

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 20-md-02924-ROSENBERG

IN RE: ZANTAC (RANITIDINE) .
PRODUCTS LIABILITY . West Palm Beach, FL
LITIGATION. . October 21, 2021
.

DISCOVERY CONFERENCE (through Zoom)
BEFORE THE HONORABLE BRUCE REINHART
UNITED STATES MAGISTRATE JUDGE

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1 *THE COURT:* This is Case Number 20-md-02924, In re:
2 Zantac (Ranitidine) Products Liability Litigation. We are here
3 today for a status conference relating to social media
4 discovery, is my understanding from my conversations with the
5 special master. Part of the purpose of the hearing is for me
6 to get a better handle on exactly what the issues are.

7 Let me start by recognizing counsel for the
8 Plaintiffs.

9 *MS. FEGAN:* Good afternoon, your Honor, Elizabeth
10 Fegan on behalf of Plaintiffs.

11 *MS. WHITELEY:* Good afternoon, your Honor, Conlee
12 Whiteley on behalf of Plaintiffs.

13 *THE COURT:* Good afternoon. Who is representing the
14 brand Defendants this afternoon?

15 *MS. SHOWALTER:* Good afternoon, your Honor, Annie
16 Showalter for the brand Defendants.

17 *THE COURT:* Good afternoon, Ms. Showalter. Anyone
18 else?

19 *MR. DEVEREAUX:* Good afternoon, your Honor, this is
20 Stephen Devereaux for Boehringer Ingelheim.

21 *MR. YOUNG:* Christopher Young, your Honor, for the
22 Sanofi Defendants.

23 *MR. SACHSE:* Good afternoon, your Honor, Will Sachse
24 on behalf of GSK. I am hoping to be a passenger on this one.

25 *THE COURT:* I was told Ms. Showalter was the pilot and

1 everyone else was just on standby.

2 MR. SACHSE: Absolutely.

3 THE COURT: All right. Good afternoon. My
4 understanding from a conversation I had with the special master
5 earlier this week is that there is a dispute which I understand
6 arises from requests for production made by the Defendants to
7 the class representatives of some of the classes. That is one
8 of the things I want to clarify, is which classes are we
9 talking about.

10 I am pretty sure I understand it involves the economic
11 loss classes. I am not sure if it also involves the medical
12 monitoring classes. My understanding is that it does not
13 involve the personal injury classes. So, let me start with
14 that.

15 Ms. Showalter, can you clarify for me who is the
16 target of the requests for production?

17 MS. SHOWALTER: Of course, your Honor. It is the
18 economic loss and medical monitoring classes, and you are
19 correct, the personal injury class is not included.

20 THE COURT: Okay. So, the request for production has
21 been made. My understanding is the Plaintiffs have lodged
22 legal objections to the request, and either Ms. Whiteley or
23 Ms. Fegan, I don't know who is speaking primarily for the
24 class, what are the legal objections that have been raised? I
25 am not asking you to argue those positions, I am just trying to

1 identify what the positions are.

2 MS. FEGAN: Your Honor, could I back up just a moment
3 and explain a little bit about what the requests specifically
4 are and the scope of what is being attacked? This isn't just
5 limited to social media, which is why we are here today in the
6 context of asking for a change of process.

7 THE COURT: For the record, this is Ms. Fegan. Go
8 ahead.

9 MS. FEGAN: Yes, thank you, this is Ms. Fegan. Your
10 Honor, the requests that were originally made, the requests for
11 production, were made more than a year ago. At that time we
12 did lodge objections and we did state how we would conduct our
13 searches. We also, over time, through meet and confers, agreed
14 to produce medical records.

15 Through that process with our 112 current named
16 Plaintiffs we have actually produced over a hundred thousand
17 pages, and we have been very clear about how those searches
18 were being conducted and what our process was.

19 For the first time last week we received three pages
20 of narrative that the scope of what we are searching must be
21 expanded and 200 new search terms, not just for social media,
22 but for any conceivable place that Plaintiff may have ESI,
23 whether it is a computer, whether it is email, whether it is
24 Snapchat. We are talking about a very, very large scope even
25 if through our process we have determined that a particular

1 Plaintiff has no relevant ESI through a particular forum or
2 search place.

3 Because we are so far into this litigation and what is
4 being asked is that we go back to the very beginning and it
5 would significantly impact the schedule, it has an impact
6 outside of this MDL. We believe that this is being used in
7 order to set a standard for class actions going forward and,
8 frankly, far beyond anything in my 25 years that I have ever
9 had requested of a class representative. We are asking that
10 the process be changed.

11 The three things that we are asking for, your Honor,
12 just to be clear, is a change in sequencing, a change in pages,
13 and a change in time for our response.

14 *THE COURT:* I will -- I promise you I will get to all
15 of those.

16 *MS. FEGAN:* No problem.

17 *THE COURT:* That is the whole purpose of today is, not
18 to argue the merits of anyone's position, but actually to set a
19 briefing schedule on process going forward. I appreciate the
20 background, but I am really only here to discuss process.

