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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO. 20-md-02924-ROSENBERG
22-CV-80208-ROSENBERG

IN RE: ZANTAC (RANITIDINE) .
PRODUCTS LIABILITY . West Palm Beach, FL
LITIGATION. . February 15, 2022

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MOTION TO COMPEL (through Zoom)
BEFORE THE HONORABLE BRUCE REINHART
UNITED STATES MAGISTRATE JUDGE

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1 *THE COURT:* Let's go on the record. Good morning,
2 everybody. This is case number 20-2924, In Re: Zantac
3 (Ranitidine) Product Liability Litigation, and also case number
4 22-80208, In Re: Third Party Subpoena to Emery Pharma, which
5 is transferred in from the Northern District of California.

6 I will start with appearances. Let me start with
7 counsel for the party moving to compel, which I think is BI
8 speaking on behalf of all the Defendants.

9 *MR. SHORTNACY:* Correct, your Honor, good morning,
10 Michael Shortnacy of King & Spalding on behalf of Boehringer
11 Ingelheim. My colleague with me today is Eva Canaan also from
12 King & Spalding.

13 *MS. CANAAN:* Good morning, your Honor.

14 *THE COURT:* Good morning. And on behalf of the
15 subpoenaed party, Emery Pharma and Dr. Ronald Najafi.

16 *MR. SEDGHANI:* Good morning, your Honor, this is Sami
17 Sedghani on behalf of non-parties Emery Pharma and Dr. Ron
18 Najafi. Good to see you again.

19 *THE COURT:* You, too, Mr. Sedghani. Good morning.
20 On behalf of the Plaintiffs.

21 *MS. FINKEN:* Good morning, your Honor, Tracy Finken on
22 behalf of Plaintiffs, and also my co-lead counsel Michael
23 McGlamry and Daniel Nigh.

24 *THE COURT:* Good morning to all of you.

25 *MR. McGLAMRY:* Thank you, your Honor.

1 *THE COURT:* Mr. McGlamry, I know you had some family
2 issues, I hope everyone is doing better and that new baby is
3 doing well.

4 *MR. McGLAMRY:* Thank you, your Honor, I appreciate
5 that. Today is the third week of life of my youngest
6 granddaughter, and that has gone very well. I have had some
7 issues with my mom on the other end of the spectrum, which has
8 not been as pleasant or gone as well, but I appreciate the
9 Court's thought and, you know --

10 *THE COURT:* I hear you. You are averaging one
11 grandchild per year in this lawsuit. If it goes on much longer
12 you will have a full house here.

13 *MR. McGLAMRY:* Your honor, that really probably is
14 okay with me. Last night was the first chance that Maeve,
15 which is my new granddaughter, got to meet her two cousins,
16 three and a half and one and a half, and it was quite an
17 entertaining evening. So, the longer we go, then, the better.

18 *THE COURT:* Very good, congratulations.

19 I understand there is one preliminary issue that the
20 Plaintiffs wanted to raise regarding a proposed demonstrative
21 exhibit that -- I will call them the Defendants, but I know
22 they are the parties moving to compel -- that the Defendants
23 wanted to use. Ms. Finken or Mr. McGlamry or Mr. Nigh, you
24 wanted to be heard on that?

25 *MS. FINKEN:* Sure, your Honor. We were served with a

1 proposed demonstrative about 30 minutes ago that we have not
2 had a chance to look at or discuss on our side, and we objected
3 to it being used during the course of the hearing. We are not
4 sure it is containing confidential information or not at this
5 point, but I understand it is a PowerPoint presentation that
6 the Defendants wanted to use.

7 *THE COURT:* Thank you. Mr. Shortnacy or Ms. Canaan,
8 let me hear from you.

9 *MR. SHORTNACY:* Sure. Thank you, your Honor. The
10 parties were up until the 11th hour in discussions over this to
11 see if a resolution could be reached, and it could not, and we
12 are here today prepared to argue that. So, we shared those
13 slides, which are basically dates on a timeline, to help
14 illustrate for the Court certain key facts and topics that
15 would be covered in a fact deposition, which is what we are
16 arguing about today, so it is for everyone's benefit.

17 There's nothing confidential in them, they are just
18 dates and facts, it's very simple material, so we would ask the
19 Court to allow us to show it during the hearing.

20 *THE COURT:* Obviously I haven't seen it, so I don't
21 know. Generally, we like to have this exchange a little
22 earlier. Here is what I will do, I will let you use it.
23 Ms. Finken, Mr. McGlamry, and Mr. Nigh, if you believe you are
24 being prejudiced in any way as we see it in real time you let
25 me know, and I am pretty good at departmentalizing it. If I

1 should ignore it, I will ignore it at that point, or at the end
2 of the hearing, if you feel there is a need to request to
3 supplement, I will deal with that as well.

4 Preliminarily, I will allow them to use it. It is
5 only a demonstrative aid, it is not evidence so for that
6 purpose I will allow it, subject to further objection by the
7 Plaintiffs.

8 *MR. SEDGHANI:* Your Honor, may I also have an
9 opportunity to respond to that as we are also the party that is
10 being moved to be compelled?

11 *THE COURT:* Yes.

12 *MR. SEDGHANI:* We were not involved in any of the meet
13 and confers, we just received this, like everyone else, 30
14 minutes ago. Our issue is not necessarily the content of being
15 confidential or not, it is that it is new information that was
16 not previously put in the Motion to Compel, so it is bringing
17 about new information that is not allowed pursuant to the
18 briefing schedule, and we haven't had an opportunity to provide
19 our rebuttal evidence to whatever they are intending on
20 presenting.

21 That is really the prejudice that we, as the
22 non-moving party, are going to suffer if they argue on the new
23 evidence. If it is already included in their brief, then they
24 are free to argue from that, but to the extent it is new stuff,
25 which as I am looking at it, I don't fully understand some of

1 the acronyms that are used or some of the issues that are
2 completely new and never before argued in two separate rounds
3 of briefings both before the Northern District of California
4 and before your Honor here, so some of this stuff is completely
5 new. That is really the main issue.

6 *THE COURT:* Again, it is not evidence, it is a
7 demonstrative aid. If it contains information -- Mr.
8 Sedghani, I didn't mean to exclude you when I was talking about
9 the Plaintiffs -- that any of the other parties feel either is
10 not supported by the factual record that has been made, or for
11 other reasons should not be considered, let me know.

12 In some respects this is an evidentiary hearing, they
13 can certainly supplement the factual record. They can't make
14 new legal arguments, but if they want to offer facts in support
15 of their position, I have never precluded any party from doing
16 that. Again, it has to properly offered, properly admitted,
17 subject to challenge by the other side.

18 Let's take it one step at a time. I haven't seen it,
19 so I can't rule on it. You all have reserved your right to
20 tell me to shut it down or to ignore it, and I will hear you on
21 that when the time comes.

22 So the record also is clear, I reviewed the Motion to
23 Compel, I reviewed the responses filed both by the Plaintiffs
24 and by Emery Pharma and Dr. Najafi, I reviewed the reply filed
25 by Boehringer Ingelheim, and I have reviewed all of the

1 attachments to the submissions, including the subpoenas
2 themselves, the objections to the subpoenas, et cetera.

3 With that, if I could ask a couple of preliminary
4 questions, it will help me focus, make sure I have the baseline
5 facts right and then I will allow the parties to argue.

6 So, as I understand it, there are two subpoenas that
7 have been tendered; one is a subpoena to Emery Pharma, the
8 entity, for a corporate representative 30(b)(6) deposition.
9 Separately, there was a subpoena served on Dr. Najafi in his
10 individual capacity for testimony, and separately, although not
11 before me today, Dr. Najafi has been identified, I guess by the
12 Plaintiffs, as an expert in this case, an expert report has
13 been tendered, and therefore, under other Federal Rules of
14 Civil Procedure he is subject to deposition in his capacity as
15 the expert.

16 Anybody disagree those are the three moving parts here
17 that I have to deal with today?

18 *MR. SHORTNACY:* That is correct, your Honor.

19 *THE COURT:* Thank you, Mr. Shortnacy. I will remind
20 the parties to identify yourselves. I will try to call on you,
21 but let's make sure the record is clear.

22 At a very high level, my first question to either Mr.
23 Shortnacy or Ms. Canaan is this: What is the relevance of Dr.
24 Najafi in his individual capacity aside from him being an
25 expert?

1 MR. SHORTNACY: Sure. Michael Shortnacy speaking on
2 behalf of Boehringer Ingelheim and the Defendants.

3 Just to level set, your Honor, Emery Pharma itself is
4 an analytical and litigation support lab. They conducted
5 testing on Zantac and Ranitidine, filed a citizen petition
6 January 2, 2020. Dr. Najafi himself was involved in that
7 testing. That testing and this citizen petition is clearly at
8 issue in the case, it is one of the founding pillars of the
9 master complaints. It now is, come to find out, buttressing 11
10 of the 12 expert reports that Plaintiffs are relying on.

11 So, the factual basis for what Dr. Najafi is aware of
12 is the testing that he performed in this case prior to him
13 being engaged as an expert.

14 He also happens to have evidence in connection with
15 his opinions that he has rendered in connection with testing
16 done at the behest of Plaintiffs, which is a separate issue.
17 As your Honor noted, it is a separate bucket.

18 What we are talking about compelling here is factual
19 depositions of Dr. Najafi and Emery Pharma.

20 THE COURT: I understand that. My question is this:
21 Other than the fact that he happens to work at Emery Pharma,
22 what is Dr. Najafi as an individual, not as a corporate
23 officer, not as an owner, Dr. Najafi in his individual
24 capacity, what does he have to do with this lawsuit other than
25 the fact he has been retained as an expert?

