work product governs in diversity cases. *See, e.g., United Coal Cos. v. Powell Const. Co.*, 839 F.2d 958, 966 (3d Cir. 1988).

[17] *See also, e.g., Sporck*, 759 F.2d at 316 ("Opinion work product ... is accorded an almost absolute protection from discovery ...."); *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.,* 32 F.3d at 866 ("[E]fforts to obtain ... opinion work product should be evaluated with particular care."); *In re Grand Jury Investigation,* 599 F.2d at 1231.

erable simply by asking the client what his or her "understanding" was after hearing those opinions, it would seriously hamper an attorney's ability to communicate fully and openly with their clients. Indeed, Petitioners' counsel are now uncertain what they can safely discuss with their clients, given the impending inquisition. This is because the Special Master's inquiry is

> simply an attempt, without purported necessity or justification, to secure [the opinions and thoughts] prepared or formed by ... counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.

Hickman v. Taylor, 329 U.S. 495, 510 (1947).

And the Special Master or the District Court have not demonstrated any exceptional circumstances requiring disclosure. There is not even any legal or factual basis for the inquiry. Even if there were a basis for inquiring into the voluntariness of the dismissals, there are far less intrusive means for discovering whether Petitioners agreed to the dismissals, such as declarations. The District Court and the Special Master cannot inquire into opinion work product, but they are poised to do so.

3. The District Court is barred from inquiring about communications subject to the attorney-client privilege.

The District Court and the Special Master have no power to require Petitioners to testify as to their communications with counsel about the dismissals at issue. Communications between counsel and the Petitioners about the dismissals are subject to the attorney-client privilege, and counsel cannot disclose them under Pa. R.P.C. 1.6.

Under Pennsylvania law,[18] the attorney-client privilege protects communications

[18] The law of Pennsylvania applies here to questions of privilege. *See* FED. R. EVID. 501; *Keating v. McCahill,* 2012 WL 2527024, at *2 (E.D. Pa. July 2, 2012) ("Federal courts sitting in diversity ... apply the law of the host state to determine privilege.").

from the client *and* communications from the attorney to the client for the purpose of providing advice and consultation about the client's claims. *See, e.g., Gillard v. AIG Ins. Co.*, 609 Pa. at 88-89. The communications between Petitioners and their counsel about the GSK agreement and the various dismissals are clearly such communications.

There are also no applicable exceptions to the attorney-client privilege. The privilege has not been waived. Nor is there is any argument that crime-fraud exception applies. Thus, neither Petitioners nor their counsel can be compelled to disclose those communications. As provided in Pennsylvania law:

> [i]n a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

See 42 Pa. C. S. § 5928. *See also, e.g., Collautt v. Li,* 2014 WL 6988657, at *2 (E.D. Pa. Dec. 11, 2014). Any inquiry into those communications, and especially direct testimony, severely impinges on the attorney-client privilege.

4. The proposed method(s) for addressing objections provide no real protection and will violate Petitioners' rights to due process.

The Special Master will address objections on the basis of privilege primarily by ruling on the objections himself and, in limited cases, by seeking a ruling from the District Court. Yet there is absolutely no protection of the privilege if the Special Master makes a Plaintiff answer a question over an objection based on work product or privilege, with an apparent threat of contempt if the Plaintiff does not answer his question over the objection of his counsel. This will not only chill legitimate objections, it likely will place the Petitioners under the coercive power of the Special Master to answer his questions over counsel's instructions. If the Plaintiff is coerced into answering, and the Special Master's ruling has misapplied the law, the answer will nonetheless be on the record and divulged to all counsel in the case. Or the Plaintiff will have to be held in contempt. This procedure is preposterous and a violation of due

process, and may place the District Court or the Special Master into a disabling conflict. *See, e.g.,* Pa. Code. Jud. Cond. § 2.1(C) ("A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed."); *In re Murchison*, 349 U.S. 133, 136-39 (1955) (violation of due process for one person to hold adjudicative and investigative capacities); *In re Oliver*, 333 U.S. 257, 272-278 (1948) (violation of due process where one person acted as prosecutor and judge, and found defendant in contempt); *Wesbrook v. Thaler*, 585 F.3d 245, 256 (5th Cir. 2009) ("Due process is violated when a judge has a dual role of both investigating and adjudicating a matter.").

Nor is the privilege adequately protected if the Special Master refers the matter to the District Court for a ruling. The District Court is the sole investigator, and the Special Master acts as the District Court's agent and at the District Court's discretion. Yet the Special Master's alternative process would refer matters of privilege to the District Court in its own investigation. This would be no different than if at a traditional deposition, a lawyer asking questions was allowed to call a supervisor partner for a ruling on the opponent's objections. It remains a coercive violation of due process.

Nor can Petitioners be expected, much less be ordered, to trust the Special Master's professed disinclination to ask about privileged or protected information. Petitioners and defense counsel have offered the Special Master several other routes that would provide the information he seeks but be far less intrusive of protected communications, and he has refused. This process is contrary to applicable law, and absolutely without precedent. This Court should issue a writ of mandamus.

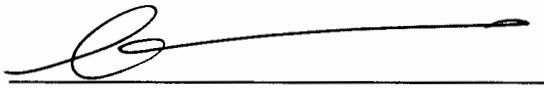
IX. CONCLUSION

For the reasons stated above, Petitioners request that the Court issue a writ of mandamus directing the District Court to recognize Petitioners' stipulated dismissals and to grant their unopposed motions for voluntary dismissal.

DATED: May 18, 2015

Respectfully submitted,

HAGENS BERMAN SOBOL SHAPIRO LLP

By: 

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CERTIFICATE OF INTEREST

1. The full name of every party represented by us is:

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2. There are no other real parties in interest represented by us.

3. The names of all the firms or lawyers that appeared for the parties now represented by us in the trial court or are expected to appear in this court are as follows:

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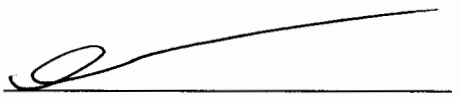
Dated: May 18, 2015



Steve W. Berman

CERTIFICATION OF BAR MEMBERSHIP

I certify that Steve W. Berman and Craig R. Spiegel, counsel for Petitioners, are members of the Bar of this Court.

Dated: May 18, 2015

Steve W. Berman

CERTIFICATION OF SERVICE

I certify that on May 18, 2015, I caused this petition to be served by overnight mail on the following counsel for respondents, as follows:

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I certify that on May 18, 2015, I caused this petition to be served by overnight mail on the trial judge and Special Master as respondents, in accordance with Fed. R. App. P. 21(a)(1), as follows:

Paul S. Diamond, District Court Judge
U.S. District Court
Eastern District of Pennsylvania
601 Market Street, Room 6613
Philadelphia, PA 19106-1714

William T. Hangley
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Philadelphia, PA 19103-6933

I certify that on May 18, 2015, I filed the original and one copy of this petition, along with the prescribed filing fee, by overnight mail with the Clerk of the Court, as follows:

Office of the Clerk
U.S. Court of Appeals for the Third Circuit
Room 21400, U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Steve W. Berman

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

GLENDA JOHNSON, et al.,	:	
Plaintiffs,	:	
v.	:	**Civ. No. 11-5782**
	:	**and all related cases**
SMITHKLINE BEECHAM	:	
CORPORATION, et al.,	:	
Defendants.	:	

Diamond, J. **October 16, 2014**

MEMORANDUM

Edmund Andre is one of fifty-two Plaintiffs who allege that they have severe birth defects caused over 50 years ago by thalidomide—a drug manufactured and distributed by Defendants—then prescribed to pregnant women for morning sickness. Because Pennsylvania's two-year limitations period has long expired, I will grant summary judgment and dismiss Plaintiff's claims as time-barred.

I. PROCEDURAL BACKGROUND

Mr. Andre is one of thirteen Plaintiffs who together filed a single personal injury Complaint on October 25, 2011 in the Philadelphia Common Pleas Court against SmithKline Beecham Corp., GlaxoSmithKline LLC, GlaxoSmithKline Holdings, LLC, Sanofi-Aventis, U.S., LLC, Avantor Performance Materials, and Grünenthal GmbH. (Compl., Docket No. 11-6711, Doc. No. 1, Ex. A.) Plaintiff brings negligence and negligent design claims against Grünenthal and the GSK Defendants. (Id. ¶¶ 343-65.) He brings fraud, negligent misrepresentation, negligent hiring, concert of action, civil conspiracy, and *alter ego* liability claims against Grünenthal only. (Id. ¶¶ 367-375, 399-436.) Thirty-six additional Plaintiffs filed substantially similar complaints in the Philadelphia Common Pleas Court from 2010 to 2013. (Case ID Nos. 110503100, 110803830, 111003316, 120800665, 120902711, 121101057, 121102810,

121202937, 130200838, 130800419.) All forty-nine Plaintiffs are represented by the same lead counsel: the law firm of Hagens Berman Sobol Shapiro LLP. The Complaint verifications for all forty-nine Plaintiffs were signed by Counsel, not by Plaintiffs themselves.

Invoking diversity jurisdiction, Defendants removed the all the cases to this Court. (Docket Nos. 11-3510, 11-5782, 11-6711, 12-4542, 12-5455, 12-6431, 12-6657, 12-7125, 13-758, 13-4591.) Plaintiffs—some of whom are Pennsylvania citizens—vigorously contested removal, arguing that the "nerve center" of the GSK Defendants is also in Pennsylvania, thus defeating complete diversity. See Hertz Corp. v. Friend, 559 U.S. 77, 93 (2010) (for purposes of diversity jurisdiction, a corporation's citizenship is determined by the location of its "nerve center"). Members of this Court were split on this jurisdictional issue, which I certified for interlocutory appeal. Compare Yeatts v. SmithKline Beecham Corp., No. 11-6711, 2012 WL 5488907 (E.D. Pa. Mar. 29, 2012) (Pennsylvania nerve center), Murray v. SmithKline Beecham Corp., No. 11-3510, 2012 WL 5488905 (E.D. Pa. Mar. 29, 2012) (same), Brewer v. SmithKline Beecham Corp., 774 F. Supp. 2d 720 (E.D. Pa. 2011) (same), and Monroe v. SmithKline Beecham Corp., No. 10-2140, 2010 WL 2606682 (E.D. Pa. June 25, 2010) (same), with Johnson v. SmithKline Beecham Corp., 853 F. Supp. 2d 487 (E.D. Pa. 2012) (Delaware nerve center), and White v. SmithKline Beecham Corp., No. 10-2141, 2010 WL 3119926 (E.D. Pa. Aug. 6, 2010) (same). The Third Circuit agreed to hear the matter, and ruled that there was complete diversity. Johnson v. SmithKline Beecham Corp., 724 F.3d 337, 358 (3d Cir. 2013).

All the thalidomide cases in this Court were then consolidated before me for pretrial purposes. (Doc. No. 94.) During discovery, three additional Plaintiffs filed suit in this Court on April 15, 2014. (Docket No. 14-2186.)

Defendants moved to dismiss as time-barred the claims of only five Plaintiffs: Glenda Johnson, Debra Johnson, Steven Lucier, Robert Murray, and Diane Kessler. (Doc. Nos. 74, 86; Docket No. 12-5455, Doc. No. 36.) All fifty-two Plaintiffs alleged primarily that Defendants' "fraudulent concealment" had equitably tolled the applicable two-year limitations clock. Each Plaintiff made separate fraudulent concealment allegations that may be divided into two categories: (1) those Plaintiffs who, as a result of Defendants' misrepresentations respecting domestic distribution of thalidomide, did not know their mothers had ingested thalidomide during pregnancy; and (2) those Plaintiffs who knew their mothers had ingested the drug, but, as a result of Defendants' misrepresentations, mistakenly believed thalidomide was a safe drug. All Plaintiffs alleged that they

> suffer from severe birth defects caused by thalidomide . . . . Until less than two years ago, Plaintiffs did not discover (and could not reasonably have discovered) that thalidomide caused their injuries. . . . But evidence that only recently came to light based on extraordinary investigative efforts, reveals that [Defendants' statements] that thalidomide did not cause thalidomide injuries in the United States was not the truth. . . . Now armed with the truth for the first time, [Plaintiffs] seek damages resulting from Defendants' negligence, fraud, negligent misrepresentation, negligent hiring, conspiracy and alter ego . . . .

(Compl. ¶¶ 1, 3, 8; see also e.g., Compl. ¶¶ 4, 8, 10, 15, Docket No. 12-5455, Doc. No. 1, Ex. A.; Compl. Introduction, Docket No. 11-3510, Doc. No. 1, Ex. A.)

Explicitly recognizing their obligation to plead fraud "with particularity," Plaintiffs alleged twenty specific false statements or fraudulent omissions that Defendants made respecting the safety and availability of thalidomide in the United States. (Compl. ¶¶ 369(1-20), 375.) Plaintiffs also alleged that Defendants knew their misrepresentations were false at the time they made them, and intended that "the public, including Plaintiffs and their mothers" would rely on those misrepresentations. (Id. ¶ 373.) As alleged, "Plaintiffs did rely on those

misrepresentations and concealments, to their detriment"—the misrepresentations caused Plaintiffs to refrain from suing Defendants for over five decades. (Id.)

Plaintiffs thus pled all the elements of fraud required by Rule 9 and Pennsylvania law. Byrnes v. DeBolt Transfer, Inc., 741 F.2d 620, 626 (3d Cir. 1984) (fraudulent concealment must be pled with particularity (citing Fed. R. Civ. P. 9(b))); Fine v. Checcio, 870 A.2d 850, 860 (Pa. 2005) (plaintiff must prove fraudulent concealment "by clear, precise, and convincing evidence"). Accepting Plaintiffs' allegations as true, I denied the motions to dismiss without prejudice, noting that "I cannot determine, at this early stage in the litigation, the viability of Plaintiffs' equitable tolling arguments." (Doc. No. 92 ¶ 4.)

Mr. Andre, who suffers from severe birth defects, alleged that while his mother was pregnant with him, she took thalidomide to treat her "serious morning sickness." (Compl. ¶ 16.) He also alleged that "[w]hen he was about 10 to 12 years old, [Plaintiff] and his father discussed the cause of his birth defects, and [Plaintiff's] father told him that his mother had taken thalidomide while pregnant with him." (Id. ¶ 18.) Plaintiff alleged that because he "could not find the doctor" who prescribed the drug, and could not obtain his mother's medical records, he had "no clues to follow" and thus could not determine "who was responsible for developing and distributing the drug." (Id.) These allegations appear to contradict other allegations that Plaintiff knew Defendants had manufactured and distributed thalidomide, but detrimentally relied upon Defendants' false representations and omissions respecting the drug. Defendants did not move to dismiss.

Having put front and center the question of when Plaintiffs knew thalidomide may have caused their injuries, once discovery began, Plaintiffs repeatedly refused to provide an answer. For instance, on October 22, 2013, Defendants propounded interrogatories asking each Plaintiff

to "[i]dentify the date on which you contend you were first on notice of a thalidomide-related claim." (Doc. No. 137, Ex. A.) Defendants also asked each Plaintiff to "[i]dentify . . . each alleged fact or document set forth in your Complaint which you contend was fraudulently concealed [and] identify how and when you first learned about each allegedly concealed fact or document." (Id.) All Plaintiffs collectively filed a single objection to these interrogatories, contending that because the inquiries were "premature and unduly burdensome," they would provide no substantive responses. (Id., Ex. B.)

After I ordered Plaintiffs to provide full and complete responses, each Plaintiff provided the identical response, purporting to rely on the "cumulative effect" of Defendants' "misrepresentations." (See, e.g., Doc. No. 164, Ex. C.) Because, as Plaintiffs themselves acknowledged in their Complaints, fraud must be pled with particularity, I ruled that because "[e]ach Plaintiff's claim of fraudulent concealment turns on her own knowledge," "each Plaintiff must provide verified individual responses disclosing each fact or document that was fraudulently concealed, and when Plaintiffs learned of these facts." (Doc. No. 166.)

On May 9, 2014, Defendants asked me to order Plaintiffs to comply with discovery requests respecting Plaintiffs' thalidomide-related online and social media communications and research. (Doc. No. 200.) I granted the Motion and ordered Plaintiffs to provide individual responses by May 18. (Doc. Nos. 206, 222.) On June 12, Defendants presented compelling evidence that, contrary to my Orders (and Plaintiffs' discovery obligations), several Plaintiffs had failed to produce highly probative, relevant evidence, including online and social media posts revealing that some Plaintiffs have known for decades that thalidomide caused their birth defects. (Doc. No. 232.) Plaintiffs responded that they failed to produce these materials because, *inter alia*: (1) some Plaintiffs could not remember making the posts; (2) some Plaintiffs

suffer from short-term memory loss; (3) in light of the volume of responsive documents, Plaintiffs' Counsel could not ensure accurate and complete discovery responses; and (4) the withheld posts were not responsive to Defendants' discovery requests. (Doc. No. 238.)

Defendants argued that after unsuccessfully seeking to obstruct these highly material discovery requests, Plaintiffs did not provide truthful or complete responses. Defendants urged that this misconduct warranted dismissal of all Complaints with prejudice. (Doc. No. 232.) Although I declined to dismiss, on June 17, I proposed, pursuant to Federal Rule of Civil Procedure 53(b)(1), appointing William T. Hangley to serve as Special Master to supervise discovery respecting Plaintiffs' knowledge of when they learned that thalidomide might have caused their injuries. (Doc. No. 239); Fed. R. Civ. P. 53(b)(1). On June 26, after all Parties stated that they had no objection, I appointed Mr. Hangley. (Doc. No. 256.)

Since then, Defendants have filed ten summary judgment motions against Plaintiffs, asking me, *inter alia*, to dismiss the claims as time-barred. (Doc. Nos. 245, 246, 258, 259, 260, 272, 274, 281, 291, 312.) Three Plaintiffs have conceded that their claims should be dismissed. (Doc. Nos. 263, 277, 318.) Ten other Plaintiffs have voluntarily dismissed their claims with prejudice. (Doc Nos. 182; 284, 305, 325, 326, 328, 332, 360.) Three of these Plaintiffs had either filed suit or made a thalidomide-related administrative claim decades ago. (Doc. No. 364 at 63-64.) Hagens Berman has asked to withdraw from representing four other Plaintiffs, stating that it cannot contest Defendants' limitations motions without contravening the Code of Professional Conduct. (Doc. Nos. 207, 301, 342, 343.) Finally, Defendants have sought sanctions against Hagens Berman with respect to the claims of three of those Plaintiffs who voluntarily dismissed their actions: Lawrence Boiardi, Jack Merica, and Roel Garza. (Doc. Nos. 258, 281, 310.) Defendants argue, *inter alia*, that had Hagens Berman acted in conformance

with its professional obligations, the firm would not have initiated these actions. With the Parties' agreement, I have referred the Sanctions Motions to Mr. Hangley for his Report and Recommendation. (Doc. No. 316.)

During a sanctions hearing before Mr. Hangley on October 1, 2014, Hagens Berman conceded that sanctions should be imposed on the firm for its continued prosecution of Plaintiff Roel Garza's case well after Defendants put the firm on notice that Mr. Garza did not know and could not show that his mother had ingested thalidomide or any other medicine during her pregnancy. (Doc. No. 364 at 133-35.) When Defendants' Counsel suggested during that hearing that so many obviously time-barred cases were filed because Hagens Berman had not spoken with its clients before commencing suit, the firm responded that "all Plaintiffs were spoken to by their lawyers prior to the institution of these proceedings." (Id. at 105.) As I describe below, however, during Plaintiff's deposition, Counsel directed him not to disclose the substance of these discussions, invoking the attorney-client privilege. (Andre Dep. at 52-54.) Whether Counsel's alleged misconduct has abrogated the privilege is an issue that I have not yet addressed. But see In re Chevron Corp., 633 F.3d 153, 166 (3d Cir. 2011) (crime-fraud exception to the privilege allows for the disclosure of communications made in furtherance of malfeasance).

Defendants filed the instant Motion for Summary Judgment on June 20, 2014. (Doc. No. 246.) Plaintiff submitted a response in opposition, Defendants submitted a reply, and both Parties submitted supplemental responses. (Doc. Nos. 262, 271, 367, 369, 370.)

II. FACTUAL BACKGROUND

Plaintiff Edmund Andre was born in West Virginia in 1957. (Compl. ¶ 15.) Because he is "abnormally short," "his legs were very twisted at birth," eventually causing amputation of his

left leg. (Id.) He has a curved spine, "two clubbed feet, very knocked knees, [and] very short legs." (Id.) His "left hip lacks a ball and socket, so his femur is in direct contact with his hip bone." (Id.) He has a malformed skeleton.

When Plaintiff was 10 or 12 years old, his parents told him that his mother took thalidomide while she was pregnant with him. (Andre Dep. 11-13.) In the 1980s, Plaintiff's father attempted to sue the doctor who had prescribed the thalidomide, but could not locate him. (Id. at 77-80.) Around the same time, Plaintiff told a lawyer who represented Plaintiff in an unrelated personal injury matter that his injuries were the "result of the thalidomide," but never asked the lawyer to investigate possible thalidomide-based litigation. (Id. at 84-87.) Plaintiff also testified that for 35 to 40 years, he would tell doctors that to the "best of [his] knowledge" thalidomide caused his injuries. (Id. at 58, 65.) In 2005, Plaintiff submitted to a doctor a form identifying "thalidomide" as an illness from which Plaintiff was suffering. (Doc. No. 246, Ex. E.)

Plaintiff brought the instant claims on October 25, 2011, after responding to an advertisement his mother (who has since passed away) saw in a newspaper. (Andre Dep. 26-28.) The advertisement was "very short and sweet," and asked individuals to call a phone number "if you or someone you know have taken thalidomide." (Id. at 26.) When Plaintiff's mother called the number, she "learned that there was possibly some action that the family could take to participate in getting more information and possibly uncovering specifics and doing something about it." (Id. at 27.) A short time later, Plaintiff called the number and spoke with "attorneys," whose names he could not recall at deposition. (Id. at 28-29.) Plaintiff testified that he decided to bring this case after receiving an "education about thalidomide." (Id. at 52-53.) When questioned about this "education," he was instructed not to answer on the grounds of attorney-

client privilege. (Id. at 52-54.) This discussion was the only contact Plaintiff had with his lawyers before filing the instant Complaint. (Id. at 28-29.)

III. STANDARD

I may grant summary judgment "if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party must initially show the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). An issue is material only if it could affect the result of the suit under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). I "must view the facts in the light most favorable to the non-moving party," and make every reasonable inference in that party's favor. Hugh v. Butler Cnty. Family YMCA, 418 F.3d 265, 267 (3d Cir. 2005). If I then determine that there is no genuine issue of material fact, summary judgment is appropriate. Celotex, 477 U.S. at 322.

Summary judgment is appropriate where the moving party shows that there is an absence of evidence to support the non-moving party's case. Id. at 325. Where a moving party identifies an absence of necessary evidence, the non-moving party "must rebut the motion with facts in the record and cannot rest solely on assertions made in the pleadings, legal memoranda, or oral argument." Berckeley Inv. Grp., Ltd. v. Colkitt, 455 F.3d 195, 201 (3d Cir. 2006). I may only consider record evidence that is admissible at trial or capable of being reduced to admissible evidence. Celotex, 477 U.S. at 324; Gonzalez v. Sec'y of Dep't of Homeland Sec., 678 F.3d 254, 262 (3d Cir. 2012).

IV. DISCUSSION

It is apparent that the record, no matter how favorably construed to Plaintiff, demonstrates that his claims are time-barred.

A. Governing Law

The Parties agree on choice of law and the controlling limitations period. (See Doc. No. 246 at 8-15; Doc. No. 262 at 5-14.) Because Plaintiff's claims arose in West Virginia but were filed in Pennsylvania, the Pennsylvania borrowing statute applies. See Pac. Emp'rs Ins. Co. v. Global Reinsurance Corp. of Am., 693 F.3d 417, 432 (3d Cir. 2012) (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941)) (federal court sitting in diversity applies the forum state's choice of law rules). That statute requires me to apply the "the law of the place where the claim [arose] or . . . the law of [Pennsylvania], whichever first bars the claim." 42 Pa. Cons. Stat. § 5521(b). I make this determination by considering each state's statute of limitations and rules governing accrual and tolling. Frankentek Residential Sys., LLC v. Buerger, No. 12-767, 2014 WL 1623775, at *4 (E.D. Pa. Apr. 24, 2014).

Because Pennsylvania and West Virginia provide a two-year limitations period for personal injury actions and analogous accrual and tolling rules, both states would bar Plaintiff's claims at the same time. Compare 42 Pa. Cons. Stat. § 5524(2), (7) (two-year statute of limitations), Wilson v. El-Daief, 964 A.2d 354, 361 (Pa. 2009) (claim accrues when injury is inflicted), and Fine, 870 A.2d at 858-61 (describing Pennsylvania tolling doctrines), with W. Va. Code § 55-2-12 (two-year limitations period), McCoy v. Miller, 578 S.E.2d 355, 358 (W. Va. 2003) ("[A] cause of action accrues . . . when a tort occurs." (citations omitted)), Goodwin v. Bayer Corp., 624 S.E.2d 562, 567 (W. Va. 2005) (describing West Virginia's discovery rule in products liability cases), and Merrill v. W. Va. Dep't of Health & Human Res., 632 S.E.2d 307, 318 (W. Va. 2006) (describing West Virginia's fraudulent concealment doctrine).

In these circumstances, I will apply Pennsylvania law. Frankentek, 2014 WL 1623775, at *4 ("Pennsylvania's limitations period applies . . . unless the foreign jurisdiction's laws,

including laws on tolling and the date of accrual, bar the claim first."); see also Ross v. Johns-Manville Corp., 766 F.2d 823, 827 (3d Cir. 1985) ("Both the statutory scheme and the case law in this area suggest that the limitations period for a foreign cause of action brought in Pennsylvania courts should never be construed to be longer than would be the case if the same events had occurred in Pennsylvania to a Pennsylvania plaintiff.").

B. Accrual

Pennsylvania's two-year limitations period for personal injury actions starts to run when "an injury is inflicted." Wilson, 964 A.2d at 361; see also 42 Pa. Cons. Stat. § 5524(2), (7); Mest v. Cabot Corp., 449 F.3d 502, 510 (3d Cir. 2006). Because Plaintiff sustained his injuries at birth, the statute began to run in February 1957. See Urland v. Merrell-Dow Pharms., Inc., 822 F.2d 1268, 1276 (3d Cir. 1987) (Pennsylvania's minor tolling statute, which tolls the limitations clock until an individual reaches 18, does not apply retroactively to claims barred at the time of its enactment in 1984); Walter v. Ditzler, 227 A.2d 833, 835 (Pa. 1967) (before enactment of the minor tolling statute, Pennsylvania minors were subject to the adult statute of limitations). The statute of limitations thus bars the instant claims unless Plaintiff can equitably toll the limitations clock until at least October 25, 2009 (two years before he initiated this action).

C. Discovery Rule

Plaintiff's New Argument

As I have discussed, the gravamen of Plaintiff's Complaint is that Defendants' fraudulent concealment of both thalidomide's extensive distribution in the United States and the drug's dangerousness tolled the running of the two-year limitations clock. As I explain below, however, Plaintiff has not remotely made out fraudulent concealment. Perhaps realizing this, in opposing summary judgment, Plaintiff raises a new contention: that until October 2009, he could

not, in the exercise of reasonable diligence, have known that thalidomide caused his birth defects. He thus argues that his October 2011 Complaint is not time-barred.

Once again, it is undisputed that Plaintiff has known since at least 1969 that his mother took thalidomide while she was pregnant with him; that in the 1980s, his father tried to sue the prescribing doctor; that at this time Plaintiff acknowledged to his then-personal injury lawyer that his birth defects were "the result of thalidomide"; that for the last 40 years, Plaintiff's "best knowledge" was that thalidomide caused his injuries; and that he so informed his doctor in 2005.

In arguing that the two-year limitations clock was stopped for some 50 years, Plaintiff offers the expert affidavit of Trent Stephens, Ph.D., who examined Plaintiff in July 2014 (after Plaintiffs were accused of discovery misconduct and I appointed Mr. Hangley). (Stephens Decl. ¶ 8, Doc. No. 262, Ex. 7.)

Plaintiff argues that his "[s]ubjective belief [that thalidomide caused his injuries] isn't enough to start the statute of limitations running." (Doc. No. 364 at 83; see also Doc. No. 262 at 16 ("[M]ere suspicision that thalidomide caused his injuries [does not] mean that his claims are time-barred as a matter of law.").) In support, Dr. Stephens avers that before October 25, 2009 (exactly two years before the instant Complaint was filed) medical science mistakenly understood that thalidomide caused only "bilateral" limb defects, not the "unilateral" defects from which Plaintiff suffers. (Stephens Decl. ¶¶ 17-19, 22-24.) Dr. Stephens believes that before this date, no "legitimate expert" would have opined that the unilateral injuries to Plaintiff's limbs and hip were caused by thalidomide, assuming Plaintiff's mother took the drug early in her pregnancy. (Doc. No. 262 at 3.) Plaintiff thus argues that the limitations clock was tolled until October 25, 2009, because Plaintiff could not, in the exercise of reasonable diligence,

have known with certainty that thalidomide caused his injuries: "medical expert testimony did not exist before that time" to support such a claim. (Id. at 5, 7.)

Assuming *arguendo* that Dr. Stephens's expert opinion passes muster under Daubert, his declaration and the arguments Plaintiff bases on the declaration are nonetheless deficient. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

The Expert Did Not Address All Plaintiff's Injuries

Once again, Dr. Stephens opines on how thalidomide caused the injuries only to Plaintiff's limbs and hip. (Stephens Decl. ¶ 12 (hip), ¶ 13 (hip and ankle), ¶ 14 (limbs), ¶ 15 (left leg), ¶ 16 (left hand), ¶ 17-24 (limbs).) As I have discussed, however, Plaintiff has additional birth defects: he is "abnormally short," has a curved spine, and has a malformed skeleton. (Compl. ¶ 15.) Dr. Stephens thus has not addressed whether thalidomide caused *all* Plaintiff's injuries. The record abounds with uncontradicted evidence that medical science has known for decades that thalidomide caused these spinal and skeletal injuries. (See Doc. No. 246, Exs. F-M.) In these circumstances, even Dr. Stephens would be compelled to agree that Plaintiff could have learned well before October 25, 2009 that thalidomide caused at least some of his injuries.

Absence of Causation Evidence

There is no record evidence as to *when* in her pregnancy Plaintiff's mother took thalidomide. (Andre Dep. 10-11 (Question: "During what part of her pregnancy [did Plaintiff's mother take thalidomide]?" Answer: "I don't know." Question: "Middle, beginning, end? Do you have any idea?" Answer: "No."); Deborah Andre Dep. at 20-21; Bruscher Dep. at 28-29; Dein Dep. at 23 (Plaintiff's wife and two sisters did not know when Plaintiff's mother took the drug).) Rather, Dr. Stephens avers that Hagens Berman "asked [him] to assume that Mr. Andre was exposed to thalidomide during the critical period in utero." (Stephens Decl. ¶ 6.) Dr.

Stephens's assumption is not evidence that Plaintiff's mother took thalidomide early in her pregnancy. See Stecyk v. Bell Helicopter Textron, Inc., 295 F.3d 408, 414 (3d Cir. 2002) ("It is an abuse of discretion to admit expert testimony which is based on assumptions lacking any factual foundation in the record."); Elcock v. Kmart Corp., 233 F.3d 734, 755 (3d Cir. 2000) (same). Without this evidence of causation, the Stephens declaration is inapplicable here.

I May Not Consider the Expert Declaration

An expert affidavit can defeat summary judgment only if the expert opinion would be admissible at trial. See Heller v. Shaw Indus., 167 F.3d 146, 150 (3d Cir. 1999) (upholding grant of summary judgment where district court refused to consider expert opinion that would have been inadmissible at trial). Dr. Stephens's opinion on the cause of Plaintiff's defects would not be admitted at trial unless it was to "a reasonable degree of medical certainty." In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 750-51 (3d Cir. 1994) (under Pennsylvania law, which applies in diversity cases, expert opinion on causation is not admissible unless it is to a reasonable degree of medical certainty that defendant caused plaintiff's injuries); Heller, 167 F.3d at 153 n.4 (same). Because Dr. Stephens avers that his opinion on causation is "more likely than not," his declaration would not be admissible at trial. (Stephens Decl. ¶ 23); see, e.g., Kollar v. Pa. Dep't of Transp., 7 A.3d 336, 342 (Pa. Commw. Ct. 2010) (excluding a medical expert's opinion that defendant "more likely than not" caused plaintiff's injuries); Griffin v. Univ. of Pittsburgh Med. Ctr.-Braddock Hosp., 950 A.2d 996, 1003 (Pa. Super. Ct. 2008) (a "more likely than not" degree of certainty is insufficient); Corrado v. Thomas Jefferson Univ. Hosp., 790 A.2d 1022, 1031 (Pa. Super. Ct. 2001) (finding inadmissible expert testimony that defendant "more likely than not . . . deviated from the standard of care"); cf. Bell v. Arvin Meritor, Inc., MDL 875, 2013 WL 5549540, at *1 n.1 (E.D. Pa. Oct. 4, 2013) (expert's testimony that plaintiff was "more likely

than not" exposed to asbestos was "impermissibly speculative" and inadmissible under Federal Rule of Evidence 702(b)).

Because the expert opinion that Dr. Stephens expressed in his declaration would be inadmissible at trial, it cannot defeat summary judgment. Heller, 167 F.3d at 150; In re Paoli, 35 F.3d at 751-52 (upholding grant of summary judgment for defendants where plaintiffs' expert could not testify on causation "with a reasonable degree of certainty").

The Expert Himself Contradicts His Opinion, as Does Undisputed Record Evidence

Plaintiff's claims would still be time-barred, even assuming, *arguendo*: that Plaintiff's mother took thalidomide early in her pregnancy; that before October 25, 2009 no "legitimate expert" would state that thalidomide caused *any* of Plaintiff's injuries; and that Dr. Stephens's expert opinion would be admissible at trial.

Defendants vigorously argue that there was no material change in medical knowledge in October 2009 respecting the connection between thalidomide and birth defects. (Doc. No. 271 at 4-5.) This is confirmed by Dr. Stephens himself, who bases his recent revelation that thalidomide causes unilateral birth defects (from which Plaintiff suffers) on a 1964 study. (Stephens Decl. ¶ 17.) Dr. Stephens also avers that data from a 1969 study shows thalidomide resulted in "significant unilateral defects." (Id. ¶ 19.) It thus appears that Dr. Stephens himself acknowledges that any "sea change" in medical thought on thalidomide occurred some 45 years before the date Dr. Stephens came to "appreciate[]" its significance. (Id. ¶ 22.)

This is further confirmed by overwhelming record evidence that the American public has known since the early 1960s that thalidomide causes serious birth defects. (Doc. No. 246, Exs. F-M.) Accordingly, personal injury litigation against Defendants and their corporate predecessors has been ongoing for over 50 years. (Id., Ex. Q.) Indeed—*in 1975*—the Third

Circuit ruled that a thalidomide personal injury case against Defendants "will be dismissed as time-barred." Henry v. Richardson-Merrell, Inc., 508 F.2d 28, 31 (3d Cir. 1975). Yet if Dr. Stephens is correct, at least some of these numerous plaintiffs could not have known that their injuries were caused by thalidomide, and thus brought personal injury actions that were supported by "illegitimate experts."

In these circumstances, Dr. Stephens's "expert" opinion is insufficient to defeat summary judgment. See Elec. Ins. Co. v. Estate of Marcantonis, 755 F. Supp. 2d 632, 636 (D.N.J. 2010) (expert witness report unsupported by the record was insufficient to defeat summary judgment); Stein v. Foamex Int'l, Inc., No. 2356, 2001 WL 936566, at *7-8 (E.D. Pa. Aug. 15, 2001) (striking from the summary judgment record an expert witness's affidavit that contradicted his expert report and deposition testimony); cf. ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 290 (3d Cir. 2012) ("When an expert opinion is not supported by sufficient facts . . . , or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict." (quoting Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242 (1993))).

No Reasonable Diligence

To toll the running of the limitations clock, Plaintiff was obligated to exercise "reasonable diligence in ascertaining the existence of [his] injury and its cause." Mest, 449 F.3d at 511 (citations omitted). "[A] diligent investigation may require one to seek further medical examination as well as competent legal representation." Cochran v. GAF Corp., 666 A.2d 245, 249 (Pa. 1995). Here, it is undisputed that Plaintiff undertook no investigation, even though for some 40 years he told doctors that "to the best of his knowledge" thalidomide—a drug he knew "came from Germany"—caused his birth defects. (Andre Dep. at 58, 65, 104-05.)

Notwithstanding this knowledge, when Plaintiff could not find his mother's medical records, he simply gave up: "with no clues to follow, [Plaintiff] was left with no understanding of what it meant to be a thalidomider and no idea who was responsible for developing and distributing the drug." (Compl. ¶ 18.) This is no diligence at all, especially compared with that demonstrated by the numerous plaintiffs who brought thalidomide personal injury actions against Defendants decades before October 25, 2009. (Doc. No. 246, Ex. Q.)

Plaintiff did not need an expert opinion to investigate the cause of his birth defects, especially when he had already heard from his parents that thalidomide had caused his injuries. (Andre Dep. at 104-05); see Brawner v. Educ. Mgmt. Corp., 513 F. App'x 148, 151 (3d Cir. 2013) ("[K]nowledge of every fact necessary to prevail on the claim is not required to . . . trigger the accrual period." (emphasis and internal citation omitted)); Mest, 449 F.3d at 510-11 (discovery rule does not toll the statute until a plaintiff "know[s] the exact nature of his injury"); Ingenito v. AC & S, Inc., 633 A.2d 1172, 1174 (Pa. Super. Ct. 1993) ("A plaintiff does not need to know that he has a cause of action, or that he has suffered an injury due to another party's wrongful conduct [if the plaintiff] possesses the salient facts concerning the occurrence of his injury and who or what caused it . . . ."). Through the exercise of diligence, Plaintiff would have discovered an expert to confirm that thalidomide caused at least some of his injuries. See Cochran, 666 A.2d at 249 ("[A] diligent investigation may require one to seek further medical examination as well as competent legal representation."); Mest, 449 F.3d at 513 (discovery rule applied where plaintiffs "noticed their injury[,] suspected that the defendants' actions were to blame [and] sought the advice of medical experts"); Love v. Raymark Indus., 633 A.2d 1185, 1186-87 (Pa. Super. Ct. 1993) (discovery rule did not apply where plaintiff "suspected that [his lung] cancer was related to his occupational exposure to asbestos" and the "causal connection

between lung cancer and occupational exposure to asbestos was neither obscure nor unascertainable").

Moreover, had Plaintiff been told by a "legitimate expert" that thalidomide did not cause *any of* his injuries—thus giving some support to Dr. Stephens's dubious opinion—that alone would not have tolled the limitations clock. Almost 20 years ago, the Pennsylvania Supreme Court held that "[i]t is well settled that the statute of limitations is not tolled by mistake or misunderstanding." Cochran, 666 A.2d at 249. The Third Circuit has cautioned that "[t]here is indeed some point in time when a patient's own 'common sense' should lead her to conclude that it is no longer reasonable to rely on the assurances of her doctor." Bohus v. Beloff, 950 F.2d 919, 930 (3d Cir. 1991). Here, where Plaintiff "knew" thalidomide caused his injuries (and no doctor or scientist told him anything to the contrary), and that a German company had manufactured the drug, "common sense" compelled him, at the very least, to obtain counsel to investigate. Yet, Plaintiff testified that even though he had retained a personal injury lawyer decades ago in connection with an unrelated injury, he never asked the lawyer to investigate the cause of his birth defects. (Andre Dep. 84-87.) Plainly Plaintiff did not exercise reasonable diligence. See Cochran, 666 A.2d at 249 ("[A] diligent investigation may require one to seek further medical examination as well as competent legal representation.")