21 Ms. Showalter, can you give me a sense of what is the
22 scope of the request, what is the information that is being
23 requested? Obviously, it has been over a year, there have
24 obviously been meet and conferrals. What is left? What is
25 sort of currently at issue? Maybe the request for production

1 asks for a lot and what is left is some subset of the request.
2 Can you clarify that for me, Ms. Showalter?

3 MS. SHOWALTER: Yes, your Honor. We issued a number
4 of requests many, many months ago now, and my understanding is
5 that those that are primarily the subject of today's discussion
6 were requests for ESI, including, but not limited to, social
7 media, although Ms. Fegan is correct that we also issued
8 requests that encompassed medical records and other documents.

9 My understanding is that that is not what we are here
10 today to discuss, although I would be remiss if I didn't
11 mention that we requested a 26(g) certification as to the
12 completeness of that other discovery and that is something that
13 we are waiting on.

14 With respect to social media and ESI, what we are
15 looking for is a collection of whatever ESI sources a
16 particular Plaintiff has, their email, the social media
17 platforms that they use, wherever they store electronic
18 documents, and we would like a certification that those sources
19 have been identified and searched and then a production of what
20 from those sources we specifically requested.

21 THE COURT: I understand. Let me repeat it back and
22 make sure I understand it correctly from both sides'
23 perspective.

24 What is still at issue is not medical records and
25 things like that, that production is occurring. There may be

1 an issue as to whether it has been completed and what
2 certification the Plaintiffs need to give. Mr. Sachse is an
3 expert on that process having been through it on the other
4 side. You all can confer with Mr. Sachse and Ms. Finken about
5 how that works, but we will put that to the side.

6 What is still in dispute, as I understand it, are some
7 ESI requests including, but not limited to, whether a party is
8 required to search social media accounts in order to respond to
9 an ESI request.

10 Am I correct, Ms. Showalter, is that your
11 understanding?

12 *MS. SHOWALTER:* Yes, that is correct. We have been
13 discussing those issues since at least February of this year.

14 *THE COURT:* Understood. There will be plenty of time
15 for everyone to argue their positions. I just want to make
16 sure I am pointing at the right bull's eyes.

17 Ms. Whiteley or Ms. Fegan, at a very high level of
18 abstraction, is that the issue here; there has been a request
19 for ESI, a request that you search certain sources of ESI, and
20 you object either to the scope of the request, no matter where
21 you have to search, and/or having to search the social media or
22 both? Am I correct?

23 *MS. FEGAN:* No, your Honor, you are not, because I
24 want to be very clear, we have conducted searches of relevant
25 ESI. I think this goes more towards scope and what is required

1 and how that search is conducted, and that, to me, I think is
2 really fundamental, the fundamental issue.

3 We have gone through the process of working with our
4 clients to identify relevant sources of ESI and to conduct
5 searches of relevant sources of ESI. So, it is not just that
6 we are objecting straight out to doing any of that.

7 *THE COURT:* Understood, understood.

8 All right. So, I guess -- a couple of thoughts, and
9 then we will get to the process questions. I guess there is a
10 couple of responses that the Plaintiffs can make to a request
11 like this, right? One is, we have looked at everything and we
12 have given you what we have. Here is a Rule 26(g)
13 certification that says you got everything, there is nothing
14 that is being held back. That is one response.

15 Another response is, under Rule 26(g), we only have to
16 conduct a reasonable search -- go back over the transcript with
17 Mr. Oot, he made this argument very articulately about a year
18 ago. We only have to make a reasonable search, we don't have
19 to look in every corner of every box or every ESI account that
20 everybody has, and we are not going to. We are giving you what
21 we are giving you. We conducted a reasonable search, here is
22 our Rule 26(g) certification. If you want to contest that, you
23 can go in front of the Court and the Judge will resolve whether
24 we conducted a reasonable Rule 26 compliant search.

25 Another response is, we are willing to look a little

1 bit more, we haven't completed our search. We are not agreeing
2 to look everywhere, but we understand there is still some
3 flexibility here, but we think there is additional searching
4 which is proportional to the needs of the case and there's
5 additional searching that's not, but we want to negotiate that
6 rather than unilaterally put our foot down and say we are done.

7 I am just trying to figure it out, and you don't have
8 to answer this now. I am going to give you time to brief all
9 these issues, but I am putting you on notice. That is a
10 question I just want to have clarified for me: Where are we?

11 If the Plaintiffs are saying we are done, we haven't
12 looked everywhere, and we are not going to, then the question
13 to me is, am I going to order the Plaintiffs to look for more
14 stuff than they agreed to? That is fine, that is an issue I
15 will address.

16 If the answer is we will look for more, but what they
17 are asking us to look for is disproportionate, that is a
18 different analysis and I will rule on that, and that's fine.

19 *MS. FEGAN:* I think we are in the third category, your
20 Honor.

21 *THE COURT:* You are willing to look for more, but you
22 just think what they are asking you to do is disproportionate
23 to the needs of the case?

24 *MS. FEGAN:* Yes.

25 *THE COURT:* Okay. That helps. Let's focus on that.

