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**IN THE COMPETITION
APPEAL TRIBUNAL**

Victoria House,
Bloomsbury Place,
London WC1A 2EB

Case Nos. 1251/1/12/16
1252/1/12/16
1253/1/12/16
1254/1/12/16
1255/1/12/16

20 December 2016

Before:

THE HON. MR. JUSTICE ROTH
(President)
(Sitting as a Tribunal in England and Wales)

BETWEEN:

GENERICS (UK) LIMITED	<u>Appellant</u>
- and -	
COMPETITION AND MARKETS AUTHORITY	<u>Respondent</u>
- AND -	
GLAXOSMITHKLINE PLC	<u>Appellant</u>
- and -	
COMPETITION AND MARKETS AUTHORITY	<u>Respondent</u>
- AND -	
(1) XELLIA PHARMACEUTICALS APS	
(2) ALPHARMA LLC	<u>Appellants</u>
- and -	
COMPETITION AND MARKETS AUTHORITY	<u>Respondent</u>
- AND -	
ACTAVIS UK LIMITED	<u>Appellant</u>
- and -	
COMPETITION AND MARKETS AUTHORITY	<u>Respondent</u>
- AND -	
MERCK KGaA	<u>Appellant</u>
- and -	
COMPETITION AND MARKETS AUTHORITY	<u>Respondent</u>

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Official Court Reporters and Audio Transcribers
5th Floor, 5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com

APPLICATION HEARING

APPEARANCES

Mr. Stephen Kon and Mr. Christophe Humpe (Partners, of King & Wood Mallesons LLP) appeared on behalf of the Appellant (Generics (UK) Limited).

Mr. James Flynn QC and Ms. Charlotte Thomas (instructed by Nabarro LLP) appeared on behalf of the Appellant (GlaxoSmithKline PLC).

Mr. Jon Turner QC (instructed by CMA Legal for the Competition and Markets Authority) appeared on behalf of the Respondent.

1 THE PRESIDENT: I am sorry so many of you had to come here, but I think it is the only way to
2 quickly sort it out. I do not want to engage in a blame game for how this has arisen. What I
3 want to do is to find a way in which Dr. Stillman can make a limited response to certain
4 aspects of Dr. Webster's report which we can identify and arrive at a sensible adjustment to
5 the timetable, which works effectively for everyone and gets us to the start of the hearing.
6 What I have in mind is this, before we go into the detailed report: the joint meeting on that
7 aspect, which was, I think, going to be on 10th January will be held by 25th January.
8 Dr. Stillman can make his limited report in response by 27th - I do not think it matters that it
9 comes after the meeting. Indeed, in so far as he is going to try and clarify some things a
10 meeting might help. Then their joint statement will be by 1st February. That gives enough
11 time, it is a week after their meeting.

12 Bundles, subject to your views on that, can be put back to 1st February as well.

13 I would like then to move the PTR to Tuesday, 7th February, have the appellants' skeletons
14 by 14th February, and the CMA's skeleton in reply by 21st February.

15 Before we get into the detail of particular points in Ms. Webster's report to which
16 Dr. Stillman should or should not be able to respond, is there a problem with a timetable on
17 those lines? You may want to consult people behind you.

18 MR. TURNER: We have thought about this too, looking for a practical solution. We think that
19 any further report, if justified at all, ought to precede the meeting of experts, and then the
20 joint statement, if that can be sensibly done. We have a proposal that we were just talking
21 about a few moments ago, which we would seek to put to the Tribunal.

22 THE PRESIDENT: When you say "talking about", you mean with each other?

23 MR. TURNER: Internally, not externally as between the parties.

24 THE PRESIDENT: There is, in fact, a school of thought among certain judges that it is better if
25 meetings precede reports, but what is your proposal?