In sum, the discovery rule does not save Plaintiff's 2011 claims, which were time-barred decades before.

D. Fraudulent Concealment

Plaintiff's Arguments

Once again, Plaintiff alleges that Defendants fraudulently concealed the extent of thalidomide's distribution in the United States and the drug's dangerousness. (Compl. ¶¶ 369(1-

20), 375.) Purportedly relying on those misrepresentations—whose falsity "became known within the last year" as a result of "extraordinary investigative efforts"—Plaintiff refrained from suing Defendants. (Compl. ¶¶ 1, 3.) Plaintiff argues that these misrepresentations tolled the running of Pennsylvania's two-year limitations clock for over 50 years. (Doc. No. 262 at 32-35.)

Traditional Fraudulent Concealment

The doctrine of fraudulent concealment tolls the limitations clock where "through fraud or concealment the defendant causes the plaintiff to relax vigilance or deviate from the right of inquiry." Ciccarelli v. Carey Canadian Mines, Ltd., 757 F.2d 548, 556 (3d Cir. 1985). As I have discussed—and Plaintiff acknowledges in his Complaint—a plaintiff must plead fraudulent concealment with particularity and, at summary judgment, the plaintiff has the burden of "proving fraudulent concealment by clear, precise, and convincing evidence." Fine, 870 A.2d at 860; Byrnes, 741 F.2d at 626.

Here, Plaintiff has not, in his Complaint or deposition, identified a single misrepresentation on which *he* relied to *his* detriment. Plaintiff does not allege that he relied on any of the twenty "fraudulent acts" alleged in his Complaint. (Compl. ¶ 369(1-20).) Plaintiff testified that he did not know of—and thus could not have relied upon—any of Defendants' misrepresentations respecting the distribution and dangerousness of thalidomide. When asked what he knew about thalidomide, Plaintiff responded only that he knew the drug caused "90 to 99 percent" of his birth defects, that it had been removed from the market, and that it had come from Germany. (Andre Dep. at 33-35, 104-05.) In these circumstances, Plaintiff has failed to carry his burden of proving a reasonable juror could find fraudulent concealment "by clear, precise, and convincing evidence." Fine, 870 A.2d at 860.

Moreover, Defendants' alleged misrepresentations never lulled Plaintiff into an incorrect understanding that he had no reason to proceed against Defendants. As pled, Plaintiff's parents told him thalidomide caused his birth defects. Indeed, Plaintiff's father tried to sue the doctor who prescribed the drug. As I have explained, Plaintiff failed to pursue claims against Defendants because of a lack of diligence, not because of Defendants' purported fraud.

Expanding the Fraudulent Concealment Doctrine

Because Plaintiff cannot prevail under the traditional fraudulent concealment rule, he has argued for a different rule, which has scant legal support and, more importantly, no evidentiary support.

At the October 1 sanctions hearing before Mr. Hangley, Plaintiff's Counsel confirmed that Defendants had made no representations of any kind directly to Plaintiff. (Doc. No. 364 at 74; see also Pl.'s Second Supp. Resp. to Sanofi-Aventis U.S. LLC's Fourth Interrog., Doc. No. 262, Ex. 7.) Counsel suggested that I have ruled that in the absence of such direct communications, there could be no fraudulent concealment. (Doc. No. 364 at 74.) This is incorrect.

In granting Defendants' unopposed motion for summary judgment against Plaintiff Jack Merica, I ruled that "in Pennsylvania, fraudulent concealment requires [an] 'affirmative act of concealment upon which Plaintiff justifiably relied.'" (Doc. No. 265 at 2 (quoting Riggs v. AHP Settlement Trust, 421 F. App'x 136, 139 (3d Cir. 2011) (per curiam)).) I have never ruled on whether that "act of concealment" must be communicated *directly* to the plaintiff. But see Mest, 449 F.3d at 517 (no fraudulent concealment in the absence of communications between the parties); Urland, 822 F.2d at 1271-72 (fraudulent concealment doctrine applied where a drug manufacturer wrote a letter to the plaintiff containing misleading information); Ciccarelli, 757

F.2d at 556-57 (no fraudulent concealment where plaintiffs submitted "a detailed offer of proof, including evidence spanning several decades, which sought to implicate the manufacturers in an industry-wide conspiracy to conceal the hazards of asbestos exposure"); Speicher v. Dalkon Shield Claimants Trust., 943 F. Supp. 554, 558-59 (E.D. Pa. 1996) (no fraudulent concealment where defendants allegedly "hid information from the public," because "allegations of a manufacturer's conspiracy are not sufficient to support a claim of fraud that would cause plaintiff to deviate from her duty to inquire"); Baselice v. Franciscan Friars Assumption BVM Province, Inc., 879 A.2d 270, 278-79 (Pa. Super. Ct. 2005) (no fraudulent concealment based on "general and systematic conduct exhibited by the Archdiocese with regard to its offending priests").

Nevertheless, for purposes of summary judgment, I will assume *arguendo* that Plaintiff could make out fraudulent concealment with evidence of Defendants' public misrepresentations, that Plaintiff indirectly learned of these misrepresentations, and that he relied on the misrepresentations to his detriment. Once again, Plaintiff has not identified any misrepresentation on which *he* relied in refraining from suing Defendants. On the contrary, Plaintiff has both pled and testified to the opposite of detrimental reliance on Defendants' alleged misrepresentations: his "best knowledge" has long been that thalidomide caused his injuries.

As Plaintiff acknowledges, the fraudulent concealment doctrine tolls the statute only until the "injured party knows or reasonably should know of his injury and its cause." (Doc. No. 262 at 33-34 (quoting Fine, 870 A.2d at 861)); see also Urland, 822 F.2d at 1273 ("[T]he [Pennsylvania] Supreme Court . . . views tolling of the statute of limitations in terms of the same 'knew or should have known' standard whether the statute is tolled because of the discovery rule or because of fraudulent concealment."). As I have discussed at length, Plaintiff knew or

reasonably should have known decades before October 2009 that thalidomide caused some or all his birth defects.

In sum, because the record does not make out fraudulent concealment under any theory, Plaintiff's claims are time-barred.

E. Causation

Defendants argue persuasively that Plaintiff has produced no admissible evidence showing that his mother ingested thalidomide at any point during her pregnancy. (Doc. No. 246 at 15-18.) In light of my decision that Plaintiff's claims are time-barred, however, I need not address this argument.

F. Additional Discovery

On October 13, Plaintiff asked me to defer ruling on summary judgment until he can explore the details and accuracy of Defendants' stated distribution of thalidomide in the United States decades ago. (Doc. No. 367 at 12-13); Fed. R. Civ. P. 56(d). Even if Plaintiff could obtain additional evidence of Defendants' "misrepresentations" respecting thalidomide's distribution in the United States, there is no record evidence that Plaintiff relied on *any* of Defendants' representations at any time. Granting Plaintiff's request would thus serve no valid purpose, because the proposed discovery has nothing to do with Plaintiff, his knowledge of his injuries, or the "misrepresentations" from Defendants that Plaintiff purportedly relied upon. As I have discussed at length, Plaintiff has long been on notice that thalidomide caused his injuries, but chose not to obtain counsel until 2011 or otherwise explore avenues of relief. Accordingly, whether additional discovery would reveal that thalidomide was somehow more or less available domestically would not affect my analysis of Plaintiff's discovery rule or fraudulent concealment contentions.

V. CONCLUSION

After some three years of litigation, it is plain that critical allegations made by Edmund Andre—allegations that I was compelled to accept as true at the Rule 12 stage—have no evidentiary support. Plaintiff offers no valid basis to conclude that the two-year limitations clock was tolled after February 1957, when Plaintiff was born with horrific injuries. I am now compelled to conclude that the clock expired decades ago and that this 2011 personal injury action is time-barred.

An appropriate Order follows.

/s/ Paul S. Diamond

October 16, 2014 Paul S. Diamond, J.

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

GLENDA JOHNSON, et al.,	:	
Plaintiffs,	:	
	:	
v.	:	**Civ. No. 11-5782**
	:	**and all related cases**
SMITHKLINE BEECHAM	:	
CORPORATION, et al.,	:	
Defendants.	:	

ORDER

AND NOW, this 16th day of October, 2014, upon consideration of Defendants' Motion for Summary Judgment (Doc. No. 246), Plaintiff's Response (Doc. No. 262), and all related filings, it is hereby **ORDERED** that Defendants' Motion is **GRANTED**. Plaintiff Edmund Andre's action is **DISMISSED** with prejudice. Judgment is hereby entered as to all Plaintiff's claims in favor of all Defendants and against Plaintiff.

AND IT IS SO ORDERED.

/s/ Paul S. Diamond

Paul S. Diamond, J.

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

GLENDA JOHNSON, et al.	:	
	:	
v.	:	**Civ. No. 11-5782**
	:	**and all related cases**
SMITHKLINE BEECHAM	:	
CORPORATION, et al.	:	

ORDER

I am disturbed by what has occurred since I granted summary judgment against Plaintiff Edmund Andre on October 16, 2014. (Doc. No. 371.) As I discussed in my Memorandum dismissing Mr. Andre's claims as time-barred, there are three sanctions motions pending against Plaintiffs' lead Counsel, Hagens Berman Sobol Shapiro LLP, in which Defendants have argued, *inter alia*, that the firm contravened 28 U.S.C. § 1927 when it initiated obviously time-barred claims. (Doc. Nos. 258, 281, 310.) I noted that during an October 1, 2014 hearing before Special Master William T. Hangley, Hagens Berman conceded that sanctions should be imposed on the firm in the Roel Garza case. (Doc. No. 371 at 7.) I also noted that resolving the remaining sanctions motions (which I have, with the Parties' agreement, referred to Special Master Hangley) might well require a determination of whether the crime-fraud exception applies to certain communications between Hagens Berman and its clients. (Id.)

As I further noted, of the fifty-two Plaintiffs whose thalidomide cases have been consolidated before me for pretrial purposes, ten have dismissed their claims with prejudice. (Doc. Nos. 182, 284, 305, 325, 326, 328, 332, 362.) Hagens Berman has asked to withdraw from representing four other Plaintiffs, averring that the firm could not, consistent with the Code of Professional Conduct, oppose Defendants' dismissal motions. (See Doc. No. 207 at 2 (citing Pa. Rule of Prof'l Conduct 1.16(a) ("[A] lawyer . . . shall withdraw from the representation of a

client if . . . the representation will result in violation of the Rules of Professional Conduct or other law . . . ."); Doc. Nos. 301, 342, 343 (same).) I ordered Hagens Berman to serve on each of those four Plaintiffs—John Marshall, Jose Navamuel, Terrie Bolton, and John Skelton, III: (1) the firm's Motion to Withdraw; and (2) my Order directing each Plaintiff to "inform this Court in writing" within thirty days whether he or she has secured replacement counsel or wishes to proceed *pro se*. (Doc. Nos. 329, 351, 352.)

On September 23, I received a letter from Ms. Bolton, in which she stated that although she had diligently sought to secure replacement counsel, she had been unsuccessful and asked for additional time. (Doc. No. 359.) Accordingly, I extended her deadline by another month to November 3, 2014. (Doc. No. 363.)

Within days after I granted summary judgment against Mr. Andre, the Parties stipulated to dismissing with prejudice the claims of Plaintiff David Hobbs and Hagens Berman sought to withdraw from representing Plaintiffs Richard Anderson and Mary Sells, again, invoking the Code of Professional Conduct. (Doc. Nos. 374, 375, 382.) On October 21, I once again ordered Hagens Berman to serve on Mr. Anderson and Ms. Sells its withdrawal Motions and my Order directing them to inform me within a month whether they had secured replacement counsel or wished to proceed *pro se*. (Doc. Nos. 384, 385.)

A day later, on October 22, I received a letter from Ms. Bolton, in which she reported that, although she "has vigorously searched dozens of law firms"—listing them all by name—she still could not find a lawyer willing to take her case. (Doc. No. 390.) Ms. Bolton (who lives in Arizona) had contacted sixty reputable law firms located in, among other places, Philadelphia, Pittsburgh, New York, Washington, D.C., San Francisco, Phoenix, and Tucson. (Id.) She requested another extension to secure replacement counsel, but alternatively asked me to deny

Hagens Berman's withdrawal Motion because the firm had represented her for three years, and "virtually no lawyer is willing to take [her] case based on how far along it is in the process." (Id.) She added: "If counsel is permitted to withdraw, my claims will likely find no representation and would not be allowed the same justice that the remaining Plaintiffs are receiving [in these cases]." (Id.) She concluded she could not represent herself *pro se* because, *inter alia*, "the consequences of losing this matter are so great." (Id.)

The next day, on October 23, I received a letter request from Hagens Berman asking me to stay "all [thalidomide] actions in their entirety—with the exception of [the six] pending summary judgment motions and [the three] pending sanctions motions until 21 days after the Court issues rulings on all pending summary judgment motions." (Doc. No. 388.) I denied the request that same day. (Doc. No. 389.)

Finally, on October 28—five days after denying Plaintiffs' request for a stay—I received a letter from the GSK Defendants, stating that "[a]ll [P]laintiffs currently represented by Hagens Berman—with the sole exception of Debra Johnson—will dismiss with prejudice all claims against the GSK [D]efendants." (Doc. No. 394.) In exchange, the GSK Defendants would withdraw all their discovery requests and sanctions motions and forgo any current or future sanctions payments. (Id.) The GSK Defendants further stated that "[t]his agreement shall not be characterized as a settlement of [P]laintiffs' claims" because "no payments are being made by GSK." (Id.)

It is difficult to understand how "[a]ll [P]laintiffs represented by Hagens Berman" could agree to dismiss *with prejudice* their claims against the GSK Defendants, when Ms. Bolton (who presently remains a Hagens Berman client) described only six days earlier her herculean efforts to secure counsel so that she would not have to suffer "the [great] consequences of losing this

matter." (Doc. No. 390.) Nor do I understand how Hagens Berman could, on October 23, request a stay of "all [thalidomide] actions in their entirety"—pending resolution of six outstanding summary judgment motions—and five days later agree to dismiss all pending thalidomide cases (save one) with prejudice.

In these circumstances, I must ensure that Hagens Berman obtained the knowing, voluntary consent of each Plaintiff before agreeing to dismiss his or her case against the GSK Defendants with prejudice. See Kabbaj v. Am. Sch. of Tanger, 445 F. App'x 541, 544-45 (3d Cir. 2011) (per curiam) (requiring "clear and unambiguous evidence that the parties have entered into" a Rule 41 dismissal); see also Kramer v. Tribe, 156 F.R.D. 96, 101 (D.N.J. 1994) ("The Court also has inherent disciplinary authority to supervise and monitor the conduct of attorneys admitted to practice." (citing Chambers v. Nasco, Inc., 501 U.S. 32, 43-46 (1991))). Because this consent question and the sanctions motions presently before Special Master Hangley implicate a number of the same factual and legal questions, I believe the question of client consent should be referred to him as well for a Report and Recommendation. Fed. R. Civ. P. 53.

AND NOW, this 31st day of October, 2014, I hereby propose the following amendment to my Special Master Appointment Order (Doc. No. 256):

1. The Special Master, William T. Hangley, Esq. shall issue a Report and Recommendation on whether each Plaintiff (except Debra Johnson) knowingly, intelligently, and voluntarily consented to dismissing with prejudice his or her claims against the GSK Defendants—or any other Defendants. Any objections to the Report and Recommendation must be filed within fourteen days after the Report is served. Any responses shall be filed within ten days after any objections; and

2. In accordance with Rule 53(b)(4), all Parties must state in writing no later than **3:30 p.m.** on **Wednesday, November 10, 2014** whether or not they object to this proposed modification, or if they have any suggestions. If they object, they should set forth the grounds for their objections.

IT IS SO ORDERED.

/s/ Paul S. Diamond

Paul S. Diamond, J.

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

GLENDA JOHNSON ET AL., Plaintiffs, v. SMITHKLINE BEECHAM CORPORATION ET AL., Defendants.	Case No. 2:11-cv-005782-PD and all related cases

THE GSK COMPANIES' RESPONSE TO THE PROPOSED AMENDMENT TO THE SPECIAL MASTER APPOINTMENT ORDER

In response to the Court's order of October 31 referencing the agreement by certain plaintiffs to dismiss their claims against GSK only, GSK wishes to clarify one aspect of that agreement. GSK does not view such agreement as encompassing plaintiffs Marshall, Navaumel, Bolton, Skelton, Anderson, or Sells, the six plaintiffs as to whom Hagens Berman has moved to withdraw. The letter to the Court from GSK dated October 28 should have so stated.

As to the 28 other plaintiffs (including Andre), who have agreed to dismiss with prejudice their claims against GSK and who are still represented by Hagens Berman, GSK welcomes the expansion of the Special Master's mandate to ensure that those dismissal decisions have been made voluntarily and knowingly. GSK has believed from the outset of this litigation that none of the claims against it has any arguable merit for many reasons, but primarily because of the lack of any admissible evidence that any plaintiffs were exposed in utero to thalidomide supplied to their mothers by SKF or its agents and because of the clear bar of the statute of limitations, with no legitimate basis for invoking fraudulent concealment or the discovery rule.

GSK trusts that the Special Master's inquiry will reveal that the decisions to now dismiss reflect plaintiffs' acceptance, albeit belated, of the lack of merit in those claims.

Dated: November 4, 2014

/s/ Michael T. Scott

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Attorney for Defendants GlaxoSmithKline LLC and GlaxoSmithKline Holdings (Americas) Inc.

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2014, a copy of this document was filed electronically and is available for viewing and downloading from the CM/ECF system. I also certify that a true and correct copy of the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ *Michael T. Scott*
Michael T. Scott

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

GLENDA JOHNSON, *et al.*, Plaintiffs, v. SMITHKLINE BEECHAM CORPORATION, *et al.*, Defendants.	Case No. 2:11-cv-05782-PD AND ALL RELATED CASES

RESPONSE OF CERTAIN PLAINTIFFS TO THE PROPOSED AMENDMENT TO THE SPECIAL MASTER APPOINTMENT ORDER

This response to the Court's Order dated October 31, 2004, is filed by all Plaintiffs who are: (1) represented by Hagens Berman Sobol Shapiro LLP ("HBSS"); and (2) not subject to a motion to withdraw by HBSS.[1] The responding Plaintiffs respectfully object to the Order because the Order appears to be based largely on a misunderstanding of the agreement reached by the responding Plaintiffs and GSK.

On October 28, 2014, GSK reported to the Court that "[a]ll plaintiffs currently represented by Hagens Berman Sobol Shapiro LLP – with the sole exception of Debra Johnson – will dismiss with prejudice all claims against the GSK Defendants." This Court reached the reasonable (albeit incorrect) conclusion that all Plaintiffs other than Debra Johnson had agreed to dismiss their claims against the GSK Defendants. But the phrase "all plaintiffs currently

[1] Those Plaintiffs are Rebecca Alexander, Edmund Andre, Kim Branscum, Doris Brust, Craig Charleston, Mark Endres, Yvonne English-Monroe, Darren Griggs, Carolyn Jean Grover, John Grover, Kathleen Gunn, Mark Harrelson, Alan Horridge, Tammy Jackson, Glenda Johnson, Diane Kessler, Gearold Ledsome, Steven Lucier, Mary McPartlan-Hurson, Robert Murray, Carmela Norcross, Yolanda Perez, Carolyn Sampson, Christopher Simeone, William Tyler III, Colleen Van Vleet, Edward Worthan, and Phillip Yeatts.

represented by [HBSS]" was intended to mean those Plaintiffs who are represented by HBSS ***and*** who are not subject to a motion to withdraw by HBSS. Therefore, the dismissal agreement did not include Terrie Bolton or any of the other Plaintiffs as to whom HBSS has filed a motion to withdraw, but instead included only those 28 Plaintiffs listed in footnote 1, *supra*.[2] All 28 Plaintiffs agreed to dismiss their claims against the GSK Defendants after consulting with HBSS attorneys about the proposal to dismiss GSK.[3]

HBSS understands the Court's concern if HBSS had agreed to dismiss the claims of Ms. Bolton and the other Plaintiffs as to whom HBSS has sought to withdraw. But that is not the case. HBSS has not communicated with those Plaintiffs about dismissal of their claims against GSK and is not purporting to dismiss any of their claims against any Defendant. The agreement to dismiss was made on behalf of only those 28 Plaintiffs who are represented by HBSS and who are not subject to a motion to withdraw.

The Order also states that the Court is concerned that, after issuance of the Court's summary judgment ruling in the Andre matter on October 16, 2014: (1) the parties filed a stipulation agreeing to the dismissal of David Hobbs's claims, and (2) HBSS moved to withdraw as counsel for Plaintiffs Richard Anderson and Mary Sells. But the entry of that summary judgment order had no bearing on the actions taken with regard to Hobbs, Anderson, and Sells. The Hobbs dismissal and the motions to withdraw in the Anderson and Sells matters were undertaken pursuant to the case-review process ordered by the Special Master (Dkt. No. 268) and were independent of the Court's summary judgment order.[4] Plaintiffs' counsel provided Defendants

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[2] *See Declaration of Craig R. Spiegel in Support of Response Of Certain Plaintiffs to the Proposed Amendment to the Special Master Appointment Order* ("Spiegel Decl."), submitted herewith, at ¶ 2.

[3] *Id.*

[4] All statements in this paragraph are supported by paragraph 3 of the Spiegel Declaration.

with a proposed stipulation for Mr. Hobbs on September 10, 2014, before this Court issued the Andre ruling. On September 16, 2014 – once again before the Andre ruling was issued – HBSS also notified the Special Master and Defendants that HBSS would either dismiss or withdraw from Richard Anderson's case. It took time to finalize and file motion papers on these cases, and therefore the papers were not filed until October, but the decisions to file those papers were independent of the Court's order. In the Sells matter, while HBSS did not notify Defendants until October 20, 2004, that it would file a motion to withdraw, HBSS concluded that it would move to withdraw following an independent review of the case and discussion with the client. The motion to withdraw in the Sells matter was not made in response to the Andre order.

The Court's Order also expresses a concern that the agreement to dismiss claims of certain Plaintiffs was made after the Court denied Plaintiffs' motion for a stay. But entry of a stay would not have prevented those Plaintiffs from agreeing to dismiss their claims against GSK, with the Court's approval. And entry of the stay would still have been effective against the remaining Defendants, Sanofi and Grünenthal. In short, the dismissal of GSK was not dependent on the Court's denial of the motion for a stay.

For the foregoing reasons, there is no basis for the Court to issue the Order. The 28 Plaintiffs at issue are represented by HBSS and are not subject to a motion to withdraw. After consultation with counsel, they have agreed to dismiss their claims against GSK only.[5] And all of those Plaintiffs will still have claims against the other Defendants, Sanofi and Grünenthal.

Nor is there any legal basis for an inquiry into whether those 28 Plaintiffs have knowingly, intelligently, and voluntarily entered into the dismissal agreement. This is a private lawsuit, such that the Court has no power to approve or disapprove the terms of dismissal. As

[5] Spiegel Decl., ¶ 2.

the Third Circuit has explained, "There are only certain designated types of suits, for instance consent decrees, class actions, shareholder derivative suits, and compromises of bankruptcy claims where settlement of the suit requires court approval." *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 835 (3d Cir. 1995). And as the Court further explained, "'In what can be termed "ordinary litigation," that is, lawsuits brought by one private party against another private party that will not affect the rights of any other persons, settlement of the dispute is solely in the hands of the parties. If the parties can agree to terms, they are free to settle the litigation at any time, and the court need not and should not get involved.'" *Id.* (citation omitted).

Moreover, there is no basis to impose any "terms and conditions" under Rule 41(a)(2), because the moving Plaintiffs and the GSK Defendants have agreed to the terms of dismissal. In *Young v. Johnson & Johnson Corp.*, 2005 U.S. Dist. LEXIS 26232, at *18 (E.D. Pa. Nov. 2, 2005), the district court stated, "'The purpose of the "terms and conditions" clause [of Rule 41(a)(2)] is to protect a defendant from any prejudice or inconvenience that may result from a plaintiff's voluntary dismissal.' *GAF Corp. v. Transamerica Ins. Co.*, 214 U.S. App. D.C. 208, 665 F.2d 364, 367 (D.C. Cir. 1981)." Here, GSK does not seek any protection from the Court but instead has agreed to the terms and conditions of the dismissal of those Plaintiffs who have agreed to dismiss their claims against GSK.[6]

And the cases cited by the Court do not support an inquiry into whether the 28 Plaintiffs knowingly, intelligently, and voluntarily agreed to dismiss their claims against GSK. In *Kabbaj*

[6] *See also In re Wellbutrin XL Antitrust Litig.*, 268 F.R.D. 539, 543 (E.D. Pa. 2010) ("When considering the effect of a voluntary dismissal under Rule 41(a)(2), a court must evaluate the presence or extent of any prejudice to the defendants caused by the dismissal. *Ferguson v. Eakle*, 492 F.2d 26, 29 (3d Cir. 1974). Terms and conditions are generally imposed by the district court under Rule 41(a)(2) for the protection of the defendant from such prejudice. 9 Wright & Miller, *Federal Practice and Procedure*, § 2366 (3d ed. 2008).").

v. Am. Sch. of Tangier, 445 F. App'x 541, 544 (3d Cir. 2011), the Third Circuit held that a joint stipulation filed by the defendants "did not conform to the requirements of Rule 41." The Court explained that "within two days of the filing of the stipulation, Kabbaj argued that he was not a party to the joint stipulation filed by the defendants." *Id.* As a result, the Third Circuit held that "the filing of the invalid notice did not end the case." *Id.* at 545. Here, in contrast, the terms of the agreement are clear, and Plaintiffs will present a motion for voluntary dismissal to the Court.

The other case cited by the Court, *Kramer v. Tribe*, 156 F.R.D. 96 (D.N.J. 1994), did not involve Rule 41 or the attorney-client privilege. Instead, it involved sanctions against a lawyer for "fil[ing] this law suit to extort a share of Appellate Counsels' fee and to embarrass the Defendants, specifically Laurence Tribe." *Id.* at 102. The court listed thirty-six other cases in which that attorney engaged in improper conduct. Here, in contrast, there is no evidence that Plaintiffs' counsel engaged in sanctionable conduct by consulting with the 28 Plaintiffs about the proposal to dismiss GSK and agreeing to dismiss their claims against GSK, while retaining those Plaintiffs' claims against Sanofi and Grünenthal.

Finally, if this Court were to order the Special Master to issue the Report contemplated by the Order, the Special Master would not have power to require the Plaintiffs who have agreed to dismiss GSK to testify as to their communications with counsel about that agreement. In this action, Pennsylvania's privilege law applies. *Kephart v. ABB, Inc.*, 2014 U.S. Dist. LEXIS 51411, at *11 (E.D. Pa. Apr. 14, 2014) ("[A] district court exercising diversity jurisdiction applies the law of privilege from the state in which it sits. *Samuelson v. Susen,* 576 F.2d 546, 549 (3d Cir. 1978)."). Pennsylvania has codified the attorney-client privilege as follows: "In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in

either case this privilege is waived upon the trial by the client." 42 Pa. Cons. Stat. Ann. § 5928 (West 1982). Here, there has been no waiver by the client.

Moreover, there is no basis to apply any exception to the attorney-client privilege. For example, there is no evidence to support the crime-fraud exception. The Pennsylvania Supreme Court has "recognized a crime-fraud exception to the attorney-client privilege to prevent a client from abusing the privilege in furtherance of a crime or fraud." *Castellani v. Scranton Times, L.P.*, 598 Pa. 283, 306 (2008). Moreover, there must be proof of some crime or fraud before the exception can be applied. For example, in *Nadler v. Warner Co.*, 321 Pa. 139, 144 (1936), the Pennsylvania Supreme Court held that the crime-fraud exception did not apply because no such crime or fraud had been shown. The Supreme Court stated:

> The protection of the statute is lost when both attorney and client are guilty or if the client alone is guilty. But before the fact may be shown the court must be satisfied that the evidence proposed to establish the fact is sufficient to go to the jury for the purpose. "To drive the privilege away, there must be 'something to give colour to the charge'; there must be 'prima facie evidence that it has some foundation in fact.' . . . When that evidence is supplied, the seal of secrecy is broken": *Clark v. U.S., supra*; *O'Rourke v. Darbishire* [1920] A.C. 581, 601; *Higbee v. Dresser*, 103 Mass. 523.

Here, there is nothing to "give colour" to a charge of crime or fraud against Plaintiffs or their attorneys with regard to the agreement to dismiss claims against GSK.[7]

And before any inquiry can be made into privileged communications, the Plaintiffs who are dismissing their claims against GSK must be given the opportunity to present evidence and

[7] In the Order at issue, this Court stated, "I also noted [in Doc. # 371] that resolving the remaining sanctions motions (which I have, with the Parties' agreement, referred to Special Master Hangley) might well require a determination of whether the crime-fraud exception applies to certain communications between Hagens Berman and its clients." But in making that statement, the Court was indicating that the crime-fraud exception might somehow apply to show that HBSS should not have brought claims in this litigation. Even if there were some evidence of such a crime or fraud (and there is not), it would not support the very different propisition that HBSS and the 28 Plaintiffs are engaging in crime or fraud in dismissing claims against GSK.

argument as to why no exception applies. In *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 96-97 (3d Cir. 1992), the Third Circuit explained the need to provide such due process:

> If the party seeking to apply the [crime-fraud] exception has made its initial showing, then a more formal procedure is required than that entitling plaintiff to *in camera* review. The importance of the privilege, as we have discussed, as well as fundamental concepts of due process require that the party defending the privilege be given the opportunity to be heard, by evidence and argument, at the hearing seeking an exception to the privilege. *See* Pet. at 33-34. We are concerned that the privilege be given adequate protection, and this can be assured only when the district court undertakes a thorough consideration of the issue, with the assistance of counsel on both sides of the dispute. *See Matter of Feldberg*, 862 F.2d at 626 (after prima facie showing that exception applies, party asserting privilege should have opportunity to rebut; "if the court finds the explanation satisfactory, the privilege remains."). [¶] We therefore must agree with petitioners' contention that where a fact finder undertakes to weigh evidence in a proceeding seeking an exception to the privilege, the party invoking the privilege has the absolute right to be heard by testimony and argument.

For the foregoing reasons, the Plaintiffs who have agreed to dismiss their claims against GSK (but who are not subject to a motion to withdraw) respectfully submit that this Court should not issue an order requiring the Special Master to issue a Report and Recommendation as to whether Plaintiffs who have agreed to dismiss their claims against GSK did so knowingly, intelligently, and voluntarily. But if the Court issues such an order, the Special Master should be instructed that he cannot take evidence concerning communications between those Plaintiffs and HBSS without providing due process, as required by the Third Circuit in *Haines*.

DATED: November 5, 2014

HAGENS BERMAN SOBOL SHAPIRO LLP

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Response of Certain Plaintiffs to The Proposed Amendment to The Special Master Appointment Order has been electronically filed with the Clerk of Court using CM/ECF on this 5th day of November, 2014. A true and correct copy of the foregoing document is being served on this date on all counsel of via transmission of Notices of Electronic Filing generated by CM/ECF.

DATED: November 5, 2014

HAGENS BERMAN SOBOL SHAPIRO LLP

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

GLENDA JOHNSON, *et al.*, Plaintiffs, v. SMITHKLINE BEECHAM CORPORATION, *et al.*, Defendants.	Case No. 2:11-cv-05782-PD AND ALL RELATED CASES

DECLARATION OF CRAIG R. SPIEGEL IN SUPPORT OF RESPONSE OF CERTAIN PLAINTIFFS TO THE PROPOSED AMENDMENT TO THE SPECIAL MASTER APPOINTMENT ORDER

I, Craig R. Spiegel, declare:

1. I have been admitted to practice *pro hac vice* in this action. I am an attorney at Hagens Berman Sobol Shapiro LLP ("HBSS"). I am one of the attorneys representing the Plaintiffs in these cases.

2. The dismissal agreement with the GSK Defendants was made on behalf of all Plaintiffs who are: (1) represented by Hagens Berman Sobol Shapiro LLP ("HBSS"); and (2) not subject to a motion to withdraw by HBSS. Therefore, the dismissal agreement did not include Terrie Bolton or any of the other Plaintiffs as to whom HBSS has filed a motion to withdraw, but instead included only the following 28 Plaintiffs, who agreed to dismiss their claims against GSK after consultation with HBSS: Rebecca Alexander, Edmund Andre, Kim Branscum, Doris Brust, Craig Charleston, Mark Endres, Yvonne English-Monroe, Darren Griggs, Carolyn Jean Grover, John Grover, Kathleen Gunn, Mark Harrelson, Alan Horridge, Tammy Jackson, Glenda Johnson, Diane Kessler, Gearold Ledsome, Steven Lucier, Mary McPartlan-Hurson, Robert Murray, Carmela Norcross, Yolanda Perez, Carolyn Sampson,

Christopher Simeone, William Tyler III, Colleen Van Vleet, Edward Worthan, and Phillip Yeatts. All 28 Plaintiffs agreed to dismiss their claims against the GSK Defendants after consulting with HBSS attorneys about the proposal to dismiss the GSK Defendants.

3. The dismissal of David Hobbs and the motions to withdraw in the Richard Anderson and Mary Sells matters were undertaken pursuant to the case-review process ordered by the Special Master (Dkt. No. 268) and were independent of the Court's Andre order. HBSS provided Defendants with a proposed stipulation for Mr. Hobbs on September 10, 2014, before this Court issued the Andre ruling. On September 16, 2014 – once again before the Andre ruling was issued – HBSS also notified the Special Master and Defendants that HBSS would either dismiss or withdraw from Richard Anderson's case. It took time to finalize and file motion papers on these cases, and therefore the papers were not filed until October, but the decisions to file those papers were independent of the Court's summary judgment ruling in the Andre matter. In the Sells matter, while HBSS did not notify Defendants until October 20, 2004, that it would file a motion to withdraw, HBSS made the decision to withdraw following an independent review of the case and discussion with the client. The motion to withdraw in the Sells matter was not made in response to the Andre order.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on November 5, 2014, in Seattle, Washington.

Craig R. Spiegel

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Declaration of Craig R. Spiegel In Support of Response of Certain Plaintiffs to The Proposed Amendment to The Special Master Appointment Order has been electronically filed with the Clerk of Court using CM/ECF on this 5th day of November, 2014. A true and correct copy of the foregoing document is being served on this date on all counsel of via transmission of Notices of Electronic Filing generated by CM/ECF.

DATED: November 5, 2014

HAGENS BERMAN SOBOL SHAPIRO LLP

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Attorneys for Plaintiffs

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

GLENDA JOHNSON, *et al.*,

Plaintiffs,

v.

SMITHKLINE BEECHAM CORPORATION, *et al.*,

Defendants.

Case No. 2:11-cv-05782-PD

AND ALL RELATED CASES

This Document Relates to:

Murray, et al. v. SmithKline Beecham Corp., et al.
No. 2:11-cv-03510

Glenda Johnson, et al. v. SmithKline Beecham Corp., et al.
No. 2:11-cv-05782

Yeatts, et al. v. SmithKlineBeecham Corp., et al.
No. 2:11-cv-06711

Spence, et al. v. Avantor Performance Materials., et al.
No. 5:12-cv-04542

Gunn, et al. v. Avantor Performance Materials, et al.
No. 5:12-cv-06431

Charleston, et al. v. Avantor Performance Materials., et al.
No. 2:12-cv-06657

Gosser, et al. v. Avantor Performance Materials, et al.
No. 2:12-cv-07125

Brust, et al. v. Avantor Performance Materials., et al.
No. 2:13-cv-00758

Alexander, et al. v. Avantor Performance Materials., et al.
No. 2:13-cv-04591

Griggs, et al. v. GlaxoSmithKline LLC, et al.
No. 2:14-cv-02186

MOTION FOR VOLUNTARY DISMISSAL OF DEFENDANTS GLAXOSMITHKLINE LLC AND GLAXOSMITHKLINE HOLDINGS (AMERICAS) INC., PURSUANT TO FED. R. CIV. P. 41(a)(2)

Pursuant to Fed. R. Civ. P. 41(a)(2), Plaintiffs Rebecca Alexander, Edmund Andre, Kim Branscum, Doris Brust, Craig Charleston, Mark Endres, Yvonne English-Monroe, Darren Griggs, Carolyn Jean Grover, John Grover, Kathleen Gunn, Mark Harrelson, Alan Horridge, Tammy Jackson, Glenda Johnson, Diane Kessler, Gearold Ledsome, Steven Lucier, Mary McPartlan-Hurson, Robert Murray, Carmela Norcross, Yolanda Perez, Carolyn Sampson, Christopher Simeone, William Tyler III, Colleen Van Vleet, Edward Worthan, and Phillip Yeatts respectfully move the Court for entry of an order dismissing all of their claims, with prejudice, against defendants GlaxoSmithKline LLC and GlaxoSmithKline Holdings (Americas) Inc. (collectively, "GSK Defendants"). As set forth in the accompanying memorandum, the moving Plaintiffs and the GSK Defendants have reached an agreement for dismissal of the moving Plaintiffs' claims with prejudice.

DATED: November 14, 2014

HAGENS BERMAN SOBOL SHAPIRO LLP

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No. 2:13-cv-04591

Griggs, et al. v. GlaxoSmithKline LLC, et al.
No. 2:14-cv-02186__

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL, WITH PREJUDICE, OF ALL CLAIMS AGAINST DEFENDANTS GLAXOSMITHKLINE LLC AND GLAXOSMITHKLINE HOLDINGS (AMERICAS) INC.

Twenty-eight Plaintiffs[1] respectfully move this Court for entry of an order dismissing all of their claims, with prejudice, against defendants GlaxoSmithKline LLC and GlaxoSmithKline Holdings (Americas) Inc. (collectively, "GSK Defendants"). The moving Plaintiffs and the GSK Defendants have agreed to the terms of dismissal. Therefore, entry of the order of dismissal cannot prejudice the GSK Defendants. As a result, this motion should be granted.[2]

The Third Circuit has explained that a "liberal policy has been adopted in the voluntary dismissal context. Rule 41 motions 'should be allowed unless defendant will suffer some prejudice other than the mere prospect of a second lawsuit.' 5 J. Moore, Moore's Federal Practice para. 41.05[1], at 41-62 (1988)." *In re Paoli R. Yard PCB Litigation*, 916 F.2d 829, 863

[1] Rebecca Alexander, Edmund Andre, Kim Branscum, Doris Brust, Craig Charleston, Mark Endres, Yvonne English-Monroe, Darren Griggs, Carolyn Jean Grover, John Grover, Kathleen Gunn, Mark Harrelson, Alan Horridge, Tammy Jackson, Glenda Johnson, Diane Kessler, Gearold Ledsome, Steven Lucier, Mary McPartlan-Hurson, Robert Murray, Carmela Norcross, Yolanda Perez, Carolyn Sampson, Christopher Simeone, William Tyler III, Colleen Van Vleet, Edward Worthan, and Phillip Yeatts.

