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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. . June 15, 2022

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

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1 *THE COURT:* All right. Let's go on the record, it is
2 2:00 o'clock, which is the time the hearing was called to
3 begin.

4 Good afternoon, everybody. This is case number
5 20-2924, In Re: Zantac (Ranitidine) Product Liability
6 Litigation.

7 We are here today for a discovery conference. Let me
8 begin by recognizing counsel for the Plaintiffs.

9 *MS. JUNG:* Good afternoon, your Honor, this is Je Yon
10 Jung on behalf of the Plaintiffs.

11 *THE COURT:* Good afternoon. On behalf of the Defense.

12 *MR. CHEFFO:* Good afternoon, your Honor, Mark Cheffo
13 for GSK, but I will be speaking on behalf of the brands today
14 as well.

15 *THE COURT:* Mr. Nigh, I saw you popped up. Did you
16 want to make an appearance as well?

17 *MR. NIGH:* Yes, your Honor, Daniel Nigh on behalf of
18 the Plaintiffs if I'm needed.

19 *THE COURT:* Okay. Very good.

20 I reviewed the submissions that the parties made,
21 which were very helpful. I reviewed both the sealed and
22 unsealed materials that were submitted.

23 Let me start with that. I didn't see anything that
24 needed to be sealed, to be honest with you, or to be redacted
25 going forward, but as always, I will leave it to the parties

1 after the hearing is over to discuss that.

2 I understand why parties may have designated certain
3 materials as confidential which required them to be filed under
4 seal presumptively, but having reviewed them all, I didn't see
5 anything in there that, to my mind, rose to the level of a
6 trade secret or any sort of other material that should excuse
7 the public right of access. I will ask the parties, when the
8 hearing is over, to go back and review what was filed under
9 seal and if they can agree on redactions, fine. If not,
10 present that to me so I can resolve it.

11 Let me turn to the substantive issue that is presented
12 today and it is -- I will acknowledge this is a real world
13 pragmatic problem that we need to address, and the issue is,
14 about a year or so ago, maybe more than a year ago, I ordered
15 the Defense to produce certain product samples to the
16 Plaintiffs in the MDL. I went back and reviewed the transcript
17 of those hearings and it looked like I ordered production of
18 approximately -- I think there were close to 300 separate
19 samples that the Plaintiffs wanted, and they wanted about a
20 third of the retained product that the Defendants had, and I
21 ordered that production. I realize I am rounding some numbers,
22 but roughly that is where we were.

23 As I understand it now -- and the purpose of that
24 production was to allow the Plaintiffs to fairly prepare their
25 general causation experts and file their Daubert motions, which

1 have now been filed.

2 As I understand it, the issue now arises that in
3 litigation outside of the MDL the Plaintiffs have requested of
4 the Defendants that they be given access to similar materials
5 for the same purpose, similar products for the same purpose,
6 and the Defense is taking the view that the most efficient
7 thing to do and the proper thing to do here is not require them
8 to bring new product from outside the country or to dig it up
9 out of warehouses, but rather, to have the Plaintiffs in the
10 MDL give product to the Plaintiffs outside the MDL.

11 I recognize that is a pragmatic problem, there is a
12 finite amount of this product out there. There are a lot of
13 lawsuits around the country, some in the MDL, some not in the
14 MDL, and it is relevant evidence. We have already determined
15 that. So that is the pragmatic problem.

16 I also think it is important in a situation like this
17 that sometimes form over substance is a little bit important.
18 I am not making a joke about substance, but the way that we
19 frame the issue becomes important.

20 The issue as it is framed to me in the pleadings is
21 that I should order the Plaintiffs in the MDL to give product
22 to the Plaintiffs not in the MDL. I don't believe I can do
23 that. I don't believe I have the authority to enter a
24 discovery order in somebody else's case.

25 While there needs to be Federal/State cooperation in

1 these sorts of cases, there does not need to be Federal
2 stomping into the ground of the State Courts where we don't
3 belong. There is a State Court judge or judges in California
4 presiding over the JCCP proceedings, and it seems to me if
5 anyone is ordered to produce discovery in the JCCP it ought to
6 be an order coming from those judges, not from me.

7 That being said, I think the issue as presented to me
8 could be framed this way, which is the Defense asking me to
9 order the Plaintiffs in this MDL to give them their product
10 back, that the Plaintiffs don't need it anymore, we want it
11 back so we can give it to these other people.

12 So, with that understanding -- and thank you for
13 letting me kind of frame the issues in the way that I like to
14 frame them.

15 Let me first turn, I guess, to Mr. Cheffo on behalf of
16 the Defense and let you say whatever you want to say, but my
17 first question is, has this issue been presented to the JCCP
18 Court for them to resolve, or that judge to resolve whether
19 this order ought to be entered, and you can make your undue
20 burden arguments directly to that judge, or has it not been
21 presented in the JCCP, or do you disagree with me and you think
22 I have the authority to order it regardless?