1 Let me tell you what my kind of -- knowing virtually
2 nothing about exactly what the dispute is, let me tell you some
3 preliminary questions would I have. Again, not -- you don't
4 have to answer this fully, but to the extent you want to give
5 me a high level flavor, this is helpful.

6 Ms. Showalter, my usual entry question in every
7 discovery dispute, what is it you are looking for and why is it
8 relevant? I understand these are the class Plaintiffs, so I
9 kind of infer that what you are trying to figure out is, you
10 want to use this information in some way either to challenge
11 certification of the class as a whole or to challenge the
12 adequacy of these 112 individuals as class representatives.

13 I don't want you to disclose your secrets, but is that
14 generally the relevance theory, that it is relevant to their
15 adequacy as a class rep?

16 *MS. SHOWALTER:* We don't have any secrets, your Honor.
17 Yes, so it's both their adequacy as the class representative
18 and the class certification issues, and obviously discovery as
19 to their particular cases. I can provide some examples of the
20 sorts of ESI that we are looking for and how that is relevant
21 to specific aspects of the case if that would be helpful.

22 *THE COURT:* Before you do, what I am more interested
23 in is not necessarily the ESI you are looking for -- and again,
24 you don't necessarily have to tell me this today, but it would
25 help inform my process -- is what are the facts we are trying

1 to develop? For example, I can say maybe the argument is, this
2 person isn't an adequate class representative because they are
3 92 years old and may have 73 other co-morbidities. What we
4 want to find out is how old are they and what co-morbidities do
5 they have.

6 Those are the facts that you are trying to develop and
7 I can understand the theory of relevance built upon those
8 facts. That would then lead to the next question, which is, is
9 searching this particular ESI the most efficient proportional
10 way to develop those facts.

11 If that makes any sense, if you want to respond to
12 that, Ms. Showalter, I will be happy to hear. I just wanted to
13 give you some examples.

14 *MS. SHOWALTER:* Yes, that makes perfect sense, your
15 Honor. So, those are exactly the sorts of facts that we are
16 looking to develop. So, for example, co-morbidities or other
17 cancer related risk-taking behaviors, like whether a particular
18 class Plaintiff, regardless of what they may have said in their
19 medical records, was a smoker, whether that is evidenced on,
20 for example, things that they were posting to social media;
21 whether in their ESI they can demonstrate proof of use or
22 purchase of the product if they are an economic loss class
23 Plaintiff; whether they have receipts for Ranitidine. For
24 example, CVS emails me a receipt for every single thing that I
25 purchase.

1 Those are the sorts of things that we are looking for
2 and the reasons that they are relevant to the particular facts
3 we are developing.

4 *THE COURT:* Okay, very well. Let me turn back to
5 Ms. Fegan and Ms. Whiteley.

6 *MS. FEGAN:* Those are easy for me to address, your
7 Honor. We have, in fact, searched for and produced receipts to
8 the extent that they had them. We searched ESI for Ranitidine.
9 And when we talk about co-morbidities and cancer, we have
10 offered -- even though we think it is beyond what we need to be
11 doing, but we have offered to search for anything related to
12 any health or medical condition.

13 So, we have offered to do more, but the more that we
14 are talking about -- I think that is why it is really critical
15 in the context of briefing to talk about it in the context of,
16 you know, the 200 search terms they asked us to use because
17 they can't be tied so easily in the way your Honor just did,
18 which is a very helpful discussion to have and what we think is
19 going to be required in this kind of going forward process.

20 *MS. SHOWALTER:* Your Honor, may I respond to that
21 briefly?

22 *THE COURT:* Yes.

23 *MS. SHOWALTER:* One of the examples there that went
24 unaddressed was smoking where it isn't disclosed in a medical
25 record, but, for example, there is a post evidencing that a

1 Plaintiff was a smoker on social media. Those are the sorts of
2 things that have not been provided. That is not another
3 illness that Plaintiffs have offered to search for. Their
4 other searches offered were limited to mentions of Zantac,
5 Ranitidine, or NDMA.

6 So, there are a number of important outstanding risk
7 factors that our search terms address that have not been
8 included in what has already been searched.

9 *THE COURT:* Understood. I am going to preempt what
10 Ms. Fegan I am sure is going to say, which is, yeah, but it is
11 not worth us searching 112 people's Facebook posts for the last
12 five years to try to find that needle in that haystack.

13 That seems to me -- let's get to the end of this
14 proceeding quickly. That is what I need you to tee up for me.
15 If that is really where the issue joins here, that the
16 Plaintiffs agree, look, if the person is really a smoker we
17 can, at least for these purposes, agree that is relevant, but
18 this isn't the way you go about figuring that out, or even if
19 it is, it is so burdensome for us to have to do it that we
20 shouldn't have to do it. Okay. That is what I am hearing as
21 sort of the issue that has been framed here.

22 Now let's talk about how we frame it properly so that
23 each side gets a fair opportunity to argue their legal
24 position, submit, if it is a burden question, obviously
25 declarations of what the burden would be or wouldn't be, or

1 anything else you want to offer, but let's talk about a process
2 to get there. Let's start with who should go first.