26 MR. TURNER: Our proposal is this: it is not so different from, Sir, your proposal. We agree
27 that the latest feasible dates for the skeletons are as you have outlined, starting with
28 skeletons on 14th February, because otherwise preparation will be----

29 THE PRESIDENT: You do not have to explain. If you agree, you agree.

30 MR. TURNER: Working back from that, and looking at it from the point of view of what the
31 parties need to do for the skeletons, ideally we do want to have the joint statement as the
32 preceding step, and for it to be a joint statement that has considered all material that has
33 gone before it, and that is why we go then to that, and say the latest feasible date for the

1 joint statement is 3rd February, because that leaves just over a week before the skeletons,
2 which are due on 14th.

3 Working back from that, on our logic, the latest feasible date for the expert meeting on
4 pricing, to precede the joint statement of agreement and disagreement, would be in the week
5 commencing 23rd January, at some point in that week. We are concerned that if it is on
6 Friday, 27th itself, if it is left that late, you only have a week for preparation of the joint
7 statement. I can tell you, Sir, that our experience has been that the preparation of the joint
8 statement after a meeting is actually quite a laborious process, and it is necessary to give a
9 sufficient amount of time for that to be done properly.

10 THE PRESIDENT: You are saying the week of the 23rd?

11 MR. TURNER: The week of the 23rd, and we say the meeting, therefore, should ideally be at
12 latest on the 25th, by 25th January.

13 Working back from that, because we consider that any new report by Dr. Stillman should be
14 considered at that meeting, because otherwise it might supersede it and be disruptive and
15 lead to cross-currents and confusion, the latest feasible date for a new report should be
16 Monday, 16th January, and that itself leaves, therefore, only just over a week for it to be
17 digested by the other experts prior to a meeting taking place.

18 THE PRESIDENT: In fact, compared to what I have said, you have suggested the joint statement
19 could be a little bit later, 3rd February, instead of the 1st?

20 MR. TURNER: Yes.

21 THE PRESIDENT: The joint meeting is actually the same, I think you are saying, by the 25th.

22 MR. TURNER: Yes.

23 THE PRESIDENT: The real difference then is regarding the report?

24 MR. TURNER: That is because of what the parties need to do, so to have a report which comes
25 after the meeting could only lead to problems, and it should precede it.

26 THE PRESIDENT: Otherwise the rest, the PTR on the 7th, that is not a problem?

27 MR. TURNER: On that particular date, I, myself, have an obligation in the European Court.

28 THE PRESIDENT: We are very restricted on dates here.

29 MR. TURNER: It may be that one of my colleagues, therefore, can attend.

30 THE PRESIDENT: You have a team with you?

31 MR. TURNER: We will.

32 THE PRESIDENT: Unless we kept it where it was, which does not seem sensible now. I think it
33 has to be the 7th. I do not want it any later.

1 The question is whether the report can be as early as the 16th. I take your point that you
2 might need some time after the meeting, so perhaps joint statement by 3rd February makes
3 more sense, which is the Friday.

4 The remaining issues covered in this report are relatively confined, and the points on which
5 Dr. Stillman says he disagrees, or in some cases may disagree, he is not sure yet, with
6 Dr. Webster are things that can be explained at the meeting. I do not think it is essential
7 that it comes before.

8 MR. TURNER: I am not going to descend into the detail at all, but may I explain our framework
9 for thinking about this and how the Tribunal ought to approach it?

10 THE PRESIDENT: It is a question also of what is practicable. Given the time of year we are in,
11 and his other commitments, it is question really of what can be achieved.

12 MR. TURNER: We agree with that. The key to resolving the issue that, Sir, you have just
13 outlined we think is this: the first question is really whether there is actually a need for a
14 further report by Dr. Stillman. It is implicit in your statement, the existing case
15 management framework already provides for a meeting of the experts and then for a----

16 THE PRESIDENT: I think there is need for a further report, but it is only on certain limited
17 points.

18 MR. TURNER: We shall look at that. Our view is that a report----

19 MR. FLYNN: Perhaps at some point I could make the application, Sir, and we can----

20 THE PRESIDENT: You have made it in writing, and I have considered it in writing, and the only
21 reason you are here is because sometimes at this stage an application like that cannot be
22 resolved in writing.

