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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, : Case No. 2:07-cv-00001-JLL-JAD
:
Plaintiff, :
:
vs. : Newark, New Jersey
: Thursday, March 12, 2015
BAYER CORPORATION, : 11:33 a.m.
:
Defendant. :

TRANSCRIPT OF TELEPHONIC STATUS CONFERENCE
BEFORE THE HONORABLE JOSEPH A. DICKSON
UNITED STATES MAGISTRATE JUDGE

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1 (Conference commenced at 11:33 a.m.)

2 THE COURT: All right. This is the matter of United
3 States versus Bayer Corporation, Docket Number 7-0001.

4 May I have appearances of counsel? Everyone is
5 appearing by phone.

6 MR. SCOTT: Claude Scott and Daniel Gibbons on behalf
7 of the United States, Your Honor.

8 THE COURT: Okay.

9 MR. DUFFY: Your Honor, good morning. Tim Duffy and
10 Mark Silver from the firm of Coughlin Duffy on behalf of Bayer
11 Corporation.

12 MR. COHN: Jonathan Cohn from Sidley Austin, also on
13 behalf of Bayer Corporation.

14 THE COURT: Okay. Now, we're having a conference
15 based on letters that came into the Court over the last few
16 days. It's my understanding -- and you can correct me when
17 I'm wrong -- Bayer had essentially served a notice of
18 deposition for, I think, Monday, March 9th, for government
19 witnesses, which the government objected to. And we can get
20 into that in a minute. And this Court, upon reading the first
21 letter, adjourned the depositions so that we could talk about
22 this in an orderly fashion.

23 Now, I've read the letters and, first of all, if I
24 misstated any of the way we got here, somebody correct me.

25 MR. SCOTT: No, sir, that -- you're right.

1 THE COURT: I've read the letters and I see the
2 makings of a compromise here and I'm -- my first question is,
3 have the parties had any further verbal discussions or
4 discussions by e-mail or whatever since these letters came in?

5 MR. SCOTT: No, Your Honor.

6 THE COURT: All right. Then, Mr. Cohn, if the
7 government is putting on -- let's -- assuming there's a
8 hearing, if the government is putting on no government
9 witnesses, do you still need a deposition?

10 MR. COHN: Yes, Your Honor, for a couple of reasons.
11 First, they have voluntarily put some, but not all, of their
12 communications into the record and cited them, we think
13 erroneously, as facts in evidence. We'd like to question
14 their -- their -- you know, whoever it is they put up there
15 about these documents that they voluntarily chose to put into
16 the record.

17 Second, they have voluntarily provided cherry-picked
18 communications to their purported experts, who relied upon
19 those communications in rendering their ill-informed opinions.
20 So we'd also like to ask about those communications to third
21 parties. In addition, we know there have been other
22 communications they have had with third parties, including
23 members of the plaintiff's bar and other ones who are involved
24 in the putative class action about other plaintiffs' attorneys
25 and we're curious about what information they found and the

1 bearing that might have on our case.

2 But more generally, Your Honor, as you might have
3 seen from their correspondence on this and their prior attempt
4 to compel us to respond to one of their interrogatories,
5 they're a moving target. Their theory of this case has
6 changed. They are now arguing things that are not in their
7 briefs, and we have to pin them down and figure out what it is
8 they're trying to hold us in contempt for. We saw that
9 written discovery does not work.

10 Previously we had a conference with Your Honor in
11 which you informed the government they should admit that the
12 language of our consent decree, the definition of competent
13 and reliable scientific evidence, is identical with the
14 exception of a typo, word-for-word identical with the language
15 in the industry guidance, and they then did comply with that,
16 but we still see in their last two briefs they're ignoring
17 that. So -- and we just don't know what to do to pin them
18 down, because they're making new arguments, they're reopening
19 old issues, and they're relying -- the -- we -- misrelying
20 upon communications that they have cherry-picked and put into
21 the record and presented to their experts.

