

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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**IN RE LORAZEPAM & CLORAZEPATE  
ANTITRUST LITIGATION**

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**MDL Docket No. 1290 (TFH)  
Misc. No. 99ms276 (TFH)**

**This Order applies to:**

**HEALTH CARE SERVICE CORPORATION,  
et al.,**

**Plaintiffs,**

**Civ. No. 01-2646 (TFH/JMF)**

**v.**

**MYLAN LABORATORIES, INC.,  
et al.,**

**Defendants.**

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**BLUE CROSS BLUE SHIELD  
OF MINNESOTA,**

**BLUE CROSS BLUE SHIELD  
OF MASSACHUSETTS,  
and**

**FEDERATED MUTUAL INSURANCE  
COMPANY,**

**Plaintiffs,**

**Civ. No. 02-1299 (TFH/JMF)**

**v.**

**MYLAN LABORATORIES, INC. et al.,  
Defendants.**

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**MEMORANDUM OPINION**

Pending before the Court is “Plaintiffs Blue Cross Blue Shield (“BCBS”) of Minnesota,  
BCBS of Massachusetts, Federated Mutual Insurance Company’s Motion for Partial

Reconsideration” (“Motion”) [# 590] of Magistrate Judge Facciola’s Memorandum Opinion and Order [## 582 and 583] dated May 20, 2004.<sup>1</sup> Upon careful review of the Motion, the related filings, the pertinent statements from the parties at the hearing on June 29, 2004, and the entire record herein, the Court will grant the motion in part and deny the motion in part.

## I. BACKGROUND

Plaintiffs’ instant motion stems from the deposition of the Mylan corporate designee, Brian Roman, which took place on February 17 and 19, 2004. In brief, Plaintiffs believe that Mylan failed to produce a Rule 30(b)(6) deponent who was prepared and knowledgeable as to topics noticed and designated. Mylan rejoins that Mr. Roman is a qualified 30(b)(6) witness, that the questioning posed him constituted duplicative discovery, and that such questioning exceeded the scope of Plaintiffs’ broad notice.

This dispute was first brought before Magistrate Judge John M. Facciola, who issued a Memorandum Opinion and Order directing certain procedural remedies, including:

By June 3, 2004, as to each area of inquiry where I concluded in the accompanying Memorandum Opinion that Blue Cross Blue Shield of Minnesota and Massachusetts and Federated Mutual Insurance Company (“the Blues”) should have gotten an answer but did not, the Blues will first propound a request for admission that is limited in scope to the questions that were asked of Roman but were left unjustifiably unanswered. If the Blues believe that the request is premised upon the testimony of another witness, they shall specify by page and line where in the deposition the witness makes the statement supporting the request; and it is further

**ORDERED** that

4. By June 18, 2004, Mylan Laboratories and Mylan Pharmaceuticals

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<sup>1</sup> Plaintiff Health Care Services Corporation (“HCSC”) attended the deposition at issue, but did not question Brian Roman nor join in the instant Motion. See [# 541]. Accordingly, any mention in this Memorandum Opinion of “Plaintiffs” applies only to BCBS Minnesota, BCBS Massachusetts, and Federated Mutual Insurance Company.

("Mylan") will admit or deny each request. If they deny the request, counsel will confer and arrange to derive a set of carefully defined topics based on my determinations in the accompanying Memorandum Opinion. The list will be submitted to me by June 25, 2004, and I will resolve any disputes that have arisen; and it is further **ORDERED** that

5. Once I have approved the list, counsel will arrange a series of depositions in which a Mylan officer or employee will speak to the specific topics on the list. The parties will make a conscientious effort to identify persons who will be able to speak to the topic of each request comprehensively and authoritatively. Once the list is prepared, the depositions, which I expect to be brief because they will focus only on the topics I have identified, will be taken in the courtroom adjacent to my chambers.