3 There was a request for production from the Defense.
4 The Plaintiff has objected on, I am guessing, proportionality
5 and relevance grounds, so it is back to the Defendant. You
6 are, in essence, seeking to compel them to produce and to
7 search for things they have said they won't search for.

8 I guess you go first, Ms. Showalter.

9 *MS. SHOWALTER:* Your Honor, I think the one wrinkle in
10 that is that we have now provided them the search terms and
11 more detail about the scope of what we are looking for, and we
12 haven't gotten a response to that. So, it would be helpful to
13 know, perhaps some of those search terms are acceptable to
14 Plaintiffs, or is it the whole process of collecting social
15 media and searching it that is objectionable to Plaintiffs.

16 I am worried that if we go first we are briefing a
17 little bit against ourselves and not really knowing what
18 Plaintiffs' full position is.

19 *THE COURT:* Ms. Fegan, should you go first?

20 *MS. FEGAN:* Your Honor, no. I think in the
21 traditional sense when there is a motion to compel, the person
22 who wants to compel has to define for the Court what it is that
23 they are seeking to compel. That is why we requested this
24 change in process from the PTO process, because that position
25 has changed over the last ten months, and we feel it is

1 important that it get locked in at this point in time.

2 *THE COURT:* I agree in part and I disagree in part.
3 The whole purpose of the objection process is to identify what
4 you are giving them and what you are holding back, like what
5 exists, what we are giving you. Ms. Finken and Mr. Sachse and
6 I had, I don't know, half a dozen hearings to work through
7 these sorts of issues.

8 I think Ms. Showalter is right to the extent that if
9 you give her transparency and you tell her, we agree to search
10 for this and we ain't searching for that, or we agree to search
11 here, but we won't search there, then I don't have a problem
12 making the Defense go first.

13 I think they are entitled to know either what exists
14 -- the traditional things that all discovery responses are
15 supposed to tell them, here is what we gave you, here is what
16 we have looked for, we know it exists, but we are not giving it
17 to you for some legal reason, and here is where we looked and
18 we didn't find anything, and here is where we aren't going to
19 look.

20 Those are the four boxes that you need to fill in to
21 then allow the Defense to frame their briefing to then allow
22 you to respond to that briefing.

23 Do you have a problem doing that, Ms. Fegan?

24 *MS. FEGAN:* We have already done that, your Honor. I
25 would like to back up a little bit here in terms of the meet

1 and confer process and kind of what has happened in the last
2 ten days. We advised them what we were willing to do, and in
3 the context of that, we said we would do additional searches
4 for any health and medical condition. They asked during the
5 meet and confer process to have the opportunity to provide ten
6 search terms on risk factors. Instead, we got 200 search
7 terms.

8 I don't know which ones they would contend are related
9 to these risk factors. I don't know if they would change, if
10 they have to define these to the Court. They did not for those
11 200 search terms say, and they were asked to, but they didn't
12 say for two with the little asterisks by it, that is related to
13 this risk factor or it's related to adequacy or it's related to
14 something else.

15 So, honestly, for us to start without understanding
16 how 200 search terms are relevant to any of these areas, that
17 would require us to start to assume what their argument is and
18 then argue against it.

19 I would just ask that, at the very least, they
20 identify why particular search terms are relevant, and I think
21 that this is why in the motion to compel process it is
22 important that the Defendants first argue why there is a
23 relevance issue, and then we can come back and deal with both
24 relevance and proportionality.

25 *MS. SHOWALTER:* Your Honor, may I respond to that,

1 please?

2 *THE COURT:* In a second, yes. Back to you, Ms. Fegan,
3 your whole argument presupposes that you have given them the
4 information I am talking about, which is, this is what we gave
5 you, this is what we are holding back, this is what we looked
6 for and we don't have, and this is what we are not going to
7 look for.

8 Then, if they say to you, well, you said you are not
9 going to look there, we want you to look there and we want you
10 to use these search terms, and we want the Court to compel you
11 to use those search terms, then I think I can -- I understand
12 your argument, Ms. Fegan, as long as they have that baseline
13 information.

14 So, my question back to you is, do you believe they
15 either have it or are you willing to provide it within short
16 order?

17 *MS. FEGAN:* Your Honor, I think we can provide that --
18 I believe we provided it, but to make it succinct and in a way
19 that this Court will ultimately be able to digest it, I think
20 that we can provide that information within seven days. I am
21 saying seven days just because for 112 people, it is not the
22 same for each one because each one has different sources. It
23 is not a matter of, like with a company, being able to say we
24 searched the network, we didn't search teams.

25 Instead, we actually have 112 people who have

1 different things, and different -- so it will take us time to
2 collate that, but that is something we can do and provide to
3 them through the special master in the meet and confer process,
4 and then that will give the basis for us to move forward with
5 the motion to compel process.

6 *THE COURT:* Thank you. I just wanted to clarify that.

7 Ms. Showalter, assuming you can get that
8 information -- and maybe you don't think seven days is fast
9 enough, but we can talk about that -- now I am happy to hear
10 your response.