23 *MR. CHEFFO:* Let me say this: I am not sure I would
24 say I disagree with you. I actually might, respectfully,
25 reframe the question a little bit, and maybe if I give you some

1 background just on that -- let me address that first. It might
2 actually give you some information that you didn't have.

3 Right?

4 So the issue here -- and we agree with you, this is
5 not trying to redo -- this is basically -- let me be clear, we
6 had a chance to argue whether we should do it, shouldn't do it.
7 That ship has sailed. This is not at all about redoing that.

8 The issue came up, the Plaintiffs in the JCCP, as you
9 would expect, good lawyers, they came and said we would like
10 this. Right? They made an informal request, but they haven't
11 made a motion to compel. They have a discovery deadline, and
12 they said we would actually like to have this information. We
13 will accept what they, the Plaintiffs -- we said essentially it
14 was samples provided to the MDL Plaintiffs informally.

15 We have no objection, in fact we could do that whole
16 rigamarole, sending it back and then giving it to you if that's
17 what you order. I think you do have the power. Just to be
18 clear, it is not an end around, so we are not asking you to
19 interfere. The Plaintiffs in the JCCP said voluntarily, and we
20 haven't objected to it for the reasons -- we had our objections
21 here, we are where we are. They have asked us and we basically
22 said we will not object to you taking the samples from the MDL
23 Plaintiffs.

24 They then asked the MDL Plaintiffs, the MDL Plaintiffs
25 basically said no. We had a meet and confer and said we would

1 like you also to do this because the potential result here is
2 any number of things that are really not a parade of horrors.
3 It will be that they will either informally serve a request or
4 we will still agree, but even if we agree, it is going to take
5 us a lot of time, effort, and money to do it.

6 To us, this is in the absolute, like if you look in
7 State Court coordination, State/Federal coordination, it is
8 trying to avoid all this rigamarole. We are not asking you to
9 get involved, but to the extent -- I view it more like if we
10 had produced a bunch of documents in the MDL, and the State
11 Court person said can you send me a hard drive of the documents
12 that you have, that there would be a level of sharing.

13 It's a little bit different analogy, but that is kind
14 of what we are talking about here. It's physical samples and
15 physical information, and essentially at least the JCCP
16 Plaintiffs and the brand Defendants agree that they should be
17 produced. We are just trying to get it to them quicker and in
18 a more efficient way.

19 If I could just maybe talk about -- unless you have
20 specific questions, I --

21 *THE COURT:* Let me respond to that, because maybe that
22 will inform where you now can go and help me.

23 *MR. CHEFFO:* Thank you.

24 *THE COURT:* Please, I wasn't suggesting and I wasn't
25 taking it that the Defendants were asking to revisit my orders

1 of last year, the substance of my orders.

2 It seemed to me what the brand Defendants were
3 essentially arguing, and this why I say this is really an
4 argument, it seems to me, that ought to be made to the JCCP
5 Court, is we agree they are entitled to discovery of this
6 material, okay, but the most efficient way to get it -- it is
7 an undue burden to require us to give it to them when they can
8 go get it from this third party who is equally available to
9 them.

10 That is what you would say if it was a bank record or
11 something else. You would just say, well, we could give it to
12 you, but it is going to take us a long time to find it. Just
13 go get it from these other people. That is what I gather you
14 are saying.

15 You are not objecting to the production of these
16 materials. You are saying it is an undue burden for us to do
17 it and there is an easier way to do it, and that's what I am
18 saying. Why isn't it the proper role, then, of the JCCP judge
19 to say, you are right, brand Defendants, that is a better way
20 to go? I am going to order this third party, and if the MDL
21 Plaintiffs want to object, they can be heard and the judge who
22 is going to ultimately resolve that case can resolve that case.

23 With that, Mr. Cheffo, let me throw it back to you.

24 *MR. CHEFFO:* Thank you. Again, we could, but
25 respectfully, that would -- I don't want to be presumptuous

1 here, but if I am a very able, smart, seasoned judge sitting in
2 Alameda County and we go and say go get this information, it is
3 ours, but it was produced pursuant to a Federal Court order in
4 an MDL, there's all kinds of chain of custody issues, I would
5 think if I was him, just like you are concerned about your
6 jurisdictional reach and your comity, that he would say, whoa,
7 that is stuff that was going on, that was all done under orders
8 that Judge Reinhart issued, and there was a protocol.

9 So, for me to basically say all these samples, I don't
10 know anything about that, that are sitting there, then the
11 Plaintiffs come in and then we have a mini issue that he has
12 never heard before.

