

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

**IN RE LORAZEPAM & CLORAZEPATE
ANTITRUST LITIGATION**

This document relates to:

**HEALTH CARE SERVICE CORPORATION,
Plaintiff,**

**MDL No. 1290
Misc. No. 99-276 (TFH/JMF)**

v.

Case No. 01-2646 (TFH/JMF)

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

-and-

**BLUE CROSS BLUE SHIELD OF
MINNESOTA, et al.,
Plaintiffs,**

v.

Case No. 02-1299 (TFH/JMF)

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

MEMORANDUM OPINION

Plaintiffs Blue Cross Blue Shield of Minnesota and Massachusetts and Federated Mutual Insurance Company (hereafter “the Blues”)¹ served a notice of deposition upon defendants Mylan Laboratories and Mylan Pharmaceuticals (“Mylan”) pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. Appended to the notice was a list of seventeen topics that were the subjects of the deposition.

¹This case has a long and tortured history. For present purposes, it suffices to know that it involves an agreement Mylan made with two companies, Profarmaco and Gyma, as to two of the drugs Mylan manufactured, Lorazepam and Clorazepate.

Mylan indicated that Brian S. Roman (“Roman”) was to be the 30(b)(6) designee, and the 30(b)(6) deposition proved to be remarkably contentious. The Blues argue that Mylan’s objections and its counsel’s direction to Roman not to answer certain questions rendered the deposition an exercise in futility. For its part, Mylan insists that the Blues should be sanctioned because their questions to Roman were duplicative of questions asked of other witnesses and exceeded the scope of the seventeen topics in the notice of the deposition. Hence, by this Memorandum Opinion, I resolve Plaintiffs’ Motion to Compel Defendants Mylan Laboratories, Inc. and Mylan Pharmaceuticals, Inc., to Make Available for Deposition a Knowledgeable and Prepared Corporate Designee, as Required under Rule 30(b)(6) and for Leave for Additional Time to Question Such Designee [#528]. I defer action on Mylan’s Motion for Sanctions [#535] until the completion of the depositions that remain to be taken.

INTRODUCTION

The major controversy that erupted during the deposition flows from radically different perceptions of the nature of the Rule 30(b)(6) deposition that was being taken. Mylan insists that Chief Judge Hogan prohibited duplicative discovery, meaning that the Blues could not ask the 30(b)(6) witness the same questions that were answered by other Mylan employees or require him to indicate his agreement or disagreement with statements made during the depositions of other Mylan employees. The Blues take a very different view—there was no duplication because the purpose and effect of the 30(b)(6) deposition of Mylan are radically different from the purpose and effect of the deposition of an employee. Hence, covering the same topics with a 30(b)(6) witness as were covered with another Mylan employee in a non-30(b)(6) deposition was appropriate because the deposition was of the corporation itself.

There were other problems. The Blues complain that Mylan purposefully selected Roman because he lacked the knowledge necessary to answer their questions while Mylan objected again and again to questions that it complained were not within the topics designated in the attachment to the notice of deposition.

Hence, I am obliged to determine whether Mylan can fairly be accused of designating as a 30(b)(6) witness a person who could not reasonably be expected to answer the Blues' questions and the validity of Mylan's objection that a 30(b)(6) witness need not answer a question that does not fall within the topics identified by the Blues as the subject of the 30(b)(6) deposition. I will then turn to the actual questions that Roman refused to or was unable to answer and decide what relief is due the Blues if I find that they were entitled to answers from Mylan to such questions.

I must make another point. Reading the transcript of Roman's deposition has been an exceedingly painful experience. The frequent objections and the reactions to them led to an atmosphere of such hostility that I did not know whether I was reading a deposition transcript or the script of the next episode of "the Sopranos."² That hostility and the most fundamental difference between counsel as to the very nature of the deposition being taken have left me with the clear belief that it was impossible for this deposition to accomplish its purposes. Had I anticipated that this was going to occur when counsel called me during the deposition, I would have adjourned the deposition and insisted that it continue in the courtroom adjacent to my chambers so that I could have ruled immediately on the questions presented. This opinion and

² On the second day, things had gotten so out of control that one group of lawyers was timing the other group's objections with a stopwatch. Fortunately, I have been spared an argument based on the stopwatch.

accompanying order represent my effort to reassert control over the deposition.

DISCUSSION

I. A 30(b)(6) Deposition Is Different

There is a significant difference between a statement made by an employee during a deposition and one made by a corporate designee under Rule 30(b)(6). As explained below, the former statement can be *imputed* to the corporation, but the latter *is itself* the corporation's statement.