1 *MR. SHORTNACY:* I will invite my colleague,
2 Ms. Canaan, to provide additional color to this, but in
3 essence, your Honor, it is because Dr. Najafi himself has
4 conducted that testing, he is a recipient witness to that
5 testing. So, that sort of distinguishes him from Emery Pharma
6 who we have served a 30(b)(6) deposition subpoena on because we
7 need to take discovery of the lab and its protocols and its
8 procedures and the like that pertain to that testing.

9 So, we would not know if Dr. Najafi would say at a
10 deposition that he wasn't aware of that, so we have to
11 effectively take both the entity and Dr. Najafi to make sure we
12 can get answers to our questions.

13 *THE COURT:* I understand your position on that. Does
14 either Mr. Sedghani or the Plaintiffs want to be heard on that
15 issue?

16 *MR. McGLAMRY:* No, your Honor.

17 *MR. SEDGHANI:* No, your Honor.

18 *THE COURT:* Thank you. The other question I had,
19 maybe this is self evident, since Emery Pharma -- this is to
20 the Plaintiff -- since Emery Pharma is not the designated
21 expert, do you take the position that Rule 26 in any way cabins
22 the deposition of Emery Pharma as a 30(b)(6) witness?

23 *MR. SEDGHANI:* Is that directed to me, your Honor?

24 *THE COURT:* I think that was a Plaintiffs' objection.
25 That was my question to the Plaintiff, do they believe that the

1 expert witness rules limit a deposition of the corporate entity
2 who has not been designated as the expert?

3 MS. FINKEN: Your Honor, our agreement, and Mr. Nigh
4 can correct me if I misstate this -- and by the way, Tracy
5 Finken on behalf of Plaintiffs for Ms. Stipes' benefit.

6 Our agreement in terms of our retention agreement is
7 with Emery Pharma and Dr. Najafi as I understand it, so Emery
8 Pharma and Dr. Najafi have been retained as experts in this
9 case.

10 I think it is important to note, your Honor, that we
11 don't dispute that the Defendants are entitled to ask Dr.
12 Najafi questions about all of this during his expert
13 deposition, which we have provided dates for.

14 Where we do have a dispute is the fact that Defendants
15 are trying to obtain two bites at the apple, and they are
16 trying to obtain two depositions of Dr. Najafi, which is just
17 overly burdensome to him, it is harassment of him, and it is
18 disproportionate to what is needed in this case.

19 We have no dispute over the fact that Defendants can
20 take the expert deposition of Dr. Najafi in accordance with the
21 dates that were provided under the PTOs that are in place here,
22 and they can ask him about all of this at their deposition.

23 I also want to make a note, your Honor, that the
24 Defendants have -- it is really important that your Honor
25 understand the timeline here of how this went down, and to put

1 it into perspective, the Defendants have served Dr. Najafi with
2 multiple subpoenas. Dr. Najafi made document productions in
3 August of 2020, in September of 2020, in November of 2020, in
4 February of 2021, and in June of 2021.

5 *THE COURT:* I apologize for interrupting you, but I
6 want to make sure I am following you. Dr. Najafi made
7 productions or Emery Pharma made productions?

8 *MS. FINKEN:* The subpoenas were served on Emery Pharma
9 and Dr. Najafi, and those entities, through their counsel, made
10 those productions from August of 2020 through June of 2021.
11 There were five different document productions made. Okay?

12 As your Honor is aware, on November 15t, Judge
13 Rosenberg entered an amended PTO 65 which amended our expert
14 report deadline to January 24th. Previously, they were due on
15 December 20th.

16 Not until November 17th, two days after Judge
17 Rosenberg amended the PTO, did BI serve a subpoena on Dr.
18 Najafi and Emery Pharma in the State of California to take
19 their deposition. Prior to that it had never been requested.
20 During any of the prior meet and confers, during any of the
21 time that they had this discussion with Dr. Najafi and Emery
22 Pharma's counsel a deposition had never been discussed. It was
23 requested via subpoena November 17th in State Court.

24 The rationale that was provided, your Honor, was that
25 this information was necessary for the Defendants' experts in

1 preparation of their expert reports. Fair enough, that is a
2 fair enough statement for them to make.

3 However, they didn't reach out, not once, to
4 Plaintiffs' counsel in the MDL to meet and confer about this,
5 to discuss this with us, to request a deposition, to request
6 this information for purposes of their expert reports. They
7 served a subpoena in State Court two days after Judge Rosenberg
8 amended PTO 65.

9 If you fast forward after that time frame, Mr.
10 Sedghani -- and I will let him speak for himself -- he filed a
11 Motion to Quash. We entered into meet and confers in good
12 faith with Defendants in the beginning of December. We made an
13 offer to them on January 2nd to provide Dr. Najafi for a
14 limited deposition to answer their questions for the
15 information that they needed for their expert reports, because
16 that is the basis that they were requesting these depositions,
17 and that offer was declined.

18 We have also asked them to provide us -- if truly what
19 they need is this information for their expert reports, we
20 asked them to articulate what they need so that we could work
21 with them to get then that information. I have offered to do
22 that through interrogatory, I have offered to do that through
23 potentially a sworn affidavit, through a very limited in scope
24 deposition.

25 All of those offers have been declined up until this

1 point, and it just seems to me that it is pretty clear that
2 this isn't information that they are seeking for their expert
3 reports or they would have been working with us to try to
4 obtain it.

5 What they are trying to do is take two depositions of
6 Dr. Najafi, and it is over reaching. They are taking two bites
7 at the apple for an expert deposition, and it is all
8 information they can properly question him about during his
9 expert deposition that we offered up in this case. It is just
10 not proportional.

11 We have been limited in the past in our depositions
12 that we have taken to a seven-hour deposition to cover an
13 extremely long period of time, significant amounts of
14 documents, and we have managed to make that work. I submit to
15 the Court that the Defendants should be held to the same
16 standard in this.

17 *MS. CANAAN:* May I respond, your Honor?

18 *THE COURT:* In a second, Ms. Canaan, yes, I will give
19 you a chance to respond to all of this.

20 Ms. Finken, I want to clarify one thing you said.

21 *MS. FINKEN:* Sure.

22 *THE COURT:* If I look in my own mind at a timeline of
23 Emery Pharma's -- I am talking about Emery Pharma, the entity,
24 not Dr. Najafi, the individual. As you can tell, I am making a
25 significant distinction between the entity and the individual

1 because I do think legally and formalistically I have to.

2 If I look at Emery Pharma, there was a period of time
3 they were doing whatever they were doing, collecting data,
4 filing a citizen's petition, providing services to third
5 parties, whatever, and then there was a time when they, along
6 with Dr. Najafi, are retained as an expert by the Plaintiffs
7 and I am going to guess they may have performed some additional
8 testing, analyzed data, they did whatever experts do.

9 Do you have any objection to a deposition of Emery
10 Pharma for the period before they became an expert? So if the
11 Defendants say, look, 11 of the Plaintiffs' experts are relying
12 on publicly announced data that Emery Pharma generated, it was
13 before they were an expert, fair game, we should be able to get
14 it. Our experts should be able to look at it.

15 I will get to Mr. Sedghani in a second. He may have
16 his own objections.

17 Again, you may have an objection to the scope of what
18 that 30(b)(6) deposition ought to look like and how much time
19 it ought to be, I understand all of that, but are you saying
20 they can't have any of that, or do you agree they are entitled
21 to have some discovery into that time period, it's just a
22 question of how much?

23 *MS. FINKEN:* Your Honor, they have had discovery into
24 that time period, they have had multiple document productions.
25 They have all the documents. They have also taken the

1 deposition of Dr. Mitch and they have questioned him about it.
2 They have taken the depositions of Dr. Braunstein, David Light
3 from Valisure, and they have questioned all of these witnesses
4 about it.

5 This is about them trying to get two bites of the
6 apple from our expert witness and it is not necessary. They
7 have the information and the documents, and we have asked them
8 specifically if there is information you need beyond the
9 documents for your experts to tell us what that is and we will
10 work with you to get that information, and they have refused to
11 do that. They will not articulate it for us, your Honor.

12 *THE COURT:* I understand. You keep saying they are
13 trying to get two bites at the apple of your expert. I have
14 carved out the period now. I am only talking about the period
15 when he is not your expert, and when this entity is not your
16 expert. So, how is that getting two bites at the apple, or are
17 you saying it is cumulative to the documentation they already
18 have and, therefore, they shouldn't get a deposition on top of
19 the document production?

20 *MS. FINKEN:* It is cumulative to the information that
21 they already have through the document production, and they
22 will get to question Dr. Najafi about all of that during the
23 course of his expert deposition.

24 The way that we are looking at this is that we believe
25 they are looking to question him about this in terms of

1 impeachment and that is more appropriate for his expert
2 deposition. It is not appropriate to be doing this in a
3 two-part process. They have the information from the
4 documents.

5 To the extent that they need information in addition
6 to the documents, and in addition to the extensive testimony
7 they have already taken from other witnesses, we are happy to
8 work with them to get that information from Emery Pharma or Dr.
9 Najafi. We have been unable to get any articulation of what
10 information they actually need for their expert reports.

11 *MR. McGLAMRY:* Your Honor, can I add --

12 *THE COURT:* Hold on, folks. One at a time, one at a
13 time.

14 Let me let Mr. Sedghani have the next response. I
15 asked the question about -- well, you can respond to anything
16 that has been raised so far, Mr. Sedghani. You have been very
17 patient.

18 *MR. SEDGHANI:* Thank you, your Honor, I appreciate
19 that. Just to make a couple of clarifying issues, the subpoena
20 to Emery Pharma has 13 broad categories, only one of which
21 relates to Zantac testing. The other ones are a whole slew of
22 different issues, and we can address those, but let's focus on
23 the testing which they brought up, so that is category one.

24 The primary person who would be talking about the
25 testing would be Dr. Najafi. In essence, they are asking for

1 three separate depositions of Dr. Najafi, one as a designated
2 witness on behalf of Emery Pharma, one in his own capacity, and
3 one as an expert. Okay?