23 MR. FLYNN: Indeed, Sir. We suggested a hearing precisely for these reasons----

24 THE PRESIDENT: I have taken your application. You have put in a full witness statement. We
25 have seen what he has said, and I am proceeding from there. I have read it. Your
26 application is made. The fact that you have not stood up to say, "I make the application"----

27 MR. FLYNN: Let me just say that the timetable that you were suggesting is something that we
28 could work with. We, of course, have explained why 27th January is a reasonable date for
29 Dr. Stillman, given everything else that is going on.

30 THE PRESIDENT: Yes, and I obviously took that into account. I think I have got your points. I
31 am not seeking to ride over them.

32 MR. FLYNN: I do not suggest that for a moment.

33 THE PRESIDENT: Mr. Turner, yes, you were saying?

1 MR. TURNER: Our perspective is that the practical justification for a report, as opposed to
2 following the existing process in the way that, for example, GUK's representatives have
3 pointed out in their letter, would be if you need detailed written calculations of reasoning to
4 be presented to the Tribunal to address some particular aspect of Ms. Webster's evidence,
5 so that the opposing party and the Tribunal can properly see what that process of reasoning
6 is.

7 Leaving aside possibly the two points that we referred to in our letter, there is really nothing
8 of substance in Dr. Stillman's witness statement which shows that, because all he does is
9 say, "Ms. Webster says this about my report, I need to"----

10 THE PRESIDENT: I do not want to get into it now, Mr. Turner. You have just acknowledged, as
11 did the letter from the CMA, that there may be two points on which there is something that
12 could be said. Suppose there are only two points. The question is: why is it essential that
13 the report comes before the meeting? He can explain those points. These are responsible
14 experts, all of them, they are experienced, they understand these matters. He can explain
15 what his position is at the meeting, and he has to produce his report a couple of days
16 afterwards. So it is not as though he is going to go away and do a whole lot more research
17 and write a very different report, and sabotage the whole report. He will not get very far if
18 he does, because it will all come out.

19 MR. TURNER: It is less satisfactory because until the material is there in writing, which
20 obviously is what they say is needed for the Tribunal's purpose and for our purpose, we will
21 not fully be able to appreciate the points that are being made and the reasoning that is used
22 to support them.

23 THE PRESIDENT: I am sorry, I do not accept that. I think that Ms. Webster, who is extremely
24 experienced, as is Dr. Stillman, they will be able to discuss it. One of the reasons for having
25 it in writing is not for the benefit of the other experts, it is really for the help of the Tribunal
26 in getting more in writing and less in oral evidence. You will be able to explain, and indeed
27 by that stage show, and say, "Look, you have calculated this average", or whatever it is, "or
28 this on closed prescriptions, this is the work we have done, and this is what it comes out
29 with", and they can discuss it. It may not be ideal, but we are where we are. Dr. Stillman is
30 in another case. If he was not, no doubt one could have a different timetable proposed, and
31 it seems to me, doing the best with what we have got in a way that I really do not think is
32 unfair to your client, this can work. We are not talking about a major new report. We will
33 go through everything that he wants to deal with. Mr. Flynn will try and persuade me that
34 all of it is necessary. At the moment I am not persuaded, but I have not heard him, but

1 some of it is, and I think perhaps a bit more than the two points you have identified. Even
2 so, they are not points of great length, some of these, they are fairly circumscribed matters.

3 MR. TURNER: We agree with that. We do not think that----

4 THE PRESIDENT: I do not think there is a problem really that the meeting comes before the
5 report.

6 MR. TURNER: In that case, and hearing, Sir, what you say about it, I will move to a slightly
7 different angle on it. We are where we are, and therefore the ability to grapple with some
8 written reasoning is not considered essential, because the experts will have a frank, open
9 and full discussion about the points before any report is produced. There is still the need to
10 ensure, perhaps Sir you have this well in mind, that any report which is produced is then
11 limited in the way that you have outlined. One concern, a legitimate concern that the CMA
12 does have is that a further report at that stage should not open up new or different issues,
13 because that would really place us in difficulties. You will be aware, Sir, that the way in
14 which this arose was precisely because the reply evidence served by GSK was supported by
15 three additional factual witness statements and some new pricing data that was for some
16 reason missed at the time of the administrative stage.