A statement by an agent or servant that concerns a matter within the scope of agency or employment and is made during the existence of the relationship is not hearsay and can be admitted as an admission by a party opponent. Fed. R. Evid. 801(d)(2)(D). Hence, if a bus driver were to state, as he exited from a bus after an accident, that the brakes failed, that would be admissible against the transit company that owns the bus. Similarly, when a deposition is taken of the bus driver, as long as he is still employed by the transit company, his statements about the cause of the accident are admissible as admissions by the corporate entity. The finder of fact may consider them as evidence, but the company is free to counter such statements with evidence demonstrating that the accident was caused by other factors. This is because the statements are only *attributable* to the corporation and do not represent the definitive position of the corporate entity.

On the other hand, statements made during a 30(b)(6) deposition by a corporate designee are statements of the corporation itself. If the transit company were to designate a 30(b)(6) witness and that individual stated during his deposition that the brakes failed, that statement would be admissible against the transit company as a statement by the organization. See Fed. R.

Civ. P. 30(b)(6); Fed. R. Evid. 801(d)(2)(A). The finder of fact would evaluate this evidence as an admission by the company *itself* because it is through a 30(b)(6) deponent that an organization or corporation speaks. Simply put, the 30(b)(6) deposition presents for the finder of fact an unequivocal admission by a party opponent.

It follows, therefore, that it is not duplicative to ask a 30(b)(6) deponent a question previously asked of a non-30(b)(6) witness because there is a legally significant difference in the two depositions. I therefore see no impediment to the Blues reading to the 30(b)(6) witness the testimony of another Mylan employee and asking questions about that testimony, culminating in a question as to whether the 30(b)(6) witness disagreed with the testimony or had reason to believe that it was not true. This mechanism was obviously designed to have Mylan, as a party and deponent, adopt as its testimony the testimony of one of its employees or indicate why Mylan's testimony was different so that the difference, once highlighted and explained, would become the testimony of Mylan, even if it differed from the employee's.

By the same token, the unique purpose of a 30(b)(6) deposition should inform the court's exercise of discretion in supervising it in any case, let alone this one where the Chief Judge has insisted that neither the court's nor the parties' resources be needlessly expended in duplicative discovery. If, as occurred here, the deposition occurs at the end of discovery, the deposition must be designed to elicit statements that can be used to articulate a party's position and thereby shape an admission from it. It should not be used to plow old ground for no apparent purpose.

Additionally, certain questions are so intrinsically factual that seeking the corporation's answer while already having a sufficient answer that binds the corporation as an admission is a waste of time in any case and, in this case, surely offends the Chief Judge's prohibition against

duplicative discovery. Finally, if documents that are obviously authentic and admissible as business records establish a fact, asking the 30(b)(6) witness whether that fact is true is wasteful. While inquiry into the meaning of an ambiguous document is one thing, asking the 30(b)(6) witness whether a certain fact is true when a document establishes it is true is burdensome and unnecessary.

II. The Ignorance of a 30(b)(6) Witness

Another consideration informing the court's discretion is the inability of the 30(b)(6) witness to answer the question. While it is understandable that in a large corporation there may not be one person who can answer all the questions in a 30(b)(6) deposition, the courts have been vigilant to protect a party from the gamesmanship of its opponent selecting as a 30(b)(6) witness a person who cannot possibly have sufficient knowledge to speak to the topics of the deposition. If there has not been that kind of game playing and the witness cannot in good faith answer the question, it is legitimate that a court demand that a person be produced who can answer it or grant similar relief. After all, Rule 30(b)(6) states that an "organization so named shall designate *one or more* officers, directors, or managing agents, or other persons who consent to testify on its behalf." Fed. R. Civ. P. 30(b)(6) (emphasis added).

I appreciate that the Blues point to, for example, Roman's ignorance of the total sales as indicative of his ignorance and lack of preparation for the deposition. I have reviewed his entire deposition carefully on several occasions, and I can say with certainty that I can find no indication that Mylan chose for the 30(b)(6) deposition a person who was incapable of answering the questions asked. This deposition is therefore not like the situation in In re Vitamins Litigation, 216 F.R.D. 168 (D.D.C. 2003), and similar cases to which the Blues try to equate it.

III. Deposition Questions and Topics

Mylan also declined to have the 30(b)(6) witness answer certain questions because Mylan claimed that they did not fall within the topics listed in the 30(b)(6) notice of deposition. For example, Roman refused to answer whether Mylan had ever entered into a profit-sharing agreement with a supplier of raw materials prior to the agreement with Profarmaco and Gyma because it was not on the topic list. Oddly, there is little specific authority on the legitimacy of directing a 30(b)(6) witness not to answer a question because the question does not fall within one of the topics.