4 Number two, all of the issues, to the extent they are
5 relevant, Plaintiffs would have to be relying on it. If they
6 are relying on it, it is going to be in the expert report. If
7 it is not in the expert report, how can they say they are
8 relying on it? To the extent it is impeachment testimony, they
9 can surely impeach him on it, use it for whatever purpose they
10 want during his deposition.

11 They can't at the same time say Plaintiffs are relying
12 on it if it is not in his expert report because they have to
13 put it in there if they are relying on it. If it is there,
14 they are going to get a chance to depose him. If it is not
15 there, they are going to get a chance to impeach him, to the
16 extent there is anything to impeach him on.

17 All of the documents we have now multiple times
18 certified, we have produced, we are not withholding anything.
19 We have given them all the raw data, all the bases, all the lab
20 reports, all the protocols. Everything that is public,
21 everything that is private, everything that has ever been done
22 in any fashion sort of way, pre-testing, post testing,
23 engagement, everything has been produced.

24 To the extent they want to claim that certain things
25 are missing, they can surely try to impeach him with that and

1 say, hey, why didn't you keep this kind of record? Go ahead
2 and ask them. We don't object to that. We don't see the basis
3 for separately issuing a subpoena on things that they could
4 probably get from the parties, because if the parties are
5 relying on it and they have that information, why should you
6 come to a nonparty to get it, right? That is really the
7 objection here.

8 *THE COURT:* I understand. Thank you. Let me let
9 Ms. Canaan respond. I'm sorry, Mr. McGlamry, you wanted to say
10 something, and then I will let Ms. Canaan respond to everybody.

11 *MR. McGLAMRY:* Thank you, your Honor, Mike McGlamry
12 for Plaintiffs.

13 I just wanted to add to what Tracy was talking about.
14 I can see, your Honor, what you are talking about with regard
15 to Emery Pharma as distinguished from Dr. Najafi.

16 The way I think about this, and why we got involved in
17 this when we did initially because we felt like this was
18 encroaching on the expert process, and that is, I would expect
19 most every expert in this litigation -- maybe not every one,
20 but for the most part have been involved at some level prior
21 to, quote, their engagement as an expert in this case as it
22 relates to Ranitidine or Zantac, and that sort of thing. That
23 is why they are an expert.

24 Our concern is that if essentially after Dr. Najafi is
25 known because they were aware, because of all the product issue

1 and where the product was going to go, that he was our testing
2 expert, and therefore would be an expert witness, and only
3 after that, only after the change to PTO 65 did they seek to
4 take his deposition, which, of course, to me belies the fact
5 that they needed it, otherwise it would have happened before
6 Judge Rosenberg changed her order.

7 But nevertheless, if essentially it is okay from an
8 expert's standpoint to go depose the entity, the 30(b)(6) type
9 of thing for each expert, to me it is a slippery slope in this,
10 and that was our concern. With Dr. Najafi, and with the
11 documents that have already been produced and what Mr. Sedghani
12 has already gone through, it is all there, all been produced,
13 they have an opportunity at his expert deposition to do what I
14 think always happens in every case with any expert, and that
15 is, you ask about what they have done in the past, and that
16 builds toward what is in their expert report that they are
17 doing in this case.

18 And so, from our perspective, the burden -- and again,
19 aside from the issues that Sami sort of has from a corporate
20 and individual standpoint, from the MDL standpoint is this, and
21 I know your Honor can appreciate this, we have all -- and I
22 include the Defense on this -- worked tirelessly and almost
23 24/7 on all of this expert stuff and for us to stop and prepare
24 Dr. Najafi or someone from Emery Pharma to do this outside the
25 context of the expert deposition that is going to take place

1 anyway is a huge undertaking.

2 It is -- you know, I can't tell you how many weeks it
3 takes to prepare a witness for something like this, and
4 particularly where now, in the context of he is an expert, that
5 includes MDL counsel, and Sami as individual counsel, and Dr.
6 Najafi and people at Emery Pharma, so it is not a simple -- you
7 know, had they come here a year ago, after they subpoenaed
8 Emery Pharma and gotten all their documents and said we needed
9 a deposition to do this for our experts, which your Honor will
10 remember their experts were originally required to be submitted
11 by the 1st of September, they never requested this.

12 And so, now as we fast forward, it is not simply --
13 the way I look at it, it is not simply a question of can we
14 take a deposition of a third party.

15 You know, again, a year ago, that may have been in my
16 mind the issue because they had production, they subpoena the
17 guy for a deposition. We talk about that and distinguish that
18 from his expert testimony.

19 Now that we are in the midst of it, they know we are
20 in the midst of it, we are working night and day on all of
21 this, we are continuing to work night and day on this because
22 we have the Defense experts that are coming up, then our
23 rebuttal experts, and trying to get all of the depositions done
24 by May 31st. It is not as simple, at least from our
25 perspective, to say, okay, they need some testimony.

1 We acknowledge they are allowed to have the testimony,
2 and we tried to provide some ways to do that, but ultimately
3 and essentially what we believe is that they are entitled to
4 the expert depo, just like any other expert in any other
5 situation, just like we would have to do of their people.
6 Otherwise, if they put up somebody that has done a study in the
7 past, do we get to go to that entity and do a fact deposition
8 of that study about what they have done? I would expect most
9 everybody in this case has something like that.

10 Your question ultimately -- or initially was, why not
11 Emery Pharma? Because it is essentially the same thing, and it
12 can all be dealt with in the context of the expert depo.

13 Thank you, your Honor.

14 *THE COURT:* Thank you. Ms. Canaan, you have been very
15 patient, let me let you respond to any or all of what you want
16 to respond to.

17 *MS. CANAAN:* Thank you, your Honor. Eva Canaan for
18 the record.

19 There are a number of different arguments and I am
20 going to try to quickly respond to each of them. The argument
21 about we already have the documents from Emery, well, that has
22 never been a reason not to get a deposition.

23 First of all, there are gaps in the documents, there
24 are legitimate questions that our experts have about the
25 documents. For example, they produced documents like

1 PowerPoints with no underlying date that we want to
2 legitimately ask Emery or Dr. Najafi, whoever is the right
3 person, the 30(b)(6) person, to tell us is there underlying
4 data. Why is there a PowerPoint with NDMA numbers and no data?
5 Like I said, getting documents has never been a reason not to
6 take a deposition. Plaintiffs have taken countless depositions
7 of witnesses despite getting thousands of documents.

8 Another argument was, well, they say we have already
9 taken depositions of Dr. Mitch and Dr. Braunstein. That's true
10 the Dr. Braunstein deposition had absolutely nothing to do with
11 Emery testing. I took the deposition and I asked him, has he
12 ever heard about Emery or Dr. Najafi, there is nothing. There
13 is nothing they can point in the Braunstein deposition that has
14 to do with a Emery.

15 Then the Mitch deposition, Dr. Mitch did collaborate
16 with Emery on a very specific type of testing, urinary testing
17 of Zantac, but it is like less than 5 percent of the testing
18 that we seek to depose Emery on, and even there Dr. Mitch said
19 in his deposition, look, I didn't do the testing, it was Emery
20 who did the testing. So, that is a nonstarter to me.

21 And then the whole thing about, oh, we are here at the
22 seventh hour, that is true, but the delay is of Plaintiffs' own
23 making. We served these deposition subpoenas on Emery and Dr.
24 Najafi on November 17th, more than two months before the close
25 of fact discovery, but there was this -- you know, Emery fought

1 us. There were jurisdictional issues, we had briefing in the
2 Northern District of California before the JPML. Believe me,
3 we would have loved to take these depositions two months ago,
4 and not in the middle of expert discovery when I have 3,000
5 pages of expert reports on my desk in addition to the Emery
6 fact deposition now. That is not what I wanted at all.

7 With all due respect to Dr. Sedghani, the test of
8 relevance is not what the Plaintiffs' experts are relying on.
9 I think your Honor can understand that our experts will likely
10 want to rely exactly on the data that Plaintiffs' experts are
11 not relying on, the data in the Emery documents that
12 Plaintiffs' experts conveniently ignore.

13 Finally, I think most importantly, I really want to
14 take the time to address Ms. Finken's and Mr. McGlamry's
15 position that Dr. Najafi's deposition is enough, that is enough
16 for us to explore all factual issues. Essentially they are
17 saying, why don't you just ask Dr. Najafi whatever fact
18 questions you want about his testing at his expert deposition.
19 Your Honor, there are three separate reasons why we cannot do
20 that.

21 First, our experts have legitimate questions about
22 Emery's testing that we need to explore at these depositions so
23 that our experts can incorporate this information into their
24 expert reports. Emery has produced over 2600 pages of
25 documents related to Zantac testing that was performed

1 pre-retention or post retention, but shared with other third
2 parties or shared on You Tube or their website, in videos and
3 PowerPoints, clearly testing that was not performed at the
4 behest of the Plaintiffs, otherwise Emery wouldn't have given
5 us these pages of documents.

6 Now, our experts have reviewed these documents and
7 they have all sorts of questions about this testing. For
8 example, there are PowerPoints with NDMA levels, but no
9 underlying raw data, or we have raw data, but no protocols or
10 any indication of where the data are coming from or how they
11 were derived.

12 Some of these documents have very low NDMA levels, so
13 our experts are saying, we may want to rely on this, but we
14 don't understand enough about this. Can you please find out X,
15 Y, and Z, like where did these product samples come from, where
16 did the NDMA numbers come from, how many tests were run, what
17 was specified, is there a protocol and why wasn't it produced.

18 Another example, Emery conducted urinary testing with
19 Dr. Mitch. They detected absolutely no NDMA in the urine.
20 None of Plaintiffs' experts discuss this in their reports. Of
21 course our experts want to address this, but they have some
22 questions about the methodology so they can address it.