11 *MS. SHOWALTER:* Yes, your Honor. For the threshold we
12 would absolutely need to know as to each Plaintiff how they
13 went about identifying the sources that were searched, was this
14 a simple conversation where they asked the Plaintiff what their
15 sources were, or how was that verified, which sources were
16 searched as to each particular Plaintiff.

17 My understanding is that that search thus far has just
18 been for references to NDMA, Ranitidine, and Zantac, and they
19 have offered searches only for other illnesses, and that hasn't
20 been done yet. That would need to be confirmed.

21 With respect to our search terms, we had discussed
22 developing search terms that would get at the top ten cancer
23 risk factors, not ten terms, and that we would provide those to
24 Plaintiffs along with other search terms that were relevant to
25 the categories that are in the charts we provided. For

1 example, one of them is labeled Damages. I think it is pretty
2 clear what those terms are related to.

3 So, if there are any of those terms that Plaintiffs
4 are willing to search, we would appreciate knowing what those
5 are, because those are then knocked off the table for purposes
6 of our briefing and we can narrow the issues. With that
7 information this should be a pretty straightforward dispute.

8 *THE COURT:* I agree with at least the second half of
9 what you are saying, which is, if the Plaintiffs are going to
10 agree to do -- agree to some of your search terms, they ought
11 to tell you that before you file your motion to compel. What I
12 don't want to see is a motion to compel and the answer is, no,
13 no, Judge, we agree to half of this. That is a waste of
14 everybody's time and money and energy.

15 As to the first half, I don't think you are entitled
16 to know the communications they had to figure out what to
17 search for. Again, you can blame Mr. Sachse, he very
18 persuasively made the argument that that is privileged, the
19 conversations that you have with your client to ask then what
20 they have and where they have it is privileged. I don't know
21 that I ever formally ruled on that, but I don't think they have
22 to give you that.

23 I think they have to tell you this is where we looked,
24 this is what we looked for, this is what we found, and this is
25 what we know is out there, but we are not going to look. I

1 think that is what you are entitled to know, those facts, not
2 their process for how they decided what to look for and all of
3 that.

4 *MS. SHOWALTER:* I agree, your Honor. I think you put
5 it more artfully. What I was trying to get at is whether there
6 was anything being withheld, if there are places that they
7 refused to look.

8 *THE COURT:* It's ironic for me. I can just flip you
9 over, that's Ms. Finken's argument. You win on that for the
10 same reason Ms. Finken won, but transparency is a good thing.
11 I hope it is clear where we are in terms of the information
12 exchange that I am expecting to occur.

13 Ms. Showalter, any objection if I give them a week to
14 get that information to you? During that week I expect the
15 parties will continue to confer with the special master. She
16 is listening right now and so she can also facilitate making
17 sure that my expectations are met.

18 Ms. Showalter, any objection to a week to allow that
19 process to play out? Then we can start the clock on how long
20 you will need -- once you know what you are seeking to compel,
21 how long you will need to brief that issue.

22 *MS. SHOWALTER:* I think that a week sounds all right
23 to me, although I am looking to Mr. Sachse and Mr. Devereaux to
24 make sure that there isn't any disagreement. I am seeing nods
25 of affirmation as opposed to shakes of disagreement, so, yes,

1 that is fine.

2 Your Honor, are we going to be discussing whether we
3 are proceeding under PTO 32 or briefing this issue as a motion
4 to compel?

5 *THE COURT:* That is where we are going. Absolutely,
6 yes, now that I know the scope of where we are going.

7 What is the Defense's preference? Do you want to
8 do -- well, tell me your preference, Ms. Showalter.

9 *MS. SHOWALTER:* Our preference, your Honor, would be
10 the PTO 32 process. We see this as a routine issue that is
11 briefed all the time in this sort of litigation. We have
12 operated under the PTO 32 process in this case for much more
13 complex, as we see it, issues. To the extent that there is
14 information that can be provided, we think it could simply be
15 attached to that memorandum. Often the shorter the submission,
16 the clearer and better it is.

17 Time is of the essence here. We are getting ready to
18 notice these depositions, and the information we are talking
19 about is part of the custodial files that would need to be
20 provided in advance of our taking them. And what is even more
21 of the essence, during our most recent meet and confer
22 Plaintiffs referred to their position that discovery on the
23 class cases actually closes on the December 2021 date.

24 We disagree with that. I don't know whether that is
25 still their position. If that is the case, time is even more

1 of the essence.

2 MS. WHITELEY: Your Honor --

3 THE COURT: Hold on, everybody. We can't talk across
4 each other.

5 Ms. Showalter, why don't you finish. Ms. Whiteley, I
6 will recognize you next.

7 MS. SHOWALTER: That may not be correct. That was a
8 single comment by one Plaintiff's counsel during the meet and
9 confer. If it is their position that that is the close of all
10 discovery, then that would mean we have to move all the more
11 expeditiously. 21 days for full briefing and 50 pages we just
12 think is unnecessary.