17 THE PRESIDENT: I think it has arisen for the reason you have mentioned. Clearly, that has
18 been a major cause of the expert evidence changing late, plus the fact that you have had to
19 change your expert, which has inevitably led to a fresh pair of eyes looking through it and
20 viewing a few things in a slightly different way, which is understandable because experts
21 are independent, although Ms. Webster has very faithfully tried to indicate where she is
22 happy to adopt what Dr. Haydock said. So it has been a combination of those things that
23 has put us in this position, but delay, do not forget, that has led to delay in what would have
24 been a report from Dr. Haydock, and Ms. Webster had to start from scratch.

25 MR. TURNER: She did, but she produced it under enormous pressure and very quickly in the
26 circumstances.

27 THE PRESIDENT: Yes, I take your point, it has got to be limited and circumscribed.

28 MR. TURNER: Therefore, if one goes down the path, Sir, that you are outlining, what we would
29 say is that there are two dimensions that would need to be controlled by the Tribunal. The
30 first is the timing, which we have been canvassing so far. The other is very strictly to look
31 at the content of what is permitted to be produced by Dr. Stillman in any further report, as
32 opposed to an agreement, disagreement statement, the joint statement itself. Those
33 parameters need to be tightly supervised to prevent the wheels coming off shortly before the
34 trial.

1 THE PRESIDENT: Yes. What I suggest I do is to go with Mr. Flynn through the particular
2 points that Dr. Stillman says he would like to respond to, as identified in his witness
3 statement, and then we will see where we get to.

4 MR. TURNER: Yes, Sir.

5 THE PRESIDENT: I think, Mr. Flynn, we start at para.11, which, as I understand it, concerns
6 Ms. Webster's paras.4.16(c) and (d). The rest is comment which he makes about data. The
7 actual analysis that she has done is in (c) and (d). It seems to me that he can respond to
8 4.16(c) and (d) but nothing else.

9 MR. FLYNN: Those are the points to which he refers.

10 THE PRESIDENT: So he can respond to 4.16(c) and (d) on the issue of CIMS versus Sellick.
11 Paragraph 12 concerns paras.4.35 to 4.38.

12 MR. FLYNN: That is exactly right, Sir.

13 THE PRESIDENT: It seemed to me, and I will hear from Mr. Turner, that he should be entitled
14 to respond to those, which is about the rebates, I think.

15 MR. FLYNN: Yes.

16 THE PRESIDENT: He says 4.36 to 4.38, I think perhaps logically it starts at 4.35, which is the
17 introduction. He can respond to those.

18 MR. FLYNN: He will respond to the data points in those paragraphs.

19 THE PRESIDENT: In para.13, the 3.3 per cent mark-up, he says that Ms. Webster has failed to
20 take account of the warnings made, "It is necessary for me to explain the difficulties with
21 the approach". That seems to me comment on just what goes into the expert statement. I do
22 not think that needs a report.

23 MR. FLYNN: I will not press that point if you are of that view, Sir.

24 THE PRESIDENT: The next one is the closed versus open prescriptions, paras.3.29 to 3.33, as I
25 understand it. It is annexed to Dr. Majumdar's analysis, but it is that section, is it not?

26 MR. FLYNN: That is where it starts. It is also in her conclusion at section 5.

27 THE PRESIDENT: Yes, I will come on to section 5, because some of this feeds in to section 5.

28 MR. FLYNN: I think that was really my point on the closed and open point, as it has---

29 THE PRESIDENT: On the actual analysis it seemed to me he should be able to respond to 3.29
30 to 3.33.

31 Then para.15, you say it is replication, the updates, "I need to review and replicate Ms.
32 Webster's analysis of industry-average price to determine the scope of the other adjustments
33 that she has made". I am sure he does need to review it, I do not see that needs a report.

1 MR. FLYNN: To be fair, Sir, I think that describes background work that he is going to have to
2 do in order to make such a report or understand Ms. Webster, so I think----

3 THE PRESIDENT: He needs to understand it for the purposes of the meeting, but if he comes up
4 with a different figure on the calculation he will no doubt raise it at the meeting and no
5 doubt will re-do the calculation to make sure it was right. I do not think that is part of a
6 report.