13 Could we do that? Sure, we could do that, but that
14 doesn't seem to be the most efficient. The most efficient way
15 is to say that the person, you, and the parties, us, who have
16 these things is, let's figure out the most pragmatic way of
17 helping other parties kind of get to it. Are there plan B, C,
18 and D? Sure, but the other thing to remember, there is an
19 expert deadline in July.

20 I am not one to be speaking on behalf of the
21 Plaintiffs' lawyers, but they do have time sensitive issues,
22 there's a trial in February. When you hear about the equities,
23 I really don't think that this is stepping on anyone's toes. I
24 think it is squarely within your purview because this whole
25 sample -- I won't say scheme, but this sample kind of situation

1 was created, really, under your guidance and direction as well
2 as our District Court Judge, Judge Rosenberg.

3 Here is what I would say, a few things. I want to be
4 brief. Thank you for giving us the opportunity.

5 To take a step back, I honestly thought this was
6 pretty simple. Right? I honestly did. Sometimes we have
7 things I know are going to come to Court, this wasn't one of
8 them. I thought what we were asking for was really
9 straightforward. Basically, they have some extra samples, they
10 were ours, let somebody else use them. We haven't heard
11 anything that says they don't have them or they don't have
12 enough, this kind of a parade of horrors.

13 We filed a six-page brief, which in and of itself is
14 kind of miraculous for a bunch of Defendants because it was
15 pretty straightforward, wasn't hair on fire. It was very, I
16 think, intentionally important, but vanilla. I would just say
17 this because words matter and this tone. You, obviously, have
18 to be the judge of why the Plaintiffs are fighting so hard on
19 this.

20 I just jotted down some things because we do read
21 these things and take them seriously. You know, they said that
22 the arguments that we made were misleading, disingenuous, and
23 contrary to State/Federal coordination. They exhibited
24 unsavory litigation defense tactics. Perhaps the one that
25 caught me the most, and this is a quote, it is a setup of you,

1 your Honor, and the Plaintiffs' lawyers, as if we were setting
2 you up by filing a motion in your court.

3 This is another ploy, feigned cooperative nature. In
4 their conclusion they say that our arguments about coordination
5 are fallacious, disingenuous, and contrary to the overwhelming
6 evidence of Defendants' true and nefarious intentions. What I
7 would say to that is sometimes a duck is just a duck. It is
8 basically that is what this is, it is an important duck, we had
9 to address it.

10 This isn't some master conspiracy theory, ploy to
11 undercut the entire litigation. This is an effort to try and
12 help the Plaintiffs' lawyers in another litigation get what
13 they asked for, what they are willing to accept on an expedited
14 basis.

15 My point number two on this, and I have three points,
16 there are really just practical reasons. It is hard for me to
17 understand, frankly, some of the arguments in opposition, and I
18 always try to.

19 What do we know? We know the Plaintiffs have this.
20 We met and conferred and one of the first questions -- and to
21 their credit they got right on the phone, they didn't
22 dilly-dally, we had a meet and confer. I said, before we go
23 down this road, you are not telling us that you don't have
24 enough samples. So, they have never said that, so we know
25 that.

1 What also know that what we are asking for is a
2 portion, and by portion, we are meaning like teeny tiny. I've
3 seen some numbers, 60,000 pills on one. There are thousands
4 and thousands of samples that could have been done. We also
5 know, as you said to kick this off, that they largely have been
6 done sufficient enough to do an expert report, so we are kind
7 of past that. So it's a portion.

8 Another thing, these are located, and this is just
9 good luck, in Alameda County, that is where Emery, the lab, is,
10 and that's where the lab is for the Plaintiffs. Really like
11 left hand, right hand. The Plaintiffs in the JCCP have already
12 said we will pay, we will send a delivery truck to pick it up.
13 So, logistics, the cost, the burden, it's almost impossible to
14 see any of them. We have the JCCP schedule. If we had a year,
15 maybe we could do this, but July, they have to get them tested.

16 I am not in the business of making arguments for the
17 Plaintiffs, but I think these are practical pragmatic issues.

18 The JCCP -- this is the other issue, is that the JCCP
19 Plaintiffs have basically said that they will accept what these
20 are. Right? So, rather than have to go back and say we want
21 the same exact thing and the Defendants agree to produce it,
22 this seems to be again pragmatic and practical, they have
23 completed their testing of it.

24 The one thing I really, in addition to what I read,
25 take issue with, this idea that all you have to do is slap a

1 FedEx -- your Honor knows that that is not how the world works.
2 Right? We have never said that it is physically impossible.
3 If you made us boil the ocean, could we find samples, but that
4 is not really the standard. The standard is, we have to go to
5 nine countries in three continents, get a chain of custody,
6 COVID issues, travel issues, loss, damage. Right? If we are
7 doing that de novo, that is what we had to do, we did that.
8 Now it is literally sitting in a refrigerator or a freezer in
9 Alameda County when the Plaintiffs in Alameda County want it.