[2] The terms of the parties' agreement are not subject to court approval. As the Third Circuit has stated, "There are only certain designated types of suits, for instance consent decrees, class actions, shareholder derivative suits, and compromises of bankruptcy claims where settlement of the suit requires court approval." *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 835 (3d Cir. 1995). As the Court further explained, "'In what can be termed "ordinary litigation," that is, lawsuits brought by one private party against another private party that will not affect the rights of any other persons, settlement of the dispute is solely in the hands of the parties. If the parties can agree to terms, they are free to settle the litigation at any time, and the court need not and should not get involved.'" *Id.* (quoting *United States v. City of Miami*, 614 F.2d 1322 (5th Cir. 1980), *reh'g granted*, 625 F.2d 1310, *aff'd in part, vacated in part*, 664 F.2d 435 (5th Cir. 1981) (en banc)).

(3d Cir. 1990).[3] Thus, a district court recently explained that under Third Circuit precedents, motions for voluntary dismissal should be granted absent prejudice to the dismissed defendant:

> The Third Circuit adopts the same liberal policy for motions brought under Fed. R. Civ. P. 41(a)(2) that it utilizes in resolving motions to amend under Fed. R. Civ. P. 15(a). *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 863 (3d Cir. 1990). As a general matter, a district court considering a plaintiff's motion for voluntarily dismissal must first "decide the presence or extent of any prejudice to the defendant" that may result from dismissing plaintiff's complaint. *In re Diet Drugs Prods. Litig.*, 85 F. App'x at 847 (3d Cir. 2004) (quoting *Ferguson* 492 F.2d at 29). Unless the court determines that "defendant will suffer some prejudice other than the mere prospect of a second lawsuit," the district court should grant plaintiff's motion. *Paoli*, 916 F.2d at 863 (citing 5 J. Moore, Moore's Federal Practice ¶ 41.05[1], at 41-62 (1988)).

Yazzie v. GlaxoSmithKline LLC, 2013 U.S. Dist. LEXIS 110217, at *4-5 (E.D. Pa. Aug. 5, 2013). Here, granting the motion for dismissal of the GSK Defendants could not prejudice them, because they have agreed to the terms of dismissal with the moving Plaintiffs.

Moreover, the Third Circuit recently explained that a motion for voluntary dismissal cannot prejudice the dismissed defendant when all claims against that defendants are dismissed with prejudice:

> "An order of dismissal entered pursuant to [Rule 41(a)(2)] ... should not be disturbed on appeal of the defendant except for arbitrary action which has subjected the defendant to plain prejudice beyond the prospect of subsequent litigation." *Westinghouse Elec. Corp. v. United Elec. Radio & Mach. Workers of Am.*, 194 F.2d 770, 771 (3d Cir. 1952). Here, Appellant has not shown how she was prejudiced by the dismissal of the Trustee's claims. The claims have been dismissed with prejudice so she will not need to defend against them again.

In re Innovative Commc'n Corp., 567 F. App'x 109, 112 (3d Cir. 2014) (footnote omitted).

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[3] *See also Ferguson v. Eakle*, 492 F.2d 26, 29 (3d Cir. 1974) (when considering dismissal under Rule 41(a)(2), "it becomes necessary to decide the presence or extent of any prejudice to the defendant").

Moreover, there is no basis to impose any "terms and conditions" under Rule 41(a)(2), because the moving Plaintiffs and the GSK Defendants have agreed to the terms of dismissal. In *Young v. Johnson & Johnson Corp.*, 2005 U.S. Dist. LEXIS 26232, at *18 (E.D. Pa. Nov. 2, 2005), the district court stated, "'The purpose of the "terms and conditions" clause [of Rule 41(a)(2)] is to protect a defendant from any prejudice or inconvenience that may result from a plaintiff's voluntary dismissal.' *GAF Corp. v. Transamerica Ins. Co.*, 214 U.S. App. D.C. 208, 665 F.2d 364, 367 (D.C. Cir. 1981)." Here, the GSK Defendants do not seek any protection from the Court but instead have already agreed to the terms of dismissal with the moving Plaintiffs.[4]

For these reasons, the motion should be granted.

DATED: November 14, 2014

HAGENS BERMAN SOBOL SHAPIRO LLP

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[4] *See also In re Wellbutrin XL Antitrust Litig.*, 268 F.R.D. 539, 543 (E.D. Pa. 2010), ("When considering the effect of a voluntary dismissal under Rule 41(a)(2), a court must evaluate the presence or extent of any prejudice to the defendants caused by the dismissal. *Ferguson v. Eakle*, 492 F.2d 26, 29 (3d Cir. 1974). Terms and conditions are generally imposed by the district court under Rule 41(a)(2) for the protection of the defendant from such prejudice. 9 Wright & Miller, *Federal Practice and Procedure*, § 2366 (3d ed. 2008).").

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

GLENDA JOHNSON and STEVEN LUCIER,

Plaintiffs,

v.

SMITHKLINE BEECHAM CORPORATION, *et al.*,

Defendants.

Case No.: 2:11-cv-05782-PD

AND ALL RELATED CASES

This Document Relates to:

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No. 2:13-cv-04591

Griggs, et al. v. GlaxoSmithKline LLC, et al.
No. 2:14-cv-02186

[PROPOSED] ORDER GRANTING MOTION FOR VOLUNTARY DISMISSAL OF DEFENDANTS GLAXOSMITHKLINE LLC AND GLAXOSMITHKLINE HOLDINGS (AMERICAS) INC., PURSUANT TO FED. R. CIV. P. 41(a)(2)

AND NOW, on this _____ day of _____, 2014, upon consideration of Plaintiffs' Motion For Voluntary Dismissal of Defendants GlaxoSmithKline LLC and GlaxoSmithKline Holdings (Americas) Inc., Pursuant To Fed. R. Civ. P. 41(a)(2), it is **ORDERED** that the Motion is **GRANTED,** and that all claims by Plaintiffs Rebecca Alexander, Edmund Andre, Kim Branscum, Doris Brust, Craig Charleston, Mark Endres, Yvonne English-Monroe, Darren Griggs, Carolyn Jean Grover, John Grover, Kathleen Gunn, Mark Harrelson, Alan Horridge, Tammy Jackson, Glenda Johnson, Diane Kessler, Gearold Ledsome, Steven Lucier, Mary McPartlan-Hurson, Robert Murray, Carmela Norcross, Yolanda Perez, Carolyn Sampson, Christopher Simeone, William Tyler III, Colleen Van Vleet, Edward Worthan, and Phillip Yeatts againt Defendants GlaxoSmithKline LLC and GlaxoSmithKline Holdings (Americas) Inc. are hereby dismissed with prejudice.

BY THE COURT:

_____
HON. PAUL S. DIAMOND
UNITED STATES DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Motion For Voluntary Dismissal of Defendants GlaxoSmithKline LLC and GlaxoSmithKline Holdings (Americas) Inc., Pursuant To Fed. R. Civ. P. 41(a)(2), Memorandum of Law In Support of Plaintiffs' Motion For Voluntary Dismissal of Defendants GlaxoSmithKline LLC and GlaxoSmithKline Holdings (Americas) Inc., and Proposed Order have been electronically filed with the Clerk of Court using CM/ECF on this 14th day of November, 2014. A true and correct copy of the foregoing documents are being served on this date on all counsel of via transmission of Notices of Electronic Filing generated by CM/ECF.

DATED: November 14, 2014

HAGENS BERMAN SOBOL SHAPIRO LLP

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

GLENDA JOHNSON, et al.	:	
	:	
v.	:	**Civ. No. 11-5782**
	:	**and all related cases**
SMITHKLINE BEECHAM	:	
CORPORATION, et al.	:	

ORDER

On October 28, 2014, I received a letter from the GSK Defendants stating that "[a]ll [P]laintiffs currently represented by Hagens Berman—with the sole exception of Debra Johnson—will dismiss with prejudice all claims against the GSK [D]efendants" in exchange for the GSK Defendants withdrawing their discovery requests and sanctions motions. (Doc. No. 394.) This letter capped a disturbing course of events after my October 16th grant of summary judgment against Plaintiff Edmund Andre. (Doc. Nos. 372, 373, 396.) Accordingly, on October 31, I proposed amending the Special Master Appointment Order (Doc. No. 256) to allow Special Master William T. Hangley to advise me as to whether each Plaintiff (except Debra Johnson) knowingly, intelligently, and voluntarily consented to dismissing with prejudice his or her claims against the GSK Defendants. (Doc. No. 396 at 4.) In accordance with Rule 53, I gave the Parties an opportunity to object, or offer changes or suggestions to the proposed amendment. Fed. R. Civ. P. 53; (Doc. No. 396 at 5.) On November 14, Hagens Berman and the GSK Defendants filed a formal Motion for Voluntary Dismissal of these Plaintiff's claims. Fed. R. Civ. P. 41(a)(2); (Doc. No. 409.)

A. Clarification of the October 28th Agreement

Defendants have not objected to the proposed amendment. (Doc. Nos. 397, 398, 401.) The GSK Defendants have clarified that the October 28th agreement—which explicitly covered

"[a]ll [P]laintiffs currently represented by Hagens Berman (except Debra Johnson)"—in fact did not include the six Plaintiffs as to whom Hagens Berman's Motions to Withdraw are pending—John Marshall, Richard Anderson, Jose Navamuel, Terrie Bolton, Mary Sells, and John Skelton. (Doc. No. 397 at 1.) The GSK Defendants conceded their October 28th letter "should have so stated" that these six Plaintiffs were not part of the agreement. (Id.) Hagens Berman agreed with this clarification. (Doc. No. 400 at 1.)

Accordingly, the agreement applies to the following twenty-eight Plaintiffs: Rebecca Alexander, Edmund Andre, Kim Branscum, Doris Brust, Craig Charleston, Mark Endres, Yvonne English-Monroe, Darren Griggs, Carolyn Jean Grover, John Grover, Kathleen Gunn, Mark Harrelson, Alan Horridge, Tammy Jackson, Glenda Johnson, Diane Kessler, Gearold Ledsome, Steven Lucier, Mary McPartlan-Hurson, Robert Murray, Carmela Norcross, Yolanda Perez, Carolyn Sampson, Christopher Simeone, William Tyler III, Colleen Van Vleet, Edward Worthan, and Phillip Yeatts. (Id. at 1 n.1.) The subsequently filed November 14th Motion also applies to these same Plaintiffs. (Doc. No. 409 at 2.)

Although Plaintiffs Annette Manning, Sharon Anderson, and Ted Mann are currently represented by Hagens Berman and not subject to a motion to withdraw, they are not subject to the October 28th agreement—or the November 14th Motion—because they apparently intend to dismiss their cases against all Defendants, but have not yet moved to do so. (Doc. No. 417.)

B. Objections to the Proposed Special Master Order Amendment

Hagens Berman objects to the proposed amendment on the basis of Federal Rule of Civil Procedure 41 and the attorney-client privilege, contending there is no "legal basis for an inquiry into whether those [twenty-eight] Plaintiffs have knowingly, intelligently, and voluntarily

entered into the dismissal agreement." (Doc. No. 400 at 3.) The first objection is contrary to law, and the second is premature.

Federal Rule of Civil Procedure 41

Hagens Berman argues that because "[t]his is a private lawsuit," the Court has "no power to approve or disapprove the terms of dismissal." (Id.) This is incorrect. Under Rule 41, a plaintiff can voluntarily dismiss a case without court approval by, *inter alia*, filing "a stipulation of dismissal signed by *all parties* who have appeared." Fed. R. Civ. P. 41(a)(1)(A)(ii). Here, Sanofi and Grünenthal—which are Defendants in all the cases subject to the October 28th agreement—have not stipulated to the voluntarily dismissals. Accordingly, these twenty-eight Plaintiffs may dismiss their claims against the GSK Defendants "only by court order." Id. (a)(2). Indeed, in its November 14th Motion—which was filed after it objected to the proposed Special Master Amendment—the firm, acting pursuant to Rule 41(a)(2), seeks an approval for the voluntary dismissal. (Doc. No. 409 at 2.)

Attorney-Client Privilege

Hagens Berman also contends that Mr. Hangley may not seek to determine whether the twenty-eight Plaintiffs knowingly, voluntarily, and intelligently consented to dismissing with prejudice their claims against the GSK Defendants because: (1) such information is privileged; (2) Plaintiffs have not waived the privilege; and (3) the crime-fraud exception to the privilege does not apply. (Doc. No. 400 at 5-7.)

The attorney-client privilege objection is premature: Mr. Hangley may well resolve the question of client consent *without* inquiring into protected communications. See Upjohn Co. v. United States, 449 U.S. 383, 395 (1981) ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who

communicated with the attorney."); Gillard v. AIG Ins. Co., 15 A.3d 44, 52 n.8 (Pa. 2011) (Pennsylvania privilege law only protects communications made "for the purpose of securing or providing professional legal services" and thus "does not . . . protect clients from factual investigations").

C. The December 4, 2014 Report and Recommendation

In accordance with my August 11, 2014 Order, Mr. Hangley issued a Report and Recommendation with respect to sanctions motions brought against Hagens Berman for litigating the claims of Plaintiffs Jack Merica, Lawrence Boiardi, and Roel Garza well after Defendants put the firm on notice that these claims were time-barred, meritless, or both. (Doc. Nos. 414, 316.) Mr. Hangley explained why the firm should have known from the outset that the claims were untimely. In recommending the imposition of sanctions, Mr. Hangley repeatedly found that Hagens Berman thus acted dishonestly and in bad faith. (See Doc. No. 414 at 17 (finding that Hagens Berman's statements in support of its opposition to Mr. Merica's sanctions motion "*are just false*"); 15 ("In resisting sanctions, Hagens Berman invokes a tolling theory that it did not employ and could not have employed in Mr. Merica's case because not even his pleaded facts—much less the actual facts gleaned in discovery—would have supported that theory. *That is bad faith.*"); 16 ("Hagens Berman has attempted—*and again this is bad faith advocacy*—to leave the Special Master and the Court with the false impression that Mr. Merica *was* claiming non-fraud tolling, and *was* asserting claims that he simply had not made in his complaint or elsewhere . . . ."); 28 ("I do find that, in each of these plaintiffs' cases, Hagens Berman's conduct has multiplied the proceedings in an unreasonable and vexatious manner, and *that the conduct was both intentional and in bad faith.*") (emphasis added).

In light of Mr. Hangley's troubling findings respecting Hagens Berman's conduct, and the disturbing events that prompted me to propose the instant Amendment to the Special Master Appointment Order, I am compelled to ensure that Hagens Berman obtained the knowing, voluntary, and intelligent consent of each Plaintiff before he or she agreed to dismiss his or her case against the GSK Defendants with prejudice. Accordingly, this 8th day of December, 2014, I will overrule Hagens Berman's objections and **ORDER** that my Special Master Appointment Order (Doc. No. 256) is **AMENDED** as follows:

1. Special Master Hangley shall issue a Report and Recommendation on whether each of the twenty-eight Plaintiffs referenced in the November 14th Motion for Voluntary Dismissal (Doc. No. 409) knowingly, voluntarily, and intelligently consented to dismissing with prejudice his or her claims against the GSK Defendants—or any other Defendants; and
2. Any objections to the Report and Recommendation must be filed within 21 days after the Report is served. Any responses shall be filed within 14 days after any objections.

IT IS SO ORDERED.

/s/ Paul S. Diamond

Paul S. Diamond, J.

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December 15, 2014

Via Facsimile (267) 299-5069

Hon. Paul S. Diamond
U.S. District Court
Eastern District of Pennsylvania
601 Market Street, Room 6613
Philadelphia, PA 19106-1714

Re: *Johnson, et al. v. SmithKline Beecham, LLC, et al.*, Case No.: 2:11-cv-05782-PD and all related cases
Plaintiffs' renewed motion for stay in all related cases.

Dear Judge Diamond:

Plaintiffs in all related cases in which Hagens Berman Sobol Shapiro LLP is counsel and has not sought to withdraw from as counsel ("Plaintiffs") request an order staying all motions for summary judgment in Plaintiffs' cases and related actions until 21 days after the motions that have already been fully briefed have been decided.[1] Staying these cases will serve judicial economy, regardless of how the Court rules. The Court's rulings on those motions will provide important guidance to the parties in the related cases with regard to whether further discovery and motion practice should proceed on some, or none, of the remaining cases. The stay will prevent unnecessarily duplicative time and expenses by all parties, and the Court, and therefore Plaintiffs respectfully request that the Court grant Plaintiffs' motion.

Plaintiffs are aware that they brought a similar motion, seeking a broader stay, on October 23, and the Court promptly denied that motion. However, it is now the case that,

[1] Hagens Berman Sobol Shapiro has moved to withdraw as counsel from the cases brought by the following plaintiffs: John Marshall, Jose Navamuel, Terrie Bolton, John Skelton, Richard Anderson and Mary Sells. This motion is not brought directly on behalf of those plaintiffs. However, the reasoning of this motion applies equally to all plaintiffs, and therefore Plaintiffs believe the stay they are requesting should be entered in all cases in order to maximize the judicial economy of the stay.

with a few minor exceptions, fact discovery is completed.[2] It is clear from recent filings that Defendants' summary judgment motions are not going to raise new issues.

In addition, the Special Master has made evident that he believes that Plaintiffs' counsel are extending this litigation in bad faith. While Plaintiffs disagree with many of the Special Master's findings, as will be set forth in their upcoming objections, Plaintiffs' counsel take those findings extremely seriously and do not want to extend or multiply this litigation unnecessarily. Plaintiffs therefore ask the Court to not require the parties to unnecessarily brief summary judgment, and potentially exacerbate the costs accrued by any party, or cause unnecessary work for the Court.

I. STANDARDS FOR GRANTING MOTION FOR STAY

Federal courts may stay one action pending rulings in another action. The Supreme Court has explained that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."[3] The Court has explicitly rejected the argument that "before proceedings in one suit may be stayed to abide the proceedings in another, the parties to the two causes must be shown to be the same and the issues identical."[4] Thus, in *Bechtel Corp. v. Local 215, Laborers' Int'l Union of North Am., AFL-CIO*,[5] the Third Circuit stated, "In the exercise of its sound discretion, a court may hold one lawsuit in abeyance to abide the outcome of another which may substantially affect it or be dispositive of the issues."

In *Bechtel*, the Third Circuit affirmed the issuance of a stay, "because the arbitrator's resolution of the section 301 action ***may*** obviate the need to pursue the section 303 action to trial."[6] As the Third Circuit then explained in more detail that the

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[2] There remain a few depositions that Defendants have requested and which Plaintiffs have agreed to, but which were delayed due a death of the father one of Plaintiffs' counsel. Plaintiffs are not seeking to stay or postpone any of these depositions should Defendants wish to proceed with them.

[3] *Landis v. Am. Water Works & Elec. Co.*, 299 U.S. 248, 254 (1936).

[4] *Id. See also American Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937) ("In the exercise of a sound discretion [a court] may hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and the issues are the same.").

[5] 544 F.2d 1207, 1215 (3d Cir. 1976).

[6] *Id.* (emphasis added).

case was properly stayed even though resolution of the other action would not necessarily obviate the stayed action:

> That the court did not abuse its discretion by staying the section 303 action here is obvious from the nature of Bechtel's claims against the union. The two counts of Bechtel's complaint allege identical damages -- $12,000 per day for each day of the alleged work stoppage. Although Bechtel has the right to prosecute its claim on both the contract theory (under section 301) and the tort theory (under section 303), Bechtel cannot recover damages more than once. If Bechtel should prevail in the arbitration of its § 301 claim for breach of contract and be awarded the damages it claims, Bechtel should have no further claim against the union under section 303. *We do not know whether this will in fact occur but the possibility is sufficient justification to warrant the stay.*[7]

Similarly, courts frequently stay cases pending appellate decisions in related cases. For example, in *Miccosukee Tribe of Indians of Florida v. South Fla. Water Mgmt. Dist.*,[8] the Eleventh Circuit explained that "the reason for the district court's stay was at least a good one, if not an excellent one: to await a federal appellate decision that is likely to have a substantial or controlling effect on the claims and issues in the stayed case." And in In *Haas v. Burlington County*,[9] the district court stayed the action pending the Third Circuit's decision in another action entitled *Florence*. The court explained that "the Third Circuit's decision may have implications for this action. If *Florence* is resolved in favor of defendants the federal claims may be disposed of and the matter could be remanded to state court. Therefore, the Court finds that a stay will promote judicial economy."[10] Numerous other courts have stayed actions pending decision in other actions or on appeal in other actions.[11]

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[7] *Id.* (emphasis added).

[8] 559 F.3d 1191, 1198 (11th Cir. 2009).

[9] 2009 U.S. Dist. LEXIS 110173 (D.N.J. Nov. 24, 2009).

[10] *Id.* at *6.

[11] *See, e.g., Langenberg v. Papalia*, 2014 U.S. Dist. LEXIS 133941, at *3 (W.D. Pa. Sept. 24, 2014) (staying action, because the "pending administrative proceeding and subsequent district court action could resolve factual

II. THE MOTION FOR A STAY SHOULD BE GRANTED

As one court in this district has explained,[12] "[i]n determining whether to stay an action under its inherent authority, a court must weigh the competing interests of and possible harms to the parties." In particular, "[f]actors that the court should weigh include 'whether the proposed stay would prejudice the non-moving party, whether the proponent of the stay would suffer a hardship or inequity if forced to proceed and whether granting the stay would further the interest of judicial economy.'"[13]

In this motion, Plaintiffs propose staying all summary judgment briefing in the related thalidomide cases, aside from pending summary judgment motions that have already been briefed. This limited stay would serve the interests of judicial economy, would not prejudice Defendants, and would likely save substantial resources. The Court's rulings on these motions, as evidenced by the Court's recent ruling in the *Andre* motion, will have obvious implications on other cases with extremely similar facts and overlapping legal issues.

As Plaintiffs have noted previously, on October 1, 2014, Defendants requested an update as to the status of the pending summary judgment motions, because they wanted to know whether they should file additional motions. As Defendants stated, they thought additional motions were probably unnecessary because the ones that they had already filed covered all of the major issues in these cases:

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disputes and have a direct impact on the liability and damages aspects of Counts 7 and 8, as well as upon any possible exemplary or punitive damages award from a jury"); *Alps South, LLC v. Ohio Willow Wood Co.*, 2014 U.S. Dist. LEXIS 118857, at *4 (M.D. Fla. Aug. 26, 2014) (staying action pending a decision by the Federal Circuit in another action, where that decision "could very likely impact this Court's rulings at trial"); *Challenge Mfg. Co. v. Blue Cross and Blue Shield of Mich.*, 2013 U.S. Dist. LEXIS 158765, at *2 (E.D. Mich. Nov. 6, 2013) ("Staying the instant case makes sense because the parties have informed the Court that the outcome of the appeal will have a substantial effect on the proceedings in this matter and provide the Court with significant guidance on the relevant legal issues. Accordingly, the Court finds that a stay of this case pending the Sixth Circuit's decision in *Hi-Lex* best effectuates the goals of judicial economy and will not prejudice Plaintiffs."); *Homa v. American Express Co.*, 2010 U.S. Dist. LEXIS 110518, at *26 (D.N.J. Oct. 18, 2010) (staying action until United States Supreme Court ruling in separate matter, because "a stay at this point in the litigation will act to prevent the possibility of having any advancement nullified or substantially altered by the outcome" of the Supreme Court case). *MEI, Inc. v. JCM American Corp.*, 2009 U.S. Dist. LEXIS 96266 (D.N.J. Oct. 15, 2009) (staying action pending appeal to Federal Circuit in related action).

[12] *Rhodes v. Independence Blue Cross*, 2012 U.S. Dist. LEXIS 17129, at *9 (E.D. Pa. Feb. 9, 2012).

[13] *Id.* (citation omitted).

> We do have, we feel, pretty much the waterfront covered in terms of the issues with the motions that are on file, and obviously decisions on those motions could provide guidance on the remainder. So if the Court was able to provide some guidance on that issue, certainly that would be welcomed.

See App. A at 46:13-18. Thus, Defendants admitted at that hearing that they believed additional motions would likely be unnecessary and duplicative.

The recently filed motions for summary judgment only make it even clearer that the parties have little new to add to what is before the Court. Defendants have made essentially the same legal arguments in those briefs that they have already made to the Court several times before in fully briefed motions that await the Court's consideration. Both of the motions also rely heavily on the Court's prior orders in *Merica* and *Andre*, and essentially argue that the *Yeatts* and *Jackson* cases are indistinguishable from *Merica* and *Andre* and should be decided on identical grounds. *See, e.g.*, Dkt. No. 415 at 1, 9, 10, 11, 13; Dkt. No. 416-1 at 7, 10, 11, 12, 14, 17.

It is thus abundantly clear that proceeding with further summary judgment motions at this stage will simply mean that the parties will continue to brief the same issues, place the same sort of evidence and expert testimony before the Court, and force the Court to issue unnecessary and duplicative rulings. Plaintiffs' counsel have heard the concerns stated by the Special Master about unnecessarily extending this litigation, and therefore ask the Court to stay proceedings that are likely unnecessary.

The proposed stay would give the parties 21 days after the Court's ruling on the last of the currently pending summary judgment motions to assess how the Court's ruling affects the remaining cases, and whether it would be judicially efficient to continue to proceed on discovery and motion practice in the remaining cases. For example, if the Court granted some motions but denied others, Plaintiffs would expect that it would be relatively clear which cases should proceed through expert discovery and motion practice in this Court, and which should be stayed pending appeal of certain orders. Or if the Court were to grant all of the pending motions, Plaintiffs expect that it would make sense from the standpoint of judicial efficiency to either stipulate to summary judgment in all remaining cases based on the Court's opinions, or extend the stay pending resolution of an appeal. More particularly, Plaintiffs would be able to determine whether to dismiss some or all of the remaining cases if the Third Circuit were to affirm any summary judgment rulings in favor of Defendants. As a result, the proposed stay would avoid

most, or perhaps all, of the costs of further dispositive motions. Absent a stay, Plaintiffs expect Defendants will move for summary judgment on all of the remaining cases – even though they have already admitted that additional motions are likely unnecessary in light of the ones that are already pending.

Moreover, if the Third Circuit were to affirm all of the summary judgment rulings, Plaintiffs in all likelihood would dismiss virtually all (if not all) of any remaining cases. While Plaintiffs' counsel cannot commit to dismissal of any specific case until the Third Circuit rules, there is a very high probability that the vast majority of all remaining cases would be dismissed if this Court entered summary judgment on all pending motions and if the Third Circuit affirmed all such rulings that Plaintiffs appealed. As set forth above, the Third Circuit established in *Bechtel* that the ***possibility*** that Plaintiffs would dismiss virtually all (if not all) remaining cases suffices to support such a stay.

III. CONCLUSION

Plaintiffs move for an order staying further summary judgment briefing in all related actions until the Court issues rulings on all pending summary judgment motions.

Sincerely,

HAGENS BERMAN SOBOL SHAPIRO LLP

/s/ Nick Styant-Browne

Nick Styant-Browne

cc: All parties (via email)

Appendix A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

GLENDA JOHNSON, ET AL	)	2:11-cv-05782-PD
	)	AMENDED TRANSCRIPT
vs.	)	
	)	
SMITHKLINE BEECHAM CORPORATION, ET AL	)	October 1, 2014 Philadelphia, PA

SANCTIONS HEARING
BEFORE THE HONORABLE PAUL S. DIAMOND
UNITED STATES DISTRICT COURT JUDGE
AND BEFORE THE SPECIAL DISCOVERY MASTER WILLIAM T. HANGLEY

APPEARANCES:

For Plaintiffs: NICK STYANT-BROWNE, ESQ.
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(indiscernible). Right now we have seven contested summary judgment motions pending. I believe there is one unopposed summary judgment motion pending. We are preparing additional summary judgment motions, in fact, a number of summary judgment motions and actually at the risk of being forward, but what we wanted to ask you is if the Court would be able to provide some guidance as to whether it would be appreciated for us to continue to file summary judgment motions at this time, as opposed to belating resolution of some of the previously filed motions, that would be helpful, Your Honor.

We do have, we feel, pretty much the waterfront covered in terms of the issues with the motions that are on file, and obviously decisions on those motions could provide guidance on the remainder. So if the Court was able to provide some guidance on that issue, certainly that would be welcomed.

MR. HANGLEY: Yeah, I don't want to speak on behalf of Judge Diamond. I did discuss essentially this issue with him this morning because he and I have a little bit of a chicken and egg situation with respect to the spews of responsibility.

What I think is going to happen and I will say no more than that, because I don't want to

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

I, Sheila G. Orms, the court approved transcriber, do hereby certify the foregoing is a true and correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Signature of Approved Transcriber DATE

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

GLENDA JOHNSON ET AL., Plaintiffs, v. SMITHKLINE BEECHAM CORPORATION ET AL., Defendants.	Case No. 2:11-cv-005782-PD and all related cases

MEMORANDUM AND ORDER OF THE SPECIAL DISCOVERY MASTER

The District Court has instructed me (Dkt. 420) to determine, for purposes of a Report and Recommendations to be submitted to the Court, whether each of 28 plaintiffs in these consolidated cases "knowingly, voluntarily, and intelligently consented to dismissing with prejudice his or her claims against the GSK Defendants . . ." (the "GSK Dismissals") in exchange for and as a condition precedent to GSK's agreement to cease pursuing sanctions awards against plaintiffs' counsel, Hagens Berman (the "Hagens/GSK Agreement").[1] In this Memorandum, I will raise certain concerns that affect my inquiry, and seek the assistance of counsel in addressing those concerns.

BACKGROUND

GSK and its co-defendant Grünenthal GmbH ("Grünenthal") moved for sanctions against Hagens Berman (but not Hagens Berman's plaintiff clients) pursuant to 28 U.S.C. § 1927 and the inherent powers of the Court, based on Hagens Berman's conduct in pursuing the claims of three

[1] "GSK" refers to defendants GlaxoSmithKline LLC and GlaxoSmithKline Holdings (Americas) Inc. and predecessors. "Hagens Berman" refers to Hagens Berman Sobol Shapiro LLP.

plaintiffs in these consolidated cases – Jack Merica, Lawrence Boiardi and Roel Garza.[2] The sanctions motions were assigned to me. They had been fully briefed and argued, but not yet decided,[3] when GSK informed the Court that it had agreed to withdraw all its pending motions for sanctions and, with one exception, to forego filing any additional motions, provided that 28 of the 29 plaintiffs whose actions are being actively pursued by Hagens Berman would be dismissed with prejudice as against GSK alone.[4] Hagens Berman later moved pursuant to Fed. R. Civ. P. 41(a)(2) to dismiss those 28 plaintiffs' claims with prejudice. (Dkt. 409)

The District Court proposed and later ordered that the Order appointing me as Special Discovery Master be amended to instruct me to investigate the circumstances of the 28 plaintiffs' agreement to the GSK Dismissals. The Court's concern goes to the question whether the 28 plaintiffs' decisions to dismiss their claims were voluntary and informed. *See* Dkt. 396, 420.

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[2] Defendant Sanofi-Aventis U.S. LLC (referred to, with predecessors, as "Sanofi") did not seek sanctions.

[3] I have since issued a Report and Recommendations recommending the imposition of sanctions in Grünenthal's favor (Dkt. 414, *Johnson v. SmithKline Beecham Corp.*, 2014 WL 6851277 (E.D. Pa. Dec. 4, 2014)), and Hagens Berman has filed objections (Dkt. 427). Because of the pendency of the present issues, I did not act on GSK's prayer for sanctions. 2014 WL 6851277 at *15-*16.

[4]The 28 plaintiffs are: Rebecca Alexander, Edmund Andre, Kim Branscum, Doris Brust, Craig Charleston, Mark Endres, Yvonne English-Monroe, Darren Griggs, Carolyn Jean Grover, John Grover, Kathleen Gunn, Mark Harrelson, Alan Horridge, Tammy Jackson, Glenda Johnson, Diane Kessler, Gearold Ledsome, Steven Lucier, Mary McPartlan-Hurson, Robert Murray, Carmela Norcross, Yolanda Perez, Carolyn Sampson, Christopher Simeone, William Tyler III, Colleen Van Vleet, Edward Worthan, and Phillip Yeatts. It was explained that a pending motion for summary judgment against the 29th active plaintiff, Debra Johnson, would be contested, and that GSK was preserving its rights to seek sanctions regarding Hagens Berman's conduct in representing her. *Id.* Shortly before filing this Memorandum and Order, I received email notification that one of the 28, Rebecca Alexander, has agreed to dismiss all her claims against all defendants, presumably with prejudice, and that a formal stipulation to this effect is being prepared for filing. This Memorandum does not take that anticipated filing into account.

In an untranscribed telephone conference with all counsel on December 10, 2014, I suggested that I might, as a first step in my investigation, generate a questionnaire to the 28 plaintiffs, asking each of them to articulate in writing her[5] desire to dismiss the claims against GSK and to supply her employment and education history. Plaintiffs' counsel asked that I defer doing anything until I had considered a letter from Hagens Berman, which I would receive the next day. Mr. Styant-Browne, of Hagens Berman, expressed confidence that the information in the letter would persuade me that individualized inquiries were unnecessary. I agreed to await the letter.

DISCUSSION

I have now received and considered Mr. Styant-Browne's letter (Dkt. 425, Letter Brief of Hagens Berman, Dec. 11, 2014). It does not persuade me that, without more, I can conscientiously advise the District Court that the proposed dismissals are voluntary and informed. I am requesting the parties to brief certain issues before I go forward with a plaintiff-by-plaintiff consideration of the proposed GSK Dismissals.

In the letter, Hagens Berman understandably preserves its position, previously voiced in objection to the referral of this issue to me, that "the only proper inquiry with regard to a motion to dismiss pursuant to Rule 41 is whether a defendant would be prejudiced by the dismissal."[6] The letter goes on to state – without disclosing details thought to implicate the attorney-client privilege – that the Hagens Berman attorneys took pains to communicate orally and in writing with each of the 28 plaintiffs, and held off on filing the Rule 401 dismissal motion until it was satisfied that all 28 plaintiffs were willingly and knowingly consenting to the GSK dismissals:

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[5] For convenience, feminine pronouns include both feminine and masculine.

[6] *Id.* I will not address that point because a higher tribunal, the District Court, has already done so.

> Plaintiffs' counsel decided which attorney would speak to each individual Plaintiff. In every case, the attorney who had the closest relationship with a particular client was assigned to discuss the proposal with that client.
>
> On the same day, counsel provided an explanatory letter to each of the Plaintiffs and encouraged each Plaintiff to discuss the situation with counsel. Plaintiffs' counsel subsequently answered any questions the Plaintiffs had about the proposal. All of the Plaintiffs agreed to the proposal at the conclusion of this process, and Plaintiffs' counsel did not move to dismiss before obtaining the full and informed consent of each Plaintiff.
>
> We can assure you that Plaintiffs' counsel would never have sought to dismiss anyone's claim if counsel did not know that the Plaintiffs had consented willingly after being fully informed.

Id. at 2. I am not persuaded.

There are three entities whose interests are obviously in play here – defendant GSK, the 28 plaintiffs, and Hagens Berman. GSK's co-defendants may also be interested entities, but they have neither supported nor opposed the Hagens/GSK Settlement to this point.

From GSK's vantage, it is not at all surprising that a defendant would choose to accept total victory on the claims in a group of law suits and, in exchange, curb its enthusiasm for sanctions. The difficulty is in discerning a rational or informed basis for the 28 plaintiffs' part of the three-way bargain. It is hard to identify any particular benefit they might gain from the GSK Dismissal or the Hagens/GSK Agreement as a whole. Indeed, it appears that they are giving away, for nothing, claims that the plaintiffs and Hagens Berman consider to be quite valuable. To be sure, these adult plaintiffs are free to make any deal they choose – good or bad – but it is their lawyers' obligation to satisfy themselves that the clients' choices are fully and fairly informed ones. And if there are circumstances that call the reliability of that effort into serious question, some level of inquiry by the tribunal may be in order.

There is every reason to believe that each of the 28 plaintiffs believes in good faith that she has actionable and valuable claims against all three defendants, including GSK. Hagens Berman's own conduct underscores this assessment of the value of the 28 cases. Apart from the implicit Rule 11 representations that are part and parcel of the filing of any complaint and the prosecution of any action, Hagens Berman has gone further with respect to these 28 clients. Through the summer and fall of 2014, Hagens Berman conducted a case-by-case analysis of all its active clients' claims pursuant to an agreed-upon Order of the Special Master (Dkt. 268). Some cases were voluntarily dropped, but Hagens Berman expressly informed the Discovery Master and the defendants that, after investigation, it would continue to pursue these 28 plaintiffs' claims. At this very moment, Hagens Berman is actively opposing several motions for summary judgment against members of the 28. Indeed, it filed its oppositions to the motions against two of the 28 plaintiffs, Tammy Jackson and Philip Yeatts, just days ago (Dkts. 428 (Jackson), 429 (Yeatts)), and several weeks after the announcement of the Hagens/GSK Agreement (Dkt. 394). The briefing on Hagens Berman's side radiates every confidence that these plaintiffs will prevail.[7] Further, the 28 will not avoid the pain and distraction of litigation by agreeing to the GSK Dismissals; they are continuing to sue Grünenthal and Sanofi. Besides, virtually all the pretrial "heavy lifting" is behind them. The parties have already conducted more than 130 depositions,[8] and discovery closed on November 30.[9]

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[7] Each of the briefs exceeds 35 pages and is supported by an expert declaration running to 25 pages. All told, the filing packages were 140 pages (Yeatts) and 160 pages (Perez).

[8] According to periodic reports given to me by the parties' counsel Mr. Yeatts, his parents, his aunt, his ex-wife, and two treating physicians were deposed. Similarly, Ms. Jackson, her husband, both parents, two siblings, and her treating physician were deposed.

[9] If the Court accepts my recommendation (Dkt. 422), it will enter an order permitting a few identified post-deadline depositions to be completed, as agreed by the parties. No other discovery seems to be contemplated.

On the other hand, Hagens Berman will receive a clear benefit if the Hagens/GSK Agreement goes through: The law firm will avoid serious potential sanctions exposure if the 28 cases are dismissed. If my recommendations (Dkt. 414) are upheld, GSK's co-defendant, Grünenthal, will recoup from Hagens Berman a substantial part of the attorneys' fees and costs it sustained after April 11, 2014. I perceived nothing in briefing and evidence on the Merica, Boiardi and Garza sanctions motions that would materially distinguish GSK's potential entitlement to sanctions from Grünenthal's.

Hagens Berman did not address this point in its objections to the proposed Order of October 31 (Dkt. 400) or the December 11 letter (Dkt 425), but the firm must surely have considered whether its advice to its clients might be colored by the very real benefit Hagens Berman would enjoy by being relieved from GSK's pending (and possibly additional anticipated) sanctions motions, and must have considered whether, in the words of the Pennsylvania Rules of Professional Conduct, "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer." Pa. R.P.C. 1.7(a)(2).

In the circumstances, I simply cannot place my entire reliance on Hagens Berman's expressed confidence in the sufficiency of its undescribed disclosures to its clients or its assurances that the 28 plaintiffs have all knowingly agreed to an arrangement that is so facially disadvantageous to them. I conclude that I must make plaintiff-by-plaintiff inquiries into the precise question raised by the District Court – whether each of these plaintiffs understands the implications of the concessions that Hagens Berman proposed to make on her behalf. Although it is not absolutely clear that the confidentiality and privilege protections repeatedly invoked by Hagens Berman are available in the present circumstances (*cf.* Pa. R.C.P. 1.6(b)(2), 1.6(b)(5)), it

is not my intention, at this early point, at least, to probe into communications between the 28 plaintiffs and their lawyers.

The difficulty, of course, is in the actual detail, the shaping of my interchange with the 28 plaintiffs in a manner that least intrudes on private matters while assuring me that I will obtain the information I require.

By the Order that follows, I am enlisting the good faith assistance of Hagens Berman and GSK in analyzing these issues and shaping my inquiries of the 28 plaintiffs.