23 Our experts are asking questions about this data so
24 they can address them in the expert reports, but we can't
25 answer these questions without a deposition of Emery and Dr.

1 Najafi.

2 I think this is critical, your Honor, if Plaintiffs'
3 experts, as they were preparing their expert reports, if they
4 had questions about Emery's data pre retention, in the citizen
5 petition, urinary testing, whatever, they had access to that
6 information. They were able to get that information from
7 Plaintiffs in preparing their expert reports. So, why
8 shouldn't our experts have that same opportunity? Why
9 shouldn't they be able to understand the results of Emery's
10 nonexpert testing just as Plaintiffs' experts had that
11 opportunity?

12 To me, your Honor, this is an issue of fundamental
13 fairness. Our experts should have the same access to Emery's
14 factual information that Plaintiffs' experts had in forming
15 their opinions. That is reason number one, your Honor.

16 The second reason why we can't just ask all our
17 questions at Dr. Najafi's expert deposition is that, as you
18 pointed out, we served a 30(b)(6) deposition notice on Emery.
19 We don't know if Dr. Najafi is the person who can answer the
20 questions relating to the topics in that notice or if it is
21 someone else at Emery who is a more appropriate 30(b)(6)
22 deponent.

23 Finally, third, your Honor, Emery produced, as I said,
24 over 2600 pages of documents related to Zantac testing. That
25 was not done at the behest of the Plaintiffs. Additionally, I

1 looked at Dr. Najafi's report yesterday and it is exactly 199
2 pages of complicated new data and analyses that were done,
3 these are different analyses, that were done at the behest of
4 the Plaintiffs. With all due respect, seven hours is not
5 enough for me to question Dr. Najafi on all of these issues.

6 Here, your Honor, I wanted to show the demonstrative
7 that we discussed earlier to demonstrate the buckets of
8 information that we want to depose Emery and Dr. Najafi on, the
9 fact buckets, to really distinguish it in your mind from the
10 expert stuff.

11 So, if we could do that, your Honor, with your
12 permission.

13 *MR. SHORTNACY:* Your Honor, I believe it may require
14 permissions.

15 *THE COURT:* Yes. Let me figure out how to do that.
16 Hold on.

17 Okay, Ms. Canaan, you should have permission to screen
18 share now.

19 *MS. CANAAN:* Did you give it to me, your Honor? I was
20 hoping someone else would do it. I am like the absolute worst
21 when it comes to doing --

22 *THE COURT:* Everybody has the capability, so if
23 someone on your team and they want to do it, they can jump on
24 and do it.

25 *MS. FINKEN:* Your Honor, I would like to note a

1 continuing objection to the extent that this PowerPoint
2 provides any information that would be considered confidential
3 under the confidentiality order and the documents that have
4 been produced in this case. We object to it being put up on
5 the screen in open court with hundreds of people on the Zoom.

6 *THE COURT:* I understand. It has been represented by
7 the other side that it doesn't, so I don't know. If you see
8 something you think is confidential, let me know. No one other
9 than us is recording this, so we can seal or redact those
10 portions of any exhibits.

11 Ms. Canaan, you may proceed when you are ready.

12 *MS. CANAAN:* Thank you, your Honor. Here we can see
13 Emery's pre-retention testing. It includes baseline testing,
14 meaning they tested how much NDMA was in the pill at baseline
15 without doing anything to the pill. It includes stability
16 testing, meaning that they tested how much NDMA forms when
17 Zantac is subjected to high temperature, high humidity, or
18 other extreme conditions. That is what stability testing is.

19 It includes simulated gastric fluid testing, meaning
20 they tested how much NDMA forms in conditions that they think
21 will simulate the human stomach after a person ingests Zantac.
22 Okay?

23 Here on the second slide, your Honor, after being
24 retained by Plaintiffs, Emery continued to do non-privileged
25 testing, so this is clearly not on behalf -- behest of the

1 Plaintiffs, and they are scanning this stuff on You Tube, they
2 are sharing it with third parties, like Dr. Mitch, they are
3 putting it up on their website.

4 And this includes, for example, the urinary testing
5 that we talked about that measured how much NDMA was excreted
6 in the urine of someone who ingested Zantac. They designed
7 this study, they collaborated on it with Dr. Mitch, they even
8 had a draft manuscript about it, but ultimately they found
9 nothing, they found no NDMA. Guess how many of their experts
10 discuss this testing. None. No one talks about it. It is as
11 if it never existed.

12 Next slide, please.

13 By contrast, your Honor, on the bottom what you see is
14 all this other testing that was done at the behest of
15 Plaintiffs for their expert report and there are literally 21
16 different studies that Emery conducted -- Emery or Dr. Najafi
17 conducted and then are reported in his expert report. This is
18 testing that obviously would not be explored at Emery's or Dr.
19 Najafi's fact depositions.

20 Next slide, please.

21 So, on the top part of the graph here, your Honor, you
22 have the testing that we seek to explore at Emery's fact
23 deposition, and one thing that I want to point out just to be
24 clear is that even as we were putting these slides together and
25 we were trying to put these things into buckets, right, of what

1 is in an expert report and what is in this bucket of different
2 tests and studies that they ran that were pre-retention or post
3 retention that they posted on You Tube or produced to us, we
4 had trouble doing it because some of the documents -- like I
5 said, there is a document that just has NDMA numbers on it.
6 There is a document that is a protocol, but I don't know what
7 it is associated with.

8 So, this doesn't even represent all the testing that I
9 have in these 2600 pages of documents that my experts are
10 looking at and they are saying, could you please ask Dr. Najafi
11 where is this coming from or what does this belong with.

12 I think the bottom line, your Honor is, because Emery
13 and Dr. Najafi are clearly wearing two different hats in this
14 litigation, there is the expert witness hat, there is a fact
15 witness hat, multiple depositions are appropriate and
16 necessary. This has been done in numerous cases, as we have
17 cited in our briefs, and has never been a reason not to take a
18 deposition of a fact witness just because they happen to be
19 retained as a consultant or a testifying expert. Right?

20 If that were the rule, then a litigant could always
21 preclude his opponent from having access to relevant,
22 non-privileged factual information from a fact witness simply
23 by retaining the fact witness as an expert, and say, no, you
24 don't get a deposition, he is our expert. That has never been
25 the rule.

1 Like in an example of a witness to an accident, a
2 Plaintiff retains an accident reconstruction expert, that is
3 Plaintiffs' choice. Fact and expert witnesses are routinely
4 deposed in their separate capacities.

5 So, I think I will stop there unless there are any
6 other questions, your Honor.

7 *THE COURT:* You have answered my questions. My last
8 question to you and Mr. Shortnacy is, so what is it you are
9 asking me to order today? What is it that BI and the
10 Defendants want the Court to order; is it compliance with both
11 subpoenas in toto, is it compliance with certain portions of
12 the subpoenas, is it additional time to take one depo, to take
13 both depos? What is it you are asking for?

14 *MS. CANAAN:* Your Honor, we are asking for compliance
15 with both subpoenas.

16 *THE COURT:* Full compliance with both subpoenas, all
17 right. What about, you mentioned additional time for depos or
18 no? Are you asking for that or not?

19 *MS. CANAAN:* If we get compliance with our subpoenas,
20 we do not need additional time. We will be able to explore the
21 expert report issues separately in the expert depositions and
22 the fact issues separately in the fact depositions.

23 *THE COURT:* Thank you very much, I appreciate that.
24 Let me turn back to Mr. Sedghani.

25 Mr. Sedghani, I will let you go next. With all due

1 respect to the Plaintiffs, you are really more the party at
2 interest here.

3 *MR. SEDGHANI:* I am chomping at the bit, your Honor.
4 Thank you.

5 *THE COURT:* I am sure you are. Go right ahead.

6 *MR. SEDGHANI:* I wanted to clarify a couple of
7 misconceptions here that have been propagated by Defendants
8 here, and they consistently said this even though it is not
9 true, your Honor. They have consistently said there is no
10 protocols for where there is data. That is absolutely untrue,
11 your Honor. Every testing we have given them has all of the
12 requisite information there, so that is just their
13 misunderstanding of the production.

14 As you can tell, ECF number 5051-9, this was in
15 response to the first document subpoena that Emery received in
16 this case, they stated some of the same things they are saying
17 now, and our counsel, Mr. Bill Egan at the time was
18 representing Emery Pharma, responded methodically, point by
19 point addressing each of these and Defendants were satisfied
20 with those answers and went away.

21 Otherwise, they would have filed a Motion to Compel on
22 those deficiencies. They didn't do that, your Honor.

23 The same thing happened -- just to provide a little
24 bit of backdrop, January 2, 2020, almost two years ago, the
25 citizen's petition was filed. In June of 2020, Emery Pharma

1 received the first document subpoena. Now, this was a
2 burdensome task in itself. We went through multiple meet and
3 confers, multiple documents were produced, a second round of
4 search was done, more documents were produced.

5 Even though we had our bases to object, we didn't do
6 that. We were trying to save costs and not have these fights
7 because, from our standpoint, it was easier to make these
8 productions and spend the money and do that rather than fight
9 it out, but we have been harassed ever since, and at some
10 point, enough is enough.

11 The issue is, we got a document subpoena in June 2020,
12 we met with all of the Defendants, we reached some accord of
13 what the document production would be, we reached some accord
14 as to, hey, there are these issues, sensitive issues where we
15 are also engaged, but we will produce these things to you. We
16 will give you everything you need. We will make that
17 accessible to you whether we believe it is relevant or not, we
18 don't care, you want it, here you go.

19 And if you can tell, your Honor, on ECF 5051-9, the
20 supplemental responses, the issue is Defendants are propagating
21 these conspiracy theories that they think these documents must
22 exist. They mentioned Mr. Leo Braunstein. They have a
23 subpoena for a topic, communications between you and Leo
24 Braunstein, even though counsel just said there were never any
25 communications, they haven't even heard of Emery Pharma.