10 My third point is really jut to address maybe some of
11 the issues that I have -- when I took some of the hyperbole
12 away, I said, well, what are the Plaintiffs' arguments here?
13 What are they saying in opposition? I had a hard time
14 understanding why this was such a hot button issue for them.

15 They said that they don't represent the JCCP
16 Plaintiffs and when they negotiated it was only on behalf of
17 the MDL. So stipulated, right? Okay. I don't represent the
18 Plaintiffs, but that doesn't matter to this issue, so that is
19 irrelevant in my view.

20 They said that they might need testing later. That is
21 kind of interesting for two points. One is, I don't think the
22 Plaintiffs are going to come today and say for specific
23 causation they need to do testing of each individual Plaintiff.
24 If they are, that would be interesting to hear. I don't want
25 to be cute, I don't think that is their point. I think the

1 answer to that is, as I said earlier, we are just asking for a
2 small portion. They are going to have still the tons of
3 materials that they have. They haven't even made that argument
4 that they won't.

5 They basically say that this is an end run around our
6 efforts at Dr. Najafi. Look, it is clear that they are very
7 concerned about Dr. Najafi for good reason, and it is very
8 clear that we do have issues with Dr. Najafi, but those are
9 clearly -- we are not hiding anything. We made those motions,
10 we filed those motions. That's not what this is about. We
11 wouldn't be addressing Dr. Najafi in a six-page plain vanilla.
12 We are just talking about samples. The Dr. Najafi issue is for
13 another day for you and/or Judge Rosenberg.

14 Then, the last thing I would say is this kind of
15 pooh-poohing, my word, not theirs, of kind of the burden and
16 the timing. I would say again, this is going to be and would
17 be very, very time consuming. This is not a gotcha, it's not a
18 setup. It is really an effort to basically say we sent you and
19 Emery samples, you have used them. You have experts.

20 We could have gone, and maybe a better or an alternate
21 relief, your Honor, in thinking about it, and said either order
22 them to do it or order them to return it. To the extent we
23 could modify our request, if that is something you think is
24 more in your jurisdictional wheelhouse, though I think you can
25 do what I am asking as well.

1 I am going to stop there because that is really as
2 basic as this is, and it really is just a duck.

3 *THE COURT:* Thank you very much. I will give you a
4 chance to be heard after I hear from Ms. Jung.

5 Ms. Jung, let me hear from you as to why is it that
6 the Plaintiffs in this litigation need to keep all this stuff?
7 Wasn't the whole purpose really to facilitate general causation
8 discovery, which is now over? Why do you need to keep it?

9 *MS. JUNG:* Sure, your Honor, I will address that
10 question first.

11 I think it is important to remember that when we were
12 negotiating this, and your Honor was painfully involved in all
13 of that over the course of 11 months a year ago, and when we
14 were making those selections and having those disputes with the
15 Defendants, our position was that we were doing it as the MDL
16 Plaintiffs. The selections were made, and I want to, in this
17 regard, make one correction. Your Honor made the indication
18 that we essentially requested and received a third of the
19 Defendant's product. That is not true.

20 *THE COURT:* No, I understand there was the whole issue
21 of the 5 percent versus -- what I remember is, there was talk
22 about the vials had 30 grams in it, and you were asking for ten
23 of the 30, and your position is, when you add up all of the
24 product that they have, you only asked for 5 percent.

25 Your position is, if you look only at the 294, 5, 6

1 that were specifically requested, you got more than that. That
2 percentage number is not material to me today, but I understand
3 your point.

4 MS. JUNG: I think it is important because had we
5 understood that our position was to make selections for
6 inventory for the JCCP Plaintiffs, as well as all the rest of
7 the State litigations throughout this country, our decisions
8 would have been very different, and this was not just mere
9 conjecture, your Honor.

10 As you know, they made very clear statements on the
11 record that we needed to make selections from inventory that
12 would allow for them to make these productions to State
13 litigations in the future as well as their own testing. That
14 was the parameter of how the MDL Plaintiffs made their
15 selection.

16 I do think, while we don't want to relitigate those
17 issues, that was the premise under which the Plaintiffs in the
18 MDL made decisions about inventory, and your Honor also
19 received those same representations, so I think that that is
20 important.

21 Secondly, with respect to the inventory that we have,
22 and we have used for the general causation, while that may be
23 true, we have a finite amount of inventory that we may use and
24 should have within our discretion to use for further testing in
25 the future, whether it be for any reason that may come up, and

1 based on the facts and circumstances of a particular case,
2 whether that be specific causation, whether that be rebuttal
3 testing or testimony, all those reasons. We have a very
4 finite -- and again, we have 5 percent of the product, and some
5 of that product, as you know, has been tested, the bottles have
6 been opened.