7 Paragraph 16, this is the decline in sales, which I think is a new point. That is, I think, 3.43
8 to 3.54.

9 MR. FLYNN: That is correct.

10 THE PRESIDENT: There is a detailed analysis there. That, I would have thought - again I will
11 hear from Mr. Turner - he should be allowed to respond to.

12 MR. FLYNN: If I might just point out, in our account of this, it is paras.4.49 and 4.51 to 4.54.

13 THE PRESIDENT: No, I do not think 4.49. 4.54 is just a comment based on the analysis in the
14 paragraphs we have just discussed.

15 MR. FLYNN: The key analysis is contained in the paragraphs you have identified.

16 THE PRESIDENT: I think he should respond to the analysis, the rest can be in their discussions.
17 Then para.17, import prices, that relates to Ms. Webster's 4.55 and 4.56. That is simply the
18 question of using a different basis for an average. Then obviously you get a slightly
19 different result if you use a different average. How should you compile your average? I do
20 not think that needs a report.

21 MR. FLYNN: It is an analysis of the Sellick data, and it is a methodological point. It is one that
22 in Dr. Stillman's opinion requires great analysis of the data and possibly a somewhat
23 technical explanation, so----

24 THE PRESIDENT: Is it not a question of whether you use a simple average or a weighted
25 average having regard to the use of the----

26 MR. FLYNN: The differences that that produces and the implications that one can draw from
27 using those different averages. That is something which, in our submission, and in
28 Dr. Stillman's opinion is something that he would need to investigate and explain. That is
29 not just a matter of comment in the joint report.

30 THE PRESIDENT: He has used one method of averaging, and she has said it is better to use a
31 different method of averaging, plus the fact that it is better to use only 2001. He disagrees,
32 and he stands by the way he has done it presumably.

33 MR. FLYNN: This is also a point, as Dr. Stillman observes, where Ms. Webster is going beyond
34 what Dr. Haydock says in saying that the Decision has used the wrong figure. Therefore,

1 the Decision does overstate the parallel import prices, and he disagrees and, in our
2 submission, being able to demonstrate that properly is important. This is not a fringe
3 matter, this is something which is actually in the Decision itself and, in my submission, he
4 should be able to spell that out in a report. This is not just a simple matter of approach, this
5 is, in effect, Ms. Webster saying, “Not only do I support Dr. Haydock in her view that the
6 Decision was probably overstated, actually it is”.

7 THE PRESIDENT: She says that she is responding to Dr. Stillman’s use of simple averages and
8 as a critique of why she says, using simple averages, the period of years used. It is simply
9 that, is it not?

10 MR. FLYNN: The report speaks for itself as to what she says, but she is taking a different year,
11 different averages, she is assessing it on a completely different----

12 THE PRESIDENT: If the calculation is said to be wrong, then that can be raised at the meeting,
13 but so far as what is the better average to use, the better year to use, that is something that
14 can be explored in evidence. I do not see that there is a major presentation of new data
15 there.

16 MR. FLYNN: I apologise, Sir, when you say it can be explored in evidence?

17 THE PRESIDENT: They will set out in their joint statement why they each think their method of
18 averaging is the more appropriate, and then it can be explored when they give evidence at
19 the hearing as to which method is more appropriate. They will each set out their own
20 method.

21 MR. FLYNN: They have, but this is a new point which says the Decision is positively wrong on
22 this issue, and the reason that she is able to reach her conclusion that the Decision is wrong
23 is by a critique of the way Dr. Stillman has approached it. In our submission, it is important
24 that Dr. Stillman should be able to respond to that properly, and that is not going to be a
25 small box in a joint expert report. That is a matter on which we would submit we are
26 entitled to have----

27 THE PRESIDENT: -- explain why it is his conclusion is right on the only bit that she is engaged
28 with, that Ms. Webster is engaged with. She has put forward two reasons why she disagrees
29 with his result as being unreliable. The first, as I understand it, is that Dr. Stillman uses the
30 simple average and she says that that is not an appropriate way to do it, it should be a
31 weighted average, even though that has certain problems. She says, “This is the result if
32 you use a weighted average”, and then she says, “Secondly, 4.56(b), because of the month
33 used, that gives undue weight in the total to 2000”. Those are the only two points, as I
34 understand it, that have been made about this.