There could be two kinds of objections. The first would be that the topics defined in the 30(b)(6) are neither relevant nor likely to lead to relevant evidence. Fed. R. Civ. 26(b)(1). As I pointed out during the deposition, it is inappropriate for counsel to direct a witness not to answer a question that is claimed to be neither relevant nor likely to lead to relevant evidence. Instead, just as in a non-30(b)(6) deposition, counsel notes her objection, and the witness answers the question. Once the objection has been noted, the corporation itself is not prejudiced by the answer; if the question is truly irrelevant, it cannot be admitted into evidence and thereby bind the corporation. Thus, I see no basis for a 30(b)(6) witness to decline to answer a question on the grounds that the answer is neither relevant nor likely to lead to relevant evidence when a non-30(b)(6) witness cannot so decline.

The second objection would be that the question does not fall within the topics as defined in the notice of deposition. If the answer is otherwise relevant or likely to lead to relevant information and the 30(b)(6) witness can nevertheless refuse to answer, there is a radical difference between a 30(b)(6) and a non-30(b)(6) deposition. That difference cannot be justified

by any competing concern. One has to suppose that the obligation to specify the topics of the 30(b)(6) deposition with “reasonable particularity”³ has two purposes. First, it permits the corporation to ascertain which of its “officers, directors, or managing agents” are most likely to possess the information defined within the topics in the notice of deposition. Second, it gives the persons named to give the deposition an opportunity to review the available information so that they are prepared for the deposition. Therefore, if the question asked is relevant, that it did not fall within one of the topics should not be an impediment to its being answered. By definition, a question relevant to a claim or defense warrants a response if the witness is capable of giving the answer.⁴ It would be an odd interpretation of rules designed to provide generous discovery to interpret them to preclude an answer to a relevant question because, despite the question’s relevance, the questioner gave inadequate notice of the question even though the witness can answer it. While it is certainly true that granting a license to ask a question not within the topics removes an incentive to draft those topics carefully, the creation of that disincentive is trumped by the interest in the efficiency of having a witness answer a relevant question she can answer as soon as it is asked. Surely, nobody is suggesting that making discovery more time-consuming and expensive is a worthwhile endeavor.

Moreover, lawyers are clever enough to amend their notices of deposition and ask a court for leave to have the 30(b)(6) deponent resume the deposition. At that point, a court might well

³ Fed. R. Civ. P. 30(b)(6).

⁴ Note, however, that if the question is relevant and does not fall within one of the topics - and the witness does not have the knowledge necessary to provide an answer - the court will have to entertain its discretion to determine whether the inquiring party should be permitted to demand that its opponent name another 30(b)(6) witness who can answer the question.

conclude that it would be abusing even its substantial discretion by refusing to permit a party to ask a 30(b)(6) witness an unquestionably relevant question that the witness can answer merely because its list of topics was incomplete. That comes too close for my blood to having discovery become a game of “gotcha” where resolution of an issue turns not on relevance to a claim or defense but on whether the list of topics for the deposition can be construed to include the question.

With all of these principles in mind, I turn to the specific questions and answers in controversy.

IV. Roman's Deposition

A. Total Sales and Price of Raw Materials.

As indicated in his deposition, Roman did not know the total sales of Lorazepam in 1999 and refused to answer the question as to what Mylan was paying for raw materials for Lorazepam and Clorazepate in 1997. Deposition Transcript of Brian S. Roman (“Tr.”) at 39, 233-234. As I have pointed out, it is wasteful to ask a 30(b)(6) witness a question that is contained within an unimpeachable document. Furthermore, these questions were not really suggested by the topics identified in the 30(b)(6) notice of deposition. Because they were not, I am hard pressed to understand how anyone could be expected in 2004 to remember the total sales of a product five years earlier or the price of raw materials seven years earlier. I will not require any greater response.

B. Whether Difficulties in Securing Supplies Motivated the Agreement

After much “fencing,” Roman never gave an answer to whether, prior to entering into the

agreement at issue with Profarmaco and Gyma, Mylan was experiencing problems in securing and insuring a steady supply of raw materials to manufacture Lorazepam and Clorazepate. Tr. at 121. Having reviewed the transcript, I am certain that plaintiff asked a legitimate question and never got an answer. It was appropriate for plaintiff to pursue whether it is Mylan's position that it entered into the agreement with Profarmaco and Gyma to assure itself a steady supply of raw materials.

C. Indemnification and the Anti-Trust Laws

Roman then refused to answer whether during the negotiation for the agreement Profarmaco and Gyma raised concerns that the agreement might violate the antitrust laws and subject them to liability. Tr. at 134-35. After a claim of attorney-client privilege was made and apparently withdrawn,⁵ Roman, after more fencing, indicated that he was not prepared to answer the question because it was not within one of the topics attached to the notice of deposition. This objection was improper because this was a legitimate inquiry and should have been answered by a 30(b)(6) deponent familiar with the negotiations.