7 I am not convinced that the JCCP Plaintiffs are
8 willing to actually take the product inventory or would have
9 made the same selections that the MDL Plaintiffs have made, and
10 I surely would suspect that they don't necessarily want the
11 product that has been opened and tested by the MDL Plaintiffs.

12 I do think that is important, that the JCCP Plaintiffs
13 aren't subjected to just whatever they can get of leftovers,
14 particularly given that there are millions of product available
15 with the Defendants themselves without all of the intervening
16 issues that may be raised regarding transport to us, retention
17 by us, chain of custody by us, storage by us. All of those
18 questions would be removed if the Defense themselves produced
19 those.

20 *THE COURT:* As to that issue, I will tell you, the
21 JCCP Plaintiffs live with the choices they have made. They
22 chose not to be in the MDL, which they are perfectly entitled
23 to do. That is their right. If they are willing to accept
24 what you have with whatever potential glitches there may be in
25 the chain of custody, or the fact that the bottles have been

1 opened, or that later on the Defendants will argue there was
2 spoliation by Emery Pharma, again, they live with the choices
3 that they make. What I am seeing is they wrote a letter to you
4 saying please give us what you have and we will accept it.

5 To the extent you are saying they are not going to
6 like what they get, that is not my problem. That is the choice
7 they have made.

8 *MS. JUNG:* Understood, your Honor. Part of the issue
9 is that I am not sure that they understood or were informed of
10 all of the potential issues with the product that we have. I
11 don't know if their position may still be that they would take
12 those now that we have identified many of the issues, but I
13 hear what you are saying, your Honor.

14 The other point I wanted to make is that Mr. Cheffo
15 compared this issue with documents and handing a thumb drive
16 over, and we are all very clear that it is a very, very
17 different issue, these product samples are of a very, very
18 different nature than the documents.

19 While I --

20 *THE COURT:* I agree with you on that. I think it's --
21 the difference is, if I make a copy of a document and I give it
22 to you, I retain the same quantum of evidence that you have.
23 Here we have a limited amount of evidence that has been
24 retained by the brands, and when it is used, it is used. Once
25 again, maybe the MDL Plaintiffs are lucky because they got to

1 it first, and there may be people who came along later in this
2 litigation who opted out of the MDL and by them all the product
3 is gone. Again, those are choices people make.

4 I agree with you on that, Ms. Jung, the document
5 analogy is not spot on.

6 *MS. JUNG:* The last point I think I need to make is, I
7 understand your Honor concerns about being pragmatic, again,
8 that assumes that we have the same product as Defendants, and
9 that it really doesn't make any sense to make the Defendants
10 produce what the Plaintiffs already have, but they are very
11 different inventories and they are very different circumstances
12 under which what we retain and what we have retained as well as
13 what Defendants hopefully have retained within their own
14 facilities.

15 Again, we are talking billions of pills and product
16 from which not only JCCP Plaintiffs, but others should have the
17 benefit of choosing just as we did under the very painful
18 processes that we went through. And we are very much willing
19 to share the results of the initial processes where we looked
20 into the inventory, compared, and Defendants made many
21 corrections regarding where it was contained, what they had,
22 what they didn't have, how much.

23 We stayed away from making selections of any product,
24 including unexpired product, that was available in very small
25 amounts because of these very issues. So, we definitely made

1 decisions and would have made different decisions had we known
2 that this was also being done for the benefit of other
3 Plaintiffs in other State litigation.

4 *THE COURT:* Well, I don't think it is. I don't think
5 the argument is that you have -- that you somehow or should
6 have made decisions for the benefit of people who aren't in
7 this lawsuit. People chose not to be in this lawsuit, they
8 chose not to be represented by Plaintiffs' lead counsel in this
9 lawsuit, and again, those choices have consequences that flow
10 from them. I am not being critical of anybody who chose not to
11 be in the MDL, but that is not your job. It wasn't your job to
12 make those choices.

13 I am more focused on the back side of this, which is,
14 you made the choices you made for whatever reasons you made
15 them. I gave you what you asked for. Now you have had it, you
16 have done that which was the reason why I gave it to you in the
17 first place, and I am still just not clear as to why you still
18 need it.

19 I am hard pressed to see how you are going to do
20 continued product testing for specific causation, because if
21 this case -- one of two things is going to happen, Judge
22 Rosenberg is either going to grant the Daubert motions or deny
23 them. Okay.