ORDER

1. On or before January 15, 2015, Hagens Berman and GSK shall, either jointly or separately as they may choose, submit briefs addressing the following questions:

a. Does Hagens Berman have a Rule 1.7(a)(2) conflict with respect to the GSK settlement? If not, why not? If so, how so?

b. What steps should the Settlement Master take to ascertain, as required by the District Court, that each of the 28 plaintiffs has made a voluntary and informed decision to dismiss its claims against GSK with prejudice while continuing to pursue its claims against Grünenthal and Sanofi? What questions should be asked of each plaintiff? How (in writing, by telephone, by in-court hearing, and with or without the participation of counsel) should the inquiries be conducted?

c. In the particular circumstances before the Court, to what extent, if any, does the attorney-client privilege or Rule 1.6 preclude the Discovery Master from inquiring into Hagens Berman's communications with any of the 28 plaintiffs respecting the proposed GSK Dismissals or the Hagens/GSK Agreement?

2. Grünenthal and Sanofi need not submit briefs but are invited to do so on or before the same date if they so choose.

3. Hagens Berman and GSK counsel shall transmit copies of this Memorandum and Order to their clients, and confirm to me that they have done so.

December 23, 2014

WILLIAM T. HANGLEY
SPECIAL DISCOVERY MASTER

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

GLENDA JOHNSON, *et al.*, Plaintiffs, v. SMITHKLINE BEECHAM CORPORATION, *et al.*, Defendants.	Case No.: 2:11-cv-05782-PD AND ALL RELATED CASES This Document Relates to: *Yeatts, et al. v. SmithKline Beecham Corp., et al.*, No. 2:11-cv-06711

JOINT MOTION FOR VOLUNTARY DISMISSAL WITH PREJUDICE

Defendants and all represented plaintiffs in this action hereby jointly move for the voluntary dismissal with prejudice of the claims of Plaintiffs Sharon Anderson, Ted Mann, and Annette Manning.

The parties file this Motion rather than a stipulation of dismissal because Federal Rule of Civil Procedure 41(a)(1)(A)(ii) requires that a stipulation of dismissal be "signed by all parties who have appeared." Defendants and all plaintiffs represented by counsel in *Yeatts, et al. v. SmithKline Beecham Corp., et al.*, No. 2:11-cv-06711 (E.D. Pa.) consent to the voluntary dismissal with prejudice of these three Plaintiffs' claims on the terms set forth in the proposed order accompanying this motion. However, the *Yeatts* action also involves a plaintiff, John Marshall, who is proceeding *pro se*. Defendants contacted Mr. Marshall on October, 8, 2014, seeking his consent to the voluntary dismissals, but have received no response. Because movants have been unable to obtain Mr. Marshall's consent, we file this Motion rather than submitting the usual stipulation of dismissal for the Court's approval.

The form of order submitted with this Motion reflects Defendants' and the represented Plaintiffs' agreement to specific terms of the dismissals. Movants therefore respectfully request that the Court enter their proposed order in the form submitted herewith.

Respectfully submitted,

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Dated: January 5, 2015

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2015, I electronically filed the foregoing Joint Motion for Voluntary Dismissal with Prejudice with the Clerk of the Court using CM/ECF. I also certify that a true and correct copy of the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF. I further certify that a true and correct copy of the foregoing document is being served this day on Plaintiff John Marshall via electronic mail.

/s/ Daniel S. Pariser
Daniel S. Pariser

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

GLENDA JOHNSON, *et al.*, Plaintiffs, v. SMITHKLINE BEECHAM CORPORATION, *et al.*, Defendants.	Case No.: 2:11-cv-05782-PD AND ALL RELATED CASES This Document Relates to: *Yeatts, et al. v. SmithKline Beecham Corp., et al.*, No. 2:11-cv-06711

[PROPOSED] ORDER GRANTING
JOINT MOTION FOR VOLUNTARY DISMISSAL WITH PREJUDICE

Upon consideration of the Joint Motion of the represented plaintiffs in *Yeatts, et al. v. SmithKline Beecham Corp., et al.*, No. 2:11-cv-06711 (E.D. Pa.) and Defendants GlaxoSmithKline LLC, GlaxoSmithKline Holdings (Americas) Inc., Grünenthal GmbH, and Sanofi-Aventis U.S. LLC, it is hereby **ORDERED** that the Joint Motion is **GRANTED**.

1. The claims of Plaintiff Ted Mann are **DISMISSED WITH PREJUDICE** and **SEVERED** from the claims of the other plaintiffs in the *Yeatts* case, with all parties to bear their own costs and fees.
2. The claims of Plaintiffs Sharon Anderson and Annette Manning are **DISMISSED WITH PREJUDICE**, with Ms. Anderson, Ms. Manning, and Defendant Sanofi-Aventis U.S. LLC to bear their own costs and fees, and Defendants GlaxoSmithKline LLC, GlaxoSmithKline Holdings (Americas) Inc., and Grünenthal GmbH reserving their rights to seek their costs and fees under applicable law.

IT IS SO ORDERED this ___ day of _____, 2015.

BY THE COURT:

_____
HON. PAUL S. DIAMOND
UNITED STATES DISTRICT JUDGE

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

GLENDA JOHNSON, et al.	:	
	:	
v.	:	**Civ. No. 11-5782**
	:	**and all related cases**
SMITHKLINE BEECHAM	:	
CORPORATION, et al.	:	

ORDER

On January 5, 2015, all Defendants and (it appears) all but one Plaintiff moved voluntarily to dismiss with prejudice the claims of Plaintiffs Annette Manning, Sharon Anderson, and Ted Mann against all Defendants. (Doc. No. 440.) With respect to Mr. Mann, the Parties agree to bear their own costs. (Id., Proposed Order.) With respect to Mses. Anderson and Manning, Defendant Sanofi agrees to bear its own costs and Defendants GSK and Grünenthal "reserv[e] their rights to seek their costs and fees under applicable law." (Id.) Plaintiff John Marshall, who is currently subject to Hagens Berman's Motion to Withdraw as Counsel, has not stipulated to the dismissal, and it is unclear whether Plaintiff Richard Anderson, who is also subject to a Motion to Withdraw, has stipulated. (Doc. Nos. 323, 375.)

In accordance with my previous Order referring questions of client consent to Special Master Hangley for a Report and Recommendation (Doc. Nos. 396, 420), I hereby propose the following amendment to my Special Master Appointment Order (Doc. No. 256):

1. The Special Master, William T. Hangley, Esq., shall issue a Report and Recommendation on whether Plaintiffs Annette Manning, Sharon Anderson, and Ted Mann knowingly, voluntarily, and intelligently consented to dismissing with prejudice their claims against all Defendants;

2. Any objections to the Report and Recommendation must be filed within fourteen days after the Report is served. Any responses shall be filed within ten days after any objections; and
3. In accordance with Rule 53(b)(4), all Parties must state in writing no later than **3:30 p.m.** on **Friday, January 15, 2015** whether or not they object to this proposed modification, or if they have any suggestions. If they object, they should set forth the grounds for their objections.

IT IS SO ORDERED.

/s/ Paul S. Diamond

January 6, 2015

Paul S. Diamond, J.

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

GLENDA JOHNSON ET AL., Plaintiffs, v. SMITHKLINE BEECHAM CORPORATION ET AL., Defendants.	Case No. 2:11-cv-005782-PD and all related cases

GSK'S RESPONSE TO THE DECEMBER 23, 2014
ORDER OF THE SPECIAL DISCOVERY MASTER

GSK does not believe that Hagens Berman has a Rule 1.7(a)(2) conflict with respect to the dismissals of GSK. The voluntary dismissal of claims which have no merit accrues to the benefit of both the plaintiffs and their lawyers – as well as the defendant – and there is a common interest in such action.

The claims against GSK have no merit, and as discussed herein, there are good and legitimate reasons for both plaintiffs' counsel and plaintiffs to have finally agreed to dismiss them, without giving rise to a conflict between the attorneys and their clients. GSK conducted a limited clinical trial of thalidomide and did not distribute thalidomide to the mothers of any of the 28 plaintiffs. Rather than devote further expense to meritless litigation, GSK agreed to forbear from pursuing both costs and sanctions liability in return for its immediate dismissal. GSK's forbearance conferred a benefit on the plaintiffs themselves, and not just their counsel, that exonerated plaintiffs from a substantial costs liability that they already had accrued (and would continue to incur) under Rule 54(d)(1).

1. Plaintiffs' Claims Against GSK Have Always Been Devoid of Merit.

Thalidomide was developed by Grünenthal and made available in overseas markets. In 1956-57, SKF, pursuant to a license from Grünenthal, conducted a limited clinical trial in the United States of thalidomide as a sedative or tranquilizing agent, and not as a "morning sickness" pill. Based on unimpressive efficacy results, SKF decided to end its research, terminated its licensing agreement with Grünenthal, and never sought FDA permission to market the drug. SKF's involvement with thalidomide ended long before anyone had reported to SKF or publicly any birth defects suffered by children born to mothers who had taken thalidomide.[1]

After thoroughly investigating SKF's testing of thalidomide in 1962, the FDA found no wrongdoing by SKF and it made the following key findings:

> A complete review of [SKF's] investigation of the article SKF #5627 (thalidomide) indicated that the reason for suspension of this article in December 1957 was that the article failed to meet [SKF's] expectations as to possible tranquilizing properties. There was nothing in the firm's files to suggest otherwise.
>
> There was nothing in [SKF's] file which suggested that [its] investigation of SKF #5627 was other than a bona-fide clinical investigation of a new compound.
>
> SKF's first knowledge [that birth defects were associated with thalidomide] came from a report which appeared in the British Medical Journal of 12/2/61.

See Sept. 25, 1962 and Oct. 26, 1962 FDA reports. Despite the extensive FDA investigation in 1962, the many books and other publications relating to thalidomide, multiple thalidomide lawsuits, and extensive discovery in this litigation, there still remains not one shred of evidence that SKF ever knew of, or had any reason to know of, any association between thalidomide and

[1] Dr. Frances Kelsey, who only arrived at the FDA in 1960, is considered a national hero because her exceptional vigilance in 1961 prevented approval of thalidomide for sale in the United States. See, e.g., Morton Mintz, "'Heroine' of FDA Keeps Bad Drug Off Market," Washington Post (July 15, 1962). But it was SKF's 1957 decision to not seek FDA approval which kept the thalidomide New Drug Application from reaching the FDA prior to Dr. Kelsey's arrival.

birth defects before 1961 – when it, along with the rest of world, learned of the link between thalidomide and birth defects through the public reporting of that link.

Moreover, despite the many and extensive inquiries into thalidomide and discovery in this case, not one of these 28 plaintiffs can link his or her injuries to SKF-distributed thalidomide. There is no evidence that the mothers of any of these 28 plaintiffs were patients of any of the SKF investigators or that they otherwise somehow received thalidomide from SKF.

2. The Dismissal of GSK Benefits Plaintiffs, and Not Merely Their Counsel.

Dismissal of meritless claims benefits the plaintiffs themselves by relieving them of responsibility for out-of-pocket costs for which they could be personally liable in the event of no recovery. Here, for example, if the cases were not dismissed at this juncture, significant additional expenses would have to be incurred to hire experts to opine on whether SKF acted negligently back in 1956-57, assuming any such experts could be found. Moreover, GSK already has incurred, and would continue to incur, substantial Rule 54(d) costs in the cases that are subject to the dismissals. Plaintiffs now are relieved of the high likelihood that they would personally become liable to GSK for Rule 54(d) costs, which are assessed as a matter of course to a "prevailing party" and which are the losing party's obligation. As the Third Circuit has explained:

> [T]he very possibility that a losing party will be required to reimburse the prevailing party for its costs should cause parties to litigation to pause and calculate the risks of pursuing meritless or marginal claims. … It is incumbent on an attorney to explain the risks of litigation to his or her client—including the risk that under Rule 54(d)(1) they may have to pay costs should their litigation ultimately prove unsuccessful.

Reger v. Nemours Found., Inc., 519 F.3d 285, 289 (3d Cir. 2010). Such costs are the responsibility of the parties, not their attorneys. See, e.g., In re Cardizem CD Antitrust Litig., 481 F.3d 355 (6th Cir. 2007). Such costs, for the items specified in 28 U.S.C. § 1920, can be

quite substantial. See, e.g., Duchesneau v. Cornell Univ., No. 08-cv-4856 (E.D. Pa. May 22, 2014) (assessing over $100,000 in costs against individual plaintiff in personal injury case).

There is nothing inherently suspect or amiss when a plaintiff and his lawyer take common and mutually beneficial action to end a meritless case or at least excise meritless claims. This is evident, for example, in the process mandated under Rule 11. Under Rule 11 a defendant who wishes to pursue sanctions against an attorney for filing a frivolous claim is required to first serve upon plaintiffs' counsel a motion detailing the attorneys' sanctionable conduct. The Rule then provides for a 21-day safe harbor provision under which the allegedly frivolous claims can be withdrawn and the threat of Rule 11 sanctions against the attorney eliminated. The purpose of the Rule is to encourage counsel to withdraw the allegedly frivolous claim or risk sanctions. See Advisory Committee Notes to 1993 Amendments. The GSK agreement is no different. In exchange for withdrawing allegedly frivolous claims, the threat of sanctions against the attorneys (as to GSK) is eliminated. Since there is no genuine conflict or impropriety in the process dictated by Rule 11, there is none here.

This is also evident in the procedure established by the Special Master in July 2014 under which plaintiffs' counsel agreed to review their cases. A number of cases have been dismissed in their entirety under that process, with defendants agreeing in certain of them to bear their own costs and fees and forego any request for sanctions.

Even if GSK is no longer in the litigation, plaintiffs have retained the ability – if they can overcome numerous other enormous hurdles -- to recover the full measure of their damages against any defendant that can be proven to have caused their injuries. Whatever the difficulties in proving a case against Grünenthal or Sanofi, there is no need in any such case for a plaintiff to take on the redundant burden of also proving the liability of GSK. That added burden would

require plaintiffs to prove that SKF was negligent and that thalidomide reached plaintiff's mother through SKF, neither of which they can do.[2]

In short, the claims against GSK have been devoid of merit from the outset, and the interests of plaintiffs themselves, and not merely their counsel, are furthered by the elimination of the claims against GSK.

GSK, of course, agrees that any decision by a party to dismiss litigation must be a knowing and intelligent decision. As to the precise process to be followed or the nature of evidence to be required by the Special Master, GSK takes no position on what (if any) further steps are warranted, except to state that the scope and nature of any further inquiry should be consistent with the strong public interest in the voluntary and early dismissal of meritless cases and the absence of any material conflict of interest between plaintiffs' counsel and their clients under the present circumstances. With respect to the attorney-client privilege, GSK further notes that each plaintiff's state of knowledge could be addressed by means of individually executed declarations setting forth the relevant facts known to and understood by each plaintiff, without requiring any disclosure of privileged communications.[3]

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[2] It is worth noting that in the Debra Johnson case, which is not included within the GSK dismissal agreement, GSK is the sole defendant. That is presumably the reason that Hagens Berman declined to include that case in the dismissal agreement. On its merits that case is no more viable than the others, as set forth in GSK's pending motion for summary judgment.

[3] A declaration stating, for example, that a given plaintiff (i) understands that she is giving up her claims against GSK; (ii) understands that she is retaining claims against two other defendants; (iii) understands that she is being relieved of the risk of a substantial personal assessment of costs as to GSK, (iv) understands that her attorneys are being relieved of the risk of a substantial imposition of sanctions as to GSK in all cases, and (v) has had the opportunity to discuss the agreement with her lawyers and to have them answer any questions, would seem to provide full assurances that the dismissals are being made knowingly without any infringement on privileged communications.

Dated: January 15, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2015, a copy of this document was filed electronically and is available for viewing and downloading from the CM/ECF system. I also certify that a true and correct copy of the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Michael T. Scott
Michael T. Scott

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

GLENDA JOHNSON, *et al.*, Plaintiffs, v. SMITHKLINE BEECHAM CORPORATION, *et al.*, Defendants.	Case No. 2:11-cv-05782-PD AND ALL RELATED CASES

RESPONSE OF CERTAIN PLAINTIFFS TO THE PROPOSED AMENDMENT TO THE SPECIAL MASTER APPOINTMENT ORDER

This response to the Court's Order dated January 7, 2015, is filed by the three Plaintiffs involved in the joint motion to dismiss, filed on January 5, 2015. All of these Plaintiffs agreed to dismiss their claims following extensive consultation between those Plaintiffs and their counsel and as part of the general review of cases ordered by the Special Master on July 17, 2014 (Dkt. No. 268). As provided in that Order, Plaintiffs were directed to (and agreed to):

> investigate each of the remaining active cases in these consolidated actions with a view to making a decision whether it should continue to be prosecuted or dismissed with prejudice by consent. Plaintiffs' counsel will report to the Special Discovery Master and Defendants' counsel on a weekly rolling basis as this process proceeds ....

Pursuant to this process, Plaintiffs' counsel undertook an extensive and detailed review of all aspects of every pending case, including the cases of Sharon Anderson, Ted Mann, and Annette Manning. *See* Declaration of Nick Styant-Browne, ¶ 2, submitted herewith. When Plaintiffs' counsel concluded following that exhaustive investigation that, in the words of the Special Master, a particular Plaintiff's case should be "dismissed with prejudice by consent," Plaintiffs'

counsel engaged in extensive discussions with that Plaintiff about his or her case. *See id.* at ¶ 3. This resulted in a number of stipulated dismissals that were granted by the Court. *See, e.g.,* Dkt. Nos. 284, 285, 305, 325, 326, 327, 328, 332, 362, and 374. It also resulted in several motions to withdraw where Plaintiffs' counsel concluded, after extensive discussions with those Plaintiffs, that professional considerations required them to move to withdraw as counsel. *See, e.g.,* Dkt. Nos. 301, 342, 343, 375 and 382.

As to Plaintiffs Sharon Anderson, Mann, and Manning, Plaintiffs' counsel performed a complete review of their cases, and then following that review, engaged in numerous conversations with each of these Plaintiffs. *See* Styant-Browne Decl., ¶ 4. Following those reviews and conversations, and after obtaining the consent of each of these clients, Plaintiffs' counsel notified Defendants on September 16, 2014 (Mann and Manning) and September 18, 2014 (Sharon Anderson) that they would be dismissing those Plaintiffs' cases as part of the Court-ordered review of all cases. *See id.*, Exs. A and B.[1] These dismissals were not part of any agreement with Defendants, and the dismissals explicitly reserve to Grünenthal and GSK the ability to seek fees and costs, as the Court notes in its referral order. While Sanofi has indicated that it will not seek fees and costs as to these three Plaintiffs, that was Sanofi's unilateral decision, and it was not as a result of any negotiated agreement with Plaintiffs' counsel. *See id.* at ¶ 5.

The requested dismissals are nothing more than the result of the good-faith effort of Plaintiffs' counsel to do exactly what they were directed to do: review all of its cases and then consult with the individual Plaintiffs about whether their case should proceed in light of that

[1] While there was a delay in filing the dismissal motion, in part due to a need to confer with Plaintiffs who are subject to motions to withdraw, the motion filed on January 5, 2015, is a direct result of the process of reviewing all cases pursuant to the Special Master's July 17, 2014 order.

review. This is no different than any other good-faith review in response to (for example) a Rule 11 motion, where a party is allowed to withdraw a case or pleading following consideration of that Rule 11 motion. And there is absolutely no reason to treat these dismissals any differently than that process by requiring inquiry into whether Plaintiffs' counsel adequately conferred with their clients before seeking dismissal of their claims.

There is thus no factual basis for an inquiry into whether Plaintiffs Mann, Manning, and Sharon Anderson knowingly and voluntarily dismissed their claims. In the prior referral orders regarding dismissal of claims against GSK, and in the Special Master's order of December 23, 2014, the Court and the Special Master have expressed various and changing bases for the inquiry. Those bases have included the mistaken assumption that Plaintiffs' counsel were attempting to dismiss the claims of individuals for whom counsel have moved to withdraw, the fact that the dismissals were sought shortly after a summary-judgment order and denial of a motion to stay, and more recently a stated concern about a possible conflict of interest arising out of the terms of the GSK agreement. None of those concerns apply here. Plaintiffs' counsel represent Mann, Manning, and Sharon Anderson; the decisions to dismiss came before the summary judgment order and the denial of Plaintiffs' request for a stay; and there is not even a whisper of any potential conflict due to an agreement as to fees and costs.[2] Thus, there is no basis for the present referral to the Special Master.

Nor is there any legal basis for an inquiry into whether those three Plaintiffs knowingly, intelligently, and voluntarily agreed to dismiss their cases. This is a private lawsuit, such that the Court has no power to approve or disapprove the terms of dismissal. As the Third Circuit has

[2] To be perfectly clear, Plaintiffs do not believe there is a Rule 1.7 conflict as suggested by the Special Master's order, but Plaintiffs will address that issue separately, and in response to the Special Master's December 23 order.

explained, "There are only certain designated types of suits, for instance consent decrees, class actions, shareholder derivative suits, and compromises of bankruptcy claims where settlement of the suit requires court approval." *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 835 (3d Cir. 1995). And as the Court further explained, "'In what can be termed "ordinary litigation," that is, lawsuits brought by one private party against another private party that will not affect the rights of any other persons, settlement of the dispute is solely in the hands of the parties. If the parties can agree to terms, they are free to settle the litigation at any time, and the court need not and should not get involved.'" *Id.* (citation omitted).

Moreover, there is no basis to impose any "terms and conditions" under Rule 41(a)(2), because the moving Plaintiffs and all Defendants have agreed to the terms of dismissal. In *Young v. Johnson & Johnson Corp.*, 2005 U.S. Dist. LEXIS 26232, at *18 (E.D. Pa. Nov. 2, 2005), the district court stated, "'The purpose of the "terms and conditions" clause [of Rule 41(a)(2)] is to protect a defendant from any prejudice or inconvenience that may result from a plaintiff's voluntary dismissal.' *GAF Corp. v. Transamerica Ins. Co.*, 214 U.S. App. D.C. 208, 665 F.2d 364, 367 (D.C. Cir. 1981)." Here, Defendants do not seek any protection from the Court but instead have agreed to the terms and conditions of the dismissal of those Plaintiffs who have agreed to dismiss their claims.[3]

Finally, if this Court were to order the Special Master to issue the Report contemplated by the Order, the Special Master would not have the power to require the Plaintiffs to testify as to their communications with counsel about that agreement. In this diversity action, the privilege

[3] *See also In re Wellbutrin XL Antitrust Litig.*, 268 F.R.D. 539, 543 (E.D. Pa. 2010) ("When considering the effect of a voluntary dismissal under Rule 41(a)(2), a court must evaluate the presence or extent of any prejudice to the defendants caused by the dismissal. *Ferguson v. Eakle*, 492 F.2d 26, 29 (3d Cir. 1974). Terms and conditions are generally imposed by the district court under Rule 41(a)(2) for the protection of the defendant from such prejudice. 9 Wright & Miller, *Federal Practice and Procedure*, § 2366 (3d ed. 2008).").

law of Pennsylvania applies. *Kephart v. ABB, Inc.*, 2014 U.S. Dist. LEXIS 51411, at *11 (E.D. Pa. Apr. 14, 2014) ("[A] district court exercising diversity jurisdiction applies the law of privilege from the state in which it sits. *Samuelson v. Susen,* 576 F.2d 546, 549 (3d Cir. 1978).") Pennsylvania has codified the attorney-client privilege as follows: "In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client." 42 Pa. Cons. Stat. Ann. § 5928 (West 1982). Here, there has been no waiver by the clients, and there is no basis to apply any exception to the attorney-client privilege.

And before any inquiry can be made into privileged communications, the Plaintiffs who are dismissing their claims must be given the opportunity to present evidence and argument as to why no exception applies. In *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 96-97 (3d Cir. 1992), the Third Circuit explained the need to provide such due process:

> If the party seeking to apply the [crime-fraud] exception has made its initial showing, then a more formal procedure is required than that entitling plaintiff to *in camera* review. The importance of the privilege, as we have discussed, as well as fundamental concepts of due process require that the party defending the privilege be given the opportunity to be heard, by evidence and argument, at the hearing seeking an exception to the privilege. *See* Pet. at 33-34. We are concerned that the privilege be given adequate protection, and this can be assured only when the district court undertakes a thorough consideration of the issue, with the assistance of counsel on both sides of the dispute. *See Matter of Feldberg*, 862 F.2d at 626 (after prima facie showing that exception applies, party asserting privilege should have opportunity to rebut; "if the court finds the explanation satisfactory, the privilege remains."). [¶] We therefore must agree with petitioners' contention that where a fact finder undertakes to weigh evidence in a proceeding seeking an exception to the privilege, the party invoking the privilege has the absolute right to be heard by testimony and argument.

For the foregoing reasons, Plaintiffs Sharon Anderson, Ted Mann, and Annette Manning respectfully submit that this Court should not issue an order requiring the Special Master to issue a Report and Recommendation as to whether they agreed to dismiss their claims against Defendants. But if the Court issues such an order, the Special Master should be instructed that he cannot take evidence concerning communications between those Plaintiffs and HBSS without providing due process, as required by the Third Circuit in *Haines*.

DATED: January 15, 2015

HAGENS BERMAN SOBOL SHAPIRO LLP

By: /s/ Nick Styant-Browne

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Attorneys for Plaintiffs/Local Counsel

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Response of Certain Plaintiffs to The Proposed Amendment to The Special Master Appointment Order has been electronically filed with the Clerk of Court using CM/ECF on this 15th day of January, 2015. A true and correct copy of the foregoing document is being served on this date on all counsel of via transmission of Notices of Electronic Filing generated by CM/ECF.

DATED: January 15, 2014

HAGENS BERMAN SOBOL SHAPIRO LLP

By: /s/ Nick Styant-Browne

Steve W. Berman (*Pro Hac Vice*)
Craig R. Spiegel (*Pro Hac Vice*)
Nick Styant-Browne (*Pro Hac Vice*)
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

GLENDA JOHNSON, *et al.*, Plaintiffs, v. SMITHKLINE BEECHAM CORPORATION, *et al.*, Defendants.	Case No. 2:11-cv-05782-PD AND ALL RELATED CASES

DECLARATION OF NICK STYANT-BROWNE IN SUPPORT OF RESPONSE OF CERTAIN PLAINTIFFS TO THE PROPOSED AMENDMENT TO THE SPECIAL MASTER APPOINTMENT ORDER

I, Nick Styant-Browne, declare:

1. I have been admitted to practice *pro hac vice* in this action. I am an attorney at Hagens Berman Sobol Shapiro LLP ("HBSS"). I am one of the attorneys representing the Plaintiffs in these cases.

2. Pursuant to Special Master's July 17, 2014 Order, Plaintiffs' counsel undertook an extensive and detailed review of all aspects of every pending case, including the cases of Sharon Anderson, Ted Mann, and Annette Manning.

3. When Plaintiffs' counsel concluded following that exhaustive investigation that a particular Plaintiff's case should be dismissed with prejudice, Plaintiffs' counsel engaged in extensive discussions with that Plaintiff about his or her case.

4. As to Plaintiffs Sharon Anderson, Ted Mann, and Annette Manning, Plaintiffs' counsel performed a complete review of their cases, and then following that review, engaged in numerous conversations with each of these Plaintiffs. Following these conversations, and after

obtaining the informed consent of each these Plaintiffs, we notified Defendants that we would be dismissing these Plaintiffs' cases.

5. While Sanofi has indicated that it will not seek fees and costs as to Plaintiffs Sharon Anderson, Mann, and Manning, that was Sanofi's unilateral decision, and it was not as a result of any negotiated agreement with Plaintiffs' counsel.

6. Attached hereto as Exhibit A is a true and correct copy of an email from Nick Styant-Browne to William T. Hangley, *et al.* dated September 16, 2014.

7. Attached hereto as Exhibit B is a true and correct copy of an email from Ari Brown to Daniel S. Pariser dated September 18, 2014.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on January 15, 2015, in Seattle, Washington.

/s/ Nick Styant-Browne
Nick Styant-Browne

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Attorneys for Plaintiffs

Exhibit A

From: Nick Styant-Browne
Sent: Tuesday, September 16, 2014 3:29 PM
To: Hangley, William T.; Chan, Ashely M.; Pariser, Daniel; SDiIorio@ReedSmith.com; Craig Spiegel; Steve Berman; Jeff Kodroff; mscott@reedsmith.com; Weissman, Sonja S.; Agneshwar, Anand; Sharpe, Paige H.; cknot@sidley.com; sgourley@sidley.com; Albert Bixler
Subject: RE: Thalidomide weekly reports on plaintiffs' review of cases [IWOV-HASP1.FID104272]

Dear Special Master Hangley,

1. Plaintiffs have fully reviewed the following cases:

Richard Anderson
Manning
Gunn
Jackson
Mann

2. Plaintiffs are dismissing the following cases:

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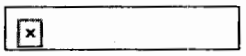
Regards,

Nick.

Nick Styant-Browne | **Hagens Berman Sobol Shapiro LLP** | Direct: (206) 268-9373



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To: Ari Brown
Cc: Sharpe, Paige H.; Tyler Weaver; Robert Haegele; Nick Styant-Browne; Craig Spiegel
Subject: Re: Sharon Anderson

Thanks - yes, I will run by other defendants.

Dan

Daniel S. Pariser
Arnold & Porter LLP
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Washington DC 20004
Phone: (202) 942-6216
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daniel.pariser@aporter.com

On Sep 18, 2014, at 5:20 PM, "Ari Brown" <ari@hbsslaw.com> wrote:

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<Stipulation of Voluntary Dismissal With Prejudice - Sharon Anderson.docx>

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EASTERN DISTRICT OF PENNSYLVANIA

GLENDA JOHNSON, *et al.*, Plaintiffs, v. SMITHKLINE BEECHAM CORPORATION, *et al.*, Defendants.	Case No. 2:11-cv-05782-PD AND ALL RELATED CASES

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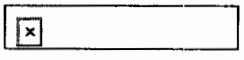

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GLENDA JOHNSON, ET AL., Plaintiffs, v. SMITHKLINE BEECHAM CORPORATION, ET AL., Defendants.	Case No. 2:11-cv-05782-PD AND ALL RELATED CASES Electronically Filed

RESPONSE OF GRÜNENTHAL GMBH AND SANOFI-AVENTIS U.S. LLC TO THE DECEMBER 23, 2014 ORDER OF THE SPECIAL DISCOVERY MASTER

Defendants Grünenthal GmbH ("Grünenthal") and Sanofi-Aventis U.S. LLC ("Sanofi") take no position on the specific questions that the Special Master raised in his Memorandum and Order of December 23, 2014 regarding the dismissals by 28 Plaintiffs of their claims against the GSK Defendants only (Doc. 430). However, as has been demonstrated in the motions for summary judgment filed to date, and as Defendants expect to show in additional motions to be filed, the claims against all Defendants are without merit, most clearly because they are time-barred and because Plaintiffs lack any proof that they were exposed to thalidomide. Accordingly, Grünenthal and Sanofi submit that justice is served by a process that permits the prompt dismissal of claims against all Defendants, and will as appropriate comment separately on any proposed procedures for the same.

Dated: January 15, 2015

Respectfully submitted,

/s/ Daniel S. Pariser
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Paige H. Sharpe *(admitted pro hac vice)*
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Anand Agneshwar *(admitted pro hac vice)*
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Counsel for Defendant Sanofi-Aventis U.S. LLC

/s/ Craig A. Knot
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Eugene A. Schoon (*admitted pro hac vice*)
Craig A. Knot (*admitted pro hac vice*)
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Counsel for Grünenthal GmbH

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2015, the foregoing document was filed electronically and is available for viewing and downloading from the CM/ECF system. I also certify that a true and correct copy of the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Daniel S. Pariser
Daniel S. Pariser

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

GLENDA JOHNSON, *et al.*, Plaintiffs, v. SMITHKLINE BEECHAM CORPORATION, *et al.*, Defendants.	Case No. 2:11-cv-05782-PD AND ALL RELATED CASES

PLAINTIFFS' RESPONSE TO THE DECEMBER 23, 2014 ORDER OF THE SPECIAL DISCOVERY MASTER

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OTHER AUTHORITIES

Hagens Berman hereby responds to the December 23, 2014 order (Dkt. No. 430) that requests a response to three issues.

As an initial matter, Hagens Berman notes our objection to the inquiry. As stated in Plaintiffs' original objections to the Court's referral order (Dkt. No. 400), and again in our December 11, 2014 letter (Dkt. No. 425), Rule 41(b)(2) does not contemplate or allow for the type and manner of inquiry that the Court is considering undertaking.

In addition, we note that in the most recent iteration of the basis for the inquiry (which was originally based on a mistaken understanding of which individuals were involved in the dismissals), the justification for the inquiry has now shifted into an examination of the terms of the agreement and whether Plaintiffs knowingly agreed to those terms. As pointed out in our previous filings, the Third Circuit has explicitly held that it is not in the province of the Court or the Special Master to investigate the terms or the fairness of agreements between parties in cases such as this. Federal courts do ***not*** have

> the authority … to review and approve the settlement of every case brought in the federal court system. There are only certain designated types of suits, for instance consent decrees, class actions, shareholder derivative suits, and compromises of bankruptcy claims where settlement of the suit requires court approval. *Cf. United States v. City of Miami*, 614 F.2d 1322 (5th Cir. 1980), *reh'g granted* 625 F.2d 1310, *aff'd in part, vacated in part*, 664 F.2d 435 (5th Cir. 1981) (en banc): "In what can be termed 'ordinary litigation,' that is, lawsuits brought by one private party against another private party that will not affect the rights of any other persons, settlement of the dispute is solely in the hands of the parties. If the parties can agree to terms, they are free to settle the litigation at any time, and the court need not and should not get involved."

Caplan v. Fellheimer Eichen Braverman & Kaskey, 68 F.3d 828, 835 (3d Cir. 1995). *See also, e.g., Disabled in Action in Penn. v. Southeastern Penn. Transp. Auth.*, 224 F.R.D. 601, 607-08 (E.D. Pa. 2004) (applying *Caplan* and refusing to scrutinize agreement between public entities in

face of allegations of collusion by another party); *Forest Serv. Employees for Env. Ethics v. U.S. Forest Serv.*, 2009 WL 1324154, at *3 (W.D. Pa. May 12, 2009) (citation omitted) ("the general rule of law ... is that settling parties retain the autonomy to fashion their own settlement terms free from the interference of the Court and non-settling parties" even where the settlement is allegedly illegal, unless another party to the litigation demonstrates prejudice); *U.S. v. Altman*, 750 F.2d 684, 696 (8th Cir. 1984) ("Courts not only frown on interference by trial judges in parties' settlement negotiations, but also renounce the practice of approving parties' settlement agreements.").

Yet the most recent order proposes to use the terms of the private agreement with GSK as a lever to investigate the settlement and privileged communications between Plaintiffs and their counsel. This is improper. No party has objected or complained that the dismissals might prejudice them, and there is no suggestion that the dismissals negatively affect the other parties in any way. The Court therefore has no authority to engage in this inquiry, and the Court and the Special Master do not cite any authority to the contrary. Counsel's letter of December 11, 2014, should be more than sufficient to resolve this issue and allow Plaintiffs to dismiss their claims against GSK.

However, in the interests of moving forward, Hagens Berman responds to the points of inquiry and proposes a method of demonstrating that the individual Plaintiffs are aware of all the terms of the dismissal of their claims against GSK, and knowingly, voluntarily, and intelligently consent to the dismissals on those terms.

We also note in response to item 3 on page 8 of the December 23 order that we have provided a copy of the order to each of the individual Plaintiffs whose claims are at issue.[1]

1. Hagens Berman Does Not Have a Rule 1.7(a)(2) Conflict.

A conflict exists under Pa. R.P.C. 1.7(a)(2) if "there is a significant risk that the representation of one or more clients will be materially limited by … a personal interest of the lawyer." While the terms of the GSK agreement implicated a "personal interest" of Hagens Berman, Hagens Berman's representation of the Plaintiffs was not materially limited by that personal interest, and there is not (and was not) a significant risk that the representation would be materially limited. Further, even if there was a material limitation, or a significant risk of one, Plaintiffs have provided informed consent that would waive any such conflict.

a. Hagens Berman's representation is not "materially limited" by a personal interest.

All of the evidence before the Court and the Special Master points to one conclusion: Hagens Berman's representation of its clients in this matter has not been materially limited by any personal interest of Hagens Berman in avoiding sanctions, and there is no significant risk that it will be. Hagens Berman has zealously represented the interests of its clients in the face of potential sanctions, and it has not refused – and will not refuse – to fully prosecute claims simply

[1] The bare fact that counsel has transmitted a publicly available document pursuant to a judicial directive is not itself privileged information, and therefore nothing has been waived by this disclosure. *See, e.g., U.S. v. Woodruff*, 383 F. Supp. 696, 697 (E.D. Pa. 1974) ("it is the duty of counsel to relay such instructions as an officer of the court; that, in this regard, defense counsel merely served as a conduit for the transmission of a message; and that, the transmission of such an instruction is not in the nature of a confidential communication"); *U.S. v. Hall*, 346 F.2d 875, 882 (2d Cir. 1965) (where counsel is merely acting as a conduit for the transmission of a message that he has a duty to relay to his client, there is no privilege that attaches to the fact of that transmission). The situation is decidedly different for communications Plaintiffs and their counsel have had ***about*** the order; those communications are clearly privileged, as set forth in section 3 of this letter. *Cf. Woodruff*, 383 F. Supp. at 697 (holding fact of communication itself is not privileged, but forbidding inquiry about communications regarding legal matters and defenses).

because of a threat of sanctions. No party, no Defendant, and neither the Special Master or the Court can come forth with any evidence that Hagens Berman has failed to fully represent its clients in the face of possible sanctions. To the contrary, as should be abundantly clear by now, Hagens Berman has pursued the interests of its clients to the fullest extent, even though it is apparent that Defendants, the Court, and the Special Master have argued or ruled that many of Plaintiffs' legal arguments are without merit. There could hardly be any stronger evidence that Hagens Berman's representation of its clients has not been limited by the threat of sanctions for that representation. This is more than sufficient to demonstrate the lack of a concurrent conflict under Rule 1.7(a)(2).

The mere existence of an attorney's personal interest does not in and of itself create a conflict under Rule 1.7(a)(2). "Finding a concurrent conflict requires not only that the lawyer have a personal interest, but also that the lawyer's personal interest significantly risks materially interfering with the lawyer's professional judgment in representing his client." *U.S. v. Savage*, 2013 WL 6667744, at *3 (E.D. Pa. Dec. 17, 2013). And in making that determination, "[t]he critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." Pa. R.P.C. 1.7, cmt. 8. *See also Jackson v. Rohm & Hass Co.*, 2008 WL 3930510, at *3 (E.D. Pa. Aug. 28, 2008) ("The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably would be pursued on behalf of the client.").

Moreover, mere speculation that there is such a risk or likelihood is not sufficient to establish a conflict; there must be evidence to support such a conclusion. As one court has explained:

> Because of the virtually limitless cases in which a "conflict" may theoretically arise when a lawyer's self-interest is implicated, there is a very real danger of analyzing these issues not on fact but on speculation and conjecture. Accordingly, when a conflict of interest issue arises based on a lawyer's self-interest, a sturdier factual predicate must be evident than when a case concerns multiple representation. Only by requiring a more specific articulation of the facts giving rise to a conflict situation can courts refrain from effectively "straightjacket[ing] counsel in a stifling, redundant federal code of professional conduct." [] Supposition and speculation, therefore, will simply not do.