22 So, even if they agreed not to present the witness,
23 we still feel we need to depose them. And, I mean, as they
24 recognize, the government is not immune from a 30(b)(6)
25 deposition. And in a case like this one, which they put their

1 own communications into the record and cited them as alleged
2 facts in evidence, we should be allowed to ask their witness
3 about that alleged evidence.

4 THE COURT: You say their witness. How many
5 witnesses, based on your review of these communications that
6 you're talking about, are there? Is it one or twenty? I
7 mean, --

8 MR. COHN: Who to put up, of course is up to them,
9 but we have seen communications from two individuals and
10 probably it would suffice if they put up one. I am not going
11 to select to them who they put up, but most of the
12 communications at issue are from Mike Davis. I don't know if
13 they want to put him up or someone else up, but I think
14 probably it would take only one witness to speak to these
15 issues.

16 THE COURT: Well, it may be irrelevant or it may not
17 be actually germane to trying to make a decision here, but I
18 am -- and it's probably my shortcoming on this -- but if we
19 know exactly who these two people are, why are we calling it a
20 30(b)(6) deposition?

21 MR. COHN: We want to give them the flexibility of
22 who to put up there to talk about those communications. There
23 is also the fifth item on the notice of deposition about
24 asking them for their theory of the case, which we put there
25 because their theory is shifting. So we want to speak to them

1 as to who they put up. You know, we could do a deposition of
2 just Mike Davis, but I didn't want to speak for them, and also
3 I didn't want them to then argue that Mike Davis is just an
4 FTC staff attorney and he doesn't know what he's talking
5 about.

6 THE COURT: All right. Well, I want to -- pardon me
7 for jumping around a little bit, but the theory of the case
8 issue, my thought on that is you have a conference I think
9 coming up -- and correct me if I miss the fact -- with Judge
10 Linares. I think that conference is later in this month;
11 correct?

12 MR. COHN: Next week, Your Honor.

13 THE COURT: And that conference is to determine
14 basically how you're going to go forward, whether or not there
15 will be a hearing?

16 MR. COHN: Yes, sir.

17 THE COURT: All right. I really think -- and now I
18 assume, if there's a hearing, it won't be that week, or maybe
19 even the next week, but I can't presume too much about Judge
20 Linares's calendar. But that theory of the case issue and
21 those questions I think is something that's going to open up a
22 can that I don't know if we should be deciding it right now.
23 I want you to raise that issue with Judge Linares. And if --
24 because, frankly, I think it's something that he wants to be --
25 he is going to be interested in hearing. And if indeed, after

1 that conference is over, he sends you back to me or thinks
2 there should be discovery on that, then we'll deal with it.

3 So, let's put that one to the side and raise it with
4 Judge Linares at the time. I will speak to him in advance if
5 I get the chance, which I should. Okay?

6 MR. SCOTT: All right, Your Honor. Now, this is
7 Claude Scott for the United States. May I address the other
8 issues raised by Mr. Cohn?

9 THE COURT: Well, okay. Sure.

10 MR. SCOTT: Well, the correspondence that he is
11 talking about is correspondence between the FTC and Mr. Cohn's
12 office. And in that correspondence, there was, you know,
13 requests for information from the -- from Bayer through that
14 office. There are a few letters from the FTC to them and
15 there are some letters back make -- taking positions about the
16 case.

17 Those documents -- the ones that have been provided
18 to the experts, they were well aware that the expert had had
19 them and they deposed the expert and had the opportunity to
20 ask the expert about what, if anything, they understood about
21 that partic -- one or two letters that they sent.
22 Essentially, it's a letter saying that the target audience for
23 the product we're talking about here is helping people. And
24 the expert was given that. To the extent he relied on it,
25 they've had the opportunity to probe him of that fact.

1 The other piece, the two pieces of correspondence
2 from the FTC to them were put in, in response to arguments
3 they had made. They argued that nobody ever talked about an
4 RCT before we filed that piece in September of 2014. Our
5 motion to show cause. We were responding and showing, well,
6 they, in fact, did come up before that. That's not a true
7 statement. That's not accurate. And, in fact, information
8 was provided by Bayer that they themselves or Wakunaga, the
9 supplier of the ingredients for Phillips' Colon Health, was
10 involved in performing RCTs on that product, and Bayer was
11 aware of that before September of 2015.