1 MR. FLYNN: There are only two points, but going to a view that the Decision is wrong that is
2 based on a new analysis of the Sellick data, of the CIMS export data----

3 THE PRESIDENT: I am sorry to interrupt you, but this, as I understand it, is the same data that
4 Dr. Stillman has analysed, but applied a different way of averaging. It is a critique of
5 Dr. Stillman's approach, and what is said to be a correction because of an undue weight
6 given to the year 2000. She presumably says that the simple averaging and the second point
7 are not correct. That is the issue. Yes, it may have a major significance at the end of the
8 day in terms of what it says to a part of the Decision, but that is the only issue raised here to
9 which he wants to respond.

10 MR. FLYNN: What he is saying, as I understand his evidence, is that she has gone into the
11 Sellick data, the CIMS export data, and drawn certain conclusions from it and saying that he
12 has not read it correctly. That is something which he will need to investigate and no doubt
13 spell out.

14 THE PRESIDENT: It is the same data that he has used, is it not?

15 MR. FLYNN: It is the same dataset.

16 THE PRESIDENT: It is just a different way of analysing pricing on that data. He has done it his
17 way and Ms. Webster has done it her way, and they each think their own way is better. I do
18 not think that needs a rebuttal report. One can go on with reports and counter-reports *ad*
19 *infinitum*, and I do not think----

20 MR. FLYNN: That is the point that Dr. Stillman makes very fairly in the next paragraph.

21 THE PRESIDENT: He does, and the question is whether he has drawn the line at the right place,
22 and that is ultimately for me to decide. It does seem to me on this point, now that I have
23 read it, which is a very confined section - of course, if he says, "I use a monthly, I stand by
24 my approach, but if I use monthly volumes as a weight, I do not get £12.68, I get £10.42".
25 He should say that, and he should, first of all, tell Ms. Webster, and if they still do not get
26 the right result then he should set out his calculations, and that is better done in writing, I
27 agree. Just on which is the better methodology, he has produced his methodology and she
28 has produced hers.

29 MR. FLYNN: Sir, I have raised the point, but it is the implications of the different methodology.

30 THE PRESIDENT: It is not the implications. They are for argument and for later submission.

31 When we are dealing with the expert evidence it is the methodology. So I am not persuaded
32 by that.

33 MR. FLYNN: I have no further point then.

1 THE PRESIDENT: I do think it is right to say that in so far as the points are concerned - and I
2 think there have been, subject to hearing from CMA, four sections - how these changes
3 affect the analysis at the end in section 5, because it feeds into section 5 of Ms. Webster's
4 report, is something that logically he can then cover as consequential matters in section 5.

5 MR. FLYNN: Thank you. I understand that approach.

6 THE PRESIDENT: That is the approach that I would suggest.

7 MR. FLYNN: Yes, Sir.

8 THE PRESIDENT: Shall I hear from Mr. Turner?

9 MR. FLYNN: I think so, yes.

10 MR. TURNER: I am grateful, Sir, that has been very constructive in clarifying the ambit of
11 dispute. The first point is that the joint statement is, itself, an important way for the experts
12 to engage. It sets where you need to have a new report, because it is commonplace that
13 when the experts engage, if they continue to disagree they can set out in a statement of
14 reasons why they disagree, as well as the materiality point that you have provided for.

15 The question then is whether a further report from Dr. Stillman is needed on any of these
16 issues that the debate has now focused on. There can be two reasons for a further report.

17 To be clear about it, the first possible reason would be because that report needed to set out
18 detailed calculations. If that were the case then I would repeat what I said at the outset, that
19 it would be important for the experts when they meet to have those detailed calculations
20 available so that they can discuss the matter properly.