JMF Order [# 583] of May 20, 2004 at 2–3. Plaintiffs then filed the instant Motion before this Court, stating that

Plaintiffs['] Motion for Partial Reconsideration is simply an appeal to this Court for the opportunity to depose a knowledgeable and prepared Mylan 30(b)(6) deponent on key topics at issue in this litigation, devoid of the frequent interruptions, colloquies and instructions not to answer from Defense Counsel. . . . Plaintiffs have styled their Motion a Motion for *Partial* Reconsideration based on Plaintiffs' agreement with the majority of Magistrate Judge Facciola's findings with the exception of his procedural remedy and his findings regarding the competence of Mr. Roman.

Reply [# 593] at 3. At the conclusion of the June 29, 2004 status hearing that focused on this issue, the matter was taken under advisement pending issuance of this Memorandum Opinion.

## **II. DISCUSSION**

### **A. Conduct of Attorneys**

The deposition of Mr. Roman was marked with repeated objections, arguments, and a great deal of rancor. As Magistrate Judge Facciola correctly found, it is clear that an atmosphere of intense hostility developed which ultimately prevented the deposition from accomplishing its purposes. Such behavior only serves to delay this case and waste judicial resources. In fact, such

conduct is one of the reasons Magistrate Judge Facciola has offered to spend his valuable time overseeing any future 30(b)(6) deposition in the courtroom adjacent his chambers.

Attorneys for all parties in this case are admonished that zealous and effective representation of clients does not give attorneys license to abandon their duty to conduct themselves with civility and decorum.

## **B. Merits of the Instant Motion**

### **(I). The Competence of Mr. Roman.**

By Mylan’s own words, “Mr. Roman reviewed both the original and amended deposition notices, spoke with other Mylan employees, reviewed deposition transcripts of several previous Mylan witnesses, reviewed exhibits to those depositions, as well as other documents, and met with counsel — all to prepare for his 30(b)(6) deposition.” Opposition [# 591] at 4–5. While it is understandable that Mr. Roman could not remember certain facts from five years ago, and it is true that he was evasive and “fenced” at certain points in his February 2004 deposition, there is no indication that Mr. Roman was anything less than a knowledgeable and competent corporate officer and 30(b)(6) deponent. The Court affirms the Magistrate Judge’s findings regarding the competence of Mr. Roman. Accordingly, the Court shall not order at this time that another Mylan officer, director, or agent be deposed as Mylan’s 30(b)(6) witness.

### **(ii). The Procedural Remedy.**

In addition to carefully considering the Magistrate Judge’s remedy of utilizing requests for admission, the Court has also considered alternative remedies. One such alternative is to have Mr. Roman deposed using a Rule 31 “Deposition Upon Written Question.” Consideration

of a Rule 31 written deposition takes into account the fact that requests for admission are not the same as depositions. Indeed, the Court's experience has shown that requests for admission are often denied outright, while the inherent nature of a written deposition tends to elicit more detailed answers.

A second alternative, and the one which the Court will follow, is to merely have Mr. Roman redeposed in the same manner as before but in the room adjacent to Magistrate Judge Facciola's chambers. This method provides several benefits not found in the first two alternatives. To begin, this method will obviate any delays incurred through the time requirements built in to both the Magistrate Judge's procedure and the Rule 31 alternative. Second, since Mr. Roman's deposition will occur in the room adjacent to the Magistrate Judge's chambers, Judge Facciola will be on hand to immediately address any objections that come up and prevent a redevelopment of the atmosphere of intense hostility evident in the February 2004 deposition.

Overall, the Court holds that it would be more efficient to have Mr. Roman deposed again under Rule 30(b)(6). To this extent, Plaintiffs' Motion is granted in part since the Court is modifying the Magistrate Judge's procedural remedy; however, the Court agrees with the Magistrate Judge's other holdings and findings, and in this regard Plaintiffs' Motion is denied in part.