24 Assuming some Plaintiffs survive after the Daubert
25 rulings are made, so there is a judicial decision made that a

1 jury can hear testimony of general causation, that Zantac or
2 Ranitidine causes cancer -- and maybe that will be chopped
3 down. Maybe it will be it causes cancer only if you take this
4 much, or only if you take it for that long, or only if you are
5 over this age, or only if you are of this socioeconomic --
6 certain genetic characteristics, whatever. There will be a
7 universe of people left for whom a Daubert ruling would say
8 they are allowed to go in front of the jury and argue that
9 Zantac caused their cancer. Then the only question is going to
10 be, did it cause their cancer?

11 How is it that the need for this product comes into
12 play in that analysis? Isn't that analysis all about what are
13 their co-morbidities, what did they eat, what did they do, all
14 those other things? Why would continued product testing be
15 even relevant at that point?

16 *MS. JUNG:* Your Honor, there are scenarios -- and
17 again, not committing the Plaintiffs to one type of testing or
18 another, but there are scenarios where if Defendants make an
19 argument, for example, and say, well, this individual always
20 kept it in their shower and the humidity never rose above this
21 particular temperature, and that is why there was not the type
22 of NDMA degradation, for example, we would be entitled to say,
23 okay, we will take testing of product that is similar and --
24 for all chemical intents and purposes and stick to that type of
25 limited circumstances and conditions and identify whether NDMA

1 is -- results from that.

2 That is one example. I may be speaking again --

3 *THE COURT:* Let me accept that premise, then, that
4 there could be -- at some point a year or two down the road
5 there could be a need to do that. Why couldn't I at that point
6 order the brands to go back into their inventory and just give
7 you what you need at that point?

8 Why do you have to keep this for two years or a year
9 and a half on the speculative proposition that you might need
10 it when, arguably, these other people do need it and they are
11 willing to take it?

12 *MS. JUNG:* That is a really interesting point, your
13 Honor, and if you would be willing to consider the potential
14 for ordering the Defendants to produce and provide us
15 particular product that would be relevant to a particular issue
16 and fact and circumstance, I think we would welcome that, but I
17 will let Mr. Nigh speak to that.

18 *MR. NIGH:* There is a major issue with that, your
19 Honor, and it is something we are going to speak to more later
20 on, but these Defendants have not been keeping the product in
21 the sorts of conditions that it needs to be stored in.

22 For example, what we have done is, we have put it in
23 4-degree Celsius temperature to slow down dramatically the
24 degradation that would happen to the product, and so, in that
25 situation we can actually tie up -- if later on we want to look

1 to see, okay, Defendants are going to argue, well, that
2 bathroom isn't similar to how the Plaintiff's bathroom is, we
3 can actually later test specifically Defendant's bathroom with
4 the product we already have to show the changes between the
5 product we already have in the scenario that we tested it under
6 versus the Plaintiff's specific bathroom, if that be the case,
7 or they may say, well, the Plaintiff didn't keep their product
8 in the bathroom.

9 We gave a couple examples because that is what we need
10 to do for general causation. We don't need to prove every
11 example for every specific Plaintiff. Later we can do that and
12 we can tie it up to the product that we already have that has
13 been put in a freezer to slow down degradation.

14 I hate to say that as those products -- we tested 255
15 lots, and we tested them for the amount of NDMA that they had.
16 At this point it is, yes, there are samples, but the amount
17 that we have for various lots is diminishing.

18 So, this idea that there is plenty, an abundance, we
19 need to have that ability to later be able to tie up here is
20 the testing we did before under this situation. Now we can
21 specifically show the Plaintiffs, if the Defendants are going
22 to argue that, that their situation is much different than what
23 Emery Pharma has already tested, we can tie it up with the
24 situation for the Plaintiff specifically.

25 I am very concerned that what we can't do is, a year

1 and a half later we request more product from the Defendants,
2 because they are not storing all of their product in 4 degree
3 Celsius. They have multiple different ways, and frankly, they
4 will argue, when we get the product from them, that it doesn't
5 tie up because it hasn't been stored for a year and a half
6 under that temperature.

7 *THE COURT:* All right. I understand your position on
8 that. Thank you very much.

9 Ms. Jung, anything further?

10 *MS. JUNG:* No, your Honor.

11 *THE COURT:* Thank you. Let me give Mr. Cheffo a
12 chance to be heard.

13 *MR. CHEFFO:* Just really briefly, I think, like in a
14 lot of things, what is kind of not said is more important than
15 what is said sometimes. I think that goes for all of us.

16 When we asked at the meet and confer, we were not told
17 that they didn't have enough. They filed a hundred pages of
18 paper in response to this, they never once said, here is what
19 we used, here is the percentages, it would be a burden,
20 inappropriate, all of those. Today, very informed, skilled
21 counsel, you know, told this kind of like speculation issue of
22 what we may need.