1 They have similar topics of communication between you
2 and United States Food and Drug Administration when they
3 already know the only communications we have ever had was the
4 citizen's petition. They have a topic, communications between
5 us and Valisure. They have all of that communication. We have
6 provided them any email and they have also deposed Valisure.

7 This notion that their experts need this deposition
8 topic for their reports, the topics don't bear that out, your
9 Honor. The topics are not addressing any of these issues, the
10 topics are related to communications, funding, how we collected
11 and preserved documents.

12 First of all, a non-party's document retention policy
13 is not a proper topic for a deposition, that is for a party. A
14 nonparty does not have any duties for document collection or
15 retention policy, we don't have that. So, a deposition topic
16 on that, us having to designate a custodian of records just
17 to -- for what purpose?

18 Same thing here, they are also asking for a topic on
19 our testing of other drugs. What is the point of that? Other
20 drugs? We test thousands of other drugs.

21 Really, these topics were drawn very, very broadly, no
22 thought was even involved in trying to get particular issues
23 that are of particular interest. We nonetheless complied, we
24 gave them everything regardless of whether we thought it was
25 relevant, whether Plaintiffs were going to rely on it or not,

1 and they are just misunderstanding or misconstruing the data we
2 produced. We produced terabytes of raw data, your Honor, we
3 have given them the raw data. They could recreate the
4 citizen's petition study to the extent they want.

5 Now, they brought up this great timeline and I just
6 want to kind of clarify what that is because it looks like
7 there are a lot of points, a lot of testing. That is not
8 really true, your Honor, there are three testing that Emery
9 did. Okay. One of them was related to the citizen's petition.

10 Nobody, not even Defense counsel, is disputing that
11 they have been given that, and they have had that since January
12 2020, two years ago. They had that, it was published, all the
13 protocols were there. They have had every opportunity to
14 depose whoever they want related to that petition.

15 To the extent the citizen's petition is something
16 Plaintiffs are relying on, I am sure they have included it in
17 their expert report.

18 The other testing they are talking about are, again,
19 things that Emery Pharma did on an R&D basis. I know that
20 Defendants want to characterize my client as some litigation
21 support lab. Yes, that is also a small percentage of the
22 business they do. They are an R&D CGMP testing laboratory,
23 they test drugs, that is their livelihood. That is what they
24 do for companies, even some of the Defendants. I think Pfizer
25 may be someone who has utilized Emery Pharma for their needs.

1 This is not some issue where they are saying, look,
2 you are just a fact witness and we are trying to get some
3 information from you; we are an R&D facility who is doing our
4 own R&D. We provided all the raw data and all the factual
5 information. What they want is a free explanation of what this
6 data means without paying for it.

7 They want to get expert style testimony saying, well,
8 why did you do this protocol, what were you thinking when you
9 did this, why did you do it this way, why not this way. Those
10 are all expert style questions which they don't want to pay an
11 expert fee for, so it is highly improper.

12 To the extent there are factual issues, the facts
13 speak for themselves, they are in the documents. They ran a
14 particular study, they have that. They know what the protocols
15 were, they have that, they have the lab notebooks, and to the
16 extent there is any issues with what they did or didn't do, it
17 is all there.

18 Now, they also mention this urinalysis testing. They
19 failed to mention its relevance because it is not relevant,
20 your Honor. As an R&D facility Emery Pharma continuously was
21 trying to monitor the situation.

22 They were on their own dime, your Honor, trying to do
23 the study because they were concerned that the FDA might have
24 missed something. They said, look, we did our own citizen's
25 petition because we were concerned about the potential dangers

1 of carcinogens in the Zantac tablets. They funded their own
2 R&D on their own dime and submitted that to the FDA. That is
3 beyond dispute.

4 Subsequent to that filing, they continued to do their
5 R&D because they wanted to understand how do various things
6 affect the excretion of this drug, the gastric emptying, the
7 urinary excretion, and they just wanted to understand whether
8 these high NDMA levels, or NDMA levels could be seen through
9 urine, whether that is excreted or not. They discovered that
10 it is not seen through the urine.

11 That doesn't mean the NDMA levels in the pills were
12 any less, as Ms. Canaan was trying to imply. That has nothing
13 to do with anything the Plaintiffs are trying to rely on, which
14 is whether these tablets have high NDMA levels during the
15 production, during the storage. That has nothing to do with
16 once a person takes it, whether that NDMA level can be studied
17 in their urine. Nobody is relying on that data, that was just
18 for their R&D purposes, which again we have produced.

19 The reason some of these issues that they are relying
20 on have gaps in productions is because they didn't continue.
21 They tried to investigate something with Dr. Mitch, they tried
22 to get IRB approval, but the drug was pulled off the market.
23 Once the drug was pulled off the market, they couldn't get IRB
24 approval because there was no more drug to give patients, so
25 they stopped it. That is why there is no continuing

1 information.

2 That study that they are mentioning as their basis for
3 wanting to do a very costly and expensive 30(b)(6) deposition
4 has nothing to do with anything, your Honor. These issues with
5 gaps in production, that is completely false. If it was true,
6 they would have filed a Motion to Compel under production.
7 They didn't do that. The production occurred over a year ago,
8 your Honor.

9 They mentioned that we produced only 39 documents in
10 our last production, they said that in their brief. You are
11 telling me it took them six months to go through 39 documents
12 to decide there are gaps? That is ridiculous.

13 What is clear here is consistent harassment of our
14 client. I hate to say this, but I have been doing this for a
15 long time and I have never seen someone trying to make a
16 litigation so costly.

17 We initially met and conferred in good faith and told
18 them, look, we don't believe you are entitled to expert style
19 testimony on these issues, we have given you all the facts, and
20 by the way, Plaintiffs are going to disclose them any day now,
21 so please meet and confer with them. To the extent there is
22 anything the parties can give you, please obtain it from the
23 parties, don't put the burden of the cost and production on us
24 anymore.

25 What happened was, we moved to quash, and then what

1 began was this journey of multiplication of all of these
2 proceedings that needed to happen. This could have been simply
3 resolved at the instant we file the Motion to Quash, it could
4 have been dealt with. We moved for an expedited motion, your
5 Honor. They opposed it and then went here and filed their own
6 expedited motion, your Honor. You can see clear gamesmanship,
7 it's forum shopping, it's increasing the number of motions and
8 oppositions that we have to file, it is misrepresenting the
9 facts.

10 I hate to say this again, they still to this day state
11 that they paid the witness fees when clearly they haven't, and
12 one of the other things that is very interesting is, they
13 served us on November of 2021, we filed far in advance of our
14 deadline because we were sensitive to the nature that fact
15 discovery was closing on January 24. We didn't wait until the
16 last minute. Even though we could have waited until
17 January 3rd to file our Motion to Quash, we did it as soon as
18 possible. We did it within two weeks of accepting service.

19 We informed them of the deficiencies of their
20 subpoenas, we told them that the topics they are requesting are
21 blatantly requesting privileged information, they are blatantly
22 requesting information that has nothing to do with Zantac.

23 In fact, if you take a look at topic two, it is
24 specifically citing your testing of other drugs, the source and
25 acquisition of other drugs.

1 *THE COURT:* Hold on, hold on, hold on. It says your
2 testing of other drugs for comparison with Ranitidine.

3 *MR. SEDGHANI:* Including, but not limited to the
4 source and acquisition of other drugs. So, there may have been
5 many, many other drugs that they tested to see if NDMA levels
6 were present. One of them, I believe, that has now been
7 publicly disclosed is related to Valsartan. Again, whether
8 Valsartan has NDMA has nothing to do with whether Plaintiffs'
9 case, which is whether Defendants in this case knew of NDMA
10 levels in their drugs, has anything to do with other drugs.

11 In any case, we still didn't withhold documents on
12 that basis. We haven't withheld any documents. We have given
13 them whatever we had on that.

14 But this issue that these subpoenas are for a proper
15 purpose is clearly not true. If you look at the timing, if you
16 look at when things were done, if you look at how things were
17 done, if you look at the categories that they are requesting,
18 your Honor, it is clearly for an improper purpose.

19 To the extent any of the non-retention testing has any
20 bearing on this case, they have the documents. If they want
21 expert style testimony on it, they are precluded by Rule 35,
22 your Honor. There is a rule specifically saying you can't just
23 go -- if Harvard does a study on Zantac, I can't just go get
24 free testimony from a Harvard professor. I can't do that. He
25 deserves to be compensated for that time.

1 To the extent it wasn't commissioned by Plaintiffs,
2 which in this case they are admitting none of these other three
3 tests, the gastric emptying, the urinary analysis, and the
4 citizen's petition, none of that testing was commissioned by
5 Plaintiffs. This is just something that this testing lab did
6 for R&D purposes.

7 In their brief they also mentioned that CGMP requires
8 all these records to be held, except they failed to mention
9 this was not a CGMP test, your Honor. This has nothing to do
10 with CGMP records which the FDA requires for various things.
11 Here, this was done for R&D purposes and they followed R&D
12 protocol. We have given them all of this information.

13 In a normal setting they wouldn't be entitled to that.
14 In this scenario where he is also an expert witness they surely
15 can't demonstrate any --

16 *MR. SHORTNACY:* Your Honor --

17 *THE COURT:* Hold on. Everybody will get a chance to
18 be heard. I have one or two followup questions for Mr.
19 Sedghani and then I will give everybody else a chance to be
20 heard.

21 Mr. Sedghani, if I understand your pleadings, what you
22 are saying, though, you have nothing left to produce, you have
23 produced everything that exists that is responsive; am I
24 correct?

25 *MR. SEDGHANI:* We have produced everything responsive

1 to their document requests, your Honor. To the extent the
2 deposition topics go beyond what the documents were, those we
3 would have to conduct -- to the extent they are requesting
4 other things or they are requesting communications with parties
5 that we, you know -- even though I believe that none might
6 exist related to that, we don't believe there is anything new
7 to be produced, even though they contain new document topics or
8 subject topics that weren't previously part of their document
9 requests.