Essex Cnty. Jail Annex Inmates v. Treffinger, 18 F. Supp. 2d 418, 432 (D.N.J. 1998) (quoting *Beets v. Collins*, 65 F.3d 1258, 1271 (5th Cir. 1995)). *See also Savage*, 2013 WL 6667744, at *3; *In re L.J.*, 691 A.2d 520, 529 (Pa. Super. Ct. 1997) (dismissing claim that dual representation created Rule 1.7(a) conflict in part because of a lack of evidence to support allegations of risk of material limitation); *Rohm & Hass Co.*, 2008 WL 3930510, at *4 (no conflict found because party had "not produced any evidence of an egregious, irreconcilable conflict").

Here, the only possible basis for a concurrent conflict is the bare terms of the agreement reached with GSK. The terms of that agreement are that GSK forewent possible awards of sanctions in favor of GSK against Hagens Berman and/or Plaintiffs, Plaintiffs forewent their sanctions motions against GSK, and no party received any compensation. Yet this does not prove Hagens Berman's representation of those clients was materially limited, or at risk of being materially limited, by the prospect of sanctions.

The agreement cannot be viewed in isolation from its context. As explained in section 3, below, Hagens Berman is prohibited from discussing the specific consideration that went into the decision to enter into the agreement with GSK and what Hagens Berman discussed with their

clients. However, at the time of the agreement, the parties had nearly completed fact discovery. The Court had issued one summary judgment ruling, but there was no recommendation or ruling on any sanctions motion. Hagens Berman knew what facts supported each of their claims against each Defendant, as well as the respective strengths and weaknesses of each of those claims. This included, for example, significant variations in the timing and nature of distribution of thalidomide by GSK and Sanofi. In light of the evidence that supported or undermined Plaintiffs' claims against each Defendant, both as to the statute of limitations and as to exposure issues, Hagens Berman was mindful of strategic aspects of pursuing claims against certain Defendants as opposed to others. Just as we would in any other case near the close of discovery, we assessed the situation and discussed it with our clients.

There is, of course, nothing unusual about this process. It is routine, customary, and desirable for plaintiffs and their counsel to make an honest appraisal of their cases, especially at the close of discovery, and abandon claims or dismiss defendants as they deem appropriate.

The notion that Hagens Berman's representation of their clients has been hampered, or is at risk of being hampered, by the threat of sanctions is baseless and contrary to all of the evidence before the Court and the Special Master. Everything Hagens Berman has done in this case demonstrates that it is dedicated to representing its clients zealously even though by doing so it has apparently placed itself at risk of serious sanctions, for both bringing and litigating the cases and now (possibly) for dismissing certain claims.

First, every single Plaintiff who dismissed claims against GSK still has claims against Grünenthal, and the overwhelming majority also has claims against Sanofi. Not a single person's claims were dismissed entirely as a result of the agreement with GSK. This means, of course, that Hagens Berman continues to represent all of the Plaintiffs in question even though

the firm is subject to numerous demands for sanctions made by Grünenthal in cases brought by those Plaintiffs, and the firm remains exposed in most instances to possible demands for sanctions from Sanofi (which has recently made demands of its own in summary-judgment briefing). Indeed, Grünenthal recently submitted a bill of costs to the Court in an amount of more than $176,000. Dkt. No. 445. Yet Hagens Berman continues to litigate against Grünenthal on behalf of every single Plaintiff who dismissed claims against GSK, and against Sanofi on behalf of most of those Plaintiffs.

Second, Hagens Berman has repeatedly opposed motions for summary judgment where we concluded that we could so in good faith, even though almost every one of those motions has included a demand for fees and costs. Indeed, we have continued to do so even though orders of the Court and the Special Master indicate that neither of them finds merit in Plaintiffs' arguments about the statute of limitations.

Specifically, on December 5, 2014, Grünenthal and Sanofi filed motions for summary judgment against Tammy Jackson and Phillip Yeatts, two Plaintiffs who dismissed their claims against GSK. Dkt. Nos. 415, 416. On December 4, 2014, the day before those filings, the parties received the report and recommendation on sanctions, which included an apparent finding that Hagens Berman had acted in bad faith simply by relying on the expert opinion of Dr. Trent Stephens. *See, e.g.*, Dkt. No. 414, pp. 17-18, 22-24. Yet Hagens Berman (which has separately objected to that finding), submitted Dr. Stephens' opinion again in opposition to Jackson and Yeatts, Dkt. Nos. 428-2, 429-2, despite the fact we are at risk of sanctions for merely opposing these motions with Dr. Stephens' opinion. We did so because we are firmly committed to prosecuting our clients' claims when we can do so in good faith, even when it appears that the

Court and the Special Master may be poised to sanction us for doing so.[2] This is obviously not an easy position, but it demonstrates our dedication to our clients and their claims, even when it puts our firm at risk. *Cf. Rohm & Hass Co.*, 2008 WL 3930510, at *4 (finding there was no Rule 1.7 conflict because the litigation's history demonstrated counsel was acting in client's interests).

The December 23 order takes a different tack on our oppositions to the summary judgment motions in the Jackson and Yeatts cases, and suggests that because we opposed the motions, we must have "every confidence that we will prevail" and that the fact that we opposed them suggests that all of the Plaintiffs believe that they have "valuable claims" against GSK. Order at 5. But of course Plaintiffs opposed those motions against Grünenthal and Sanofi, ***not*** against GSK, and thus the oppositions could not possibly prove what Hagens Berman or Plaintiffs think of their claims against GSK. Nor does the mere fact of an opposition prove anything about the confidence of prevailing or the ultimate value of any claim. We are under no illusions as to the Court's apparent views of our arguments and claims. But we are extremely mindful of our duty to represent our clients to the fullest extent possible, to the extent we can do so in good faith. We had a duty to oppose those summary judgments, which we firmly believe should be denied, and we did so to the best of our ability. It is ironic that those oppositions are now being suggested as a reason to believe that we have not represented those clients as fully and fairly as possible.

---

[2] Hagens Berman did request a stay of all further summary-judgment briefing until the Court ruled on the numerous motions already before it in order to address the concern raised by the Special Master that our representation of our clients was unnecessarily increasing Defendants' costs. Dkt. No. 423. We continue to maintain that this is the most reasonable path for all involved, including the individual Plaintiffs, given the breadth of the issues already covered in numerous pending motions. But we notably did ***not*** seek any stay of sanctions proceedings, and did not abandon any of our clients' positions by seeking a reasonable, limited, and temporary stay of briefing of new motions until the Court had issued the legal opinions that will obviously affect any motions yet to be filed. *See id.*

In summary, there is no evidence that there is a significant risk that Hagens Berman will materially limit (or has materially limited) our representation of our clients because of the threat of sanctions. If there is a concurrent conflict under Rule 1.7(a) in this case, all that would be required to put opposing counsel into a potentially disabling conflict would be to move for sanctions against them. That is clearly not the rule, and there is no Rule 1.7(a) conflict here. The record demonstrates that Hagens Berman has carefully and appropriately balanced our duty to zealously represent our clients against our duty not to pursue claims or arguments that we believe we cannot or should not pursue.

b. Even if a Rule 1.7(a)(2) conflict existed, Hagens Berman obtained the written and informed consent of their clients.

While Hagens Berman firmly believes that we do not suffer from a concurrent conflict under Rule 1.7(a)(2), even if we did, we have obtained informed consent from our clients, and therefore any conflict is not disabling. As provided in Rule 1.7(b):

> Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent.

Subsections 2 and 3 do not apply here. As for subsection 1, as we have already demonstrated above, we reasonably believe that we are able to provide (and have been providing) competent and diligent representation to all of our clients. As for subsection 4, we have received informed consent from each client to the dismissal, as we explained in our letter of

December 11, 2014. As explained below, we cannot disclose our communications with each client, but we are more than satisfied that each Plaintiff is completely aware of the issues raised by the December 23 order and has knowingly, voluntarily, and intelligently agreed to dismissal.

2. Plaintiffs Should Be Required – At Most – To Sign a Declaration Making Plain That They Understand the Terms of the Settlement, Including GSK's Waiver of Sanctions, and Agree to the Dismissal.

The December 23 order also seeks input from Hagens Berman and GSK about the content and form of an inquiry into our whether our clients made a voluntary and informed decision to dismiss their claims against GSK with prejudice. To be clear, Hagens Berman does not believe that any such inquiry is appropriate. Our letter of December 11, 2014, should be more than sufficient to resolve this issue.

However, in the interests of resolving this issue, Hagens Berman suggests that each Plaintiff who moved to dismiss claims against GSK sign under penalty of perjury a declaration which makes each of the following points clear:

- The Plaintiff has received and read a copy of the Special Master's order of December 23, 2014.
- The Plaintiff understands as provided in the December 23 order that once the claims are dismissed against GSK, they cannot be brought again.
- The Plaintiff understands as provided in the December 23 order that she will not receive any money from GSK for agreeing to dismiss her claims.
- The Plaintiff understands as provided in the December 23 order that as part of the same agreement, GSK has agreed not to seek monetary sanctions from Hagens Berman or the Plaintiffs, and that the sanctions requests and motions filed to date seek sanctions only from Hagens Berman.
- The Plaintiff, with these understandings, voluntarily consents to dismissal of her claims against GSK.

Declarations to this effect, under penalty of perjury, would be more than sufficient to dispel the false notion that Hagens Berman moved to dismiss claims without informing the

clients of the terms of the agreement that led to the dismissal. Moreover, it would do so without invading the attorney-client privilege that clearly applies to the written and oral communications Hagens Berman had about these issues with their clients (*see* section 3, below).

Other courts in this District, when considering possible Rule 1.7(a)(2) conflicts, have concluded that signed declarations like the ones Hagens Berman proposes are sufficient to demonstrate informed consent, and thereby resolve any conflict, including in situations involving obvious, direct conflicts far more serious than the situation in this case. *See, e.g., Martin v. Turner*, 2011 WL 717682, at *3-4 (E.D. Pa. Feb. 18, 2011) (attorney took positions contrary to the interests of the client); *Reg'l Employers Assur. Leagues Vol. Empl. Benef. Ass'n v. Castellano*, 2009 WL 1911671, at *2-3 (E.D. Pa. July 1, 2009) (joint representation of multiple parties against same defendant in the same suit); *Rohm & Hass Co.*, 2008 WL 3930510, at *4-5 (joint representation of multiple parties in litigation who had taken differing views of the facts); *Helsing v. The Avon Grove Sch. Dist.*, 2007 WL 1030096, at *3-4 (E.D. Pa. Mar. 30, 2007) (counsel represented multiple parties with divergent interests in proving key facts).

To require anything further, such as in-court testimony or interviews with the Plaintiffs, is not only unnecessary but also would be unprecedented. Hagens Berman is not aware of a single case in which a court has *sua sponte* ordered a party to testify in any capacity, or answer written questions, about whether she consented knowingly and voluntarily consented to either a conflict or a dismissal of a claim. Ordering such a requirement would be truly extraordinary given that (as discussed below) the issues the Special Master apparently wants to ask the clients about are communications that are not only privileged, but are some of the most sensitive and confidential conversations an attorney can have with her clients.

The Special Master's posited methods of inquiry – such as requiring telephone interviews or flights to Philadelphia for in-court testimony – would be especially onerous given that each Plaintiff provided informed consent and is willing to sign a sworn declaration confirming that consent. Subjecting these people to such stress and extreme inconvenience, in the name of protecting them, is entirely unacceptable and there is no evidence to support this extraordinary step.

Further, the suggestion that the Plaintiffs might be forced to appear for such testimony without counsel is entirely baseless. We cannot think of any situation in which it would be appropriate for a judicial officer to demand a party to appear without representation to be asked about privileged communications with her counsel. Indeed, it should be obvious that such a situation would not only put the person in an extremely vulnerable and powerless position, but would also create a minefield of ethical dilemmas for the judicial officer. *Cf.* Pa. Code Judicial Conduct 2.9(C) ("A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed) & cmt. 6 ("The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic"); Pa. Code Judicial Conduct 2.9(A) (general limitation on *ex parte* communications); Pa. R.P.C. 4.2 & cmt. 6 (attorney shall not communicate with represented party without counsel present absent a court order that is (for example) "necessary to avoid reasonably certain injury").

The Special Master should also abandon the proposal that each Plaintiff "supply her employment and education history" to the Special Master. Order at p. 3. Hagens Berman can only guess at the relevance of this information. There is absolutely no evidence or even a suggestion, from Defendants, the Court, or anyone else, that any Plaintiff is so uneducated or

unsophisticated that she could not understand a communication with her counsel. Further, the apparent suggestion is that if a particular person has not enjoyed education or employment of a certain level, she must not be able to provide informed consent. Any such suggestion is baseless and insensitive to the fact that many of the Plaintiffs in these cases have not enjoyed higher education or regular employee precisely ***because*** they were disabled by thalidomide. It does not mean that they are mentally disabled or incompetent. And if the thought is that the Court or Special Master would order interviews of only those Plaintiffs who appear unsophisticated, and possibly do it without counsel present, such a course of action is inappropriate and unprecedented.

Sworn declarations from each Plaintiff along the lines discussed above are more than sufficient to resolve whatever concerns the Court or the Special Master have about Plaintiffs and their informed and voluntary consent. Hagens Berman urges the Special Master to accept the declarations and end this inquiry.

3. Both the Attorney-Client Privilege and Rule 1.6 Prohibit Inquiry Into Specific Communications Between Plaintiffs and Their Counsel.

The communications between Hagens Berman and the Plaintiffs about the GSK dismissals are confidential communications subject to the protections of the attorney-client privilege, and Hagens Berman cannot disclose them under Pa. R.P.C. 1.6. Hagens Berman respectfully submits that this is readily apparent on a common-sense basis, given that the communications that the Court and the Special Master want to delve into are communications about whether or not to dismiss some of their claims. It should be obvious the communications are highly sensitive.

Under Pennsylvania law,[3] it is clear that both communications from the client, and communications from the attorney to the client for the purpose of providing advice and consultation about the client's claims, are protected by the attorney-client privilege. *See, e.g., Gillard v. AIG Ins. Co.*, 609 Pa. 65, 88-89 (2011) ("the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice"). Hagens Berman is the Plaintiffs' attorney, and the communications between them about the GSK agreement and dismissals were made for the purpose of obtaining and providing legal advice.

There are also no exceptions to the attorney-client privilege that would apply here. The privilege has not been waived. Nor is there is any possible argument that crime-fraud exception applies here, as already explained in Plaintiffs' objection to the Court's October 31, 2014 referral order. *See* Dkt. No. 400, pp. 6-7.

Thus, ***neither*** Hagens Berman ***nor*** the Plaintiffs can be compelled to disclose, or coerced into disclosing, the content of those communications. As specifically provided in Pennsylvania law:

> [i]n a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

See 42 Pa. C. S. § 5928. *See also, e.g., Collautt v. Li,* 2014 WL 6988657, at *2 (E.D. Pa. Dec. 11, 2014).

Hagens Berman is also barred by Pa. R. P. C. 1.6 from disclosing the content of their communications with Plaintiffs. As that rule provides, "a lawyer shall not reveal information

[3] The law of Pennsylvania applies here to questions of privilege. *See* FED. R. EVID. 501; *Keating v. McCahill,* 2012 WL 2527024, at *2 (E.D. Pa. July12, 2012) ("Federal courts sitting in diversity, as in this case, apply the law of the host state to determine privilege.").

relating to representation of a client unless the client gives informed consent." *See* Rule 1.6(a). While Rule 1.6 has a number of exceptions, none of them apply here. Rule 1.6(b) requires counsel to reveal information only as necessary to correct a prior misstatement of fact, or to keep a client from perjuring herself or engaging in other criminal conduct. *See* Rule 1.6(b) and Rule 3.3(a), (b).

Rule 1.6(c) allows for permissive disclosure by an attorney in specific circumstances, but again none of the exceptions apply here. The Special Master has suggested that two exceptions might apply here, Order at p. 3, but they clearly do not. Rule 1.6(c)(2) permits disclosure "to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another." There is no such imminent criminal act at issue here, nor is there a possibility that disclosing these communications would stop even a non-criminal injury to anyone's financial interests or property.

The second exception identified by the Special Master allows disclosure by an attorney to "to secure legal advice about the lawyer's compliance with these Rules." A disclosure to the Court or the Special Master in response to this inquiry would not be for the purpose of "secur[ing] legal advice." Such a disclosure would instead presumably be for the purpose of clearing Hagens Berman's name on this point, which is not a permitted reason for disclosing client confidences under Rule 1.6.

The communications are clearly privileged, and just as clearly protected from disclosure by counsel pursuant to Rule 1.6. Therefore, any inquiry into those communications, and especially direct testimony from the Plaintiffs or phone calls with them, would severely risk impinging upon the attorney-client privilege. Moreover, any order directing Plaintiffs to testify

or appear for phone calls about the communications would violate Pennsylvania's ban on orders compelling disclosure of this information. *See* 42 Pa. C. S. § 5928.

For all the reasons stated above and in Plaintiffs' prior submissions regarding this inquiry and referral to the Special Master, the Special Master should accept the declarations offered above, end this inquiry, and allow the parties and counsel to proceed on the claims the Plaintiffs have decided to continue to prosecute.

DATED: January 15, 2015

HAGENS BERMAN SOBOL SHAPIRO LLP

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Plaintiffs' Response to The December 23, 2014 Order of the Special Discovery Master has been electronically filed with the Clerk of Court using CM/ECF on this 15th day of January, 2015. A true and correct copy of the foregoing document is being served on this date on all counsel of via transmission of Notices of Electronic Filing generated by CM/ECF.

DATED: January 15, 2014

HAGENS BERMAN SOBOL SHAPIRO LLP

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

GLENDA JOHNSON, *et al.*, Plaintiffs, v. SMITHKLINE BEECHAM CORPORATION, *et al.*, Defendants.	Case No.: 2:11-cv-05782-PD AND ALL RELATED CASES This Document Relates to: *Alexander, et al. v. Avantor Performance Materials, et al.*, No. 2:13-cv-04591

STIPULATION OF VOLUNTARY DISMISSAL WITH PREJUDICE

This Stipulation applies to *Alexander, et al. v. Avantor Performance Materials, et al.*, No. 2:13-cv-04591. Under Fed. R. Civ. P. 41(a)(1)(A)(ii), it is hereby agreed between all Plaintiffs and all Defendants in the *Alexander* action that all claims of Plaintiff Rebecca Alexander against Defendant Sanofi-Aventis U.S. LLC are voluntarily dismissed with prejudice, with Ms. Alexander and Sanofi-Aventis U.S. LLC to bear their own costs and fees as to Ms. Alexander's claims.

Under Fed. R. Civ. P. 41(a)(1)(A)(ii), it is further agreed between all Plaintiffs and all Defendants in the *Alexander* action that all claims of Plaintiff Rebecca Alexander against Defendants GlaxoSmithKline LLC, GlaxoSmithKline Holdings (Americas) Inc., and Grünenthal GmbH are voluntarily dismissed with prejudice, with GlaxoSmithKline LLC, GlaxoSmithKline Holdings (Americas) Inc., and Grünenthal GmbH reserving their rights to seek their costs and fees under applicable law.

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Attorneys for Defendant Grünenthal GmbH

Dated: February 19, 2015

APPROVED:

_____

PAUL S. DIAMOND, J.

_____

DATE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Stipulation of Voluntary Dismissal With Prejudice has been electronically filed with the Clerk of Court using CM/ECF on this 19th day of February, 2015. A true and correct copy of the foregoing documents are being served on this date on all counsel of via transmission of Notices of Electronic Filing generated by CM/ECF.

DATED: February 19, 2015

HAGENS BERMAN SOBOL SHAPIRO LLP

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

GLENDA JOHNSON, et al.	:	
	:	
v.	:	**Civ. No. 11-5782**
	:	**and all related cases**
SMITHKLINE BEECHAM	:	
CORPORATION, et al.	:	

ORDER

On February 19, 2015, all Defendants and all Plaintiffs moved voluntarily to dismiss with prejudice the claims of Plaintiff Rebecca Alexander against all Defendants. (Doc. No. 468.) Defendant Sanofi agrees to bear its own costs, and Defendants GSK and Grünenthal "reserv[e] their rights to seek their costs and fees under applicable law." (Id.) Pursuant to Rule 53(b)(4), and in accordance with my previous Orders referring questions of client consent to Special Master Hangley for a Report and Recommendation, I hereby propose the following amendment to my Special Master Appointment Order (Doc. No. 256):

1. The Special Master, William T. Hangley, Esq., shall issue a Report and Recommendation on whether Plaintiff Rebecca Alexander knowingly, voluntarily, and intelligently consented to dismissing with prejudice their claims against all Defendants;
2. Any objections to the Report and Recommendation must be filed within 21 days after the Report is served. Any responses shall be filed within 14 days after any objections; and
3. In accordance with Rule 53(b)(4), all Parties must state in writing no later than **3:30 p.m.** on **March 5, 2015** whether or not they object to this proposed modification, or if

they have any suggestions. If they object, they should set forth the grounds for their objections.

IT IS SO ORDERED.

/s/ Paul S. Diamond

February 23, 2015

Paul S. Diamond, J.

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

GLENDA JOHNSON, et al.	:	
	:	
v.	:	**Civ. No. 11-5782**
	:	**and all related cases**
SMITHKLINE BEECHAM	:	
CORPORATION, et al.	:	

ORDER

On January 5, 2015, all Defendants and all but (at least) one Plaintiff moved voluntarily to dismiss with prejudice the claims of Plaintiffs Annette Manning, Sharon Anderson, and Ted Mann against all Defendants. (Doc. No. 440.) The next day, in accordance with my previous Order referring questions of client consent to Special Master William T. Hangley, Esq. for a Report and Recommendation, I proposed amending the Special Master Appointment Order (Doc. No. 256) to allow Special Master Hangley to advise me as to whether each Plaintiff knowingly, voluntarily, and intelligently consented to dismissing with prejudice their claims against all Defendants. (Doc. No. 442.) I gave the Parties an opportunity to object, or offer changes or suggestions to the proposed amendment. (Id.); Fed. R. Civ. P. 53(b)(4).

Defendants do not object to the proposed amendment. (Doc. Nos. 447-49.) Plaintiffs' Counsel, Hagens Berman Sobol Shapiro LLP, objects, contending there is no factual or legal basis for an inquiry into whether these three Plaintiffs knowingly, voluntarily, and intelligently dismissed their claims. (Doc. No. 451.)

Hagens Berman argues, *inter alia*, the instant dismissals do not raise conflict of interest issues because, unlike the proposed dismissals of 28 Plaintiffs' claims against the GSK Defendants only, Plaintiffs Manning, Anderson, and Mann are dismissing their claims against all Defendants. (Id.) Although Mr. Hangley may consider this distinction in his Report and

Recommendation, it is not a reason to foreclose inquiry into the validity of the Manning, Anderson, and Mann dismissals. As discussed in my December 8, 2014 Order referring questions of client consent to Mr. Hangley, I am compelled to make this inquiry in light of Mr. Hangley's troubling findings respecting Hagens Berman's conduct. (Doc. No. 420 (citing Mr. Hangley's Report recommending the imposition of sanctions on Hagens Berman for its bad faith and dishonesty in the prosecuting Merica, Boiardi, and Garza matters).) I will also overrule the firm's objections based on Federal Rule of Civil Procedure 41 and the attorney-client privilege for the reasons stated my December 8 Order. (Id.)

AND NOW, this 23rd day of February, 2015, I will overrule Hagens Berman's objections and **ORDER** that my Special Master Appointment Order (Doc. No. 256) is **AMENDED** as follows:

1. Special Master Hangley shall issue a Report and Recommendation on whether Plaintiffs Annette Manning, Sharon Anderson, and Ted Mann knowingly, voluntarily, and intelligently consented to dismissing with prejudice their claims against all Defendants;
2. Any objections to the Report and Recommendation must be filed within 21 days after the Report is served. Any responses shall be filed within 14 days after any objections.

IT IS SO ORDERED.

/s/ Paul S. Diamond

Paul S. Diamond, J.

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

GLENDA JOHNSON, et al.	:	
	:	
v.	:	**Civ. No. 11-5782**
	:	**and all related cases**
SMITHKLINE BEECHAM CORPORATION, et al.	:	
	:	

ORDER

On February 19, 2015, all Defendants and all Plaintiffs moved voluntarily to dismiss with prejudice the claims of Plaintiff Rebecca Alexander against all Defendants. (Doc. No. 468.) In accordance with my previous Orders referring questions of client consent to Special Master William T. Hangley, Esq. for a Report and Recommendation, I proposed amending the Special Master Appointment Order (Doc. No. 256) to allow Mr. Hangley to advise me as to whether Ms. Alexander knowingly, voluntarily, and intelligently consented to dismissing with prejudice her claims against all Defendants. (Doc. No. 471.) I gave the Parties an opportunity to object, or offer changes or suggestions to the proposed amendment. (Id.); Fed. R. Civ. P. 53(b)(4).

Defendants do not object to the proposed amendment. (Doc. Nos. 476-78.) Plaintiff objects, contending there is no factual or legal basis for an inquiry into whether she knowingly, voluntarily, and intelligently dismissed her claims. (Doc. No. 480.)

Plaintiff argues that I have no authority to review a Rule 41(a)(1)(A)(ii) dismissal. See Fed. R. Civ. P. 41(a)(1)(A)(ii) (plaintiff may dismiss without a court order upon filing "a stipulation of dismissal signed by all parties who have appeared"); Kabbaj v. Am. Sch. of Tangier, 445 F. App'x 541, 543 (3d Cir. 2011) (Rule 41(a)(1)(A)(ii) dismissal is effective upon its filing). Pursuant to the Court's inherent authority, I may, however, "look behind" such a dismissal to determine whether it is the result of "collusion or other improper conduct." United

States v. Mercedes-Benz of N. Am., Inc., 547 F. Supp. 399, 400 (N.D. Cal. 1982); see also Green v. Nevers, 111 F.3d 1295, 1301 (6th Cir. 1997) (same); Moeller v. Weber, No. 04-4200, 2012 WL 5289331, at *1 (D.S.D. Oct. 23, 2012) (court may look behind dismissal to "make certain that the stipulation of dismissal was voluntary"). Given the Special Master's findings of Hagens Berman's bad faith and dishonesty—upheld by me in my March 9, 2015 Memorandum—I remain quite concerned with respect to whether Plaintiff has knowingly, voluntarily, and intelligently agreed to the dismissal of all her claims with prejudice. (Doc. Nos. 414, 482.) Accordingly, I will overrule this objection.

Plaintiff also argues, *inter alia*, that the instant dismissal does not raise a conflict of interest because, unlike the proposed dismissals of 28 Plaintiffs' claims against the GSK Defendants only, she is dismissing her claims against all Defendants. I will overrule this objection for the same reasons stated in my February 23, 2015 Order respecting the dismissals of Plaintiffs Annette Manning, Sharon Anderson, and Ted Mann. (See Doc. No. 472.)

AND NOW, this 10th day of March, 2015, I will overrule Plaintiff's objections and **ORDER** that my Special Master Appointment Order (Doc. No. 256) is **AMENDED** as follows:

1. Mr. Hangley shall issue a Report and Recommendation on whether Plaintiff Rebecca Alexander knowingly, voluntarily, and intelligently consented to dismissing with prejudice her claims against all Defendants; and
2. Any objections to the Report must be filed within 21 days after the Report is served. Any responses shall be filed within 14 days after any objections.

IT IS SO ORDERED.

/s/ Paul S. Diamond

Paul S. Diamond, J.

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

GLENDA JOHNSON, et al.,	:	
Plaintiffs,	:	
	:	
v.	:	**Civ. No. 11-5782**
	:	**and all related cases**
SMITHKLINE BEECHAM	:	
CORPORATION, et al.,	:	
Defendants.	:	

Diamond, J. **April 1, 2015**

MEMORANDUM

In this products liability action, Debra Johnson alleges that over 50 years ago, thalidomide—a morning sickness medication manufactured and distributed by Defendants—caused her to suffer severe birth defects. Because the governing one-year limitations period has long expired, I will grant summary judgment and dismiss Plaintiff's claims as time-barred.

I. PROCEDURAL BACKGROUND

Ms. Johnson is one of fifty-two Plaintiffs born in the late 1950s or early 1960s who have brought thalidomide actions in this Court. I have recently set forth the lengthy history of this litigation. See Johnson v. Smithkline Beecham Corp., No. 11-5782, 2015 WL 1004308 (E.D. Pa. Mar. 9, 2015); Johnson v. SmithKline Beecham Corp., __ F. Supp. 3d __, 2014 WL 5285943 (E.D. Pa. Oct. 16, 2014). Briefly, Ms. Johnson initiated the instant action on September 24, 2012 in the Philadelphia Common Pleas Court against GlaxoSmithKline LLC, GlaxoSmithKline Holdings, Inc., and Grünenthal GmbH. (Case No. 12-5455, Doc. No. 1.) Plaintiff alleged negligence, negligent design, fraud, negligent misrepresentation, concert of action, and civil conspiracy against all Defendants, and negligent hiring and *alter ego* liability against Grünenthal only. (Id.)

Invoking diversity jurisdiction, Defendants removed to this Court, where the case was assigned to Judge Yohn. Plaintiff (a Louisiana citizen) moved to remand, arguing that because the GSK Defendants' "nerve center" was in Pennsylvania, they could not remove the case under the "forum-defendant" rule. (Doc. No. 20); see 28 U.S.C. § 1441(b) ("A civil action otherwise removable solely on the basis of [diversity] jurisdiction . . . may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."); Hertz Corp. v. Friend, 559 U.S. 77, 93 (2010) (for diversity purposes, a corporation's citizenship is determined by the location of its "nerve center").

On October 15, 2012, Judge Yohn placed the case in suspense pending the Third Circuit's review of my determination in a companion thalidomide case that GSK's "nerve-center" was in Delaware. (Doc. No. 18.) After the Third Circuit upheld my ruling, Judge Yohn denied Plaintiff's remand motion. (Doc. No. 31); Johnson v. SmithKline Beecham Corp., 724 F.3d 337 (3d Cir. 2013).

On August 26, 2013, Defendants moved to dismiss Plaintiff's claims as time-barred under Pennsylvania and Louisiana law. (Doc. No. 36.) On September 9, Plaintiff filed the instant, Amended Complaint, in which she proceeds against only the GSK Defendants, alleging negligence, fraud, and negligent misrepresentation. (Am. Compl., Doc. No. 41.) Accordingly, on September 17, Judge Yohn denied Defendants' dismissal motion as moot. (Doc. No. 43.)

On September 24, all thalidomide cases filed in this Court (including the instant case) were consolidated before me for pretrial purposes. (Case No. 11-5782, Doc. No. 94.) Although the GSK Defendants did not move to dismiss the instant case, they did so in companion actions, arguing strenuously that because these Plaintiffs sustained their birth injuries half a century earlier, their claims were long time-barred. (Doc. Nos. 74, 86.) I denied their Motions because I

could not determine at the Rule 12 stage "the viability of Plaintiffs' equitable tolling arguments." (Doc. No. 92 ¶ 4.)

The Parties have now completed discovery in all but a few cases. As I have discussed, when it became apparent that Counsel for all Plaintiffs, Hagens Berman Sobol Shapiro LLP, was obstructing discovery, on June 17, 2014, I appointed William T. Hangley as Special Master. Johnson, 2014 WL 5285943, at *3-4. On December 4, 2014, Mr. Hangley found that Hagens Berman's bad faith and dishonesty in prosecuting the claims of three thalidomide Plaintiffs warranted the imposition of sanctions pursuant to 28 U.S.C. § 1927 and the Court's inherent authority. Johnson v. SmithKline Beecham Corp., No. 11-5782, 2014 WL 6851277 (E.D. Pa. Dec. 4, 2014) (Hangley, Special Master). On March 9, 2015, I overruled Hagens Berman's objections to Mr. Hangley's Report and Recommendation and agreed that sanctions should be imposed. Johnson, 2015 WL 1004308. Mr. Hangley is presently preparing a Report that will include his calculation of recommended sanctions.

The GSK Defendants filed the instant Motion for Summary Judgment on July 3, 2014. (Doc. No. 260.) Plaintiff responded, GSK replied, and Plaintiff submitted supplemental responses. (Doc. Nos. 283, 315, 367, 376.)

On October 28, 2014, the GSK Defendants informed me that "[a]ll [P]laintiffs currently represented by Hagens Berman—with the sole exception of Debra Johnson—will dismiss with prejudice all claims against the GSK [D]efendants" (leaving their claims against the other Defendants in litigation). (Doc. No. 394.) In exchange, the GSK Defendants agreed to withdraw their discovery requests and not to seek sanctions against Hagens Berman. (Id.) GSK and the firm formalized this agreement on November 14 in a joint Motion for Voluntary Dismissal. (Doc. No. 409.)

In light of my concerns as to whether these Plaintiffs had actually agreed to dismiss their claims against GSK (or whether Hagens Berman had prevailed upon them to agree so that the firm could avoid further sanctions), I ordered Mr. Hangley to determine "whether each of the twenty-eight Plaintiffs referenced in the November 14th Motion for Voluntary Dismissal knowingly, voluntarily, and intelligently consented to dismissing with prejudice his or her claims against the GSK Defendants—or any other Defendants." (Doc. No. 420 (internal citations omitted).) Those matters are pending before Mr. Hangley.

With respect to Ms. Johnson, however, GSK's summary judgment motion "remains pending . . . with both sides retaining all rights, including the right to appeal and the right to seek sanctions." (Doc. No. 394.) Accordingly, I now consider the GSK Defendants' summary judgment motion and all related submissions. (Doc. Nos. 260, 283, 315, 367, 376.)

II. FACTUAL BACKGROUND

I have resolved all disputed facts and made all reasonable inferences in Plaintiff's favor.

Plaintiff was born on February 23, 1959 on England Air Force Base in Alexandria, Louisiana. (Am. Compl. ¶ 16.) Her birth injuries are extensive and grievous. She has bilateral radial clubbed hands. (Id.) She is missing her right thumb. (Stephens Decl. ¶ 7, Doc. No. 283.) Although she has a left thumb, "there [is] no bony attachment to the rest of her hand." (Id.) Because she has no radius in her right arm, her right forearm is four inches long. (Am. Compl. ¶ 16.) She has a shortened left radius. (Stephens Decl. ¶ 7.) She has worn braces to straighten her arms, and has had multiple surgeries, including 1966 procedures to remove an inguinal hernia and to create "two thumbs out of her index fingers." (Id.; Am. Compl. ¶ 16.) She also has a "scoliotic curvature of the spine and pectus excavatum of the anterior chest." (Stephens Decl. ¶ 7.)

Although Plaintiff was "ashamed" of her birth defects, she never discussed her condition with her family, her friends, or any of her doctors. (Johnson Dep. at 66-71.) After overhearing her mother, Doris Williams, tell others that "this is how God made [Plaintiff]," "that became [Plaintiff's] answer to anyone" who would ask about her injuries. (Id. at 66.)

Since Plaintiff was a "young child," Ms. Williams believed she knew what had caused her daughter's birth defects. (Williams Dep. at 13-15, 19-24.) During her pregnancy, Ms. Williams's doctor prescribed her "experimental . . . pills . . . from Germany" to treat her morning sickness. (Id. at 22-24.) Because Ms. Williams had not taken these pills during her pregnancies with her three older children—who had no birth defects—she believed the "pills were responsible for [Plaintiff's] condition." (Id. at 13-15.) Ms. Williams became even "more confident" that the pills caused Plaintiff's injuries after the doctor who performed Plaintiff's corrective surgeries in the 1960s told Ms. Williams some time before 1968 that other women who "had taken pills from Germany" gave birth to children with similar injuries. (Id. at 29-30.) Ms. Williams and her husband (who died in 1978) never investigated further and took no legal action because they "usually don't sue people." (Id. at 20-21; Johnson Dep. at 34.)

On February 13, 2012, when Ms. Williams was eighty and Plaintiff was fifty-two, Ms. Williams first explained to Plaintiff what had caused her birth injuries. (Williams Dep. 11-12.) Plaintiff testified that she had not previously spoken with anyone about the cause of her injuries. (Johnson Dep. at 67-71.) After Ms. Williams told Plaintiff that she had taken a drug from Germany to treat her morning sickness, Ms. Williams apologized to Plaintiff, saying that "I believe it was the medicine that affected you." (Id. at 73-77.)

In the late 1970s, Plaintiff took her medical records from England Air Force Base (where she was born and underwent corrective surgeries), after she learned that those records would be

removed to "a cave somewhere" if she did not retrieve them. (Id. at 10-11.) Yet, she did not look at the records—in which her injuries were described as, *inter alia*, "congenital" (i.e., present at birth) and "bilateral"—until after she spoke with her mother in February 2012. (Id. at 85-93; Doc. No. 402, passim.) Upon reviewing the records, speaking with her son (a medical student at the time), and doing Internet research, Plaintiff initiated this action on September 24, 2012. (Johnson Dep. at 85-93.)

A mother herself, Plaintiff was aware before February 2012 that the ingestion of medicine during pregnancy can cause birth defects, but "never . . . thought about" whether such medicine might have caused her birth injuries. (Id. at 60-62.) Although Plaintiff feels "misled" by her parents regarding the cause of her injuries, she does not blame anyone for failing to bring suit sooner. (Id. at 82-83.)

III. STANDARDS

I may grant summary judgment "if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party must initially show the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). An issue is material only if it could affect the result of the suit under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). I "must view the facts in the light most favorable to the nonmoving party," and make every reasonable inference in that party's favor. Hugh v. Butler Cnty. Family YMCA, 418 F.3d 265, 267 (3d Cir. 2005). If I then determine that there is no genuine issue of material fact, summary judgment is appropriate. Celotex, 477 U.S. at 322.

Summary judgment is appropriate where the moving party shows that there is an absence of evidence to support the nonmoving party's case. Id. at 325. Where a moving party identifies

an absence of necessary evidence, the nonmoving party "must rebut the motion with facts in the record and cannot rest solely on assertions made in the pleadings, legal memoranda, or oral argument." Berckeley Inv. Grp., Ltd. v. Colkitt, 455 F.3d 195, 201 (3d Cir. 2006). I may consider only record evidence that would be admissible at trial. Celotex, 477 U.S. at 324; Gonzalez v. Sec'y of Dep't of Homeland Sec., 678 F.3d 254, 262 (3d Cir. 2012).

IV. DISCUSSION

At summary judgment I am obligated to credit Plaintiff's testimony that for over 50 years after her birth in 1959, she never inquired as to the cause of her injuries, nor discussed their possible cause with her parents, her doctors, or anyone else. It is nonetheless apparent that the record, no matter how favorably construed to Plaintiff, confirms that her claims are time-barred.

A. Relation-Back

For limitations purposes, I must deem Plaintiff's September 9, 2013 Amended Complaint as having been filed on September 24, 2012, when Plaintiff filed her Original Complaint. See Fed. R. Civ. P. 15(c)(1)(B) ("An amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out . . . in the original pleading."); Garvin v. City of Phila., 354 F.3d 215, 220 (3d Cir. 2003) ("If the amendment relates back to the date of the filing of the original complaint, the amended complaint is treated, for statute of limitations purposes, as if it had been filed at that time.").

B. Governing Law

The Parties agree that Louisiana's one-year statute of limitations applies here. (Doc. No. 260 at 15; Doc. No. 283 at 5.) I will nonetheless conduct a choice of law analysis.

Because Plaintiff's claims arose in Louisiana but were filed in Pennsylvania, the Pennsylvania borrowing statute applies. See Pac. Emp'rs Ins. Co. v. Global Reinsurance Corp. of Am., 693 F.3d 417, 432 (3d Cir. 2012) (court sitting in diversity applies the forum state's choice of law rules). That statute requires me to apply the "the law of the place where the claim accrued or . . . the law of [Pennsylvania], whichever first bars the claim." 42 Pa. Cons. Stat. § 5521(b). I must consider each state's statute of limitations and rules governing accrual and tolling. Frankentek Residential Sys., LLC v. Buerger, No. 12-767, 2014 WL 1623775, at *4 (E.D. Pa. Apr. 24, 2014).