13 THE COURT: I can truncate the briefing. When you say
14 PTO 32 or formal briefing, to me really the issue is, do we do
15 something jointly and simultaneously or do we do something
16 sequentially? It sounds to me like the Defense's preference is
17 that we do something jointly and simultaneously.

18 MS. SHOWALTER: Yes.

19 THE COURT: Okay. Very well. Ms. Whiteley, you
20 wanted to say something. Let me recognize you.

21 MS. WHITELEY: Yes, your Honor, thank you. This is
22 Conlee Whiteley on behalf of Plaintiffs.

23 We did mention that in one of the orders, that date,
24 but we just mentioned it because it could be considered a
25 discrepancy. We have not taken the position that is the

1 deadline, nor do we think that that is practical. I don't
2 believe there is an actual deadline, but the depositions can go
3 on well into next year, and we think that the fact discovery
4 period, to be fair to Defendants, should go contemporaneous
5 with that deadline.

6 *THE COURT:* I haven't looked carefully at this issue
7 in the PTOs in this case. All I can tell you is in my other
8 matters with Judge Rosenberg, her general trial order is that
9 the parties can by consent continue to take discovery after the
10 discovery cutoff, recognizing motion deadlines are not moving.
11 So, the deadlines for motions for class certification are not
12 going to change even if you all by consent continue to take
13 discovery after the discovery period, if that is allowed in
14 this MDL. I just haven't looked at that question.

15 I understand Ms. Showalter's position on that.

16 Let me turn back to Ms. Fegan or Ms. Whiteley. Is
17 your position -- is there a relevance objection. To the extent
18 Ms. Showalter is saying they are trying to find out if somebody
19 is a smoker, or somebody is a sky diver, or somebody is engaged
20 in any sorts of behaviors, is the objection that it is not
21 relevant to class cert or to the adequacy of the class
22 representatives, or do you agree that it can be relevant, you
23 just object to the proportionality and the burden of having to
24 search for it?

25 Ms. Fegan.

1 *MS. FEGAN:* Your Honor, to some of what they are
2 seeking we do have a relevance objection. That being said, we
3 think that there are more proportionate ways to find the
4 information.

5 So, we are not going to say you can't ask them at
6 their deposition if they smoke, you can't explore that in their
7 medical records, you can't find that out some other way, but
8 whether somebody is holding a cigar at their baby's birth and
9 having us go through and try to find a picture, that ah-ha
10 moment, is probably not proportional.

11 So, it does depend on -- and this is why I think
12 the -- I recognize it is not full briefing, but sequencing is
13 important, for them to identify why something is relevant and
14 then for us to deal with also secondarily proportionality.

15 Ultimately, using smoking as the example and knowing
16 the extent of the medical records, it is likely to be in the
17 medical records, and they are welcome to ask them. We have a
18 little bit of both, your Honor, but it is going to be in the
19 records that have been produced to date.

20 *THE COURT:* I understand. Ms. Showalter, anything
21 further? The Plaintiffs preference is that we do sequential
22 briefing?

23 *MS. FEGAN:* That is correct, your Honor, and I
24 understand it will be truncated in time and in pages, but we do
25 feel very strongly that sequencing is the most important factor

1 for us.

2 *THE COURT:* Okay. Ms. Showalter, I will give you the
3 last word.

4 *MS. SHOWALTER:* Our last word would just be, your
5 Honor, that assuming we are continuing to work with Special
6 Master Dodge over the next week and we are provided the
7 information that Plaintiffs have offered, it seems that we can
8 continue to narrow the issues enough that we could submit a
9 sensible joint set of papers at the end of this.

10 I am not sure why sequential briefing would be
11 necessary assuming those conversations really are ongoing.

12 *THE COURT:* Um-m-m, okay. Well, I am concerned about
13 the timing that it will -- so, if we give a week for the
14 Plaintiffs to provide information to the Defendants, and that
15 will be October 28th -- if I give you each a three or four-day
16 turnaround on your briefing, I can get it done the following
17 week. We can meet before the end of that following week and
18 you will have a ruling at that point.

19 I am not sure, given the history of how long it takes
20 to do joint memos, because you have to pass them back and forth
21 and everybody has to review it, that getting those done in less
22 than seven or eight days is feasible as well.

23 And candidly, I will tell you, me personally, I have
24 not dealt a lot with class certification related issues which
25 is why I was probing with Ms. Fegan. If my ultimate decision

1 is going to really have to weigh heavily on how do Courts
2 decide class cert and how this really affects adequacy and
3 typicality, and things like that, then a little bit of extra
4 legal briefing would be helpful to me, not a full blown
5 appellate brief, but a little bit of help in understanding the
6 relevance theory. Why is smoking relevant to typicality, why
7 is it relevant to adequacy, and things of that nature, that
8 would be helpful to me.

9 That's why I am inclined to do sequential briefing and
10 give you some extra pages.

11 Ms. Showalter, if I say you can have all this
12 information from them by next Friday -- or a week from today,
13 which would be next Thursday, how quickly after that is it
14 reasonable to ask you to turn around an initial submission? I
15 can give you up to ten pages, maybe.