21 We understand that that is not what, Sir, you have in mind, and we would say in relation to
22 detailed calculations, to avoid disorder, that on any of these matters, if there are detailed
23 calculations to be brought forward, those should be made available to the opposing party
24 prior to the experts' meeting in sufficient time for them to think about them, because
25 otherwise there would be a confusion and letters afterwards.

26 I would say, regardless of anything else, that if detailed calculations are in issue, efforts
27 should be made to make those available prior to any meeting.

28 The second possible justification for a new report, which the debate came down to is that if
29 a new point has arisen then it should be addressed by the opposing party so that their
30 position is made clear in writing in an orderly fashion ahead of the hearing, and in particular
31 ahead of the skeletons.

32 If that is the line that is being taken, I would say only this in relation to the two points that
33 we said in our letter were arguably new - the closed and open script point on the one hand
34 and the volume shares point on the other, and by that I mean the change in industry average

1 prices that appears to happen, in fact being the result of a change in the mix of sales of
2 Seroxat and sales of the generic entrants' products on the other hand, giving the appearance
3 of competition when in fact it is a mere change in mix.

4 THE PRESIDENT: Just to be clear, it is Dr. Stillman's para.14----

5 MR. TURNER: And 16.

6 THE PRESIDENT: And 16. So what is left now to consider is paras.11 and 12.

7 MR. TURNER: Yes. I will not make any submissions about 12, because although we say that is
8 an area - this is the question about the CIMS database and the audited Unison database and
9 how they fit together - if they want to set out a further position on that in writing then we
10 can see that that could be helpful, if it is properly confined. So we will not oppose that.
11 So far as the first of those is concerned, and this is the remaining area, the new pricing data
12 that was discovered at the time of the reply and the existing pricing data that had been in
13 contemplation at the time of the decision, here we do not see a reason why, based on
14 para.11 of Dr. Stillman's statement, there is a justification for a further report. It seems to
15 us to be purely and simply appropriate for the joint statement engagement.

16 If, Sir, you turn to para.11 of Dr. Stillman's statement he points out that she has said,
17 although you say the Sellick dataset has these advantages, here are certain issues about it,
18 and he says at the end of his paragraph she draws attention to these points and I need to
19 investigate and consider the significance of these claims about the CIMS data as they relate
20 to the relative reliability of the two datasets.

21 So all he is saying is, "I am going to have to consider those points". It seems to us to be,
22 *par excellence*, an issue that you will engage on in a joint statement process.

23 THE PRESIDENT: The reason I singled them out - and it is not all of 4.16, it is just the two sub-
24 paragraphs - is that they are rather specific points related to certain facts. Yes, it could be a
25 section in a joint statement but you then can end up with an extremely long joint statement
26 descending to a lot of sub-points, and I think if, when he has considered it, Dr. Stillman
27 thinks that the difficulties she points to in her sub-para.(c) with the distortion through
28 having major customers, and the way, if you look at the point that is made in (ii), because it
29 is a snapshot over too short a period, and if you compare it to the longer period it is not
30 representative, if I have understood that correctly. That is a point of detail on which it
31 would be rather helpful to have Dr. Stillman's views in writing rather than in a column of a
32 report which I would expect will rather say, "I think the CIMS export data is more reliable,
33 I disagree because of (a), (b), (c)". To have too many sub-paragraphs in that is not really of

1 assistance. That is why I think it would be useful to have that set out in writing, it will
2 make for a more orderly hearing.

3 MR. TURNER: I understand and accept that, Sir.

4 THE PRESIDENT: It may be that he says, “Yes, I see that point, but when you look at the
5 supermarkets, etc” - I do not know, I have no idea what he will say. I do not think
6 Dr. Stillman knows what he will say. Certainly when he made this witness statement he had
7 not had a chance to look at it.