10 *THE COURT:* Your position is, you would have to
11 conduct an internal search just to prepare the 30(b)(6)
12 witness, which might be broader than what you already agreed
13 and produced.

14 *MR. SEDGHANI:* That is correct, that is one aspect of
15 it, your Honor. The other aspect of it is, your Honor, we have
16 been talking about it as though these subpoenas were served in
17 November, but what ended up happening is, in November they
18 served them, I accepted service, they failed to tender the
19 witness fees. We informed them of that, we moved to quash.
20 They then again served the same subpoenas on my client January
21 3rd, again without the witness fees --

22 *THE COURT:* Mr. Sedghani, with all due respect, these
23 are multi-billion dollar companies, you are going to get paid,
24 you are going to get your witness fees. This is not some mom
25 and pop who served a third party that can't afford the 40

1 bucks. Come on. Let's move beyond that.

2 *MR. SEDGHANI:* The reason I am stressing this, with
3 all due respect, under Ninth Circuit law, your Honor, it is not
4 the fact that the 60 dollars was paid or not paid, it makes it
5 procedurally deficient. The subpoenas are void from the
6 perspective of Ninth Circuit law, your Honor. So, if it is a
7 void subpoena -- and the law is clear on this, your Honor, we
8 cited it in our briefs, we distinguished the law they cited,
9 and this is something that is important. If the subpoenas are
10 void, just on a procedural basis alone we wouldn't have to
11 comply.

12 *THE COURT:* What is the law in the Eleventh Circuit on
13 that?

14 *MR. SEDGHANI:* There is no clear law in the Eleventh
15 Circuit, your Honor. There is an issue that it can be cured,
16 but it still has not been cured.

17 *THE COURT:* Well, you lose on that.

18 Next question -- I'll get to the question. You
19 mentioned the example of you can't just go to Harvard and get
20 some professor for free. First of all, why you would go to
21 Cambridge and not go to the better university in Cambridge,
22 Massachusetts is beyond me, but assuming you walked right past
23 MIT and kept going and then got somebody from Harvard, sobeit.

24 Are you asking to be compensated for that? I haven't
25 seen that in any of your requests. What are you asking for?

1 What are you asking me to do today?

2 *MR. SEDGHANI:* Your Honor, to the extent that we would
3 even be ordered to comply with these broad requests, absolutely
4 I think they should shoulder the burden of it. We have already
5 spent over \$30,000 just with the motion practice alone. The
6 previous production was another \$20,000.

7 You can't expect an individual and a small business
8 owner to pony up \$50,000 up until now and then have to comply
9 with another preparation of witness, possibly multiple
10 witnesses, depending on how many of these topics survive,
11 because you may need a custodian of records with respect to
12 some of these issues that they are requesting. So, it is going
13 to cost tens of thousands of dollars more.

14 *THE COURT:* Back to my question, what are you asking
15 for?

16 *MR. SEDGHANI:* Under Rule 45, your Honor, we would ask
17 them to reimburse us for all of our attorney's fees and all the
18 hours spent by the scientists who have to be sitting for
19 deposition, preparing for deposition, at their customary rate.

20 *THE COURT:* Okay. What else are you asking for today?

21 *MR. SEDGHANI:* Your Honor, at the very least, some of
22 these depo topics which are blatantly calling for privilege and
23 communications that have nothing to do with this --

24 *THE COURT:* Which ones?

25 *MR. SEDGHANI:* Everything except topic number one.

1 *THE COURT:* Okay. What else? That is as to Emery,
2 that is as to the 30(b)(6) deposition.

3 *MR. SEDGHANI:* Yes. With respect to Dr. Najafi's
4 subpoena, I think they have already conceded they could take
5 that deposition at the same time as the expert deposition. So,
6 realistically we are only talking about the 30(b)(6)
7 deposition.

8 *THE COURT:* Okay. Anything else you are asking the
9 Court to order today on behalf of your clients? You want money
10 to compensate you for time and attorney's fees, you want me to
11 limit the scope of the 30(b)(6) topics.

12 *MR. SEDGHANI:* We would like to quash the 30(b)(6)
13 topics because they don't have a need for it, your Honor. To
14 the extent that that information is relevant to their case,
15 they can obtain that from the parties. As Ms. Finken has
16 expressed, they can provide that to them. There is no need for
17 us to spend our own third party funds to provide information
18 when the party can provide that information at their cost, your
19 Honor.

20 So, that is why we believe that the subpoenas should
21 be quashed in their entirety, and this should really be an
22 issue related to expert discovery and what types of information
23 they need to produce related to that with respect to what their
24 experts are relying on.

25 As far as the other aspects of this whole motion

1 practice, your Honor, we think -- given the posture of how
2 these things came to be, we think that, especially based on the
3 law we have cited, we are entitled to our attorney's fees for
4 having to spend considerable resources in defending against
5 these broad topics.

6 *THE COURT:* Okay. Thank you. Let me give the
7 Plaintiffs another chance and then I will give Mr. Shortnacy
8 and Ms. Canaan the last word.

9 Ms. Finken, is it correct that 11 of your 12 experts
10 in some way or another are including Emery Pharma's data or
11 Emery Pharma's analyses in their expert reports?

12 *MS. FINKEN:* Your Honor, there are two separate issues
13 here. To the extent that the pre-retention citizen's petition
14 testing that Defendants are referring to is incorporated in the
15 expert reports, it is no different than the Valisure petition,
16 it is incorporated as part of the historical facts of how this
17 case has played out over the past two years.

18 It is not something where they have put reliance on
19 those opinions in their expert reports.

20 Now, to the extent that we are talking about the
21 testing that Emery did for Plaintiffs that is the basis of
22 Emery's expert report, yes, they rely on information in the
23 Emery expert report. There are two different concepts, your
24 Honor, so I want to be clear.

25 *THE COURT:* That is important. The first one, what

1 you are telling me is, it may be referenced in there, but it is
2 referenced only as chronological background, it does not
3 provide substantive report for any of their opinions.

4 *MS. FINKEN:* Correct, your Honor. It is similar to
5 the Valisure citizen's petition, it is there as the
6 chronological, historical events that occurred up until they
7 removed all of the drug from the market when the FDA and the
8 Defendants independently verified all of the information that
9 was contained in Dr. Najafi's citizen's petition, and that was
10 the reason why the FDA recommended that the product be removed
11 from the market, because they independently verified everything
12 that was contained in Dr. Najafi's citizen's petition.

13 That information as a historical fact is contained in
14 the expert reports, I am sure it will be contained in the
15 Defense expert reports, but it is not something where they are
16 relying on that data for purposes of their expert opinion.

17 It is a very big distinction that I am glad that your
18 Honor asked me about.

19 Can I add one more point and then I will shut up for
20 today? Unless your Honor has additional questions.

21 Over the past six to eight weeks I have repeatedly,
22 and Mr. McGlamry has repeatedly asked the Defendants for what
23 information they need for their experts for their reports,
24 because we wanted to work with them in good faith to get them
25 information to the extent their experts really needed it for

1 their expert reports. We asked them this, I offered to do it
2 via interrogatory, via affidavit, via a limited deposition,
3 they declined.

4 Today is the very first time that Ms. Canaan has
5 articulated a single question that they might need for their
6 expert reports, despite being asked this for -- since mid
7 December we have been asking this question, and we had yet to
8 hear anything articulated until today of information they might
9 need for their expert reports.

10 I just want your Honor to be cognizant of that because
11 recognizing the fact that maybe their experts might
12 have questions about any data, we have tried to work with them
13 to get them information in a timely manner. Their expert
14 reports are due three weeks from now. We have been trying to
15 work with them and they have been unable and unwilling to
16 articulate a single thing until to your Honor today on the
17 record. I just want to make that point known.

18 *THE COURT:* Thank you very much, Ms. Finken.

19 Ms. Canaan or Mr. Shortnacy, I will give you the last
20 word.

21 *MR. SHORTNACY:* Your Honor, if I could address a
22 couple of points. I know Ms. Canaan also has a point to raise
23 as well.

24 From my perspective, all of what Mr. Sedghani has just
25 said demonstrates why we need this deposition. He went through

1 a very detailed recitation of all of the pre-engagement testing
2 and all of the work that Emery has been involved in, all of the
3 work that Dr. Najafi's office has done, all of which we, to be
4 able to inform our experts, are entitled to take discovery on.
5 It demonstrates it for the Court. That is the demonstrative
6 for the Court.

7 The second thing I wanted to address was the gaps in
8 production. Without getting into the back and forth, we, the
9 Defendants, and the parties who have subpoenaed these entities
10 have pointed out gaps in the productions, giving reference to
11 Bates numbers and saying we see this slide deck, we don't see
12 the underlying data. We have been doing that since these
13 subpoenas were served.

14 We keep hearing from Mr. Sedghani and Emery that
15 everything has been produced, but last week they produced an
16 entire lab notebook they claim to have found from 2019, that
17 reflects testing done in the 2019 time period. So, this is
18 another reason we need to probe in a deposition these facts.

19 The third thing I wanted to say is that with respect
20 to timing and improper motives, I stood up in this Court before
21 your Honor in January and said, we all know how this movie
22 ends. I said we will be in front of your Honor adjudicating
23 this dispute back then. We asked repeatedly for Emery to
24 consent to transfer the motion to your Honor. All we got
25 is forcing Magistrate Judge Dealer to issue a written ruling

1 when she had already terminated the case in California based on
2 Judge Rosenberg's ruling on jurisdiction, and so we are where
3 we are today not because Defendants have sought to delay.