**(iii). Topics Not Addressed by the Magistrate Judge.**

In their pleadings before both Magistrate Judge Facciola and this Court, Plaintiffs listed nine separate topics that fell within the topics they noticed but which they "were precluded from

exploring . . . because of Defendants’ delay and subterfuge tactics.” Motion [# 590] at 9; see also Reply [# 540] at 3.<sup>2</sup> Plaintiffs also claim that certain other topics were not fully explored because of “Defense Counsel’s objections/instructions not to answer, etc.,” Motion at 9, and that Magistrate Judge Facciola “erroneously limited additional deposition to the topics identified in his Memorandum Opinion.” Id.

The Magistrate Judge’s Memorandum Opinion and Order did not address the topics mentioned by Plaintiffs.<sup>3</sup> There is no indication, however, that this omission was intentional or otherwise meant to limit Plaintiffs in any future depositions. Rather, it appears that the absence of discussion of these topics by the Magistrate Judge was the result of a mere oversight. In this light, Plaintiffs shall be permitted to explore these topics at the future deposition of Mr. Roman.

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<sup>2</sup> Specifically, Plaintiffs claim that topics not explored at all, or in adequate detail, include the following:

Mylan’s relationships with managed care plans (Topic No. 2); Mylan’s corporate officers and directors, Mylan’s Pricing Strategy for generic drugs Lorazepam and Clorazepate (Topic No. 3); Mylan’s officers and Directors (Topic No. 6); Allegations supporting Mylan’s malpractice lawsuit against Clifford Chance (Topic No. 8); The factual basis supporting Mylan’s failure to admit allegations as set forth in Plaintiff’s amended complaint (Topic No. 10); Mylan’s bulk active supply strategy (Topic No. 14); Price increases for drugs other than Lorazepam and Clorazepate (Topic No. 15); The basis for Mylan’s eventual reduction of prices (Topic No. 16); Transfer or termination of Mylan employees who were involved in the transaction at issue (Topic No. 7).

Reply [# 540] at 3 n.2; see also Motion [# 590] at 9 n.5.

<sup>3</sup> The pleadings submitted to the Magistrate Judge included the list of topics found in footnote 2, *supra*, as well as “eight areas of questioning . . . as exemplars of areas where Mylan’s corporate designee was either unable to provide answers or provided vague and inadequate responses.” Reply [# 540] at 3.

**(iv). Possible Sanctions.**

Magistrate Judge Facciola indicated in his Memorandum Opinion that he would defer ruling on Mylan's Motion for Sanctions [# 535] until the completion of remaining depositions. See JMF Mem. Op. [# 582] at 2. This Court will await Magistrate Judge Facciola's ruling as to sanctions, as well as his recommendation as to cost awards (if any), before making a ruling in this regard.

**III. CONCLUSION**

For the reasons stated above, the Court grants the Motion in part and denies the Motion in part. Specifically, the findings of the Magistrate Judge are affirmed, but the procedural remedy is modified as described above. To this end, counsel for Plaintiffs and Defendants are to promptly contact the chambers of Magistrate Judge Facciola via joint conference call to arrange a date and time to redepose Mr. Roman as a 30(b)(6) witness. Further, after such joint consultation with Magistrate Judge Facciola's chambers to schedule the deposition, Plaintiffs shall promptly renotice Defendants and Mr. Roman. Such notice shall include the topics to be covered in the deposition. Plaintiffs should not expect to completely start the deposition anew, however, for Mr. Roman shall not be required to answer those questions to which he has already answered.<sup>4</sup>

Before Mr. Roman's 30(b)(6) deposition occurs again, it is expected that he will make every reasonable effort to ensure he is knowledgeable about the topics on which he will be deposed. Mylan should ensure that Mr. Roman has available to him at his deposition any documents that might reasonably be necessary to refresh his memory if needed, and to facilitate

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<sup>4</sup> An added benefit of Magistrate Judge Facciola overseeing this deposition is that he can rule on any disagreement as to which questions Mr. Roman has already adequately answered.