8 MR. TURNER: I understand and accept that, subject to one caveat that I should enter at this
9 point, which is that if the response that comes back is not along the lines, Sir, that you were
10 outlining but rather, “I have spoken to individuals within GSK again and they tell me...”,
11 and essentially there is new factual evidence that Ms. Webster is wrong for the following
12 additional reasons - in other words, he draws on further factual evidence at that stage, that
13 really would be something that takes us off again in another direction----

14 THE PRESIDENT: If there is new factual evidence it will have to be based on something other
15 than, “I have spoken to people in GSK”. So either there is a further witness statement that
16 comes in which will need permission and certainly Ms. Webster would be able then to take
17 account of, or there will not, but that is speculation. He is certainly not indicating at the
18 moment that he is going to seek further factual evidence.

19 MR. TURNER: He is not.

20 THE PRESIDENT: If that happened, I fully take your point, Mr. Turner, that would be
21 something that Ms. Webster would clearly have to consider.

22 MR. TURNER: We would have to consider how to deal with it, but I need to raise that because
23 that is a way in which this could then create a difficulty shortly before the trial.

24 THE PRESIDENT: We will encounter that if we have to, if it happens.

25 MR. TURNER: May I take instructions for a moment, Sir? (After a pause) Sir, we are obliged.
26 We are content with that decision.

27 THE PRESIDENT: I think, on those four points, as I said, any consequential comments on the
28 implications of the analysis in section 5, which is, as I understand it, an updated drawing on
29 the points made earlier in the report is something that Dr. Stillman can also comment on. I
30 think that must follow, otherwise we are left with the raw components but not the effect of
31 putting them together.

32 MR. TURNER: Yes, we understand that. From our point of view then the only concluding
33 comment to draw together what I have been saying in these submissions is that any further
34 report does need not to hold back on detailed calculations until after a meeting has taken

1 place - that is crucial; and similarly, to express the hope that there will not be further factual
2 evidence that comes out at this late stage.

3 THE PRESIDENT: You have made that very clear. You have put down your marker.

4 What I propose to do, Mr. Flynn, and indeed this affects Mr. Kon's client as well, is to have
5 the joint meeting by 25th, and the joint statement by 3rd February - that gives a little more
6 time; and to say Dr. Stillman has permission to put in a report in response dealing with the
7 matters that I shall come to in a moment by 27th January. If there are further detailed
8 calculations, then he and those working with him should use their best endeavours to supply
9 them to the two other experts as far in advance of the joint meeting as possible. As
10 Dr. Stillman says, he is not doing this on his own, he has got some people helping him, and
11 if they have started already some of these calculations presumably will be ready by
12 16th January, even if he is going off to give evidence in another trial.

13 MR. FLYNN: Yes, he explains the position very carefully. All the experts are, in fact, from
14 consultancies and they have people to help them. However, Dr. Stillman also explains he
15 has to understand them himself. He is not delegating any of this.

16 THE PRESIDENT: He can understand them and say, "Yes, we are going to rely on that, but I
17 have not written up my surrounding narrative", but he can then supply them to the other
18 experts. I think Mr. Turner is right, they do not want to be handed large calculations at a
19 meeting and have to discuss them having just been presented with them. That obviously
20 does not work.

21 MR. FLYNN: We understand, Sir.

22 THE PRESIDENT: I think I will say bundles by 1st February, and the PTR has moved to
23 7th February, and then, as I said at the outset, the appellants' skeletons by 14th February, the
24 CMA's skeleton in reply by 21st February.

25 Then Dr. Stillman's report may cover his response to the following paragraphs of Ms.
26 Webster's report - that is with regard to what he describes as the issue of CIMS versus
27 Sellick, Ms. Webster's para.4.16(c) to (d). Secondly, what he describes as the difference
28 between the Unison and CIMS data, Ms. Webster's paras.4.35 to 4.38. Thirdly, what he
29 describes as the closed versus open prescriptions, Ms. Webster's paras.3.29 to 3.33.
30 Fourthly, what he describes as adjustments for the decline in total sales of paroxetine, Ms.
31 Webster's paras.3.43 to 3.54, and as regards all of those any consequential comments on the
32 revised calculations in section 5 of Ms. Webster's report.

33 Is there anything else? Costs in the appeal, I think.

34 MR. FLYNN: Presumably, indeed, Sir.

1 | THE PRESIDENT: It only remains for me to wish you all a Happy Christmas.
2 | _____