4 The final point, and I will turn it over to my
5 colleague, Ms. Canaan, we have been asking for Emery based
6 testing in written discovery to Plaintiffs since November -- or
7 I guess we served it in October, so it is no surprise to anyone
8 that we have been asking for testing and this information as
9 baseline factual information that we needed to discover and
10 need to discover before now our expert reports are submitted.

11 *THE COURT:* Mr. Shortnacy, what is your client's
12 position on paying for some or all of Emery Pharma's efforts to
13 prepare for a 30(b)(6) deposition and provide the compliant
14 witness?

15 *MR. SHORTNACY:* Well, your Honor, I don't think that
16 that is required under the rules, but we need the information,
17 and if your Honor is inclined to order that, I am sure, you
18 know, we can arrange to cover it as you said, but we need the
19 information. We don't think it is required that that be
20 imposed as a burden on a party taking fact discovery. I don't
21 believe any other witness in this case has been paid in that
22 regard, so it would be an anomaly in this litigation.

23 *THE COURT:* Nobody else has asked me, so I don't know
24 if they have been paid or not. I can only rule on what comes
25 in front of me. Mr. Sedghani is asking.

1 MR. SHORTNACY: Understood.

2 THE COURT: Thank you. Ms. Canaan, did you want to
3 add something?

4 MS. CANAAN: Just a few things briefly, your Honor.
5 With respect to the issue of all of this is going to be so
6 burdensome and Emery needs to get paid, with all due respect,
7 Emery inserted itself into this litigation by publicly
8 disseminating testing of Ranitidine on You Tube, on its
9 platform. They are doing this to raise money, they are in this
10 business to raise money.

11 Now, when we are asking them to come to a fact
12 deposition, they can't afford it? That seems a little
13 disingenuous to me. They are certainly getting paid a lot of
14 money to testify in this litigation. They are getting a lot of
15 money for testing the product, they are getting a lot of money
16 for storing the product, you know, they are getting paid all
17 sorts of funds, so that is a small issue.

18 The other issue is, you know, Ms. Finken said, oh, the
19 citizen petition is only cited in the expert reports as a
20 historical fact, and then she said this is similar to the
21 Valisure issue.

22 First, I really want to set the record straight on
23 this. The Valisure motion was decided after Plaintiffs
24 represented in court that none of the experts -- they just said
25 we are not relying on Valisure's testing, and yet, I can tell

1 you as an officer of the Court I have read these expert reports
2 and they are absolutely relying on the testing. In fact, they
3 are relying on the Braunstein study that nobody disputes was
4 entirely testing done by Valisure.

5 That is a side issue, but I wanted to mention it
6 because I think it is an important issue for context. In fact
7 we have -- I will count them, one, two, three, four, five, six,
8 seven -- eight reports that not just discuss for historical
9 purposes, but rely on Valisure's testing. That is the
10 Braunstein gastric fluid study, your Honor. Similarly here,
11 this claim, oh, the citizen's petition is just there as a
12 historical fact is trying to rewrite history a little bit.

13 I can read you just an excerpt from an expert
14 report --

15 *MS. FINKEN:* Which are confidential.

16 *THE COURT:* That is okay, I don't need to hear it. I
17 understand.

18 *MS. CANAAN:* I won't read it, apologies.

19 Finally, that is not even the test. The issue is not
20 what Plaintiffs' experts cherry picked and decided what they
21 were going to rely upon because it advances their litigation.
22 The issue is precisely what they cherry picked out of that
23 whole body of data that they chose not to rely upon, and that
24 is why we need this deposition. That is why we need to ask
25 questions about all the data and testing and protocols that are

1 hanging out there, and that our experts are asking us about,
2 and that we may legitimately want to rely upon.

3 *THE COURT:* Thank you very much. Very well argued,
4 everybody. Okay.

5 So, a couple of things in no particular order.

6 You know, when I was trying to think about this
7 hearing before the hearing what complicates things is that Dr.
8 Najafi is affiliated with Emery Pharma, and really that is not
9 the way to think about it. The way to think about is what if
10 they were not affiliated. What if Dr. Najafi was just a
11 free-standing scientist, possibly a renowned member of the
12 faculty of a prominent university like Wake Forest, or
13 something like that, and he was then retained as an expert and
14 he hires Emery Pharma to help him perform his expert services.

15 Where would we be if then the opposing party went
16 directly to Emery Pharma and said, hey, we want all of the
17 stuff you are doing and you are giving to the professor? Or
18 conversely, what would we do if Emery Pharma was never involved
19 in this at all as an expert, there was no affiliation between
20 Emery Pharma and any expert at all? Emery Pharma was a
21 free-standing lab out there, they published some stuff, filed a
22 citizen's petition and it was just sitting out there.

23 Could the Defendants go to them and say, hey, we want
24 what you've got? It could be helpful to defending the case, it
25 could inform our experts, we just want to get it from you, you

1 know, the Harvard example that Mr. Sedghani was using. That is
2 what I was preparing for today, that is how I was thinking
3 about things, and that is kind of where I come back to. That
4 is really the way I have to think about this case.

5 As I started out, and I will circle back now, you also
6 have to differentiate Dr. Najafi, individual, versus Dr.
7 Najafi, expert, versus Emery Pharma, expert/witness.

8 With that as background, here are some rulings.

9 I am going to quash the subpoena to Dr. Najafi in his
10 individual capacity because I think Dr. Najafi in his
11 individual capacity for the time prior to when he is retained
12 as an expert has no relevance. Whatever he is doing with
13 regard to this case he is doing within the umbrella of Emery
14 Pharma in his capacity as an officer, director, scientist,
15 employee, something having to do with Emery Pharma.

16 Just like I wouldn't necessarily allow the Plaintiffs
17 to depose an individual at Boehringer Ingelheim who happens to
18 be the lab chemist, I would say, no, you have to ask the
19 company, he works for the company, I think the same rule
20 applies to Dr. Najafi in his individual capacity.

21 Likewise, once Dr. Najafi is retained as an expert,
22 whatever happens after that has to fall under the expert rules.
23 So, looking at both of those sides of the time deadline of when
24 he becomes an expert, Dr. Najafi's subpoena has to be quashed
25 in full. That will be my ruling as to Dr. Najafi.

1 As to Emery Pharma, it is a little more complicated,
2 but I think it also falls out, basically broken down along that
3 line.

4 What Emery Pharma has done before it was retained as
5 an expert, or before Dr. Najafi was retained as an expert,
6 seems to me to be preexisting free-standing research that
7 doesn't fall within any sort of privileged relationship with
8 the Plaintiffs, and would be subject to discovery if it would
9 be helpful to the Defendants.

10 The only question becomes then undue burden, cost.
11 And I accept and I appreciate the honesty from Mr. Sedghani
12 that they are not really arguing it is an undue burden to
13 generate more documents in response to the subpoena because
14 their position is we have given them everything.

15 I think the question becomes, first, are the
16 Plaintiffs allowed to take a deposition at least as to
17 pre-retention as an expert -- I guess that was January of 2020,
18 am I right? The expert retentions were in or about early
19 January 2020? Ms. Finken, am I right about that?

20 *MS. FINKEN:* I believe so, your Honor.

21 *THE COURT:* I don't want to rely on the timeline
22 without your affirmation.

23 *MS. FINKEN:* I think Mr. Nigh might be able to give
24 you specifics, but I believe it's on about that time.

25 *THE COURT:* I scribbled down January 13th. Is that

1 more or less right, Mr. Nigh?

2 MR. NIGH: I believe so, your Honor, January 13, 2020.

3 THE COURT: We will use January 2020 as sort of a
4 breaking point.

5 So, for before January 2020, the Defendants are
6 entitled to discovery of Emery along the lines of what is laid
7 out -- they are entitled a 30(b)(6) deposition of Emery Pharma.

8 I generally, as the parties know, don't rule on
9 30(b)(6) topics in advance of the deposition. I am going to
10 abide by my usual process there.

11 Mr. Sedghani, you can talk to the Plaintiffs, they
12 know this drill very well. If you believe that some of these
13 topics are out of bounds you can instruct your witness not to
14 answer them, and I will resolve those issues on a fully
15 developed record with a question and an answer later on.

16 That is how -- I am going to allow the 30(b)(6)
17 deposition to go forward on all 13 topics, but that is not
18 ruling that all 13 topics are proper. It is simply ruling that
19 they can try. Mr. Sedghani and the Plaintiffs can object or
20 instruct the witness to not answer and I will rule on it later,
21 but I am going to let that deposition to go forward.

22 I am also going to allow them to take as part of that
23 deposition some questioning about their theory the documents
24 were not retained or documents are missing, things like that.
25 I would not have allowed an independent deposition simply for

1 that purpose, but since I am going to allow a 30(b)(6)
2 deposition of Emery Pharma, if they want to spend some of their
3 seven hours drilling down on where did you look, how long did
4 you look, and what did you find, I will defer to them if that
5 is how they want to spend their time. I will give them a whole
6 seven hour 30(b)(6) deposition of Emery Pharma.

7 As to whether that deposition can then also delve into
8 matters arising after January 2020, gets a little trickier.
9 Conceptually, it seems to me if Emery Pharma after January 2020
10 is doing things in furtherance of providing expert services,
11 directly or indirectly, to the Plaintiffs either on its own or
12 through Dr. Najafi, clearly that has to be done through the
13 expert deposition. If, however, after January 2020, Emery
14 Pharma was doing other Ranitidine, Zantac related research,
15 development, or services having nothing to do with its expert
16 relationship, then I think that is fair game.

17 I don't know if there is such a thing. I don't know
18 if there is, what it is. I don't know how the Defendants could
19 parse that out.

20 So, again, I am giving Mr. Sedghani full discretion to
21 object if he thinks they are getting into things that fall
22 within the expert world, and I can then rule on that on a fully
23 developed record, but I do believe they are entitled to try.
24 That is all I can say. I don't know what happens after January
25 2020, whether Emery Pharma does anything that isn't related to

1 performing expert services.