Although Pennsylvania and Louisiana have analogous accrual and tolling doctrines, Louisiana's one-year limitations period would bar Plaintiff's claims before Pennsylvania's two-year period. Compare 42 Pa. Cons. Stat. § 5524(2), (7) (two-year statute of limitations), Wilson v. El-Daief, 964 A.2d 354, 361 (Pa. 2009) (claim accrues when injury is inflicted), and Fine v. Checcio, 870 A.2d 850, 858-61 (Pa. 2005) (describing Pennsylvania tolling doctrines), with La. Rev. Stat. Ann. § 3492 (one-year limitations period), Titus v. IHOP Rest., Inc., 25 So. 3d 761, 763 (La. 2009) (claim accrues on "the day of injury or when the damage is sustained"), and Marin v. Exxon Mobil Corp., 48 So. 3d 234, 245-53 (La. 2010) (describing Louisiana's tolling doctrines). Accordingly, I will apply Louisiana law. Frankentek, 2014 WL 1623775, at *4 ("Pennsylvania's limitations period applies . . . unless the foreign jurisdiction's laws, including laws on tolling and the date of accrual, bar the claim first.").

C. Accrual

Louisiana's one-year personal injury limitations clock begins to run on "the day of injury or when the damage is sustained." Titus, 25 So. 3d at 763 (citing La. Rev. Stat. Ann. § 3492). The state's minor tolling statute, which stops the limitations clock until the minor plaintiff

reaches eighteen, does not apply retroactively to revive claims, like Plaintiff's, that were time-barred before its enactment in 1992. Chance v. Am. Honda Motor Co., 635 So. 2d 177, 178-79 (La. 1994); see also Urland v. Merrell-Dow Pharms., Inc., 822 F.2d 1268, 1276 (3d Cir. 1987) (Pennsylvania's minor tolling statute, enacted in 1984, does not apply retroactively). Because Plaintiff sustained her injuries at birth, the statute began to run in 1959. Accordingly, the Louisiana statute of limitations bars Plaintiff's claims unless she can toll the limitations clock until September 24, 2011—one year before she initiated this lawsuit. See Specialized Loan Servicing, LLC v. January, 119 So. 3d 582, 585 (La. 2013).

D. Burden of Persuasion

Under Louisiana law, the statute of limitations is an affirmative defense that usually must be proven by its proponent with clear and convincing evidence or by an evidentiary preponderance. See Terrebonne Parish Sch. Bd. v. Mobil Oil Corp., 310 F.3d 870, 877 (5th Cir. 2002); Wells v. Zadeck, 89 So. 3d 1145, 1149 (La. 2012); Netherland v. Ethicon, Inc., 813 So. 2d 1254 (La. Ct. App. 2002). Louisiana courts have also held, however, that when it is evident from the face of a complaint that a claim is time-barred, it is the plaintiff's burden to prove the action is timely. See Wells, 89 So. 3d at 1149-50 (plaintiff's burden where his contract law claim, which was subject to a ten-year limitations period, was brought fifteen years after the claim accrued); Whitnell v. Menville, 540 So. 2d 304, 307-08 (La. 1989) (plaintiff's burden in medical malpractice action that was filed outside the applicable limitations period), cited with approval Campo v. Correa, 828 So. 2d 502, 509 n. 10 (La. 2002); see also Frank v. Shell Oil Co., 828 F. Supp. 2d 835, 842 (E.D. La. 2011) (plaintiff's burden where wrongful death claim was filed eight years after decedent's death).

Because it is evident from the face of the Amended Complaint that Plaintiff's claims are time-barred, she must prove that they are not. Even if I assume, however, that the GSK Defendants must prove with clear and convincing evidence that Plaintiff's claims are untimely, Defendants have met that burden.

E. Discovery Rule

Plaintiff contends that she first learned the cause of her injuries on February 13, 2012, and that neither she nor her mother had any reason to suspect before this date that thalidomide was the cause. Accordingly, she believes the "discovery rule" tolled the limitations clock until February 13, 2012—less than one year before she filed suit on September 24, 2012. See Davis v. Johnson, 36 So. 3d 439, 441-42 (La. Ct. App. 2011) (under Louisiana law, the limitations clock starts when a plaintiff, in the exercise of reasonable diligence, "discovers or should have discovered the facts upon which his cause of action is based" (citing Wimberly v. Gatch, 635 So. 2d 206, 211 (La. 1994)); Renfroe v. State ex rel. Dep't. of Transp. & Dev., 809 So. 2d 947, 953 (La. 2002) (in making this determination, "a plaintiff [is] deemed to know what he could by reasonable diligence have learned"). For the following reasons, I do not agree.

1. Imputation of Mother's Knowledge

Ms. Williams has long believed that the German morning sickness drug she took while pregnant with Plaintiff caused Plaintiff's birth defects. (Williams Dep. at 12-30.) The GSK Defendants argue that the discovery rule does not toll the Louisiana limitations clock because Ms. Williams's knowledge is imputed to Plaintiff. (Doc. No. 260 at 16-17; Doc. No. 315 at 2-5.) Plaintiff disagrees, contending that in determining whether the limitations period is tolled, I should consider only whether Plaintiff—not her mother—knew or reasonably should have known thalidomide caused her birth injuries. (Doc. No. 283 at 9.)

Plaintiff is incorrect. As the GSK Defendants observe, Plaintiff effectively asks me to apply the Louisiana minor tolling statute retroactively to 1959. (Doc. No. 315 at 2-5.) Once again, Louisiana law does not permit retroactive application. See Chance, 635 So. 2d at 178-79; Urland, 822 F.2d at 1276 (same under Pennsylvania law).

Minor tolling statutes preclude the imputation of a parent's knowledge to his or her minor child for limitations purposes. Upon application of such a statute, the governing limitations period is tolled until the plaintiff reaches the age of majority and can then decide whether to bring suit. Not surprisingly, Plaintiff bases her non-imputation argument entirely on decisions in which a minor tolling statute applied. See Duncan v. Leeds, 742 F.2d 989, 991-93 (6th Cir. 1984); Squires ex rel. Squires v. Goodwin, 829 F. Supp. 2d 1041, 1058 (D. Colo. 2011); Tanaka v. First Hawaiian Bank, 104 F. Supp. 2d 1243, 1247 & n.1 (D. Haw. 2000); Ohler v. Tacoma Gen. Hosp., 598 P.2d 1358, 1360-61 (Wash. 1979) (en banc), superseded by statute on other ground as recognized in Sahlie v. Johns-Manville Sales Corp., 663 P.2d 473, 475 (Wash. 1983). Because Louisiana's minor tolling statute does not apply here, however, these decisions are inapposite.

Absent retroactive application of Louisiana's minor tolling statute, Ms. Williams's knowledge is imputed to Plaintiff. See Griffin v. Kinberger, 507 So. 2d 821, 823-24 (La. 1987) (limitations clock started when plaintiff's mother read a newspaper article suggesting defendants caused plaintiff's birth defects); Sharkey v. Sterling Drug, Inc., 600 So. 2d 701, 713-715 (La. Ct. App. 1992) (whether discovery rule tolls the limitations clock turns on grandparents' knowledge respecting their grandchild's illness). Accordingly, I must determine whether that knowledge was sufficient to start the running of Louisiana's one-year limitations clock.

As I have discussed, once a plaintiff "discovers or should have discovered the facts upon which his cause of action is based," the limitations clock begins to run. Davis, 36 So. 3d at 441-42. "A plaintiff is deemed to know what he could have learned by *reasonable diligence*." Renfroe, 809 So. 2d 947 at 953 (emphasis added); see also Chevron USA, Inc. v. Aker Mar., Inc., 604 F.3d 888, 894 (5th Cir. 2010) ("[W]hen a plaintiff suspects something is wrong, he must seek out those whom he believes may be responsible for the specific injury."). Under Pennsylvania and Louisiana law, the exercise of reasonable diligence "may require one to seek further medical examination as well as competent legal representation." Cochran v. GAF Corp., 666 A.2d 245, 249 (Pa. 1995); see also Marin, 48 So. 3d at 251 (no tolling where plaintiffs would have learned about their cause of action within the limitations period had they, *inter alia*, "hired an expert" sooner); Touchet v. Baker Hughes Inc., 737 So. 2d 821, 825 (La. Ct. App. 1999) (where information "is available to plaintiff through inquiry or professional medical or legal advice, . . . the facts and cause of action are reasonably knowable") (citations omitted).

Ms. Williams herself refutes Plaintiff's allegation that her mother did not have any reason to suspect that thalidomide caused Plaintiff's birth injuries. As I have discussed, Ms. Williams testified that since her daughter was a "young child," she suspected that "experimental . . . pills . . . from Germany" caused her daughter's birth injuries. (Williams Dep. at 13-15, 22-24). Her suspicions were confirmed by her daughter's doctor, who told Ms. Williams in the 1960s that other women who "had taken pills from Germany" gave birth to children who had injuries similar to Plaintiff's. (Id. at 29-30.)

At the very least, these suspicions obligated Ms. Williams to exercise reasonable diligence in ascertaining the cause of her daughter's injuries. See Chevron, 604 F.3d at 894 ("[W]hen a plaintiff suspects something is wrong, he must seek out those whom he believes may

be responsible for the specific injury."). Plaintiff testified that once her mother told her that German morning sickness medicine likely caused her birth defects, it took her weeks to determine that the medicine was thalidomide and several months bring this lawsuit. (Johnson Dep. at 72-90.) The record well demonstrates that, given the widespread knowledge concerning thalidomide and birth defects, even a cursory investigation by Ms. Williams would similarly have revealed that the "experimental" German medicine prescribed to treat her morning sickness was thalidomide. (Doc. No. 260, Exs. 2-10, 14-16.) A lawyer would have advised Ms. Williams as to potential avenues of relief. Ms. Williams and her husband chose not to take any further action, however, because they "usually don't sue people." (Id. at 20-21.) As I observed in Mr. Andre's case, "[t]his is no diligence at all, especially compared with that demonstrated by the numerous plaintiffs who brought thalidomide personal injury actions against Defendants decades before" September 24, 2011. See Johnson, 2014 WL 5285943, at *10.

2. Plaintiff's Failure to Exercise Reasonable Diligence

Even if I do not impute Ms. Williams' knowledge to her daughter, Plaintiff's claims remain time-barred. As I have discussed, Plaintiff undertook some investigation in the late 1970s when she retrieved her medical files—which include her birth records—from England Air Force Base. Yet, she did not look at those records for over 30 years—until 2012. Had she done so earlier, she would have discovered her injuries were "congenital" and "bilateral"—conditions that Plaintiff's expert witness opines have long been associated with thalidomide exposure. See Johnson, 2014 WL 5285943, at *7; Stephens Decl. ¶ 13. Moreover, she did not even attempt to learn the cause of her injuries: she did not speak with family members, friends, doctors, nurses, lawyers, or anyone else about her condition. She testified that as a mother herself, she knew birth defects could result from a mother's ingestion of drugs during pregnancy, yet she never

investigated whether this might have caused her injuries. Once again, even a cursory inquiry would have provided Plaintiff with abundant information concerning the connection between thalidomide and her birth defects. (Doc. No. 260, Exs. 2-10, 14-16.) According to Plaintiff, however, only after her mother's February 13, 2012 disclosure did she inquire as to the cause of her injuries. Because that diligence came decades too late, it did not toll Louisiana's limitations clock from 1959 until September 24, 2011. See Renfroe, 809 So. 2d at 953 (the discovery rule does not toll the limitations clock if a plaintiff's "ignorance is attributable to [her] own . . . neglect" (citations omitted)).

3. Plaintiff's Expert

Plaintiff also argues that the limitations clock was tolled for some five decades because before September 24, 2011, "medical expert testimony did not exist . . . to support her claim that thalidomide caused her particular injuries." (Doc. No. 283 at 32.) In support, she offers the expert affidavit of Trent Stephens, Ph.D., who examined her on an undisclosed date. (Stephens Decl. ¶ 8.) I have previously ruled that even if Dr. Stephens's opinion passed muster under Daubert (which it may well not), it is nevertheless inadmissible, contradictory, and otherwise incompetent. See Johnson, 2014 WL 5285943, at *9; cf. Johnson, 2014 WL 6851277, at *12-13, approved and adopted, 2015 WL 1004308 (Mr. Hangley's rejection of Dr. Stephens's testimony). For the following reasons, Dr. Stephens's declaration and the arguments Plaintiff bases on the declaration are deficient.

The Limitations Clock is not Adequately Tolled

Dr. Stephens avers that Plaintiff could not have brought suit until September 4, 2011 because, before that date, she could not have found an expert to testify that thalidomide caused her birth defects. (Stephens Decl. ¶ 16.) To preserve her claims, however, the Louisiana

limitations clock must have been tolled until *September 24, 2011*—one year before she filed her Original Complaint. Dr. Stephens does not address whether Plaintiff could have brought suit before that date. If the one-year limitations clock had started to run on September 4, 2011 (when Dr. Stephens suggested Plaintiff could have found an expert), Plaintiff's claims would nonetheless have been untimely when she filed them more than one year later, on September 24, 2012.

The Expert Opinion is Contradictory and Refuted by Undisputed Record Evidence

Although Dr. Stephens opines that expert testimony would not have been available to Plaintiff before September 2011, he also avers that medical science has for decades associated Plaintiff's arm and hand injuries, scoliosis, and inguinal hernia with thalidomide exposure:

- "Thenar hypoplasia/aplasia and radial hypoplasia are common defects seen with thalidomide," citing a 1962 study;
- "Scoliosis was among the first defects identified as being associated with thalidomide embryopathy," citing another 1962 study; and
- "Ignuinal hernia [is] one of many congenital defects associated with thalidomide exposure," citing a 1992 study.

(Stephens Decl. ¶¶ 11-13, 16.) In thus contradicting himself, Dr. Stephens confirms that medical knowledge has undergone no recent change respecting the connection between thalidomide and the birth defects from which Plaintiff suffers. As I observed in Mr. Andre's case, "[i]t thus appears that Dr. Stephens himself acknowledges that any sea change in medical thought on thalidomide occurred some 45 years [ago]." Johnson, 2014 WL 5285943, at *9 (internal quotation marks omitted).

The long-known causal relationship between thalidomide exposure and Plaintiff's birth injuries is further confirmed by overwhelming record evidence that since the early 1960s the

American public has known that thalidomide causes serious birth defects. (See Doc. No. 260, Exs. 2-10, 14-16); see also Johnson, 2014 WL 5285943, at *9.

In these circumstances, Dr. Stephens's "expert" opinion is insufficient to defeat summary judgment. See Elec. Ins. Co. v. Estate of Marcantonis, 755 F. Supp. 2d 632, 636 (D.N.J. 2010) (expert witness report unsupported by the record was insufficient to defeat summary judgment); Stein v. Foamex Int'l, Inc., No. 00-2356, 2001 WL 936566, at *7-8 (E.D. Pa. Aug. 15, 2001) (striking from the summary judgment record an expert witness's affidavit that contradicted his expert report and deposition testimony); cf. ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 290 (3d Cir. 2012) ("When an expert opinion is not supported by sufficient facts . . . , or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict." (quoting Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242 (1993))).

In sum, the record refutes Plaintiff's contention that the discovery rule tolled the limitations clock for over 50 years.

F. Fraudulent Concealment

Plaintiff pled that the GSK Defendants fraudulently concealed both the extent of thalidomide's distribution in the United States and its dangerousness. (Am. Compl. ¶¶ 4, 8-10, 132(1-8).) Purportedly relying on those misrepresentations—whose falsity "was recently uncovered due to extraordinary investigative efforts"—Plaintiff refrained from suing Defendants. (Id. ¶ 15.) Plaintiff argues that this detrimental reliance tolled Louisiana's one-year limitations clock until at least September 24, 2011. (Doc. No. 283 at 39-42.) Yet, the record—including Plaintiff's own testimony—refutes these allegations.

The Fraudulent Concealment Doctrine

The limitations clock is tolled where "(1) the defendant engages in conduct which rises to the level of concealment, misrepresentation, fraud or ill practice, . . . (2) the defendant's actions effectually prevented the plaintiff from pursuing a cause of action, . . . and (3) the plaintiff [was] reasonable in his or her inaction." Marin, 48 So. 3d at 252.

As Defendants have shown, Plaintiff has not identified a single misrepresentation on which she relied to her detriment. On the contrary, she explicitly denied that Defendants misled her:

> [GSK Counsel]: Is there anyone [other than your parents] who you feel has misled you in causing you not to file your lawsuit until 2012?
> [Plaintiff]: No.

(Johnson Dep. 83.) This is not surprising: she also testified that until she filed suit in September 2012, she did not know of—and thus could not have relied upon—any of Defendants' purported misrepresentations respecting the distribution and dangerousness of thalidomide. (Id. at 85.) Indeed, she testified that it is not anyone's fault she did not bring suit sooner. (Id. at 82-83.)

Because Plaintiff's failure to proceed for over five decades had nothing to do with the GSK Defendants' purported misrepresentations, the fraudulent concealment doctrine does not toll the limitations clock.

Changing Louisiana Law

Like Mr. Andre, Plaintiff urges a theory of fraudulent concealment that has scant legal support, no evidentiary support, and would not revive her time-barred claims. (Doc. No. 283 at 39-42); see Johnson, 2014 WL 5285943, at *11-12. Although Plaintiff acknowledges that Louisiana law applies, she cites only Pennsylvania case law in support of this dubious argument. (Doc. No. 283 at 5, 39-42.)

I am obligated to apply substantive state law, not change it. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). Louisiana and Pennsylvania courts have uniformly held that the fraudulent concealment doctrine applies only if the defendant communicates its misrepresentations directly to the plaintiff. See, e.g., Nathan v. Carter, 372 So. 2d 560, 563 (La. 1979) (fraudulent concealment where "defendants threatened [plaintiff] with termination of her compensation benefits if she ever contacted an attorney"); Doskey v. Hebert, 645 So. 2d 674, 680 (La. Ct. App. 1994) (fraudulent concealment where defendant "repeatedly assured" plaintiffs that their termite problem was "nothing to be concerned about"); Baselice v. Franciscan Friars Assumption BVM Province, Inc., 879 A.2d 270, 278-79 (Pa. Super. Ct. 2005) (no fraudulent concealment based on "general and systematic conduct exhibited by the Archdiocese with regard to its offending priests"). Accordingly, federal courts applying Louisiana and Pennsylvania law have held the same. See, e.g., Cross v. Alpha Therapeutic Corp., No. 94-382, 2000 WL 1140491, at *5 (E.D. La. Aug. 11, 2000) (no fraudulent concealment because defendant did not "definitely" and "directly" communicate its misrepresentations to plaintiff); see also Mest v. Cabot Corp., 449 F.3d 502, 517 (3d Cir. 2006) (no fraudulent concealment under Pennsylvania law in the absence of communications between the parties); Ciccarelli v. Carey Canadian Mines, Ltd., 757 F.2d 548, 556-57 (3d Cir. 1985) (no fraudulent concealment where plaintiffs produced evidence of only "an industry-wide conspiracy to conceal the hazards of asbestos exposure"); Speicher v. Dalkon Shield Claimants Trust., 943 F. Supp. 554, 558-59 (E.D. Pa. 1996) (same).

Plaintiff concedes that the GSK Defendants never communicated their misrepresentations directly to her. (Doc. No. 283 at 39-42.) She nonetheless argues that the doctrine should apply if she relied on any of Defendants' misrepresentations that reached her indirectly. Even though state courts have never so held, I am prepared, as I was in Mr. Andre's case, to assume here that

Plaintiff's detrimental reliance on Defendants' indirect representations respecting thalidomide would toll the limitations clock. See Johnson, 2014 WL 5285943, at *11-12. Yet even this unprecedented alteration of the fraudulent concealment doctrine would not save her claims. The allegations in her Complaint notwithstanding, there is no record evidence that she refrained from investigating her injuries or from suing Defendants because of their purported misrepresentations, whether direct or indirect. See Marin, 48 So. 3d at 252 (defendant's action must, *inter alia*, "effectually prevent[ ] the plaintiff from pursuing a cause of action"). Indeed, as I have discussed, she testified that she was unaware of *any* misrepresentations made by Defendants. (Johnson Dep. at 85.) Once again, she also testified that she did not blame anyone for her failure to investigate or commence litigation sooner. (Id. at 82-83.)

During the October 1, 2014 sanctions hearing before Mr. Hangley, Hagens Berman vigorously denied Defendants' suggestion that the firm did not speak with its clients before filing suit on their behalf. (Doc. No. 383 at 105, 107.) If Hagens Berman spoke with Plaintiff before initiating the instant suit, however, I am at a loss to understand how, consistent with the Code of Professional Conduct, the firm could have included allegations of fraudulent concealment in her Complaint. See Pa. R. Prof'l. Cond. 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."). In any event, because the record does not make out Defendants' fraudulent concealment under any formulation of the doctrine, Plaintiff's claims remain time-barred.

G. Causation

Defendants persuasively argue that Plaintiff has produced no admissible evidence showing that her mother ingested thalidomide provided by SmithKline Beecham. (Doc. No. 260

at 24-33.) In light of my determination that Plaintiff's claims are time-barred, however, I need not address this argument.

H. Additional Discovery

Like Mr. Andre, Plaintiff asks me to defer ruling on summary judgment until she can take further discovery respecting thalidomide's domestic distribution. (Doc. No. 283 at 47-49; Doc. No. 367); Fed. R. Civ. P. 56(d). This additional discovery (once again) "has nothing to do" with Plaintiff's equitable tolling contentions. See Johnson, 2014 WL 5285943, at *13. Assuming, *arguendo*, thalidomide was "somehow more or less available domestically," it would not alter her mother's long-held belief that "experimental . . . pills . . . from Germany" caused her birth injuries; it would not cure Plaintiff's lack of diligence; it would not create "misrepresentations" from Defendants that Plaintiff relied upon to her detriment. Id. Accordingly, I will deny Plaintiff's request.

V. CONCLUSION

Because Defendants have demonstrated with clear and convincing evidence that Plaintiff's claims are time-barred, I will dismiss her Complaint. An appropriate Order entering Judgment on all claims in favor of Defendants and against Plaintiff follows.

/s/ Paul S. Diamond

April 1, 2015 Paul S. Diamond, J.

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

GLENDA JOHNSON, et al.,	:	
Plaintiffs,	:	
	:	
v.	:	**Civ. No. 11-5782**
	:	**and all related cases**
SMITHKLINE BEECHAM	:	
CORPORATION, et al.,	:	
Defendants.	:	

JUDGMENT

AND NOW, this 1st day of April, 2015, upon consideration of Defendants' Motion for Summary Judgment (Doc. No. 260), Plaintiff's Response (Doc. No. 283), and all related filings, it is hereby **ORDERED** that Defendants' Motion is **GRANTED** for the reasons stated in today's Memorandum Opinion. Plaintiff Debra Johnson's action is **DISMISSED** with prejudice, and **JUDGMENT** is hereby entered as to all Plaintiff's claims in favor of Defendants and against Plaintiff.

AND IT IS SO ORDERED.

/s/ Paul S. Diamond

Paul S. Diamond, J.

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

GLENDA JOHNSON ET AL., Plaintiffs, v. SMITHKLINE BEECHAM CORPORATION ET AL., Defendants.	Case No. 2:11-cv-05782-PD and all related cases

ORDER OF THE SPECIAL DISCOVERY MASTER

On or before May 19, 2015, Hagens Berman shall submit a proposed schedule for phone interviews with all Plaintiffs that are parties to the October 28th, 2014 Agreement (Doc. Nos. 394, 420), Plaintiffs Annette Manning, Sharon Anderson, and Ted Mann (Doc. Nos. 440, 472), and Plaintiff Rebecca Alexander (Doc. Nos. 468, 485) to determine whether each Plaintiff knowingly, voluntarily, and intelligently consented to the dismissal of his or her claims against the GSK Defendants. Absent extenuating circumstances, all proposed interviews will take place on or before June 30, 2015.

May 6, 2015

WILLIAM T. HANGLEY
SPECIAL DISCOVERY MASTER

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HAGENS BERMAN

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May 8, 2015

Via E-Mail

William T. Hangley, Esquire
Hangley Aronchick Segal Pudlin & Schiller
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933

Re: *Johnson, et al. v. SmithKline Beecham, LLC, et al.*,
Case No. 2:11-cv-05782-PD and all related cases

Dear Special Master Hangley:

Plaintiffs' counsel seek a stay of your order dated May 6, 2015, or at a minimum, clarification of the order's terms, including a limitation on the questions to be asked to avoid violating the attorney-client privilege.

First, as we have made clear in numerous previous submissions to you and Judge Diamond, and at the May 5 hearing, we continue to object to these interviews, for which there is no jurisdiction, no factual or legal basis for the inquiry, and no precedent of any sort. We will be objecting to Judge Diamond, and seeking interlocutory review or petitioning for a writ of mandamus, if necessary. We respectfully request that you stay your May 6 order pending resolution of those objections and possible appeals.

Second, in the event you do not stay your May 6 order, we request clarification of that order on several points. In the telephonic hearing of May 5, you outlined the following procedures:

- Counsel for all parties will be allowed to listen on these phone calls.
- While you may at some point specify general areas of questions, you have not specified when you will, and you do not intend to limit yourself to particular questions.

- You recognize that your questions may implicate the attorney-client privilege, and you will allow objections on that basis, but you will follow one of three options in response to such an objection: (1) order the plaintiff to answer the question anyway, (2) contact Judge Diamond for a resolution of the objection, or (3) hold the interview in abeyance pending resolution of the objection (we presume, again, by Judge Diamond).

Although it was not specified at the May 5 hearing, we presume that these interviews will be transcribed by a court reporter.

We would appreciate a confirmation of our understanding of these terms of the interviews and clarification as to who you believe should be responsible for arranging the court reporter.

Third, if you are not staying this process, we respectfully submit that your apparent refusal to limit your questions is entirely unreasonable and unnecessary to discover what you have been tasked with determining: whether the plaintiffs knowingly agreed to dismiss their claims. There are questions that you could ask which would not invade the privilege but would still allow you to issue a report and recommendation. For those subject to the dismissals solely against GSK, the following questions (and limited questions to clarify any confusing responses) could be asked without invading the privilege:

- Did the plaintiff receive a copy of your order dated December 23, 2014?

- Does the plaintiff understand that under the terms of the deal discussed in that order that once the claims are dismissed against GSK, they cannot be brought again?

- Does the plaintiff understand that under the terms of the deal discussed in the order that she will not receive any money from GSK for agreeing to dismiss her claims?

- Does the plaintiff understand that under the terms of the deal discussed in the order that GSK has agreed not to seek monetary sanctions from Hagens Berman or the plaintiffs, and that the sanctions requests and motions filed to date seek sanctions only from Hagens Berman?

- Does the plaintiff understand that under the terms of the deal discussed in the order that their claims against the other defendants have not been dismissed?

- Did the plaintiff, given the understandings above, consent to dismissal of her claims against GSK?

Any further questions may invade the attorney-client privilege, but would also be completely and entirely unnecessary to determine whether the plaintiffs were informed of the terms and agreed to them.

The questions would need to be slightly different for the three plaintiffs (Mann, Manning, and Anderson) who were not part of the GSK agreement but dismissed all of their claims pursuant to the claim-review process you ordered, and the additional plaintiff (Alexander) who was part of the GSK dismissal but also directed us to dismiss her claims. The following questions would not invade the privilege for these individuals, but are more than sufficient to prepare the report and recommendation you have been directed to provide:

- Did you agree to dismiss your claims against all defendants following consultation with your attorneys?

- Are you aware that as a result of that dismissal, you will not receive any compensation?

- Are you are aware that as a result of that dismissal, you will not be able to bring your claims against those defendants again?

Again, we request that you stay your May 6 order, pending resolution of our objections to Judge Diamond, as well as any review required of Judge Diamond's ruling on those objections. Absent such a stay, we request that you clarify the terms of the order, and also limit yourself to questions that will not invade the attorney-client privilege, but are more than sufficient to issue your report and recommendation.

Sincerely,

HAGENS BERMAN SOBOL SHAPIRO LLP

/s/ Nick Styant-Browne

Nick Styant-Browne

cc: All parties (via email)

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

GLENDA JOHNSON ET AL., Plaintiffs, v. SMITHKLINE BEECHAM CORPORATION ET AL., Defendants.	Case No. 2:11-cv-05782-PD and all related cases

ORDER OF THE SPECIAL DISCOVERY MASTER

Treating the May 8, 2015 letter of Mr. Styant-Browne, one of counsel for Plaintiffs, as a motion for stay of the Special Discovery Master's Order of May 6, 2015, that motion is DENIED.

To accommodate Mr. Styant-Browne's stated intention to seek intervention by the District Court, interlocutory review or mandamus, his letter will be placed in the record.

May 8, 2015

WILLIAM T. HANGLEY
SPECIAL DISCOVERY MASTER

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

GLENDA JOHNSON ET AL., Plaintiffs, v. SMITHKLINE BEECHAM CORPORATION ET AL., Defendants.	Case No. 2:11-cv-05782-PD and all related cases

PROCEDURAL MEMORANDUM OF THE SPECIAL DISCOVERY MASTER

I have today denied the request for a stay of my Order of May 6, 2015 and, as promised, am setting down some general ground rules for the interviews with plaintiffs that are being scheduled.

1. **General Format:** The proceedings will be transcribed. They will be conducted by telephone unless that procedure turns out to be unworkable. If it does, we may have to resort to in-person proceedings. The plaintiffs will be placed under oath. I will question each plaintiff, following which each party's counsel, beginning with plaintiffs' counsel, will be given the opportunity to ask such further questions as they deem appropriate. My hope is that the typical plaintiff's examination can be completed in 15 minutes or less, but that will require the cooperation of all counsel.

2. **Questions and Objections:** Any counsel, or the testifying plaintiffs themselves, may object to my questions or those of other counsel. I expect to rule on those objections but, in my discretion, I may ask Judge Diamond to consider an objection if that can be accomplished without undue delay in the process. I do not view this as a typical adversarial proceeding, since

the inquiry is generated by the Court's concerns, and I have not been made aware of any disagreement or issues between or among the parties respecting the questions of voluntariness and informedness that will be before me. Accordingly, questions asked by counsel should not be leading unless the circumstances make this appropriate in a particular instance.

3. **Scope and Topics:** I intend to learn from the testifying plaintiffs the following:

   a. Their understanding of their claims.

   b. Their understanding of the consequences of dropping the claims.

   c. The facts and circumstances that they, the plaintiffs, took into account in deciding to drop their claims.

I am grateful to Mr. Styant-Browne for the suggested questions that he submitted in his letter of May 8, 2015; they will be useful for me in this process. If other counsel have suggestions for additional or substituted questions, they are encouraged to submit them for my attention.

I caution all counsel that this is a limited-purpose proceeding. Accordingly, I will not permit questioning on topics removed from this scope.

4. **Protecting Privilege:** It is important that the testifying plaintiff's attorney-client privilege and the attorney opinion work product protection not be invaded. I will advise each of the testifying plaintiffs that I do not want to know – and she must not tell me – what her attorney said to her, but that I am interested in learning the facts she knows (regardless of where or how she learned those facts), her own appreciation of her claims, and her reasons for deciding to drop those claims. I hope the Hagens Berman attorneys will communicate with their clients to explain these subtle distinctions in advance of the clients' testimony. I will also instruct the testifying plaintiffs that if one of the lawyers objects to a question – including a question that I ask – the witness should not answer the question until the objection has been ruled upon. Similarly, I will

instruct each testifying plaintiff that if I say "stop" she must stop, even if she is in the middle of her answer to a question, and that my rudeness will be the product of a sincere desire not to impinge on privileged matters.

May 8, 2015

WILLIAM T. HANGLEY
SPECIAL DISCOVERY MASTER

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

GLENDA JOHNSON, *et al.*, Plaintiffs, v. SMITHKLINE BEECHAM CORPORATION, *et al.*, Defendants.	Case No. 2:11-cv-05782-PD AND ALL RELATED CASES

OBJECTIONS OF PLAINTIFFS' COUNSEL TO MAY 6, 2015, AND MAY 8, 2015, ORDERS OF THE SPECIAL MASTER REGARDING TELEPHONIC INTERVIEWS WITH CERTAIN PLAINTIFFS

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Hagens Berman hereby objects to the Special Master's Orders dated May 6, 2015, and May 8, 2015 (Dkt. Nos. 498 and 501). In the May 6 order, the Special Master ordered that Hagens Berman propose, no later than May 19, 2015, dates and times to interview 31 plaintiffs by the end of June, with regard to whether those plaintiffs "knowingly, voluntarily, and intelligently consented" to various Rule 41 dismissals that the Court has refused to recognize pending an investigation from the Special Master. The May 8 order makes clear that the interrogations will have the following features:

- Counsel for all parties will be allowed to participate in these phone calls and ask questions of the plaintiffs.
- The Special Master will be interrogating the plaintiffs on the following:
    - Their understandings of their claims.
    - Their understanding of the consequences of dropping their claims.
    - The facts and circumstances that they, the plaintiffs, took into account in deciding to drop their claims.
- Objections will be resolved by the Special Master, but may in some instances be referred to the Court for resolution of the objection.

Dkt. No. 501.

The Special Master ordered further that Hagens Berman propose a schedule for all of the plaintiffs by May 19, 2015, and that all of the interviews be completed by June 30, absent unique circumstances. He has refused to stay this process pending resolution of objections, and any appellate work. Dkt. No. 500.

Hagens Berman strenuously objects to the ordered interviews. The Special Master has not provided any legal or factual basis for the interrogations. And as explained previously and again below, there is no legal basis for such an inquiry into a voluntary dismissal under Rule 41, and especially in the case of a stipulated dismissal. There is also no factual basis for this inquiry.

As to four plaintiffs (Alexander, Anderson, Mann, and Manning), the inquiry is based on pure speculation, and as to the 28 plaintiffs who are parties to the GSK agreement, it is undisputed among the parties to this litigation that there is no conflict that could serve as a basis for the interviews. Moreover, the interviews will include inquiries protected by the attorney-client privilege and the work-product doctrine, and without adequate protections, even though questions into those areas are unnecessary.

We ask that the Court rule on these objections expeditiously. The Special Master has refused to stay his Orders. Hagens Berman will petition for a writ of mandamus from the Third Circuit if these objections are overruled or if there is no ruling within a week of these objections.

I. ARGUMENT

A. There is no Legal Basis for Conducting this Inquiry.

As stated in Plaintiffs' original objections to the Court's referral order (Dkt. No. 400), and in our December 11, 2014 letter (Dkt. No. 425), and our letters regarding the Alexander, Anderson, Mann, and Manning dismissals (Dkt Nos. 451 and 480), neither this Court nor the Special Master has jurisdiction to inquire whether certain Plaintiffs have knowingly, intelligently, and voluntarily agreed to dismiss their claims. As the Third Circuit has explained, "'In what can be termed "ordinary litigation," that is, lawsuits brought by one private party against another private party that will not affect the rights of any other persons, settlement of the dispute is solely in the hands of the parties. If the parties can agree to terms, they are free to settle the litigation at any time, and the court need not and should not get involved.'" *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 835 (3d Cir. 1995) (citation omitted).

And there is no basis to impose any "terms and conditions" under FED. R. CIV. P. 41. First, the claims of plaintiff Rebecca Alexander were dismissed under Rule 41(a)(1)(A)(ii), so

that the Court has no power to impose any terms or conditions on the dismissal, and indeed ceased possessing any jurisdiction in that case once the stipulation was filed.[1]

Second, for all the other Plaintiffs at issue, Rule 41(b)(2) does not contemplate or allow for the type and manner of inquiry called for by the Special Master's May 6 Order. As the Third Circuit explained in *Hayden v. Westfield Ins. Co.*, 586 F. App'x. 835, 842 (3d Cir. 2014), "'Rule 41 motions should be allowed unless [the] defendant will suffer some prejudice other than the mere prospect of a second lawsuit.' *In re Paoli R.R. Yard P.C.B. Litig.*, 916 F.2d at 863 (internal quotation marks omitted)." Here, GSK does not seek any protection from the Court but instead has agreed to the terms and conditions of the dismissals at issue. And none of the other Defendants have objected, despite having had since November 2014 to make any objections known.

The rule has long been that a court's ***sole*** role in approving dismissal by a plaintiff is to protect the defendant. In *Ex parte Skinner & Eddy Corp.*, 265 U.S. 86, 93 (1924), the Supreme Court stated:

> "It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice, on payment of costs, was of course except in certain cases. *Chicago & A.R. Co. v. Union Rolling-Mill Co.*, 109 U.S. 702. The exception was where a dismissal of the bill would prejudice the defendants in some other way than by the mere

[1] The right to dismiss a case via stipulation is an "unconditional right," and a "court has no authority to disapprove or place conditions on any such dismissal." *Republic of the Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 81 n.21 (3d Cir. 1994). *See also In re Bath & Kitchen Fixtures Antitrust Litig.*, 535 F.3d 161, 165 (3d Cir. 2008) ("[A] filing under the Rule is a notice, not a motion. Its effect is automatic: the defendant does not file a response, and no order of the district court is needed to end the action."); *First Nat'l Bank v. Marine City, Inc.*, 411 F.2d 674, 677 (3d Cir. 1969) (quoting 2B Barron Holtzoff, *Federal Rules Practice and Procedure*, § 911 ("[t]he entry of such a stipulation of dismissal is effective automatically and does not require judicial approval")); *Kabbaj v. Am. Sch. of Tangier*, 445 F. App'x 541, 544 (3d Cir. 2011) (a stipulated Rule 41 dismissal "is automatic; it does not require judicial approval").

> prospect of being harassed and vexed by future litigation of the same kind."[2]

Consistent with that standard, the Courts of Appeals agree with the Third Circuit that the purpose of imposing "terms and conditions" under Rule 41(a)(2) is ***solely*** to protect the defendant.[3]

The cases cited by the Court in its referral orders to the Special Master do not support an inquiry into whether Plaintiffs knowingly, intelligently, and voluntarily agreed to dismiss their claims. In *Kabbaj v. Am. Sch. of Tanger*, 445 F. App'x at 544, the Third Circuit held that a joint

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[2] Quoting *City of Detroit v. Detroit City Ry. Co.*, 55 F. 569, 572 (1893).