23 The answer is not like down the road we may need to
24 get things. The answer is, they have a lot that was given for
25 general causation. That is what it was for. Right? To the

1 extent that they need some additional, it is going to be
2 within, frankly -- some of these numbers are kind of eye
3 popping, 60,000 pills. What we understand -- they haven't
4 shared exactly what was used, but these test results are a
5 really, really de minimus amount. Right?

6 So sharing -- having what they have, which was the
7 main purpose of it, and then sharing a small portion with the
8 Plaintiffs is not going to do violence to any of this. The
9 answer is not let's get more years down the road, frankly. It
10 is, if they need more, they have this sample that was a huge
11 amount that was provided.

12 The second issue, just on the jurisdictional, or maybe
13 the third issue, is that, you know, under -- if the Court is
14 kind of looking, and maybe I should have been more articulate
15 on this, for authority under Rule 37, you can have a protective
16 order to get the product back. This is all under the rubric,
17 really, of Rule 26 to avoid an undue burden and expense in
18 discovery.

19 I think we are talking about things that were kind of
20 uniquely within the discovery process here. As I've said,
21 there is nothing that we have heard today here that says they
22 can't do it, that there is a burden. Even if you say, well, we
23 would like to have it, it would be interesting, we are not
24 going to tell you how much we need or when we are -- maybe
25 there is this theoretical possibility down the road, my answer

1 again to that is, they have a lot of this.

2 And two, pragmatically, in order for them to have this
3 potential ethereal, philosophical, undefined use, I think it is
4 going to interfere with the State/Federal coordination because
5 I don't know that all the Defendants are going to be able,
6 again in the time of COVID, go back and provide all of these
7 samples when we have willing -- like the folks here, the people
8 in the JCCP -- I don't always agree with their views and
9 positions, but they are experienced counsel.

10 As you said, your Honor, they know what they are
11 getting, they understand what the issues are here. They are
12 not being misled here, and I think they are willing to take it.
13 I think this is the most pragmatic solution, and I think it is
14 time to let folks get what they need in the JCCP, and we can
15 move on to Daubert.

16 *THE COURT:* If I could go back. Maybe Mr. Nigh may be
17 the right person to answer this. Ms. Jung, if you are, fine to
18 you as well.

19 I know for the API, I think I ordered that you got
20 10 grams per vial, approximately. Didn't I do that for the
21 ones you asked for?

22 *MS. JUNG:* For GSK. We had different amounts and
23 there was a different availability for Sanofi.

24 *THE COURT:* Okay. I recall you worked it out with
25 Sanofi. I didn't have to rule on the amounts, we just had to

1 deal with some importation issues.

2 My question is, for the GSK samples that you got, how
3 much of the ten grams has been used up and how much is left, on
4 average, from when you did your general causation testing?

5 *MS. JUNG:* That is a really good question, your Honor.
6 Mr. Nigh may know the answer to this, but I believe that we do
7 not have a lot of those API from GSK in particular left, which
8 is why we left two-thirds with the Defendants. I am not sure
9 that we have much left.

10 *THE COURT:* Because, again, it seemed to me, and this
11 is purely hypothetical, if it only takes, say, one gram to run
12 the test, so you have 9 grams left, and the JCCP people want
13 4 grams, you are still left with 5 grams and you can still run
14 five more tests. On the other hand, if you need 5 grams for
15 every test, you only get to run two tests, and then you are
16 out, and that might be very different.

17 Mr. Nigh, if you know the answer to that question, I
18 would be interested.

19 *MR. NIGH:* I don't actually. It varies depending on
20 the type of test, so I couldn't tell you. There are going to
21 be some where the 10 grams are used up, and there are going to
22 be some that we didn't even have to test, so we have 10 grams.

23 *THE COURT:* All right.

24 *MR. NIGH:* And then a range in between there, it just
25 depends on which API was tested.

1 *THE COURT:* Very good. I apologize, Ms. Jung, I
2 didn't mean to jump over you. Do you have anything else you
3 wanted to say?

4 *MS. JUNG:* No, your Honor, I just wanted to respond.
5 Mr. Cheffo made representations that -- during the meet and
6 confer that this is the first time he is hearing about all of
7 the reasons and the burdens and the practical and substantive
8 reasons why MDL Plaintiffs cannot share, and that is incorrect.

9 I know that the coleads who have participated in those
10 conversations are here and could corroborate it. What I am
11 saying, that all of these reasons were given to the Defendants,
12 and there were lengthy discussion about the challenges and the
13 reasons why it would be difficult to do this.