D. Raw Materials

A substantial amount of time was spent inquiring about the price for the raw materials that Mylan used to make Lorazepam and Clorazepate. Roman could not specify what the prices for raw materials were in 1996-1997, and he and counsel for the Blues had a fundamental difference about the nature of the agreement that Mylan reached with Profarmaco and Gyma. Tr. at 236. The lawyer taking the deposition kept focusing on what Mylan paid for raw supplies

⁵The claim of attorney-client privilege was incorrect; the question was directed to what Profarmaco and Gyma said and the witness never represented them.

from Profarmaco and Gyma before and after the agreement in an apparent effort to explore whether the difference justified the price increase after the agreement. Roman kept insisting that the nature of the agreement involved a royalty payment to Profarmaco and Gyma so that they were paid a percentage of what Mylan charged its customers for Lorazepam and Clorazepate. As a result, Roman never provided the price for raw materials before and after the agreement; indeed, he refused to answer that question because it was not within the topics specified in the notice of deposition. Tr. at 236-245; see Tr. at 255 (stating that the questions concerning raw materials would best be addressed to others). Thus, Roman declined to answer the question but simultaneously explained at length how the royalty payment worked, noting that it increased Mylan's costs of producing Lorazepam and Clorazepate.

While asking Roman for the specific price was one of those questions that is too specific to expect an answer, I am also of the view that the Blues were entitled to know from a 30(b)(6) witness whether it is Mylan's position that the increase in costs of the materials supplied by Profarmaco and Gyma justified the increase in its price of Lorazepam and Clorazepate after Mylan consummated the agreement with them and, if so, what evidence it will offer to support that contention. I appreciate that a witness cannot be compelled to give an answer that the questioner wants, but I have reviewed the deposition on several occasions and, as I have said, I am struck by how hostile and incendiary the atmosphere had become, particularly as the deposition was coming to a conclusion. At this point, the atmosphere was too poisoned and hostile to allow for clear thought. I will therefore exercise my discretion and require Mylan to make a conscientious and less contentious effort to answer the Blues' questions more completely

than it did if it can honestly do so.

E. Alternate Sources of Supply

Roman could not answer whether, after the agreements with Profarmaco and Gyma, Mylan attempted to find an alternate source of supply of the materials being provided by those two companies. Tr. at 265. This is a legitimate area of inquiry, and the Blues are entitled to an answer.

F. Request for Certain Language

Roman also declined to answer whether certain language in the agreement was suggested by Profarmaco, directing the Blues' counsel to those who negotiated the agreement. Tr. at 275. Again, I think that this was a legitimate area of inquiry, and the Blues are entitled to an answer.

V. Remedy

I have concluded that, in certain respects, the Blues were entitled to more than they got from Roman. It hardly follows that they are entitled to start all over again because, for the most part, although it was a struggle, Roman answered the questions posed. Dissatisfaction with his answers is not grounds to take a second deposition.

On the other hand, as I have indicated, there are several areas of inquiry where I have found that Mylan's objections that the questions did not fall within the topics, were asked of another witness, or asked Roman to state Mylan's position as to the accuracy of the statement by another witness should be overruled. The question of proper remedy therefore arises. I note, in this context, that the Blues proposed that Mylan agree that the testimony of a non-30(b)(6) Mylan witness be deemed the 30(b)(6) testimony of Mylan. I cannot find in the transcript the

legal basis for Mylan's refusal to do so, and it appears to me to contain the seeds of a solution.

As to each area of inquiry where I have concluded that the Blues should have gotten an answer but did not, I will permit them to 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.

Fifteen days later, Mylan will admit or deny the request. If it denies the request, counsel will confer and arrange to derive a set of carefully defined topics based on my determinations in this opinion. The list will be submitted to me, and I will resolve any disputes that have arisen. 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 so that I can promptly rule on any objections and prevent any bloodshed.

An Order accompanies this Memorandum Opinion.

JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

May 20, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE LORAZEPAM & CLORAZEPATE
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HEALTH CARE SERVICE CORPORATION,

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

Defendants,

-and-

BLUE CROSS BLUE SHIELD OF
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Plaintiffs,

v.

Case No. 02-1299 (TFH/JMF)

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

Defendants

ORDER

In accordance with the accompanying Memorandum Opinion, it is, hereby, **ORDERED**
that:

1. Plaintiffs' Motion to Compel Defendants Mylan Laboratories, Inc. and Mylan Pharmaceuticals, Inc., to Make Available for Deposition a Knowledgeable and Prepared Corporate Designee, as Required under Rule 30(b)(6) and for Leave for

Additional Time to Question Such Designee [#528] is **GRANTED** in part and **DENIED** in part; and it is further **ORDERED** that

2. A decision on Mylan's Motion for Sanctions [#535] is deferred until after the depositions that remain to be taken are complete; and it is further **ORDERED** that
3. 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 ("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.

SO ORDERED.

JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

May 20, 2004