2 When I say performing expert services, I appreciate
3 knowing that they were also separately retained as an expert,
4 but I would have drawn the same line on the theory that they
5 are the agent of -- to the extent they are providing those
6 services to allow Dr. Najafi to be the witness who can be the
7 expert, I would arrive at the same place.

8 If Emery Pharma is providing services to Dr. Najafi in
9 his capacity as an expert, that would fall within the same
10 umbrella, that it's expert testimony and can only be addressed
11 in the expert deposition.

12 I know this is self evidence, but I will make sure it
13 is clear on the record, Dr. Najafi does not have to be the
14 30(b)(6) witness. Emery Pharma is free to designate someone
15 else if they want to. So, if there is a concern that it is an
16 undue burden individually to Dr. Najafi that he has to sit
17 multiple times, or there is concern about that, I remind
18 everyone, he does not have to be the 30(b)(6) witness.

19 The last thing I will address on this is the request
20 that I require the Defendants to compensate Emery Pharma in
21 this case for responding to the subpoenas and preparing for the
22 30(b)(6) deposition. I glanced quickly at Rule 45, and at
23 least on my quick glance there are two provisions of Rule 45
24 which theoretically could empower the Court to award
25 compensation to Emery Pharma.

1 One is Rule 45(d)(1), which says, if the Court
2 determines that the Defendants have not taken reasonable steps
3 to avoid imposing an undue burden or expense, the Court can
4 require compensation. The other is Rule 45(d)(3), capital B as
5 in boy, which says, if the subpoena would require disclosure of
6 trade secrets, confidential research and development, or
7 commercial information, or an unretained expert's opinion, the
8 Court may also require reasonable compensation.

9 So, what I am going to do on that is, I am not going
10 to rule on that today. I will leave it to Mr. Sedghani. If he
11 wants to separately move and maybe wait and then hit me with a
12 whole big number at the end as opposed to speculating now about
13 what it is going to cost, but I will give him leave to file a
14 request if he believes either one of those rules or some other
15 rule would allow for me to order compensation in this case.

16 So, I will consider it, I am just not going to rule on
17 it today.

18 *MR. SEDGHANI:* Your Honor, just one note on that
19 issue. There is some case law that says if you move after you
20 have complied you may waive that right. Your order is that we
21 don't waive it even if we ask for it after the fact?

22 *THE COURT:* That is correct. If you asked for it now,
23 I would probably defer ruling on it until it was all over,
24 because I like to deal with those things in one bucket.

25 To the extent there is case law suggesting that there

1 could be a waiver, you asked for it in advance -- let's put it
2 this way: You have asked for it, I am taking it under
3 advisement. I am not denying it. You have made a request, the
4 request is noted on the record. I am taking it under
5 advisement until a more fully developed record can be submitted
6 to me. Okay?

7 *MR. SEDGHANI:* Yes. Understood.

8 *THE COURT:* Not waiving any objections anyone may have
9 to the rulings I just made, Ms. Canaan, are there any other
10 issues that you or your client wanted to raise this afternoon?

11 *MS. CANAAN:* Your Honor, I just have a quick
12 clarifying question. I believe your Honor mentioned that
13 Zantac testing that was done by Emery post retention, but not
14 at the behest of Plaintiffs, right, is fair game. So, this is
15 stuff like -- clearly not privileged stuff, showing testing on
16 You Tube, on their website, their sharing it with --

17 *THE COURT:* I am not going to rule on that in a
18 vacuum. You can ask. If the other side objects, I will rule
19 on the objection when the objection comes.

20 I haven't seen any of these things. I haven't done
21 the research as to whether that would waive any expert
22 protections, so I am not going to wade into that. I understand
23 your position and you can ask the questions, and we will see if
24 there is an objection.

25 *MS. CANAAN:* If there is an objection, your Honor,

1 then the vehicle would be for us to go back with your Honor?

2 *THE COURT:* Yes, just like we have done in every other
3 30(b)(6) deposition in this case. It is much easier for me to
4 rule when I see the exact question in the context rather than
5 me to try to speculate in advance. I just don't do that.

6 *MS. CANAAN:* Another small question, your Honor. The
7 fact that, you know, Emery produced these 2600 pages of
8 documents that are clearly -- they would not have produced if
9 this was privileged information done at the behest of the
10 Plaintiffs, how does that square in your decision?

11 *THE COURT:* I am not making a decision. If it falls
12 within the contours of what they have done as an expert, they
13 don't have to answer it. If it doesn't, they do. I will leave
14 it at that. I am not going to try to draw that line on the
15 record that is before me today. I have drawn it categorically,
16 and you all can work out the details.

17 Mr. Sedghani, without waiving any objections you may
18 have, have I ruled on all the issues you wanted to address
19 today?

20 *MR. SEDGHANI:* There are two issues, your Honor, that
21 I wanted some clarification on with respect to the type of
22 witness we need to designate. Does it need to be a scientist
23 who understands the data or can it be someone who is familiar
24 with what data was done?

25 *THE COURT:* The technical answer under Rule 30(b)(6)

1 is it is anybody who can address the topics in a meaningful
2 way. Literally, under the rule, you could hire an outside
3 person, you can take the janitor off the floor, you could hire
4 the person sweeping the sidewalk outside the office, I don't
5 care. I am not going to tell you who to hire, just have a
6 witness there who can meaningfully answer.

7 *MR. SEDGHANI:* The critical issue, your Honor, is we
8 want to make sure, if we take one of the custodians as our
9 designated witness, that we are not going to have to come back
10 here and say this witness was unprepared, because we have made
11 the objection that, you know, we are not going to provide an
12 expert on these issues, we are just going to provide someone
13 who can talk about what testing was done, but not necessarily
14 what the testing means, why particular protocols were chosen,
15 or anything of that nature.

16 Would that be consistent with your ruling, your Honor?

17 *THE COURT:* I will wait and see. The topics are
18 there, you have to have a witness who can in a meaningful way
19 address the topics.

20 Look, you can take the position that this is as far as
21 we have to go, and that is a meaningful response. We don't
22 donned have to get in the weeds, we don't have to have the
23 expert. If the other side agrees, it will never come back to
24 me. If the other side doesn't agree and the witness says, I am
25 not prepared to answer it, and their position is he or she

1 should have been prepared to answer it, somebody will come back
2 to me and I will rule on it.

3 *MR. SEDGHANI:* I do not want to anticipate a problem,
4 but I am anticipating problems given the deposition topics. I
5 already know, given past discussions with Mr. Shortnacy, that
6 we are not going to agree on the broadness of these topics.

7 Because we moved to quash them on the broadness, if
8 your Honor is going to overrule us, at least let us know that,
9 or if you are going to grant our motion to quash on those
10 topics -- I think the issue is ripe for a decision because
11 pretty much any topic other than topic number one, which
12 relates to testing, we don't believe those are justifiable
13 topics to provide a witness on.

14 *THE COURT:* I hear you, I heard you before. I
15 understand your position and I am not going to rule in advance
16 as to whether these topics are overbroad or not. You all will
17 work it out. There is a risk on both sides. Maybe that will
18 inspire you all to have a reasonable conversation. Perhaps Mr.
19 Shortnacy and Ms. Canaan will say, these are the questions we
20 want to ask, and you all can work it out, but I am not going to
21 rule in advance.

22 To the Plaintiffs, Ms. Finken and Mr. McGlamry, not
23 waiving any objections you may have to the rulings I have made,
24 any there any other topics that you wanted to address today?

25 *MS. FINKEN:* Your Honor, I want to make sure I am

1 clear on your ruling.

2 You are directing the parties to go and work out the
3 specific topics for purposes of the 30(b)(6) deposition of
4 Emery Pharma; is that correct?

5 *THE COURT:* No. The Defendants served a subpoena on
6 Emery Pharma which lists 13 Rule 30(b)(6) topics. I ordered
7 Emery Pharma, within the confines that I have now pronounced,
8 to sit for a 30(b)(6) deposition. I said if Emery Pharma wants
9 to unilaterally instruct its witnesses not to prepare or not to
10 answer some or all of those topics, I will rule on that on a
11 fully developed record after the deposition.

12 If the parties want to try to negotiate between now
13 and then, that is up to the parties, but my ruling is, sit for
14 the deposition, answer what you want to answer, don't answer
15 what you don't want to answer, and everybody will bear the
16 risks later on.

17 If the Plaintiffs -- Defendants ask a bunch of
18 questions that I determine were improper, then there will be a
19 remedy. If Emery instructs its witness not to answer and I
20 determine the witness should have answered, there will be a
21 remedy. That is how I do this.

22 *MS. FINKEN:* I understand, your Honor. Having been
23 with you many times in the past, I do understand that. What I
24 am trying to do from a practical perspective is, the reasoning
25 that Defendants have indicated that they want the information

1 is for purposes of their expert, and for us to be able to
2 properly prepare Emery Pharma to answer in a way that is
3 helpful to their experts, we need some specificity on what they
4 are looking for because it is very broad in these topics right
5 now.

6 The goal, from our perspective, is to get them the
7 information that they need for their experts, so we want to
8 make sure that they are prepared appropriately along those
9 lines of what they really need for those experts.

10 That is something that is in line with what your Honor
11 has instructed us to do in the past, which is -- I think you
12 have said to me before, short of actually writing out the
13 questions to them, work with them to get the specific topics as
14 narrowly as you can so that we can make sure they are prepared
15 appropriately.

16 *THE COURT:* That is always the preferred and best
17 practices, but I never ordered you to do that. I said that is
18 the best practice, because then nobody has to worry about the
19 fact that they are going to end up in front of me with a fight
20 about this, and we are going to be delayed for three weeks
21 getting the answers, or whatever.

22 If you want to try to do that on your own or using the
23 special master, I think it is a best practice, but I am not
24 ordering it because I don't think I have the authority to order
25 it.

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