14 So, for Mr. Cheffo to say that this is the first time
15 he is hearing these arguments is just not true, your Honor.

16 *MR. CHEFFO:* I don't think that is what I said, but
17 the record will show --

18 *MS. JUNG:* Your Honor, one other thing. I don't know
19 that the JCCP Plaintiffs are on this Zoom, but I do know that
20 they are not the ones that filed this motion. I also do know
21 that if they had full information about what the state of the
22 product is, the inventory that is available to the Defendants
23 versus the inventory that is available to us, the argument that
24 they made about the chain of custody, which is why we, out of
25 an abundance of caution, had put those under seal, if they had

1 access to all of that information, I surmise that they would
2 not necessarily be making the same request, or continue to
3 press to have the product inventory leftovers that the
4 Plaintiff MDLs have.

5 I understand that may not be your issue, but I want to
6 be clear that the disclosure of information between all three
7 parties in this issue I don't think was very transparent or
8 clear.

9 *THE COURT:* Okay, thank you.

10 I want to pick up where Ms. Jung left off because she
11 has arrived where I started, which is, this is not the right
12 place to be having this discussion.

13 If this issue had been framed formally, the way it
14 would have been formally framed is that the JCCP Plaintiffs
15 would have made a request in the JCCP, a request for production
16 to the Defense for this production. The Defense would have
17 objected and said it is unduly burdensome because there is a
18 more efficient way to get it. Go get it from the Plaintiffs.

19 They would have served a subpoena on the Plaintiffs,
20 the Plaintiffs would have objected to the subpoena, and then
21 the JCCP judge could have a hearing with the JCCP Plaintiffs,
22 the objecting Plaintiffs in the MDL, and the brands.

23 The brands could argue the undue burden and Ms. Jung
24 could make the very eloquent argument she just made that they
25 don't know what they are getting and they don't want what they

1 want and all that stuff.

2 That is really the right place for this to be, other
3 than -- and I hear what Mr. Cheffo is saying, that if I am the
4 JCCP judge, I don't want to get crosswise with the Federal
5 judge, I don't want to screw up what the Federal judge is
6 trying to do. So I hear that as well.

7 Here is where I think I have to land on this one:

8 I am not going to order these Plaintiffs to give the
9 product to the Plaintiffs in the JCCP. I don't think that is
10 my place. I don't think that is the proper remedy here, but I
11 am not averse to the JCCP judge ordering the Plaintiffs in this
12 lawsuit to give it to the JCCP Plaintiffs.

13 I will make that very clear on the record that if that
14 is what the JCCP Court decides is the best way to proceed, I
15 have no problem with that.

16 While I hear what Mr. Nigh and Ms. Jung are saying
17 about they might need more product later in the future, they
18 can make that argument to the JCCP judge. I would, everything
19 else being equal, prefer that the JCCP judge leave some product
20 with these Plaintiffs so they can have it, but I think the
21 scenario that they are laying out, to me, is extremely remote
22 and extremely unlikely.

23 Maybe it will arise in one of the bellwether trials, I
24 doubt it. If this case survives Daubert and goes to
25 bellwether, like every other MDL in the history of the world,

1 as soon as Judge Rosenberg threatens to remand it back, I don't
2 think we will have very many trials after that.

3 So, the idea that the Plaintiffs need to retain this
4 so that if possibly there is an argument later about a shower
5 or some similar argument, I hear them, I am not discounting
6 that argument. I just think it is so remote that it is not
7 proportional to the needs of this case for me not to then, in
8 effect, say give the product back to the people who produced
9 it.

10 I understand that is a very unsatisfying ruling for
11 everybody here today, but that is my ruling. My ruling is, I
12 am not going to grant the motion to order these Plaintiffs to
13 give product directly to the JCCP Plaintiffs. I do not object
14 to the JCCP Court entering an order to that effect. We will
15 reduce that to writing and whoever wants to take it can take it
16 to the JCCP Court and they can do what they want.

17 Perhaps in the interim Mr. Nigh and Ms. Jung will have
18 a conversation with the JCCP Plaintiffs and explain to them
19 very eloquently why they don't want what they're asking for and
20 maybe this issue just goes away. That will be the Court's
21 ruling today.

22 Not waiving any objection you may have to the Court's
23 ruling, Ms. Jung, do you seek any clarifications or are there
24 any other issues that you wanted to raise?

25 *MS. JUNG:* No, your Honor, thank you.

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THE COURT: Mr. Cheffo, same question to you.

MR. CHEFFO: No, your Honor. Thank you for your time today.

THE COURT: Thank you all very much, very well argued and interesting issue. We will be in recess.

MR. NIGH: Thank you, your Honor.

MR. CHEFFO: Thank you, your Honor.

(Thereupon, the hearing concluded.)

* * *

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

Date: June 16, 2022

/s/ Pauline A. Stipes, Official Federal Reporter

Signature of Court Reporter

MR. CHEFFO: [8] 2/11 5/22 7/22 8/23 24/12 28/15 32/1 32/6	8	26/25
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