12 These are not a part of our affirmative case. They
13 are in response to arguments they made. And the documents
14 speak for themselves. If they think that somehow the
15 documents have been characterized incorrectly, they have a
16 reply brief and they can address that. There is no need to
17 start deposing lawyers to raise something that has been in
18 their possession quite some time and they are fully prepared
19 to discuss and address right now.

20 THE COURT: Remind me when Bayer's reply brief is
21 due.

22 MR. SCOTT: Next -- the 17th, I think.

23 THE COURT: When is the conference with Judge
24 Linares?

25 MR. COHN: The next day, Your Honor.

1 MR. SCOTT: The next day, Your Honor.

2 THE COURT: And the issues and the facts that Mr.
3 Scott just went through, are those the what Bayer -- yeah,
4 what Bayer -- what Mr. Cohn was referring to on page 3 -- page
5 2 of his letter, docket -- document number 98? And I'm asking
6 either counsel.

7 When Mr. Cohn said Bayer proposed that, in exchange
8 for Bayer waiving its right to the deposition, the government
9 would stipulate that it would not present a government witness
10 at trial, aside from its experts, and that it has no evidence
11 on one of the many new issues it raised; namely, whether Bayer
12 reviewed public literature on probiotics. My -- it --

13 MR. SCOTT: Well, those pieces of correspondence have
14 nothing to do with the second issue, whether Bayer had looked
15 at literature on probiotics. The only issue that's there is
16 that, at some point in time, and the only reason that we have
17 those documents in there was to respond to Bayer's point that
18 nobody had ever raised an RCT before our motion to show cause
19 was filed. And like I said, we do not intend to rely on those
20 documents or any testimony about those documents in our
21 affirmative case. They are responsive to the incorrect
22 statement that they made.

23 MR. COHN: Your Honor, may I respond to that?
24 Because that's the second time Mr. Scott has made that
25 representation, and it's simply false.

1 THE COURT: Sure. Go ahead.

2 MR. COHN: -- that Mike Davis sent us does not speak
3 at all about the novel drug level RCTs the government is now
4 saying we have to have. It doesn't say that. It bothered me
5 when I saw him represent that in his brief. It bothers me
6 he's saying that again now on the phone twice. And this goes
7 to the very reason or one of the reasons we should be allowed
8 to depose one of their people.

9 Because they're continuing to misrepresent documents
10 and seeking to hold us in contempt. And we have to pin them
11 down. It is just unfair they can (indiscernible) in this case
12 and produce this document, mischaracterize it, and seek to
13 hold us in contempt on the basis of it.

14 MR. SCOTT: Well, if I may respond, Your Honor? The
15 document speaks for itself. It says what it says and we can't
16 change that. He has the opportunity to describe it or
17 characterize it based on the fact that their folks were on the
18 other side of that communication however he think is
19 appropriate.

20 And, again, it is not part of our affirmative case.
21 It is not something we are trying to use affirmatively to hold
22 them in contempt. It was a response to an argument that they
23 made. Whether, you know, they think that -- and I understand
24 that they object, Your Honor, that the RCT requirement as new,
25 novel and indifferent -- different than anything else, despite

1 the fact that many of our experts have performed them and they
2 were -- Wakunaga, their supplier, performed them with this
3 product. That doesn't make it so, but he is entitled to argue
4 whatever he wants on that letter and he is entitled and -- and
5 they are certainly in a position to do whatever they need to
6 in their reply next week.

7 If there is something beyond that, I am sure we could
8 raise it with Judge Linares and address it then, if there --
9 again, if there's additional discovery that needs to be done.

10 MR. COHN: Your Honor, it's just fundamentally unfair
11 for them to insert a document into the record, call it
12 evidence, rely on it, seek to hold us in contempt on the basis
13 of it, and say we can't ask the witness about it.