16 *MS. SHOWALTER:* I think that three to four days, your
17 Honor, would be perfectly fine. We are willing to do this as
18 quickly as possible.

19 *THE COURT:* If I gave you until the following -- let's
20 say I gave you until the following Wednesday at noon -- I'm
21 sorry. If I gave you until Tuesday at noon, and then I gave
22 the Plaintiffs until Friday at 5:00 to file their response, and
23 then I set a hearing at the beginning of the following week --
24 I wouldn't ask for a reply brief at that point. You can argue
25 to me what your reply would be, but I wouldn't wait to get it

1 in writing.

2 Does that seem reasonable to you, Ms. Showalter?

3 *MS. SHOWALTER:* Yes.

4 *THE COURT:* Ms. Fegan, does that seem reasonable to
5 you?

6 *MS. FEGAN:* Yes, your Honor.

7 *THE COURT:* Okay. Let's do that then. I will order
8 the Plaintiffs to provide to the Defense by close of business
9 next Thursday the information we have been discussing, I will
10 just call it the transparency information that I have been
11 discussing, working through the special master and working
12 together.

13 The Defendants', you can caption it a Motion to Compel
14 or Discovery Memo, whatever you want to call it, will be due by
15 noon Eastern time the following Tuesday, which is, I think,
16 November 2nd, and then the Plaintiffs' response will be due by
17 five o'clock on Friday, November 6th, whatever that Friday is,
18 and then I will confer with the special master and the Court
19 staff and find out the following week what day we can schedule
20 an argument. I will call it a PTO 32 hearing, but it is a
21 discovery dispute resolution hearing.

22 Again, that is ten pages a side for briefing and
23 argument. You can supplement that with declarations or other
24 evidence, either side, as to burden, as to the scope of the
25 search, things of that nature. I will let you develop a full

1 record, I am not limiting you to ten pages in that regard.

2 Ms. Showalter, any other questions or any
3 clarifications? Are you satisfied -- maybe not with the
4 process, but are you satisfied you understand what the process
5 is?

6 MS. SHOWALTER: I am satisfied both with the process
7 and that I understand it. I don't have any questions. Mr.
8 Sachse, Mr. Devereaux, anything from you?

9 MR. ROOD: Your Honor, I wouldn't mind putting in a
10 request for a short two to three page reply if necessary. It
11 will be dependent upon, obviously, the opposition. I would
12 request permission for that.

13 THE COURT: No. Trust me, I will give Ms. Showalter
14 plenty of time to reply. I never cut anybody off in terms of
15 their ability to argue. If there are legal cases you need to
16 submit, then you can present them to me at the hearing or by
17 consent of the parties, if the parties agree they can file
18 supplemental authority, you can submit them. I can take the
19 matter under advisement if I have to.

20 I am not going to wait to get a reply brief. If I am
21 getting full briefing -- by the way, I said close of business,
22 let me be clear, five o'clock Eastern time on that Friday. I
23 said ten pages, let me be clear, double space, one-inch
24 margins. If I have to give time for a reply brief I have to
25 push back the hearing, and I don't want to do that.

1 I appreciate your request, Mr. Rood, but I will deny
2 that request.

3 Ms. Showalter, you are good with the process, you
4 understand it. Ms. Fegan or Ms. Whiteley, are you okay with
5 the process and any questions about the process?

6 *MS. FEGAN:* We understand it, thank you, your Honor.

7 *THE COURT:* Okay. My usual exit question, I'll ask it
8 again. Ms. Showalter, not objecting to anything I may have
9 ruled on here or any -- not waiving any objection you may have
10 to what I have done here this morning, was there anything else
11 you wanted to raise while we are all together today?

12 *MS. SHOWALTER:* Your Honor, only that the Defense is
13 thinking of discussing with Plaintiffs having a more fulsome
14 discovery hearing about some of the other outstanding class
15 issues at some point down the road as things are starting to
16 come to a close, so just previewing that, but no, nothing else
17 today.

18 *THE COURT:* Whenever you need one, let me know and we
19 will make it happen.

20 Ms. Fegan, Ms. Whiteley, again not waiving any
21 objections you may have to anything that has happened during
22 this hearing, anything else you wanted to raise or any
23 clarifications that you wanted?

24 *MS. FEGAN:* Other than I am not sure what
25 Ms. Showalter is referring to, we have no other issues, your

1 Honor. Thank you.

2 THE COURT: Very well. I guess I will actually get to
3 meet all of you in person December -- is it 2nd and 3rd we are
4 having Science Day? I look forward to finally noticing some of
5 you have legs, so that will be good. We will be in recess, and
6 I look forward to getting your briefing.