[3] *Cabrera v. Esso Std. Oil Co. P.R.*, 723 F.3d 82, 88 (1st Cir. 2013) ("Voluntary dismissal under Rule 41(a)(2) is conditioned on court permission 'to protect the nonmovant from unfair treatment.'") (citation omitted); *Versa Prods. v. Home Depot, USA, Inc.*, 387 F.3d 1325, 1327 (11th Cir. 2004) ("'The basic purpose of Rule 41(a)(2) is to freely permit the plaintiff, with court approval, to voluntarily dismiss an action so long as no other party will be prejudiced.'") (citation omitted); *Ellett Bros. v. United States Fid. & Guar. Co.*, 275 F.3d 384, 388 (4th Cir. 2001) ("A plaintiff's motion to voluntarily dismiss a claim should not be denied absent plain legal prejudice to the defendant...."); *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998) (Rule 41(a)(2) "allows the court to grant a plaintiff's dismissal motion only with appropriate terms and conditions to protect the defendant from prejudice"); *Bridgeport Music, Inc. v. Universal-MCA Music Publ'g, Inc.*, 583 F.3d 948, 953 (6th Cir. 2009) ("the purpose of Rule 41(a)(2) is to protect the nonmovant, here the defendants, from unfair treatment"); *Am. Nat'l Bank & Trust Co. v. Bic Corp.*, 931 F.2d 1411, 1412 (10th Cir. 1991) ("Conditions [under Rule 41(a)(2)] are designed to alleviate any prejudice a defendant might otherwise suffer upon refiling of an action. [Citations omitted.] The district court, however, should impose only those conditions which actually will alleviate harm to the defendant."); *Cross Westchester Dev. Corp. v. Chiulli*, 887 F.2d 431, 432 (2d Cir. 1989) ("The purpose of authorizing terms and conditions on a voluntary dismissal is to protect the defendant from prejudice."); *GAF Corp. v. Transamerica Ins. Co.*, 665 F.2d 364, 367 (D.C. Cir. 1981) ("The purpose of the 'terms and conditions' clause is to protect a defendant from any prejudice or inconvenience that may result from a plaintiff's voluntary dismissal."); *Le Compte v. Mr. Chip, Inc.*, 528 F.2d 601, 604-05 (5th Cir. 1976) ("Allowing the court to attach conditions to the order of dismissal prevents defendants from being unfairly affected by such dismissal.... On remand, the judge may hold a hearing, if needed, to better determine what interests are at stake *and to fashion only such conditions as are necessary to protect the legitimate interest of defendants.*") (emphasis added); *Bolten v. General Motors Corp.*, 180 F.2d 379, 381-82 (7th Cir. 1950) ("In our view, the absolute right of a plaintiff to dismiss under (a)(2) is restricted only by the requirement that it be done 'upon order of the court and upon such terms and conditions as the court deems proper.' ... [T]he purpose of the rule ... is, to protect the rights of the defendant."); *Home Owners' Loan Corp. v. Huffman*, 134 F.2d 314, 317 (8th Cir. 1943) ("The terms and conditions which the court may impose are for the protection of the rights of the defendant.").

stipulation filed by the defendants "did not conform to the requirements of Rule 41." The Court explained that "within two days of the filing of the stipulation, Kabbaj argued that he was not a party to the joint stipulation filed by the defendants." *Id.* As a result, the Third Circuit held that "the filing of the invalid notice did not end the case." *Id.* at 545. Here, in contrast, Plaintiffs have presented a motion for voluntary dismissal to the Court (with the exception of the Alexander stipulation, to which every party to her complaint has indisputedly agreed).

The other case cited by the Court, *Kramer v. Tribe*, 156 F.R.D. 96 (D.N.J. 1994), did not involve Rule 41 or the attorney-client privilege. Instead, it involved sanctions against an attorney for "fil[ing] this law suit to extort a share of Appellate Counsels' fee and to embarrass the Defendants, specifically Laurence Tribe." *Id.* at 102. The court listed thirty-six other cases in which that attorney engaged in improper conduct. Here, in contrast, there is no evidence of any kind that Plaintiffs' counsel engaged in sanctionable conduct by obtaining the agreement of Plaintiffs whom they represent (and who are not subject to a motion to withdraw) to dismiss their claims against GSK, while retaining their claims against Sanofi and Grünenthal.

So there is no legal basis for the Special Master to investigate the dismissals. No defendant has objected or complained that the dismissals might prejudice them, and there is no suggestion that the dismissals negatively affect them in any way. The Special Master therefore has no authority to engage in this inquiry. Hagens Berman has been unable to find a single case in which a similar inquiry was undertaken following a Rule 41 dismissal, and the Court and the Special Master have not cited any authority to the contrary.

B. There is No Factual Basis for the Inquiry.

The Special Master has not cited any evidence to support the ordered interviews. Nor could he, because there is no factual basis for the speculation of the Special Master and the Court that Hagens Berman sought dismissal before fully informing their clients and obtaining consent.

1. The inquiry into the Alexander, Anderson, Mann, and Manning dismissals is based on pure speculation.

In the Alexander, Anderson, Mann, and Manning dismissals, Hagens Berman has already fully explained how those dismissals arose, and has provided the Court with sworn declarations indicating that all four of those Plaintiffs agreed after extensive consultation about their claims.

As to Alexander, Hagens Berman has already explained that the dismissal came at her request after full consultation about her case. *See* Dkt. 480 (objections to referral order) and Dkt. No. 480-1 (Declaration of Ari Brown). There is absolutely no evidence to the contrary. Further, as the stipulated dismissal makes plain, the dismissal did not resolve possible sanctions against Hagens Berman, as both GSK and Grunenthal reserved their rights to seek them. *See* Dkt. No. 468.

As to Anderson, Mann, and Manning, Hagens Berman has already explained that the requested dismissal of those cases followed the Court order that Hagens Berman review all cases and dismiss them where appropriate. This resulted in a number of stipulated dismissals that were granted by the Court. *See, e.g.,* Dkt. Nos. 284, 285, 305, 325, 326, 327, 328, 332, 362, and 374. Hagens Berman followed that procedure with Anderson, Mann, and Manning, and had extensive discussions with the Plaintiffs about dismissing their cases before concluding that dismissal was appropriate. *See* Dkt. No. 451 (objections to referral order) and Dkt. No. 451-1 (Declaration of Nick Styant-Browne). There is absolutely no evidence to the contrary. Further, as the proposed order makes clear, the dismissal did not resolve possible sanctions against Hagens Berman, as both GSK and Grunenthal reserved their rights to seek them. *See* Dkt. No. 440-1.

There is no other evidence to support the inquiry as to these Plaintiffs. As such, there is no factual basis for the inquiry.

2. The inquiry into dismissals based on the agreement with GSK is not properly based on any alleged conflict, or on the other bases that the Court originally based the inquiry on.

a. As GSK agrees, Hagens Berman does not have a Rule 1.7(a)(2) conflict with respect to the GSK settlement, so the Court and Special Master have no basis to inquire into whether Plaintiffs knowingly agreed to the dismissals.

In an order (Dkt. No. 430) dated December 23, 2014, the Special Master asked whether Hagens Berman has a conflict of interest that would justify inquiry into whether Plaintiffs knowingly agreed to dismiss their claims against GSK. This appears to be the basis for the interviews, although the Special Master has never specified that it is. Hagens Berman initially notes that even if such a conflict existed, neither the Court nor the Special Master would have any power to interview the Plaintiffs, for the reasons set forth above. But in any event, as shown below, no such conflict exists. Indeed, GSK agrees that there is no conflict. *See* Dkt. No. 450.

(1) Hagens Berman Does Not Have a Rule 1.7(a)(2) Conflict.

A conflict exists under Pa. R.P.C. 1.7(a)(2) if "there is a significant risk that the representation of one or more clients will be materially limited by … a personal interest of the lawyer." While the terms of the GSK agreement implicated a "personal interest" of Hagens Berman, Hagens Berman's representation of the Plaintiffs was not materially limited by that personal interest, and there is not (and was not) a significant risk that the representation would be materially limited. And even if there were a material limitation, or a significant risk of one, Plaintiffs have provided informed consent that would waive any such conflict.

(2) Hagens Berman's representation is not "materially limited" by a personal interest.

All of the evidence before the Court and the Special Master points to one conclusion: Hagens Berman's representation of its clients in this matter has not been materially limited by any personal interest of Hagens Berman in avoiding sanctions, and there is no significant risk

that it will be. Hagens Berman has zealously represented the interests of its clients in the face of potential sanctions, and it has not refused – and will not refuse – to fully prosecute claims simply because of a threat of sanctions. No party, no Defendant, and neither the Special Master or the Court can come forth with any evidence that Hagens Berman has failed to fully represent its clients in the face of possible sanctions. To the contrary, as should be abundantly clear by now, Hagens Berman has pursued the interests of its clients to the fullest extent, even though it is apparent that Defendants, the Court, and the Special Master have argued or ruled that many of Plaintiffs' legal arguments are without merit. There could hardly be any stronger evidence that Hagens Berman's representation of its clients has not been limited by the threat of sanctions for that representation. This is more than sufficient to demonstrate the lack of a concurrent conflict under Rule 1.7(a)(2).

The mere existence of an attorney's personal interest does not in and of itself create a conflict under Rule 1.7(a)(2). "Finding a concurrent conflict requires not only that the lawyer have a personal interest, but also that the lawyer's personal interest significantly risks materially interfering with the lawyer's professional judgment in representing his client." *U.S. v. Savage*, 2013 WL 6667744, at *3 (E.D. Pa. Dec. 17, 2013). And in making that determination, "[t]he critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." Pa. R.P.C. 1.7, cmt. 8. *See also Jackson v. Rohm & Hass Co.*, 2008 WL 3930510, at *3 (E.D. Pa. Aug. 28, 2008) ("The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent

professional judgment in considering alternatives or foreclose courses of action that reasonably would be pursued on behalf of the client.").

Moreover, mere speculation that there is such a risk or likelihood is not sufficient to establish a conflict; there must be evidence to support such a conclusion. As one court has explained:

> Because of the virtually limitless cases in which a "conflict" may theoretically arise when a lawyer's self-interest is implicated, there is a very real danger of analyzing these issues not on fact but on speculation and conjecture. Accordingly, when a conflict of interest issue arises based on a lawyer's self-interest, a sturdier factual predicate must be evident than when a case concerns multiple representation. Only by requiring a more specific articulation of the facts giving rise to a conflict situation can courts refrain from effectively "straightjacketing counsel in a stifling, redundant federal code of professional conduct." [] Supposition and speculation, therefore, will simply not do.

Essex Cnty. Jail Annex Inmates v. Treffinger, 18 F. Supp. 2d 418, 432 (D.N.J. 1998) (quoting *Beets v. Collins*, 65 F.3d 1258, 1271 (5th Cir. 1995)). *See also Savage*, 2013 WL 6667744, at *3; *In re L.J.*, 691 A.2d 520, 529 (Pa. Super. Ct. 1997) (dismissing claim that dual representation created Rule 1.7(a) conflict in part because of a lack of evidence to support allegations of risk of material limitation); *Rohm & Hass Co.*, 2008 WL 3930510, at *4 (no conflict found because party had "not produced any evidence of an egregious, irreconcilable conflict").

Here, the only possible basis for a concurrent conflict is the bare terms of the agreement reached with GSK. The terms of that agreement are that GSK forewent possible awards of sanctions in favor of GSK against Hagens Berman and/or Plaintiffs, Plaintiffs forewent their sanctions motions against GSK, and no party received any compensation. Yet this does not indicate, let alone prove, that Hagens Berman's representation of those clients was materially limited, or at risk of being materially limited, by the prospect of sanctions.

The agreement cannot be viewed in isolation from its context. As explained in section I.D.3., below, Hagens Berman is prohibited from discussing the specific consideration that went into the decision to enter into the agreement with GSK and what Hagens Berman discussed with their clients. However, at the time of the agreement, the parties had nearly completed fact discovery. The Court had issued one summary judgment ruling, but there was no recommendation or ruling on any sanctions motion. Hagens Berman knew what facts supported each of their claims against each Defendant, as well as the respective strengths and weaknesses of each of those claims. This included, for example, significant variations in the timing and nature of distribution of thalidomide by GSK and Sanofi. In light of the evidence that supported or undermined Plaintiffs' claims against each Defendant, both as to the statute of limitations and as to exposure issues, Hagens Berman was mindful of strategic aspects of pursuing claims against certain Defendants as opposed to others. Just as we would in any other case near the close of discovery, we assessed the situation and discussed it with our clients.

There is, of course, nothing unusual about this process. It is routine, customary, and desirable for plaintiffs and their counsel to make an honest appraisal of their cases, especially at the close of discovery, and abandon claims or dismiss defendants as they deem appropriate.

The notion that Hagens Berman's representation of their clients has been hampered, or is at risk of being hampered, by the threat of sanctions is baseless and contrary to all of the evidence before the Court and the Special Master. Everything Hagens Berman has done in this case demonstrates that it is dedicated to representing its clients zealously even though by doing so it has apparently placed itself at risk of serious sanctions, for both bringing and litigating the cases and now (possibly) for dismissing certain claims.

First, every single Plaintiff who dismissed claims against GSK still has claims against Grünenthal, and the overwhelming majority also have claims against Sanofi. Not a single person's claims were dismissed entirely as a result of the agreement with GSK. This means, of course, that Hagens Berman continues to represent all of the Plaintiffs in question even though the firm is subject to numerous demands for sanctions made by Grünenthal in cases brought by those Plaintiffs, and the firm remains exposed in most instances to possible demands for sanctions from Sanofi (which has recently made demands of its own in summary judgment briefing). Indeed, Grünenthal recently submitted a bill of costs to the Court in an amount of more than $176,000. Dkt. No. 445. Yet Hagens Berman continues to litigate against Grünenthal on behalf of every single Plaintiff who dismissed claims against GSK, and against Sanofi on behalf of most of those Plaintiffs.

Second, Hagens Berman has repeatedly opposed motions for summary judgment where we concluded that we could do so in good faith, even though almost every one of those motions has included a demand for fees and costs. Indeed, we have continued to do so even though orders of the Court and the Special Master indicate that neither of them finds merit in Plaintiffs' arguments about the statute of limitations.

For example, on December 5, 2014, Grünenthal and Sanofi filed motions for summary judgment against Tammy Jackson and Phillip Yeatts, two Plaintiffs who dismissed their claims against GSK. Dkt. Nos. 415, 416. On December 4, 2014, the day before those filings, the parties received the report and recommendation on sanctions, which included an apparent finding that Hagens Berman had acted in bad faith simply by relying on the expert opinion of Dr. Trent Stephens. *See, e.g.,* Dkt. No. 414, pp. 17-18, 22-24. Yet Hagens Berman submitted Dr. Stephens' opinion again in opposition to Jackson and Yeatts, Dkt. Nos. 428-2, 429-2, despite the

fact we are at risk of sanctions for merely opposing these motions with Dr. Stephens' opinion. We did so again in opposition to motions for summary judgment against Robert Murray and Doris Brust, Dkt. Nos. 465-2, 473-2. We did so because we are firmly committed to prosecuting our clients' claims when we can do so in good faith, even when it appears that the Court and the Special Master may be poised to sanction us for doing so. We are under no illusions as to the Court's apparent views of our arguments and claims. But we are extremely mindful of our duty to represent our clients to the fullest extent possible, to the extent we can do so in good faith. We had a duty to oppose those summary judgments, which we firmly believe should have been denied on the merits, and we did so to the best of our ability, despite the spectre of possible sanctions. This is obviously not an easy position, but our actions have consistently demonstrated that we are dedicated to our clients and their claims, even when it puts our firm at risk. *Cf. Rohm & Hass Co.*, 2008 WL 3930510, at *4 (finding there was no Rule 1.7 conflict because the litigation's history demonstrated counsel was acting in client's interests).

In summary, there is no evidence that there is a significant risk that Hagens Berman will materially limit (or has materially limited) our representation of our clients because of the threat of sanctions. If there is a concurrent conflict under Rule 1.7(a) in this case, all that would be required to put opposing counsel into a potentially disabling conflict would be to move for sanctions against them. That is clearly not the rule, and there is no Rule 1.7(a) conflict here. The record demonstrates that Hagens Berman has carefully and appropriately balanced our duty to zealously represent our clients against our duty not to pursue claims or arguments that we believe we cannot or should not pursue.

b. Even if a Rule 1.7(a)(2) conflict existed, Hagens Berman obtained the written and informed consent of their clients.

While we firmly believe that we do not suffer from a concurrent conflict under Rule 1.7(a)(2), even if we did, we have obtained informed consent from our clients, and therefore any conflict is not disabling. As provided in Rule 1.7(b):

> Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent.

Subsections 2 and 3 do not apply here. As for subsection 1, as we have already demonstrated above, we reasonably believe that we are able to provide (and have been providing) competent and diligent representation to all of our clients. As for subsection 4, we have received informed consent from each client to the dismissal, as we explained in our November 5 objection and accompanying declaration (Dkt. Nos. 400 and 400-1) and our letter of December 11, 2014 (Dkt. No. 425). As explained below, we cannot disclose our communications with each client, but we are more than satisfied that each Plaintiff is completely aware of the issues raised by the Special Master's December 23 order and has knowingly, voluntarily, and intelligently agreed to dismissal.

C. The Special Master's Areas of Inquiry Exceed the Scope of This Court's Referral.

The Special Master has been tasked with determining whether Plaintiffs knowingly and voluntarily agreed to dismiss some or all of their claims. His inquiry is inappropriately far broader in scope, and instead is an investigation into the merits of those claims.

The Special Master intends to ask Plaintiffs about the "understanding of their claims" and "the fact and circumstances that they … took into account in deciding to drop their claims." Dkt. No. 501. Neither of these topics has any bearing on whether the Plaintiffs voluntarily agreed to dismiss their claims. Aside from clearly delving into work product and attorney-client communications (as discussed below), inquiries into Plaintiffs' understanding of what their claims are, or what was in their minds when they decided to drop their claims, would prove nothing as to whether they understood the terms of the dismissals and agreed to them. To the extent a Plaintiff has a view of their claims that is independent of their counsel's opinion, it may be based on speculation or a misunderstanding of fact or law, but even so, that does not mean that they were uninformed of a possible conflict or failed to consent to the dismissals. The Special Master could limit himself to questions targeted at actually learning whether the Plaintiffs knew of, and consented to, the dismissal of their claims, without invading privilege or work product (*see* section I.D.5., below), but he has refused to do so.

It appears that the Special Master is on a fishing expedition to determine whether individual Plaintiffs believe their claims might have merit and whether there was something that they learned or believed about the merits of their claims that indicates that the claims should or should not have been dismissed. Even if the Court and Special Master could be considered to have laid some factual foundation for an inquiry into the GSK agreement and whether the Plaintiffs gave informed consent to the perceived conflict, there is absolutely no foundation for the Special Master to inquire of any Plaintiff (and especially those not subject to the GSK

agreement) what they understand about their claims and the reasons for dismissing them. The areas of inquiry not only exceed the scope of the referral to the Special Master, but also are entirely unnecessary to resolve the question of informed consent, and are flatly inappropriate to inquire about in the presence of all counsel, with all counsel permitted to ask questions of the Plaintiffs.

D. The Special Master's Areas of Inquiry Clearly Implicate Attorney-Client Communications or Attorney Work Product, and the Protections He Proposes Are Inadequate.

The Special Master has indicated that he will not limit himself to certain questions. He has also recognized, and anticipates, that his questions will delve into areas of attorney-client privilege and work product. He specifically intends to ask whatever questions he deems necessary to discern the following for each of the 31 plaintiffs:

- "Their understanding of their claims."
- "Their understanding of the consequences of dropping their claims."
- "The facts and circumstances that they, the plaintiffs, took into account in deciding to drop their claims."

Dkt. No. 501. All of these areas of inquiry clearly risk invasion of the attorney-client privilege and protections for work product. And while the Special Master purports that he will protect against disclosure by entertaining objections, he will be ruling on those objections himself, thus providing absolutely no meaningful protection for attorney opinions and protected communications.

1. The topics of inquiry cannot be divorced from communications from their counsel's opinion work product, and the communications that Plaintiffs have had with their counsel about that work product.

The topics of inquiry can and will invade on both the attorney-client privilege and opinion work product. The Special Master's planned areas of inquiry will wade into areas of

protected communications between the Plaintiffs and their counsel. There is no way to divorce the Plaintiffs' understanding of their claims, their understanding of the consequences of the dismissal, or the facts and circumstances they considered in consenting to the dismissals from the conversations they have had with their counsel about those same topics. What they know about the legal and factual basis for their claims, the pros and cons of dismissing against one or all defendants, the likelihood of success on their claims, the terms of any agreement with defendants, and the consequences of dismissing all have one common source: what their attorneys have told them about the legal and factual basis for their claims, and the likelihood of success given the law and facts. The Special Master simply cannot engage in an interrogation about these topics without asking the Plaintiffs, directly or indirectly, what their attorneys have told them about these various topics. The Special Master apparently believes that by couching the questions as seeking their "understanding" of various points, he can seek the non-privileged testimony of the plaintiffs, but those "understandings" have their direct roots in the extensive communications they have had with their counsel on those topics.

For example, there is simply no way that a Plaintiff could testify about what his understanding of his claims are in any substantive or meaningful fashion without divulging what his attorneys have told him about what facts they consider to be relevant or insightful, what they understand the law to be on topics such as the statute of limitation, and how they believe expert opinion plays into their claims. The fact that it has come from the client's mouth as an "understanding" does not change the fact that the understanding is necessarily based on what counsel has told them.

Moreover, what their attorneys have told them about these topics of inquiry constitutes opinion work product. As set forth in FED. R. CIV. P. 26(b)(3)(B), opinion work product is "the

mental impressions, conclusions, opinions, or legal theories of a party's attorney ... concerning the litigation." *See also, e.g., In re Grand Jury Investigation*, 599 F.2d 1224, 1231 (3d Cir. 1979) ("analyses or assessments of (the client's) position with respect to the various parties in the litigation" are core opinion work product); *In re Cendant Corp. Sec. Litg.*, 343 F.3d 658, 662 (3d Cir. 2003) (work product protections apply to both tangible and intangible forms of work product). That protection exists even if it is not the attorney himself who is being sought to testify or produce documents about the attorney's opinions; it also applies to any attempts to get a client or an agent of the attorney to reveal those opinions indirectly. *See, e.g., In re Cendant*, 343 F.3d at 660-61, 667-68 (jury consultant present at meeting between client and attorney cannot be compelled to provide discovery about counsel's meeting); *Sporck v. Peil*, 759 F.2d 312, 313-14, 317-18 (3d Cir. 1985) (discovery of testimony of client about documents he had reviewed was barred, because the documents were selected by his counsel, and testimony would reveal opinion work product); *Bush Dev. Corp. v. Harbour Place Assocs.,* 632 F. Supp. 1359, 1363 (E.D. Va. 1986) ("Counsel's statements concerning the claim's likely success, even when transcribed by the client, are prime examples of the types of materials entitled to near absolute protection under Rule 26(b)(3)."). And as explained below in section I.D.2., opinion work product is provided nearly absolute protections from discovery.

Further, discussions Plaintiffs have had with their attorneys about that opinion work product are also protected by the attorney-client privilege, regardless of who is testifying about those communications. *See, e.g., Gillard v. AIG Ins. Co.*, 609 Pa. 65, 88-89 (2011) ("the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice"); 42 Pa. C. S. § 5928 (client cannot be compelled to testify about

communications with counsel). The Special Master also cannot require testimony about those communications, as discussed below in section I.D.3.

2. The Special Master is barred from inquiring about opinion work product, which is subject to nearly absolute protection.

Under federal law,[4]

> "core" or "opinion" work product that encompasses the "mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning the litigation" is "generally afforded near absolute protection from discovery." [FED. R. CIV. P. 26(b)(3)]; *In re Ford Motor Co.,* 110 F.3d 954, 962 n. 7 (3d Cir. 1997). Thus, core or opinion work product receives greater protection than ordinary work product and is discoverable only upon a showing of rare and exceptional circumstances.

In re Cendant Corp., 343 F.3d at 663. *See also, e.g., Sporck*, 759 F.2d at 316 ("Opinion work product ... is accorded an almost absolute protection from discovery because any slight factual content that such items may have is generally outweighed by the adversary system's interest in maintaining the privacy of an attorney's thought processes and in ensuring that each side relies on its own wit in preparing their respective cases."); *see also Rhone-Poulenc Rorer Inc. v. Home Indem. Co.,* 32 F.3d 851, 866 (3d Cir. 1994) ("[E]fforts to obtain disclosure of opinion work product should be evaluated with particular care."); *In re Grand Jury Investigation,*599 F.2d at 1231 ("Memoranda summarizing oral interviews ... may indirectly reveal the attorney's mental processes, his opinion work product.... [S]pecial considerations ... must shape any ruling on the discoverability of interview memoranda like those at issue in this case. The result, we believe, is exactly that contemplated in *Hickman;* such documents will be discoverable only in a 'rare situation.'").

[4] Federal law regarding work product governs in diversity cases. *See, e.g., United Coal Cos. v. Powell Const. Co.*, 839 F. 2d 958, 966 (3d Cir. 1988).

The reason for this protection is, of course, obvious. If an attorney's opinions about the viability of claims were discoverable simply by asking the client what his or her "understanding" was after hearing those opinions, it would seriously hamper an attorney's ability to communicate fully and openly with their clients. Indeed, Plaintiffs' counsel are now uncertain what they can safely discuss with their clients, given the impending inquisition into areas of supposedly protected communications. This is because the Special Master's inquiry is apparently

> simply an attempt, without purported necessity or justification, to secure [the opinions and thoughts] prepared or formed by ... counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.

Hickman v. Taylor, 329 U.S. 495, 510 (1947).

Nor has the Special Master (or the Court) demonstrated any exceptional circumstances requiring disclosure. Indeed, as discussed above, there is not even any legal or factual basis for the inquiry. And even if there were a basis for inquiring into whether the dismissals were knowing and voluntary, there are far less intrusive means for discovering that information, including the declarations or strictly limited questions which Plaintiffs have suggested to the Special Master, and which he has rejected. *See* section I.D.5, *infra*. The Special Master cannot inquire into opinion work product, but he is poised to do so.

3. The Special Master is barred from inquiring about communications subject to the attorney-client privilege.

This Court and the Special Master have no power to require Plaintiffs to testify as to their communications with counsel about the dismissals at issue. Communications between Hagens Berman and the Plaintiffs about the dismissals are subject to the attorney-client privilege, and Hagens Berman cannot disclose them under Pa. R.P.C. 1.6. Hagens Berman respectfully submits

that this is readily apparent on a common-sense basis, given that the communications that the Court and the Special Master want to delve into are communications about whether or not to dismiss some of their claims.

Under Pennsylvania law,[5] the attorney-client privilege protects communications from the client *and* communications from the attorney to the client for the purpose of providing advice and consultation about the client's claims. *See, e.g., Gillard v. AIG Ins. Co.*, 609 Pa. 65, 88-89 (2011) ("the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice"). Hagens Berman is the Plaintiffs' attorney, and the communications between them about the GSK agreement and dismissals were made for the purpose of obtaining and providing legal advice.

There are also no exceptions to the attorney-client privilege that would apply here. The privilege has not been waived. Nor is there is any possible argument that crime-fraud exception applies here, as already explained in Plaintiffs' objection to the Court's October 31, 2014 referral order. *See* Dkt. No. 400, pp. 6-7. Thus, neither Hagens Berman nor the Plaintiffs can be compelled to disclose the content of those communications. As provided in Pennsylvania law:

> [i]n a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

See 42 Pa. C. S. § 5928. *See also, e.g., Collautt v. Li,* 2014 WL 6988657, *2 (E.D. Pa. Dec. 11, 2014).

[5] The law of Pennsylvania applies here to questions of privilege. *See* FED. R. EVID. 501; *Keating v. McCahill,* 2012 WL 2527024, at *2 (E.D. Pa. July 2, 2012) ("Federal courts sitting in diversity, as in this case, apply the law of the host state to determine privilege.").

Hagens Berman is also barred by Pa. R.P.C. 1.6 from disclosing the content of their communications with Plaintiffs. As that rule provides, "a lawyer shall not reveal information relating to representation of a client unless the client gives informed consent." *See* Rule 1.6(a). While Rule 1.6 has a number of exceptions, none of them apply here. Rule 1.6(b) requires counsel to reveal information only as necessary to correct a prior misstatement of fact, or to keep a client from perjuring herself or engaging in other criminal conduct. *See* Rule 1.6(b) and Rule 3.3(a), (b).

Rule 1.6(c) allows for permissive disclosure by an attorney in specific circumstances, but again none of the exceptions apply here. The Special Master requested inquiry about two exceptions, but neither of them apply here. Rule 1.6(c)(2) permits disclosure "to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another." There is no such imminent criminal act at issue here, nor is there a possibility that disclosing these communications would stop even a non-criminal injury to anyone's financial interests or property.

The second exception identified by the Special Master allows disclosure by an attorney to "to secure legal advice about the lawyer's compliance with these Rules." A disclosure to the Court or the Special Master in response to this inquiry would not be for the purpose of "secur-[ing] legal advice."

The communications are clearly privileged, and just as clearly protected from disclosure by counsel pursuant to Rule 1.6. Therefore, any inquiry into those communications, and especially direct testimony from the Plaintiffs, severely risks impinging upon the attorney-client privilege. Moreover, any order directing Plaintiffs to testify or appear for phone calls about the

communications would violate Pennsylvania's ban on orders compelling disclosure of this information. *See* 42 Pa. C. S. § 5928.

4. The proposed method(s) for addressing objections on the basis of attorney-client privilege or work product doctrine provide no protection to the Plaintiffs or the privilege, and are likely violations of due process.

The Special Master has indicated that he will address objections on the basis of work product and attorney-client privilege primarily by ruling on the objections himself, and in limited cases by seeking a ruling from this Court, even though this Court is the driving force behind this inquiry. These are clearly inappropriate, for what should seem obvious reasons.

There is absolutely no protection of the privilege if the Special Master makes a Plaintiff answer a question over an objection based on work product or privilege, with an apparent threat of contempt if the Plaintiff does not answer his question over the objection of his counsel. This will not only chill legitimate objections, it likely will place the Plaintiffs under the coercive power of the Special Master to answer his questions even though their counsel has instructed them not to answer. If the Plaintiff is coerced into answering, and the Special Master's ruling misapplies the law, the answer will nonetheless be on the record and divulged to all counsel in the case. Or the Plaintiff will have to be held in contempt. This procedure is preposterous and a violation of due process, and may place the Court or the Special Master into a disabling conflict. *See, e.g.,* Pa. Code. Jud. Cond. § 2.1(C) ("A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed."); *In re Murchison*, 349 U.S. 133, 136-39 (1955) (violation of due process for one person to hold adjudicative and investigative capacities); *In re Oliver*, 333 U.S. 257, 272-278 (1948) (violation of due process where one person acted as prosecutor and judge, and found defendant in contempt); *Wesbrook v. Thaler*, 585 F.3d 245, 256 (5th Cir. 2009) ("Due process is

violated when a judge has a dual role of both investigating and adjudicating a matter."). The Court cannot allow such a process to transpire.

Nor is the privilege adequately protected if the Special Master refers the matter to the Court for a ruling. The Court sits in this matter as the sole investigator and prosecutor, and the Special Master acts as the Court's agent and at the Court's sole discretion. No Defendant has requested this inquiry or even approved of it. Yet the Special Master's alternative proposals would refer matters of privilege to the Court in its own investigation. This would be no different than if at a traditional deposition, a lawyer asking questions was allowed to call her supervising partner for a ruling on the opposing side's objections. It remains an incredibly coercive violation of due process.

Nor can Plaintiffs be expected, much less be ordered, to trust the Special Master's professed disinclination to ask about privileged or protected information. Plaintiffs and defense counsel have offered the Special Master several other routes that would provide the information he seeks but be far less intrusive, and would not violate the ironclad protections afforded to opinion work product and attorney-client communications. But he has refused to adopt any of them, choosing instead to not limit himself in his questions into areas that clearly implicate privilege and work product, without any real protections for Plaintiffs' rights.

5. Plaintiffs should be required – at most – to sign a declaration making plain that they understand the terms of the settlement, including GSK's waiver of sanctions, and agree to the dismissal, or in the alternative, any interviews should be limited to those subjects.

However, in the interests of resolving this issue, Hagens Berman suggested to the Special Master, and suggests again directly to the Court, that each Plaintiff at issue sign under penalty of perjury a declaration which makes each of the following points clear:

- The Plaintiff received and read a copy of the Special Master's order of December 23, 2014.

- The Plaintiff understands as provided in the December 23 order that once the claims are dismissed against GSK, they cannot be brought again.
- The Plaintiff understands as provided in the December 23 order that she will not receive any money from GSK for agreeing to dismiss her claims.
- The Plaintiff understands as provided in the December 23 order that as part of the same agreement, GSK has agreed not to seek monetary sanctions from Hagens Berman or the Plaintiffs, and that the sanctions requests and motions filed to date seek sanctions only from Hagens Berman.
- The Plaintiff, with these understandings, voluntarily consents to dismissal of her claims against GSK.

Declarations to this effect, under penalty of perjury, would be more than sufficient to dispel the false notion that Hagens Berman moved to dismiss claims without informing the clients of the terms of the agreement that led to the dismissal. Moreover, it would do so without invading the attorney-client privilege that applies to the written and oral communications Hagens Berman had about these issues with their clients.

Other courts in this District, when considering possible Rule 1.7(a)(2) conflicts, have concluded that signed declarations are sufficient to demonstrate informed consent, and thereby resolve any conflict, including in situations involving obvious, direct conflicts far more serious than the situation in this case. *See, e.g., Martin v. Turner*, 2011 WL 717682, at *3-4 (E.D. Pa. Feb. 18, 2011) (attorney took positions contrary to the interests of the client); *Reg'l Employers Assur. Leagues Vol. Empl. Benef. Ass'n v. Castellano*, 2009 WL 1911671, at *2-3 (E.D. Pa. July 1, 2009) (joint representation of multiple parties against same defendant in the same suit); *Rohm & Hass Co.*, 2008 WL 3930510, at *4-5 (joint representation of multiple parties in litigation who had taken differing views of the facts); *Helsing v. The Avon Grove Sch. Dist.*, 2007 WL 1030096, at *3-4 (E.D. Pa. Mar. 30, 2007) (counsel represented multiple parties with divergent interests in proving key facts).

To require anything further is not only unnecessary but also would be unprecedented. Hagens Berman is not aware of a single case in which a court has *sua sponte* ordered a party to testify in any capacity, or answer written questions, about whether she consented knowingly and voluntarily to either a conflict or a dismissal of a claim. Ordering such a requirement would be truly extraordinary given that (as discussed below) the issues the Special Master apparently wants to ask the clients about are communications that are not only privileged, but are some of the most sensitive and confidential conversations an attorney can have with her clients.

However, Hagens Berman will not seek a petition for a writ of mandamus if the Court were to limit the interviews to the following questions, and only these questions, for Plaintiffs who are parties to the GSK agreement:

- Did you receive a copy of the Special Master's order dated December 23, 2014?
- Do you understand that under the terms of the deal discussed in that order that once the claims are dismissed against GSK, they cannot be brought again?
- Do you understand that under the terms of the deal discussed in the order that you will not receive any money from GSK for agreeing to dismiss your claims?
- Do you understand that under the terms of the deal discussed in the order that GSK has agreed not to seek monetary sanctions from Hagens Berman or the plaintiffs, and that the sanctions requests and motions filed to date seek sanctions only from Hagens Berman?
- Do you understand that under the terms of the deal discussed in the order that their claims against the other defendants have not been dismissed?
- Did you, given the understandings above, consent to dismissal of your claims against GSK?

For the four Plaintiffs who have dismissed all of their claims, the questions would have to vary slightly, but Plaintiffs would accept the following:

- Did you agree to dismiss your claims against all defendants following consultation with your attorneys?

- Are you aware that as a result of that dismissal, you will not receive any compensation?

- Are you are aware that as a result of that dismissal, you will not be able to bring your claims against those defendants again?

We proposed these questions to the Special Master as a revision to his May 6 order (along with specific questions for the plaintiffs whose dismissals are not based on the GSK agreement). Dkt. No. 499. He has refused to agree to these limitations. Dkt. No. 501. We urge the Court to consider limiting any inquiry to these questions in order to resolve this issue without having to resort to an appellate process.

II. ALTERNATIVE REQUEST FOR STAY AND § 1292(b) CERTIFICATION

If the Court orders Plaintiffs and Hagens Berman to comply with the Special Master's orders dated May 6 and 8, 2015, without modification to address the concerns stated in these objections, Hagens Berman respectfully requests that the Court stay its order and certify that order for appeal under 28 U.S.C. § 1292(b), which states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

An order authorizing the Special Master to inquire into attorney-client communications regarding Plaintiffs' dismissals is a controlling question of law as to which there is substantial ground for difference of opinion. Hagens Berman is unaware of any precedent allowing such an inquiry, and respectfully submits that its arguments in these Objections demonstrate that there is

substantial ground for difference of opinion as to whether such an inquiry is permissible. And an immediate appeal from the order may materially advance the termination of the litigation, since a ruling by the Third Circuit that such an inquiry is not permitted would allow the dismissals to take place immediately, thereby avoiding any more litigation as to those matters.

Even if the Court does not certify the order under section 1292(b), Hagens Berman respectfully requests that the Court stay the order requiring interviews, pending resolution of the issue via a petition for mandamus. In *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991), the Third Circuit granted the plaintiff's petition for mandamus to review an order compelling the production of documents claimed to be protected by privilege. The Court explained that the district court had denied the plaintiff's motion for certification under § 1292(b) but nonetheless "concluded that Westinghouse had raised 'substantial questions' concerning the application of the attorney-client privilege and the work-product doctrine 'which should be resolved by the Third Circuit in the last instance rather than myself.' Therefore, the court granted Westinghouse's motion for a stay pending efforts to review its disclosure order." *Id.* at 1421. Similarly, an order denying Hagens Berman's objections to the Special Master's May 6 order should be stayed even if this Court does not certify a § 1292(b) appeal. The need for a stay is imperative given the Special Master's refusal to grant one pending resolution of objections to, and/or appeal of, his order. Dkt. No. 500.

III. CONCLUSION

Plaintiffs' counsel respectfully submits that the Court should order that no interviews with Plaintiffs take place, and that at most Plaintiffs should be required to submit a declaration that contains the information listed in the bullet points in section I.D.5., above. But if the Court orders Plaintiffs and Hagens Berman to comply with the Special Master's order dated May 6, 2015 (Dkt. No. 498), Hagens Berman respectfully requests that the Court stay that order and

enter an order certifying the stayed order for appeal under 28 U.S.C. § 1292(b). We further request that the Court rule on these objections promptly, given the short schedule ordered by the Special Master, which he has refused to stay pending resolution of these objections. Plaintiffs will file a petition for a writ of mandamus if we do not receive a ruling from the Court within a week of these objections.

DATED: May 11, 2015

HAGENS BERMAN SOBOL SHAPIRO LLP

By: /s/ Craig R. Spiegel
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Objections of Plaintiffs' Counsel To May 6, 2015, and May 8, 2015, Orders of The Special Master Regarding Telephonic Interviews With Certain Plaintiffs has been electronically filed with the Clerk of Court using CM/ECF on this 11th day of May, 2015. A true and correct copy of the foregoing document is being served on this date on all counsel of via transmission of Notices of Electronic Filing generated by CM/ECF.

DATED: May 11, 2015

HAGENS BERMAN SOBOL SHAPIRO LLP

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

GLENDA JOHNSON ET AL., Plaintiffs, v. SMITHKLINE BEECHAM CORPORATION ET AL., Defendants.	Case No. 2:11-cv-005782-PD and all related cases

GSK'S STATEMENT IN RESPONSE TO THE OBJECTIONS OF PLAINTIFFS' COUNSEL TO SPECIAL MASTER HANGLEY'S MAY 6, 2015 AND MAY 8, 2015 ORDERS

GSK takes no position on any of the relief sought by Hagens Berman in their objections to the Special Master's Orders dated May 6, 2015 and May 8, 2015. (Doc. 502). GSK's only interest remains the prompt and efficient dismissal of claims against it which should never have been brought in the first instance. Accordingly, GSK provides this Statement to apprise the Court of its views on the lack of merit in plaintiffs' claims against GSK and on certain of the other issues raised by the Special Master concerning the proposed dismissals in his December 23, 2014 Order.