14 And they're saying it's not their affirmative case?
15 That's ridiculous. Part of their case, they have to show that
16 we had notice. That we violated a clear and unambiguous
17 provision of the consent decree. They have to show that we
18 had notice. Without notice, they have no case. The letters
19 are their affirmative for our defense. It is part of this
20 case. And if they insert evidence into the record, we should
21 be allowed to ask about it.

22 THE COURT: Who authored the document --

23 MR. COHN: -- but at the same time, they're leaving
24 open -- they might call someone to testify at trial, if there
25 is a trial, the -- otherwise, this purported evidence is not

1 going to be part of the trial record. I don't see how they
2 can keep that option open and at the same time say we can't
3 ask their witness about it.

4 THE COURT: All right. I need to ask you a couple of
5 questions. What -- is the document identified in the letters
6 that you gave to me?

7 MR. COHN: They are, yes. So they have --

8 THE COURT: Is it they -- is it multiple documents or
9 one document?

10 MR. COHN: It's multiple. So there are two
11 communications from Mike Davis to us. There --

12 THE COURT: Well, are -- e-mail -- are those e-mails?

13 MR. SCOTT: No, they're letters, Your Honor.

14 MR. COHN: No, they're letters.

15 THE COURT: Okay. All right.

16 MR. COHN: In addition, there are the communications
17 they had with a third party affiliated with the University of
18 Florida, which they relied on and they gave to their expert
19 who relied on. Those are e-mails. Those are cherry-picked
20 communications which misled their experts.

21 THE COURT: Who authored those communications?

22 MR. COHN: That was Mike Davis again.

23 THE COURT: And all of these -- let me -- all of
24 these letters and e-mails are placed in the record by the
25 government in its opposition or reply. I understand what

1 you're saying. I understand that Bayer is taking the position
2 that it has to be a part of the affirmative case, and I
3 understand the government is saying it's not part of the
4 affirmative case, we're just rebutting Bayer. Correct?

5 MR. SCOTT: Well, I -- you -- the piece that he's
6 talking about, Your Honor, I was aware of the (indiscernible)
7 letters, but the piece he's talking about of that
8 correspondence with people at the University of Florida, I --
9 I'm not sure what he's referring to there.

10 MR. COHN: Claude, we've discussed this before and it
11 came up in the deposition two days ago. Your expert had
12 testified that the University of Florida study had found a
13 lack of statistically significant evidence on PCH. You
14 recognized in a deposition that it was statistically
15 significant for the primary end points. The only things that
16 were not found significant were secondary end points, which
17 you recognized are irrelevant, they are merely hypothesis
18 generating, but he didn't know there are secondary end points,
19 because he relied upon the cherry-picked communication from
20 Mike Davis.

21 MR. SCOTT: So you're saying that your argument is
22 that he looked at one document and drew something, but he
23 should have looked at a different document? Why does that
24 justify talking to a lawyer about what the communication was?
25 It's a question of cross-examination for the expert that he

1 didn't look at the right thing.

2 MR. COHN: We need to know what other communications
3 Mike Davis had, because he cherry-picked these documents or
4 perhaps someone else in the government did, put some
5 communications with third parties into the record, but didn't
6 put other communications with third parties into the record.

7 Another example is Wakunaga, which we cite in our
8 letter. You guys suggest that, in your communications with
9 Wakunaga, you learned that Wakunaga has never made the claims
10 that we made, but that's simply false, as they informed you in
11 their communication. But, yet again, there is a cherry-picking
12 of third-party communications, on the basis of those third-
13 party communications you are seeking to hold us in contempt --

14 THE COURT: All right. I need to ask another
15 question. Mr. Cohn, are you telling me that these documents
16 are cherry-picked by the government to give to their experts
17 or are you telling me they're cherry-picked to put it also in
18 their brief? In other words, I need to know, are these
19 documents the expert relied upon and you want to know why the
20 government gave them to the expert, or is there something in
21 addition to that?

22 MR. COHN: It's both. So, the e-mails regarding Mike
23 Davis and the University of Florida, those were given to the
24 expert.