7 MS. SHOWALTER: Thank you, your Honor.

8 MR. SACHSE: Thank you, your Honor.

9 MS. FEGAN: Thank you, your Honor.

10 *(Thereupon, the hearing was concluded.)*

11 * * *

12 I certify that the foregoing is a correct transcript
13 from the record of proceedings in the above matter.

14
15 Date: October 22, 2021

16 /s/ Pauline A. Stipes, Official Federal Reporter

17 Signature of Court Reporter
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Pauline A. Stipes, Official Federal Reporter

MR. DEVEREAUX: [1] 3/18 MR. ROOD: [1] 29/8 MR. SACHSE: [3] 3/22 4/1 31/7 MR. YOUNG: [1] 3/20 MS. FEGAN: [17] 3/8 5/1 5/8 6/15 8/22 10/18 10/23 13/5 15/19 16/23 18/16 24/25 25/22 28/5 30/5 30/23 31/8 MS. SHOWALTER: [22] 3/14 4/16 7/2 8/11 11/15 12/13 13/19 13/22 15/8 17/24 19/10 21/3 21/21 22/8 23/6 23/17 26/3 27/15 28/2 29/5 30/11 31/6 MS. WHITELEY: [3] 3/10 23/1 23/20 THE COURT: [39]	4600 [1] 1/25 4748 [1] 2/3 5 50 [1] 23/11 504-524-5777 [1] 1/16 5171 [1] 1/13 5567 [1] 1/22 561-803-3434 [1] 2/7 5777 [1] 1/16 5:00 [1] 27/22 6 60606 [1] 1/12 619-699-4748 [1] 2/3 6th [1] 28/17 7 701 [1] 1/15 70130 [1] 1/15 725 [1] 1/21 73 [1] 12/3 8 844-399-5171 [1] 1/13 9 92 [1] 12/3 92121 [1] 2/3 A ability [1] 29/15 able [2] 18/19 18/23 about [21] 4/9 5/3 5/17 5/24 8/4 9/17 11/2 13/9 13/14 13/15 14/18 14/22 15/1 15/11 18/4 19/9 19/13 22/19 26/12 30/5 30/14 above [1] 31/13 absolutely [3] 4/2 19/12 22/5 abstraction [1] 8/18 acceptable [1] 15/13 account [1] 9/19 accounts [1] 8/8 across [1] 23/3 actions [1] 6/7 actual [1] 24/2 actually [5] 5/16 6/18 18/25 22/23 31/2 additional [3] 10/3 10/5 17/3 address [3] 10/15 13/6 14/7 adequacy [7] 11/12 11/15 11/17 17/13 24/21 27/2 27/7 adequate [1] 12/2 advance [1] 22/20 advised [1] 17/2 advisement [1] 29/19 affects [1] 27/2 affirmation [1] 21/25 after [3] 24/9 24/13 27/13 afternoon [9] 3/9 3/11 3/13 3/14 3/15 3/17 3/19 3/23 4/3 again [6] 11/3 11/23 20/17 28/22 30/8 30/20 against [2] 15/17 17/18 ago [3] 5/11 7/4 9/18	agree [12] 14/16 14/17 16/2 16/9 16/10 20/8 20/10 20/10 20/13 21/4 24/22 29/17 agreed [2] 5/13 10/14 agreeing [1] 10/1 ah [1] 25/9 ah-ha [1] 25/9 ahead [1] 5/8 ain't [1] 16/10 all [16] 4/3 6/14 8/4 9/8 10/8 16/14 21/2 21/22 22/11 23/9 23/10 24/7 24/12 27/11 30/11 31/3 allow [3] 16/21 16/21 21/18 allowed [1] 24/13 along [1] 19/24 already [2] 14/8 16/24 also [5] 4/11 5/13 7/7 21/16 25/14 although [3] 7/7 7/10 21/23 am [34] analysis [1] 10/18 and/or [1] 8/21 ANNIE [2] 1/20 3/15 another [3] 9/15 9/25 14/2 answer [4] 10/8 10/16 11/4 20/12 any [20] 5/22 9/6 11/16 12/11 13/12 17/4 17/16 20/3 21/13 21/18 21/24 24/20 29/2 29/2 29/7 30/5 30/9 30/9 30/20 30/22 anybody [1] 29/14 Anyone [1] 3/17 anyone's [1] 6/18 anything [11] 6/8 13/11 15/1 16/18 21/6 25/20 29/8 30/8 30/10 30/21 30/22 appellate [1] 27/5 appreciate [3] 6/19 20/4 30/1 Arch [1] 1/18 are [115] areas [1] 17/16 aren't [1] 16/18 argue [8] 4/25 6/18 8/15 14/23 17/18 17/22 27/24 29/15 argument [9] 9/17 12/1 17/17 18/3 18/12 20/18 21/9 28/20 28/23 arises [1] 4/6 around [1] 27/14 artfully [1] 21/5 articulately [1] 9/17 as [25] 7/11 8/1 8/6 11/11 11/12 11/15 11/17 11/18 14/20 18/12 18/12 19/12 19/16 20/15 21/25 22/3 22/10 22/13 25/15 26/22 27/17 27/18 28/24 28/24 30/15 ask [7] 17/19 20/19 25/5 25/17 27/14 27/24 30/7 asked [5] 6/4 13/16 17/4 17/11 19/14 asking [6] 4/25 5/6 6/9 6/11 10/17 10/22 asks [1] 7/1
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