GSK, of course, agrees with the Court that any decision by a party to dismiss litigation must be a knowing and intelligent decision. There are good and legitimate reasons for both Hagens Berman and plaintiffs to have finally agreed to dismiss their meritless claims against GSK, without giving rise to a conflict between the plaintiffs' attorneys and their clients. GSK conducted a limited clinical trial of thalidomide and did not distribute thalidomide to the mothers of any of the plaintiffs included in the proposed dismissals. Rather than devote further expense

to meritless litigation, GSK agreed to forbear from pursuing both costs and sanctions liability in return for its immediate dismissal. GSK's forbearance conferred a benefit on the plaintiffs themselves, and not just their counsel, that exonerated plaintiffs from a substantial costs liability that they already had accrued (and would continue to incur) under Rule 54(d)(1).

1. Plaintiffs' Claims Against GSK Have Always Been Devoid of Merit.

Thalidomide was developed by Grünenthal and made available in overseas markets. In 1956-57, SKF, pursuant to a license from Grünenthal, conducted a limited clinical trial in the United States of thalidomide as a sedative or tranquilizing agent, and not as a "morning sickness" pill. Based on unimpressive efficacy results, SKF decided to end its research, terminated its licensing agreement with Grünenthal, and never sought FDA permission to market the drug. SKF's involvement with thalidomide ended long before anyone had reported to SKF or publicly any birth defects suffered by children born to mothers who had taken thalidomide.[1]

After thoroughly investigating SKF's testing of thalidomide in 1962, the FDA found no wrongdoing by SKF and it made the following key findings:

> A complete review of [SKF's] investigation of the article SKF #5627 (thalidomide) indicated that the reason for suspension of this article in December 1957 was that the article failed to meet [SKF's] expectations as to possible tranquilizing properties. There was nothing in the firm's files to suggest otherwise.
>
> There was nothing in [SKF's] file which suggested that [its] investigation of SKF #5627 was other than a bona-fide clinical investigation of a new compound.
>
> SKF's first knowledge [that birth defects were associated with thalidomide] came from a report which appeared in the British Medical Journal of 12/2/61.

[1] Dr. Frances Kelsey, who only arrived at the FDA in 1960, is considered a national hero because her exceptional vigilance in 1961 prevented approval of thalidomide for sale in the United States. See, e.g., Morton Mintz, "'Heroine' of FDA Keeps Bad Drug Off Market," Washington Post (July 15, 1962). But it was SKF's 1957 decision to not seek FDA approval which kept the thalidomide New Drug Application from reaching the FDA prior to Dr. Kelsey's arrival.

See Sept. 25, 1962 and Oct. 26, 1962 FDA reports. Despite the extensive FDA investigation in 1962, the many books and other publications relating to thalidomide, multiple thalidomide lawsuits, and extensive discovery in this litigation, there still remains not one shred of evidence that SKF ever knew of, or had any reason to know of, any association between thalidomide and birth defects before 1961 – when it, along with the rest of world, learned of the link between thalidomide and birth defects through the public reporting of that link.

SKF's clinical trial of thalidomide occurred during a limited period in 1956 and 1957 and involved 67 physicians whose identities have long been publicly available. GSK produced to plaintiffs more than 4,000 pages of over 50 year old documents that were located in company files relating to SKF's testing of thalidomide. None of the 67 SKF investigators treated any of plaintiffs' mothers. And not one of the plaintiffs' mothers even resided in the same locale as any of the SKF investigators. Despite the many and extensive inquiries into thalidomide and discovery in this litigation, none of the plaintiffs subject to the proposed dismissals can link his or her injuries to SKF-distributed thalidomide. There is simply no evidence that the mothers of any of the plaintiffs were patients of any of the SKF investigators or that they otherwise somehow received thalidomide from SKF.

The lack of merit in plaintiffs' claims against GSK is even more apparent in light of the Court's recent dismissal with prejudice of the claims of Debra Johnson, who was not included in the dismissal agreement between Hagens Berman and GSK. GSK was the sole defendant in her case, and that is presumably the reason that Hagens Berman declined to include it in the agreement. The Court dismissed the Debra Johnson case on summary judgment as time-barred and, importantly, noted that GSK "persuasively argue[d] that Plaintiff has produced no admissible evidence showing that her mother ingested thalidomide provided by SmithKline

Beecham." (Doc. 487 at 19-20) (emphasis added). The dismissal of Hagens Berman's purported "best case" against GSK speaks volumes about the baseless nature of the remaining claims against GSK.

Hagens Berman has essentially conceded that the claims against GSK are devoid of merit and explained that they made a strategic decision to dismiss GSK and pursue the claims against the other defendants:

> [A]t the time of the agreement [with GSK], the parties had nearly completed fact discovery. The Court had issued one summary judgment ruling, but there was no recommendation or ruling on any sanctions motion. Hagens Berman knew what facts supported each of their claims against each Defendant, as well as the respective strengths and weaknesses of each of those claims. This included, for example, significant variations in the timing and nature of distribution of thalidomide by GSK and Sanofi. In light of the evidence that supported or undermined Plaintiffs' claims against each Defendant, both as to statute of limitations and as to exposure issues, Hagens Berman was mindful of strategic aspects of pursing claims against certain Defendants as opposed to others. Just as we would in any other case near the close of discovery, we assessed the situation and discussed it with our clients

(Doc. 502 at 10). As explained below, the voluntary dismissal of claims which have no merit accrues to the benefit of both the plaintiffs and their lawyers – as well as the defendant – and there is a common interest in such action.

2. The Dismissal of GSK Benefits Plaintiffs, and Not Merely Their Counsel.

The dismissal of meritless claims benefits the plaintiffs themselves by relieving them of responsibility for out-of-pocket costs for which they could be personally liable in the event of no recovery. Here, for example, if the cases were not dismissed at this juncture, significant additional expenses would have to be incurred to hire experts to opine on whether SKF acted negligently back in 1956-57, assuming any such experts could be found. Moreover, GSK already has incurred, and would continue to incur, substantial Rule 54(d) costs in the cases that are subject to the dismissals. Plaintiffs now are relieved of the high likelihood that they – like

Debra Johnson – would personally become liable to GSK for Rule 54(d) costs, which are assessed as a matter of course to a "prevailing party" and which are the losing party's obligation. As the Third Circuit has explained:

> [T]he very possibility that a losing party will be required to reimburse the prevailing party for its costs should cause parties to litigation to pause and calculate the risks of pursuing meritless or marginal claims. ... It is incumbent on an attorney to explain the risks of litigation to his or her client—including the risk that under Rule 54(d)(1) they may have to pay costs should their litigation ultimately prove unsuccessful.

Reger v. Nemours Found., Inc., 519 F.3d 285, 289 (3d Cir. 2010). Such costs are the responsibility of the parties, not their attorneys. See, e.g., In re Cardizem CD Antitrust Litig., 481 F.3d 355 (6th Cir. 2007). Such costs, for the items specified in 28 U.S.C. § 1920, can be quite substantial. See, e.g., Duchesneau v. Cornell Univ., No. 08-cv-4856 (E.D. Pa. May 22, 2014) (assessing over $100,000 in costs against individual plaintiff in personal injury case).

The "very possibility" noted by the Third Circuit became a certainty in the Debra Johnson case. Indeed, shortly after the Court granted summary judgment in GSK's favor, GSK filed a bill of costs against her in the amount of approximately $7,000. (Doc. 490). The bill of costs was promptly satisfied in full. (Doc. 493). Thus, there is an economic benefit to the plaintiffs subject to the proposed dismissals since they will be relieved of the potential for a personal assessment of costs.

There is nothing inherently suspect or amiss when a plaintiff and his lawyer take common and mutually beneficial action to end a meritless case or at least excise meritless claims. This is evident, for example, in the process mandated under Rule 11. Under Rule 11 a defendant who wishes to pursue sanctions against an attorney for filing a frivolous claim is required to first serve upon plaintiffs' counsel a motion detailing the attorneys' sanctionable conduct. The Rule then provides for a 21-day safe harbor provision under which the allegedly frivolous claims can

be withdrawn and the threat of Rule 11 sanctions against the attorney eliminated. The purpose of the Rule is to encourage counsel to withdraw the allegedly frivolous claim or risk sanctions. See Advisory Committee Notes to 1993 Amendments. The GSK agreement is no different. In exchange for withdrawing allegedly frivolous claims, the threat of sanctions against the attorneys (as to GSK) is eliminated. Since there is no genuine conflict or impropriety in the process dictated by Rule 11, there is none here.

This is also evident in the procedure established by the Special Master in July 2014 under which plaintiffs' counsel agreed to review their cases. A number of cases have been dismissed in their entirety under that process, with defendants agreeing in certain of them to bear their own costs and fees and forego any request for sanctions.

Even if GSK is no longer in the litigation, plaintiffs have retained the ability – if they can overcome numerous other enormous hurdles – to recover the full measure of their damages against any defendant that can be proven to have caused their injuries. Whatever the difficulties in proving a case against Grünenthal or Sanofi, there is no need in any such case for a plaintiff to take on the redundant burden of also proving the liability of GSK. That added burden would require plaintiffs to prove that SKF was negligent and that thalidomide reached plaintiff's mother through SKF, neither of which they can do.

In short, the claims against GSK have been devoid of merit from the outset, and the interests of plaintiffs themselves, and not merely their counsel, are furthered by the elimination of the claims against GSK.

Dated: May 13, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2015, a copy of this document was filed electronically and is available for viewing and downloading from the CM/ECF system. I also certify that a true and correct copy of the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Michael T. Scott
Michael T. Scott

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

GLENDA JOHNSON, *et al.*, Plaintiffs, v. SMITHKLINE BEECHAM CORPORATION, *et al.*, Defendants.	Case No. 2:11-cv-05782-PD AND ALL RELATED CASES

PLAINTIFFS' MOTION TO STAY
SPECIAL MASTER'S ORDERS OF MAY 6 AND 8, 2015

The Special Master has ordered Plaintiffs to propose no later than May 19, 2015, a schedule for him to interview 31 plaintiffs on or before June 30, 2015. Dkt. Nos. 498 and 501. Plaintiffs objected to the order of the Special Master on May 11, 2015. Dkt. No. 502. GSK filed a response on May 13, 2015. Dkt. No. 503.

Plaintiffs request that the Court stay the planned interviews until the objections are resolved. The Special Master has declined to do so. Dkt. No. 500. Plaintiffs further note that absent a grant of this motion, or a ruling from the Court amending the Special Master's order to address our objections, we intend to file a petition for a writ of mandamus and seek an emergency stay from the Third Circuit Court of Appeals.

DATED: May 15, 2015

HAGENS BERMAN SOBOL SHAPIRO LLP

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Plaintiffs' Motion To Stay Special Master's Orders of May 6 and 8, 2015, has been electronically filed with the Clerk of Court using CM/ECF on this 15th day of May, 2015. A true and correct copy of the foregoing document is being served on this date on all counsel of via transmission of Notices of Electronic Filing generated by CM/ECF.

DATED: May 15, 2015

HAGENS BERMAN SOBOL SHAPIRO LLP

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

GLENDA JOHNSON and STEVEN LUCIER, Plaintiffs, v. SMITHKLINE BEECHAM CORPORATION, *et al.*, Defendants.	Case No.: 2:11-cv-05782-PD AND ALL RELATED CASES

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION TO STAY SPECIAL MASTER'S ORDERS OF MAY 6 AND 8, 2015

AND NOW, on this _____ day of _____, 2015, upon consideration of Plaintiffs' Motion to Stay Special Master's Orders of May 6 and 8, 2015, it is **ORDERED** that the Motion is **GRANTED**. The Special Master's Orders of May 6 and 8, 2015, are hereby stayed until the Court resolves Plaintiffs' Objections to said Orders.

BY THE COURT:

_____
HON. PAUL S. DIAMOND
UNITED STATES DISTRICT COURT JUDGE

In re: REBECCA ALEXANDER; SHARON ANDERSON; EDMUND ANDRE; KIM BRANSCUM; DORIS BRUST; CRAIG CHARLESTON; MARK ENDRES; YVONNE ENGLISH0MONROE; DARREN GRIGGS; CAROLYN JEAN GROVER; JOHN GROVER; KATHLEEN GUNN; MARK HARRELSON; ALAN HORRIDGE; TAMMY JACKSON; GLENDA JOHNSON; DIANE KESSLER; GEAROLD LEDSOME; STEVEN LUCIER; TED MANN; ANNETTE MANNING; MARY MCPARTLAN-HURSON; ROBERT MURRAY; CARMELA NORCROSS; YOLANDA PEREZ; CAROLYN SAMPSON; CHRISTOPHER SIMEONE; WILLIAM TYLER, III; COLLEEN VAN VLEET; EDWARD WORTHAN; PHILLIP YEATTS,

Petitioners

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

GLENDA JOHNSON, et al.	:	
	:	
v.	:	**Civ. No. 11-5782**
	:	
SMITHKLINE BEECHAM CORPORATION, et al.	:	

MEMORANDUM

Diamond, J. **May 19, 2015**

Between 2011 and 2014, fifty-two Plaintiffs brought suit alleging that thalidomide—a morning sickness drug manufactured and distributed by Defendants—caused them to suffer severe birth defects in the 1950s and 1960s. Special Master William Hangley seeks to interview thirty-two of the Plaintiffs to determine whether they consent to the proposed termination of their claims. Although Mr. Hangley has not yet asked a single question—indeed, no interviews have even been scheduled—Plaintiffs' counsel, Hagens Berman Sobol Shapiro LLP, objects, threatening to seek mandamus relief unless, by May 18, I either prohibit the interviews altogether or limit the questions Mr. Hangley may ask to those Hagens Berman has authorized. (Doc. No. 502.) Hagens Berman raises this objection only after Mr. Hangley has recommended the imposition of sanctions because of the firm's dishonesty and bad faith—a recommendation I have accepted. (Doc. No. 414); Johnson v. SmithKline Beecham Corp., 2015 WL 1004308 (E.D. Pa. Mar. 9, 2015). Because Hagens Berman's objections to Mr. Hangley's proposed interviews are premature or otherwise meritless, I will overrule them.

I. BACKGROUND

I have previously described the extensive procedural history of this litigation. Johnson v. SmithKline Beecham Corp., 2014 WL 5285943, at *1-5 (E.D. Pa. 2014 Oct. 16, 2014); Johnson

v. SmithKline Beecham Corp., 2015 WL 1476386, at *1-2 (E.D. Pa. Apr. 1, 2015). I will set out here the events germane to Hagens Berman's objections to Mr. Hangley's Orders.

Plaintiffs Invoke Equitable Tolling

In ten separate state court actions, Plaintiffs brought negligence, negligent design, and related claims. Defendants removed to this Court, where the cases were assigned to several judges, including me. After the Third Circuit upheld my refusal to remand, all the cases were consolidated before me for pretrial purposes. (Doc. No. 81); Johnson v. SmithKline Beecham Corp., 724 F.3d 337, 340 (3d Cir. 2013).

Anticipating Defendants' motions to dismiss, Plaintiffs pled with particularity that Defendants' fraudulent concealment and, in some cases, the discovery rule tolled the two-year limitations clock. Accordingly, I denied Defendants' dismissal motions in September 2013, noting that "I cannot determine, at this early stage in the litigation, the viability of Plaintiffs'" tolling allegations. (Doc. No. 92.)

Discovery Misconduct

Defendants then repeatedly and unsuccessfully sought to learn when each Plaintiff knew or reasonably should have known that thalidomide had caused his or her birth defects. As I have described, Plaintiffs provided no responses, misleading "collective" responses, or absurd responses to Defendants' discovery requests. See Johnson, 2014 WL 5285943, at *3-4; Johnson, 2015 WL 1004308, at *1-2. By June 2014, it was apparent that Plaintiffs had violated my discovery orders and had failed to produce highly probative evidence—including online posts that some Plaintiffs have known for decades that thalidomide caused their birth defects. (Doc. No. 232.) Accordingly, with the Parties' agreement and in accordance with Rule 53, on June 26,

2014, I appointed William Hangley as Special Discovery Master. (Doc. No. 256); Fed. R. Civ. P. 53(b)(1).

Defendants Threaten Sanctions

As discovery proceeded, it became apparent that many of Plaintiffs' cases were badly flawed. As Mr. Hangley explained,

> [D]efendants learned that several of the [P]laintiffs could not sue for the simple reason that they had already done that once; indeed, in at least one instance, a [P]laintiff was continuing to receive monthly settlement payments from a [D]efendant it was suing a second time for the same alleged tort.

(Doc. No. 414 at 6.)

On March 26, 2014, Defendants GlaxoSmithKline and Grünenthal urged Hagens Berman "to undertake a careful review of the claims it made in all these cases." (Doc. No. 310, Exs. 10-11.) GSK and Grünenthal offered to bear their own costs for cases Plaintiffs agreed to dismiss before April 11. (Id.) For cases "which remain pending after that date," however, GSK and Grünenthal "reserved [their] right[s] to seek both costs and attorneys' fees under all applicable rules and statutes." (Id.) Hagens Berman did not agree to dismiss any case before April 11, 2014, and the Parties proceeded with "massive" deposition discovery. (Doc. No. 414 at 8.)

In July and August, 2014, GSK and Grünenthal filed Motions for Summary Judgment against three Plaintiffs. (Doc. Nos. 258, 281, 310.) Invoking 28 U.S.C. § 1927 and the Court's inherent authority, they also asked me to sanction Hagens Berman for the firm's bad faith prosecution of these obviously time-barred matters. With the Parties' agreement, I referred these Motions to Mr. Hangley. (Doc. No. 316.)

Hagens Berman Takes Its Leave

With Mr. Hangley's appointment, it became apparent that Plaintiffs were going to be compelled to produce evidence to support their equitable tolling and fraudulent concealment

allegations. In fact, no such evidence exists. Around this time, Hagens Berman began seeking to dismiss cases or to withdraw as counsel. On July 25, 2014, Hagens Berman submitted stipulations of voluntary dismissal in two cases. (Doc. Nos. 284, 285.) On August 1, 2014, the firm asked to dismiss a third case and moved to withdraw from representing another Plaintiff. (Doc. Nos. 301, 302.) On August 14 and 15, 2014, Hagens Berman sought to dismiss four more cases. (Doc. Nos. 317, 319, 320, 321.) Between August 21 and 29, 2014, Hagens Berman moved to withdraw from two cases and asked me to dismiss one. (Doc. Nos. 331, 342, 343.) Two more voluntary dismissals came on September 26, 2014 and October 14, 2014. (Doc. Nos. 360, 368.) In sum, between the time I appointed Mr. Hangley to oversee discovery—when it became apparent that each Plaintiff would have to disclose when he or she knew or should have known that thalidomide caused his or her injuries—and October 14, 2014, Hagens Berman sought to dismiss ten cases and moved to withdraw from three others. In asking to withdraw, Hagens Berman informed me that it could not, consistent with its obligations under the Rules of Professional Conduct, continue to prosecute these actions. (See, e.g., Doc. No. 342 ("Plaintiffs' counsel seek[s] to withdraw solely because professional considerations require that they withdraw.").)

On October 16, 2014, I granted Defendants' Motion for Summary Judgment against Plaintiff Edmund Andre. Johnson, 2014 WL 5285943. At his deposition, Mr. Andre admitted that, contrary to the allegations in his Complaint, he had not relied on any alleged misrepresentation made by any Defendant. Id. at *11. Accordingly, he could not show fraudulent concealment. Again directly contradicting his own pleadings, Mr. Andre also admitted that he had known for some forty years before commencing suit that thalidomide had

caused his birth defects. Id. at *5, 10. Accordingly, I ruled on October 16, 2014 that Mr. Andre had not exercised reasonable diligence as required by the discovery rule.

Several days later, Hagens Berman sought to withdraw from representing two more Plaintiffs. (Doc. Nos. 375, 382.)

Plaintiffs "Settle" with GSK

On October 22, 2014, I received a letter from Terrie Bolton in which she asked me, *inter alia*, to deny the firm's pending Motion to Withdraw from her case. (Doc. No. 390.) She stated: "If counsel is permitted to withdraw, my claims will likely find no representation and would not be allowed the same justice that the remaining Plaintiffs are receiving [in these cases]." (Id.) She concluded she could not represent herself because, *inter alia*, "the consequences of losing this matter are so great." (Id.) On October 23, 2014—one day later—Hagens Berman asked me to stay "all [thalidomide] actions in their entirety—with the exception of [the six] pending summary judgment motions and [the three] pending sanctions motions" until twenty-one days after I decided all pending summary judgment motions. (Doc. No. 388.) I denied the request that same day. (Doc. No. 389.)

On October 28, 2014, I received a letter from the GSK Defendants, stating that "[a]ll [P]laintiffs currently represented by Hagens Berman—with the sole exception of Debra Johnson—will dismiss with prejudice all claims against the GSK [D]efendants." (Doc. No. 394.) In exchange, GSK would withdraw all their discovery requests and sanctions motions and forgo any current or future sanctions payments. (Id.) GSK further stated that "[t]his agreement shall not be characterized as a settlement of [P]laintiffs' claims" because "no payments are being made by GSK." (Id.)

These events were disturbing, to say the least. As Mr. Hangley's orders issued and Defendants sought sanctions, Hagens Berman went from vigorously litigating Plaintiffs' claims, to withdrawing some cases on a piecemeal basis, to proposing wholesale dismissal of the claims of all remaining Plaintiffs. The proposed dismissal came five days after Hagens Berman requested a stay of these cases. (Doc. No. 388.) The proposed dismissal came six days after Plaintiff Terrie Bolton (who, I was subsequently informed, apparently was not subject to the October 28th Agreement) emphasized her desire to continue with her litigation. (Doc. No. 390.) Under the proposed Agreement, Plaintiffs would dismiss their claims only against GSK; their litigation against the other Defendants would continue. The only benefit GSK conferred was its commitment not to seek sanctions against Hagens Berman.

The "Settlement" Is Referred to Mr. Hangley

On December 4, 2014, Mr. Hangley found that Hagens Berman's bad faith and dishonesty in prosecuting the claims of three thalidomide Plaintiffs warranted the imposition of sanctions. (Doc. No. 414.) Mr. Hangley made this recommendation—which I have accepted—after conducting a hearing at which Hagens Berman acknowledged that its misconduct warranted the imposition of sanctions in one of these cases. (Doc. No. 383, Tr. 10/1/14 at 133-34); Johnson, 2015 WL 1004308. Mr. Hangley is presently calculating the amount of sanctions to be imposed.

Four days later, on December 8, 2014, over Hagens Berman's objection, I referred to Mr. Hangley the question whether the twenty-eight Plaintiffs subject to the GSK-Hagens Berman October 28th Agreement had knowingly, intelligently, and voluntarily consented to dismissing their claims against GSK. (Doc. No. 420.)

To help him resolve the consent question, on December 10, 2014, Mr. Hangley suggested that he provide each Plaintiff with a questionnaire. (Doc. No. 430 at 3.) Hagens Berman objected to *any* inquiry, stating that the firm could "assure [Mr. Hangley] that Plaintiffs' counsel would never have sought to dismiss anyone's claim if counsel did not know that the Plaintiffs had consented willingly after being fully informed." (Doc. No. 425 at 2.) Mr. Hangley explained that he could not place his "entire reliance" on "Hagens Berman's expressed confidence in the sufficiency of its undescribed disclosures to its clients or its assurances that the [twenty-eight] plaintiffs have all knowingly agreed to an arrangement that is so facially disadvantageous to them." (Doc. No. 430 at 6.) Accordingly, Mr. Hangley concluded that he "must make plaintiff-by-plaintiff inquiries," and invited the Parties to assist in crafting appropriate procedures. (Id. at 7.) Noting that the October 28th Agreement appeared to confer a benefit only on Hagens Berman—and not its clients—Mr. Hangley also asked for briefing on whether Hagens Berman has a conflict under Rule 1.7(a)(2) of the Pennsylvania Rules of Professional Conduct. (Id.)

The Parties subsequently moved to dismiss the claims of four additional Plaintiffs against all Defendants (not just GSK). (Doc. Nos. 440, 468.) Again, over Hagens Berman's objection, I referred these matters to Mr. Hangley to evaluate Plaintiffs' consent. (Doc. Nos. 471, 485.)

On April 1, 2015, I granted Defendants' Motion for Summary Judgment as to Plaintiff Debra Johnson, whose claims were not covered by the October 28th Agreement. Johnson, 2015 WL 1476386. Once again, the evidence eventually produced in discovery contradicted Ms. Johnson's pleadings and demonstrated that her claims (which accrued in the 1960s) were time-barred. Hagens Berman filed a Notice of Appeal on April 28, 2015. (Doc. No. 494.)

Hagens Berman Seeks to Preclude Interviews

On May 6, 2015, Mr. Hangley ordered Hagens Berman to submit by May 19, 2015 a proposed schedule of Plaintiffs' phone interviews that could be completed by June 30, 2015. (Doc. No. 498.) On May 8, 2015, Hagens Berman asked Mr. Hangley to stay this Order, indicating that it would be filing objections with me, "and seeking interlocutory review or petitioning for a writ of mandamus, if necessary." (Doc. No. 499.) The firm argued that there is no basis for Mr. Hangley's inquiry, which would abrogate the attorney-client privilege. If Mr. Hangley insisted on the interviews, Hagens Berman proposed a list of six permissible questions that "could be asked without invading the privilege." (Id.) For the four Plaintiffs dismissing their claims against all Defendants, Hagens Berman proposed three different questions. (Id.)

After denying the stay request, Mr. Hangley issued a Procedural Memorandum describing how he expected to conduct the interviews. (Doc. Nos. 500, 501.) He emphasized that he would take special care not to ask about privileged communications:

> I will advise each of the testifying plaintiffs that I do not want to know—and she must not tell me—what her attorney said to her, but that I am interested in learning the facts she knows (regardless of where or how she learned those facts), her own appreciation of her claims, and her reasons for deciding to drop those claims.

(Doc. No. 501 at 2.) Accordingly, the interviews would cover the Plaintiffs': (1) "understanding of their claims"; (2) "understanding of the consequences of dropping their claims"; and (3) "the facts and circumstances that they, the plaintiffs, took into account in deciding to drop their claims." (Id.) Mr. Hangley refused to limit his questions to those proposed by Hagens Berman. Mr. Hangley stated that although he expects to rule on counsel's objections, in his discretion, he might ask me to consider an objection. (Id.)

To date, Hagens Berman has not made any of the thirty-two Plaintiffs available, and not a single interview has taken place.

On May 11, 2015, Hagens Berman filed the instant objections to Mr. Hangley's Procedural and Scheduling Orders respecting the interviews. (Doc. No. 502.) The firm admonishes that if I do not rule on the objections within a week or if I overrule the objections, Hagens Berman "will petition for a writ of mandamus from the Third Circuit." (Id. at 2.) Alternatively, Hagens Berman asks me to stay the interviews and certify an interlocutory appeal on the question of whether Mr. Hangley may "inquire into attorney-client communications." (Id. at 26); 28 U.S.C. § 1292(b).

On May 15, 2015, Hagens Berman asked me to "stay the planned interviews until [its] objections are resolved." (Doc. No. 504 at 1.) The GSK Defendants take "no position on any of the relief sought by Hagens Berman." (Doc. No. 503.)

II. DISCUSSION

Hagens Berman raises four objections to Mr. Hangley's Orders. All are either premature, meritless, or both.

Objection #1: Mr. Hangley's Inquiry Is Without Legal Basis

I have repeatedly set out the legal basis for Mr. Hangley's inquiry, and will do so again here. (Doc. Nos. 396, 420, 471, 485.)

Under Rule 41, a plaintiff may voluntarily dismiss a case without court approval by, *inter alia*, filing "a stipulation of dismissal signed by all parties who have appeared." Fed. R. Civ. P. 41(a)(1)(A)(ii). Defendants Sanofi and Grünenthal have not joined the October 28th Agreement. Accordingly, these twenty-eight Plaintiffs may dismiss their claims against the GSK Defendants "only by court order." Fed. R. Civ. P. 41 (a)(2). In more usual circumstances, I have approved

innumerable stipulations of dismissal. These are not usual circumstances, however. It appears that in return for terminating twenty-eight cases against GSK, the October 28th Agreement confers a benefit only on Hagens Berman, not its clients. Moreover, I have accepted Mr. Hangley's recommendation to impose sanctions on the firm for its bad faith and dishonesty.

In these highly unusual circumstances, I feel compelled to ensure that the Plaintiffs have actually consented to the Agreement. See Kabbaj v. Am. Sch. of Tanger, 445 F. App'x 541, 544-45 (3d Cir. 2011) (per curiam) (requiring "clear and unambiguous evidence that the parties have entered into" a Rule 41 dismissal); Kramer v. Tribe, 156 F.R.D. 96, 101 (D.N.J. 1994) ("The Court also has inherent disciplinary authority to supervise and monitor the conduct of attorneys admitted to practice." (citing Chambers v. Nasco, Inc., 501 U.S. 32, 43-46 (1991))).

All Parties have joined the dismissal in the four remaining cases. Fed. R. Civ. P. 41(a)(1)(A)(ii). This is a distinction without a difference, however. Pursuant to the Court's inherent authority, I may look behind the dismissal to determine whether it is the result of "collusion or improper conduct." United States v. Mercedes-Benz of N. Am., Inc., 547 F. Supp. 399, 400 (N.D. Cal. 1982); see also Green v. Nevers, 111 F.3d 1295, 1301 (6th Cir. 1997) (same); Moeller v. Weber, No. 04-4200, 2012 WL 5289331, at *1 (D.S.D. Oct. 23, 2012) (court may look behind dismissal to "make certain that the stipulation of dismissal was voluntary"). Again, the circumstances presented compel me to act on this inherent authority.

Objection #2: Mr. Hangley's Inquiry Is Without Factual Basis

Hagens Berman next repeatedly argues that because "everything" it "has done in this case demonstrates that it is dedicated to representing its clients zealously," there is no "factual basis for the speculation of the Special Master and the Court that Hagens Berman sought dismissal before fully informing their clients and obtaining consent." (Doc. No. 502 at 5, 8, 10, 12, 13.)

Further, Hagens Berman suggests that Mr. Hangley is "on a fishing expedition." (Id. at 14.) Once again, I do not agree.

The October 28th Agreement capped a disturbing course of conduct. From the outset, Plaintiffs sought to obstruct Defendants' legitimate, and indeed, critical discovery requests as to when Plaintiffs knew or reasonably should have known that their injuries were caused by thalidomide. It became apparent after Mr. Hangley's appointment that Plaintiffs would have to disclose this information. Only then did Hagens Berman apparently begin investigating its clients' claims and then seek to dismiss them. In the span of a few weeks, however, Hagens Berman went from actively litigating claims to dismissing them en masse. Plainly, there is a more than sufficient factual basis for Mr. Hangley to conduct limited interviews of each Plaintiff to ensure that he or she actually consented to these dismissals.

Objection #3: Mr. Hangley's Proposed Inquiry Is Overbroad

Hagens Berman next argues that Mr. Hangley's proposed inquiry exceeds the task I assigned him. (Doc. No. 502 at 14.) This is simply incorrect. As Mr. Hangley has set out, the interviews will cover Plaintiffs': (1) "understanding of their claims"; (2) "understanding of the consequences of dropping their claims"; and (3) "the facts and circumstances that they, the plaintiffs, took into account in deciding to drop their claims." (Doc. No. 501 at 2.) Mr. Hangley thus proposes to do exactly what I ordered: determine whether each Plaintiff knowingly, voluntarily, and intelligently agreed to dismiss his or her claims.

Objection #4: Protection of Attorney-Client and Work-Product Privileges

Hagens Berman argues that Mr. Hangley's inquiry will abrogate the attorney-client and work-product privileges because there are "no protections" in Mr. Hangley's proposed questioning. This concern is curious for several reasons. The attorney-client privilege is the

client's, not the lawyer's, who may invoke the privilege for the client's protection. See Haines v. Liggett Grp. Inc., 975 F.2d 81, 90 (3d Cir. 1992) ("Although the privilege belongs to the client, and only the client may waive it, an attorney may assert the privilege on the client's behalf."); United States v. Fisher, 692 F. Supp. 488, 494 (E.D. Pa. 1988) ("It is well established that the attorney-client privilege belongs to the client."). Yet, as the objections themselves provide, they are the "Objections of Plaintiffs' Counsel," not Plaintiffs themselves. (Doc. No. 502.) It is difficult to see how Plaintiffs benefit when Hagens Berman invokes the privilege to obstruct an inquiry intended to protect Plaintiffs. In any event, the privilege objection is obviously premature. The interviews have not been scheduled; Mr. Hangley has not asked a single question.

Moreover, because Hagens Berman overstates the scope of these privileges, the firm's hypothetical objections are meritless. The attorney-client privilege protects communications between the client and attorney made for the purpose of "obtaining or providing legal advice." Gillard v. AIG Ins. Co., 15 A.3d 44, 59 (Pa. 2011); see also Keating v. McCahill, 2012 WL 2527024, at *2 (E.D. Pa. July 2, 2012) ("Federal courts sitting in diversity . . . apply the law of the host state in determining privilege."). The work-product privilege similarly protects "documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative." Fed. R. Civ. P. 26(b)(3).

Hagens Berman argues that Mr. Hangley cannot inquire into a Plaintiff's decision to dismiss her own claims because "those 'understandings' have their direct roots in the extensive communications [Plaintiffs] have had with counsel on those topics." (Doc. No. 502 at 16.) This is incorrect. The attorney-client privilege protects against the disclosure of *communications*. It does not protect from disclosure any fact that maybe based, however loosely, on something

Hagens Berman lawyers told Plaintiffs. See Upjohn Co. v. United States, 449 U.S. 383, 395 (1981) ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."); Gillard, 15 A.3d at 52 n.8 (privilege protects communications made "for the purpose of securing or providing professional legal services" and thus "does not . . . protect clients from factual investigations"). Similarly, a client's disclosure of a fact that may also be mentioned in a document prepared by her lawyer does not abrogate the work-product privilege. In re Grand Jury (Impounded), 138 F.3d 978, 981 (3d Cir. 1998) (privilege "shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case").

Mr. Hangley, an attorney of considerable skill and experience, has set forth detailed procedures by which he will determine whether each Plaintiff understands her claims and her reasons for withdrawing those claims. Mr. Hangley will instruct each Plaintiff not to disclose attorney communications and not to answer a question before any objection is resolved. Hagens Berman fears that Plaintiffs may be compelled to respond to Mr. Hangley's questions by the "apparent threat" that Mr. Hangley will hold them in "contempt." (Doc. No. 502 at 22.) Yet, the contempt power resides with the Court, not the Special Master. 18 U.S.C. § 401. Although Hagens Berman suggests that Mr. Hangley's proposal would violate due process, it is difficult to see how the proposed process materially differs from that employed during the depositions in this litigation.

Hagens Berman's Pre-Approved Declaration and Questions

Finally, if I overrule the firm's objections, Hagens Berman asks me to allow the firm to script Mr. Hangley's inquiry. The firm proposes that I order Mr. Hangley to have each Plaintiff sign a declaration (written by Hagens Berman) or limit the interviews to a list of four to six

questions (again, written by Hagens Berman). (Doc. No. 502 at 23, 25.) These declarations and proposed questions are not materially different from Mr. Hangley's proposed inquiry: all would necessarily require Plaintiffs to disclose their "understandings" of their claims and the October 28th Agreement. Accordingly, I do not understand why Hagens Berman believes that its own proposed questions or declarations preserve the attorney-client and work-product privileges. In any event, I cannot expect Mr. Hangley to perform an adequate inquiry if he cannot ask his own follow-up questions.

Alternative Request for Interlocutory Appeal or a Stay

An order compelling the disclosure of arguably privileged information is no longer an appealable collateral order. Mohawk Industries, Inc. v. Carpenter, 558 U.S. 100, 110 (2009). Accordingly, Hagens Berman asks me to stay the proceedings and certify for interlocutory appeal the question of whether "the Special Master" may "inquire into attorney-client communications regarding Plaintiffs' dismissals." (Doc. No. 502 at 26); 28 U.S.C. § 1292(b). I will not do so.

I may certify for interlocutory review an otherwise non-appealable order if I find that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and that "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Yet, certification will not help inform me or Mr. Hangley if he may "inquire into attorney-client communications." He may not, and he does not propose to do so. Because there is no "ground for difference of opinion" as to this question, certification would be pointless. See, e.g., Johnson, 724 F.3d at 344 (finding "substantial ground for difference of opinion" on question of citizenship of defendant when disagreement among District Courts would continue absent a decision from the Third Circuit).

Finally, I will not "stay the planned interviews" of Plaintiffs. (Doc. No. 504 at 1.) Because Hagens Berman has refused to produce its clients for interviews, none is "planned."

III. CONCLUSION

If a Plaintiff has freely and intelligently decided that she no longer wishes to proceed with her case against GSK or the other Defendants, I will likely allow her to withdraw her claims. Because the record suggests that Hagens Berman may have made this decision for Plaintiffs, Mr. Hangley's inquiry is critically important.

An appropriate Order follows.

/s/ Paul S. Diamond

May 19, 2015 Paul S. Diamond, J.

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

GLENDA JOHNSON, et al.	:	
	:	
v.	:	**Civ. No. 11-5782**
	:	
SMITHKLINE BEECHAM CORPORATION, et al.	:	

O R D E R

Accordingly, this 19th day of May, 2015, upon consideration of Hagens Berman's Objections to the Special Masters May 6, 2015 and May 8, 2015 Orders (Doc. No. 502) and Motion for Stay (Doc. No. 504), it is hereby **ORDERED** that the Objections are **OVERRULED** and the Motion for a Stay is **DENIED**.

AND IT IS SO ORDERED.

/s/ Paul S. Diamond

_____

Paul S. Diamond, J.

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RE: In re: Rebecca Alexander, et al
Case Number: 15-2245
District Case Number: 2-11-cv-05782

Effective December 15, 2008, the Court implemented the Electronic Case Files System. Accordingly, attorneys are required to file all documents electronically. See 3d Cir. L.A.R. 113 (2008) and the Court's CM/ECF website at www.ca3.uscourts.gov/ecfwebsite.

To All Parties:

Enclosed is the case opening information regarding the above-captioned petition filed by Kathleen Gunn, Yvonne English0Monroe, Robert Murray, Annette Manning, Sharon Anderson, Mary McPartlan-Hurson, Glenda Johnson, Mark Endres, Alan Horridge, Doris Brust, Carolyn Sampson, Yolanda Perez, Tammy Jackson, Carolyn Jean Grover, Rebecca Alexander, Carmela Norcross, Mark Harrelson, Kim Branscum, Craig Charleston, Diane Kessler, Christopher

Simeone, William Tyler, Darren Griggs, Colleen Van Vleet, Ted Mann, Edward Worthan, Gearold Ledsome, Steven Lucier, Phillip Yeatts, John Grover, Edmund Andre, docketed at No. **15-2245**. Any inquiries should be directed to your Case Manager in writing or by calling the Clerk's Office at 215-597-2995. This Court's rules, forms and case information are available on our website at http://www.ca3.uscourts.gov.

The docketing fee in the amount of $500.00 has been paid. A receipt for the fee is enclosed.

The petition will be forwarded to the Court for disposition. The parties will be advised when an order is entered by the Court either denying the petition or directing that a response be filed.

Counsel for Petitioner(s)

As Counsel for Petitioner(s), you must file:
1. Application for Admission (if applicable);
2. Appearance Form
3. Disclosure Statement (except governmental entities)
These forms must be filed on or before **06/02/2015**.

Counsel for Respondents(s)

1. Application for Admission (if applicable);
2. Appearance Form
3. Disclosure Statement (except governmental entities)
These forms must be filed on or before **06/02/2015**.

Very truly yours,

Marcia M. Waldron

Marcia M. Waldron, Clerk

By: Maria, Case Manager
267-299-4937

cc:
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