25 THE COURT: Okay.

1 MR. COHN: The Wakunaga correspondence was referred
2 to in their brief to the Court.

3 THE COURT: Okay. And Mr. Scott, --

4 MR. SCOTT: Yes, sir.

5 THE COURT: -- it's your position, among other --
6 well, what is the -- tell me one more time why you object to
7 this. Forget about the fact that it's too late, don't make
8 those documents, or it's burdensome or anything like that.
9 What legal objections do you have to putting up Mike Davis for
10 a deposition?

11 MR. SCOTT: Well, --

12 THE COURT: On these limited issues.

13 MR. SCOTT: Well, I don't have all of the documents
14 that he is referring to in front of me. And the -- so I am
15 not -- I'll do the best I can with this. I'm not -- it was
16 not clear to me that all of these are attached to our piece.
17 But in any event, let me just put it this way. We gave
18 information to the expert. The expert has rendered an
19 opinion. Why we selected particular documents to give to an
20 expert or not is work product.

21 They're fair game to them to say, well, there are
22 other documents that the expert should have had. They had an
23 opportunity to depose both of our experts. If there's a
24 trial, they can cross-examine them on the point. But legal
25 processes and thought regarding what we produces and shared

1 with an expert is work product. We have -- you know, they
2 know what they -- he had. They know what he had access to.
3 We have satisfied our discovery obligations. And if you start
4 asking questions about what -- why you picked this one versus
5 that one to give to an expert, you're directly going into work
6 product.

7 The other issues that we talked about here on the
8 other documents, the correspondence with them, I mean, again
9 we cited it, we've argued it what we put it in for; which,
10 basically, those correspondence with -- from the FTC to
11 Bayer's counsel for the points that we raised. They're there.
12 They can argue what they want. The reason we put them in,
13 understanding of why we argued what we argued, gets into
14 impermissible work product again. It's our thought processes,
15 our theory, and -- and -- and the work product that goes into
16 us formulating the arguments that we have raised.

17 They have them there. They have access and people
18 who have (indiscernible). They can argue whatever they wish
19 regarding this. Okay? But when you start down this path, if
20 he wants to depose a lawyer what the documents and the
21 correspondence says, am I going to be permitted to corres --
22 to depose the lawyer from Bayer on the other side who was
23 involved in this? In those same correspondence that they're
24 going to take the position?

25 Again, they can argue what they want regarding those

1 things. Those two particular things are not part of our
2 principal case, they're in response to them. But once you get
3 into this, the work product line is hit almost immediately and
4 really runs in both directions if we're going to start
5 deposing lawyers.

6 THE COURT: All right. And, Mr. Cohn, your final
7 response, please?

8 MR. COHN: My point is they had communications with
9 third parties. That is not work product. They voluntarily
10 disclosed those communications with third parties to us and to
11 the Court, so if there was any work product, and there wasn't,
12 they waived it. They should not be allowed to cherry-pick
13 communications, present them to the Court or their experts.
14 We should be allowed to ask about those communications.

15 THE COURT: Okay.

16 MR. SCOTT: And if I may very quickly, Your Honor?
17 The reason that we selected particular documents to give to
18 the Court is work product. Pure and simple. If he thinks
19 they were cherry-picked, we have turned over the
20 communications that we've had with third parties, the written
21 communications with these folks, the information we got, and
22 he's already got the means and the opportunity to argue
23 whatever he likes regarding what else the Court should
24 consider.

25 THE COURT: You're telling me that you argued -- and

1 I'm going to hypothetically say you spoke to somebody at the --
2 what was it, University of Florida?

3 MR. SCOTT: We got information from them. The study
4 that -- one of the --

5 THE COURT: Okay.

6 MR. SCOTT: They did one of the studies on Wakunaga --

7 THE COURT: Right.

8 MR. SCOTT: -- and through a process the FTC got
9 information regarding that study.

10 THE COURT: Right. And --

11 MR. SCOTT: And there was communication back and forth
12 with them about getting that material and we turned that
13 communication -- those written communications over.

14 THE COURT: And you used some of them and you didn't
15 use others, but you turned over everything to Bayer that you
16 received and/or sent to that third party.

17 MR. SCOTT: Yes, sir.

18 THE COURT: Mr. Cohn, it does seem like -- and maybe
19 I'm missing your point. Please, this is -- so, really,
20 educate me. It does seem the questions that you want to ask
21 are directed to why the government used certain documents
22 and/or arguments. And is that correct?

23 MR. COHN: We want to know not just why they used
24 those arguments -- arguments -- those -- those documents (indiscernible)
25 fundamentally, we want to know what communications they had

1 with third parties. And they might say they turned over
2 everything, but they clearly also had oral communications with
3 third parties, as reflected in those documents. We should
4 know what the facts are that they allegedly have against us.

5 THE COURT: Okay. All right. I want to think about
6 this a little bit more. And I understand you've got a time
7 problem here, so I am going to -- I'm going to tell you what I
8 want to try to do, and I'm also going to tell you, if that
9 doesn't happen, what I will do.

10 I'm going to talk to Judge Linares about putting off
11 Bayer's brief for a day or two or three or whatever. Maybe
12 post the conference you have with him on March 18th.

13 I am not inclined to allow Bayer to invade the work
14 product of the government, but I want to give it some more
15 thought. So -- but I may allow a very limited deposition of
16 Mike Davis to explore, as Mr. Cohn just talked about, what
17 other verbal communications were had and who said what to
18 whom. And if Judge Linares is not -- does not want to do what
19 I want to do, then I'll have to do something else and I will
20 do it within 24 hours. Okay?

21 MR. SCOTT: One -- if I may -- may raise an
22 associated point, Your Honor?

23 THE COURT: Yes?

24 MR. SCOTT: In relation to this? But, well, let me
25 address what you just said a moment. To the extent that we're

1 relying on anything from any of these third parties, it is
2 documented and he -- they have it. They have the materials we
3 have given. They have --

4 THE COURT: I --

5 MR. SCOTT: -- the communications of these people.

6 THE COURT: I've got --

7 MR. SCOTT: We're not relying on any writ -- any oral
8 communications with these people.

9 THE COURT: I understand.

10 MR. SCOTT: But, secondly, if I may? And this may
11 not be the appropriate time. I just would like to raise with
12 the Court that we have an outstanding motion to compel an
13 interrogatory response from Bayer. That's been pending before
14 the Court. This kind of gets back to the issue that we have
15 in front of you now, which is the question of whether or not
16 Bayer had substantiation for its claims.

17 I mean, one of the things that they had been
18 attempting to do through the use of this 30(b)(6) is to get us
19 to stipulate that we don't have evidence that they didn't look
20 at and had what was publicly available in the way of
21 scientific papers and have that available to them when they
22 were making the claims about PCH that they -- that are at
23 issue in this case. We ask an interrogatory, they -- we got a
24 non-response.

25 And at this stage of the case, it real -- I think

1 it's incumbent upon them, if they actually had in had
2 substantiation for the claims when they made them, they need
3 to tell us that. And if they didn't, they need to acknowledge
4 that and take the consequences that come with that in the
5 course of this case.

6 And so we're looking for really an order from the
7 Court directing them to tell us what did you have in hand,
8 what did you rely on when you made the claims, or an order
9 deeming an answer at -- with -- with a finding that they
10 didn't have it. Because so far we have been able -- unable to
11 get an answer to that question and it is pretty fundamental to
12 the case.

13 THE COURT: I --

14 MR. COHN: So to that point he just made about the
15 motion to compel, and also what he said with respect to the
16 30(b)(6)? I'm not sure which order you want me to do it, but
17 he made two points there. I didn't want to lose sight of the
18 two of them.

19 THE COURT: In any order you want to go in.

20 MR. COHN: All right. So let's actually start with
21 the second point, rog 4, because this ties back into the
22 30(b)(6). Rog 4 asks us, among other things, to provide the
23 date upon which Bayer first became aware of the study. We
24 don't, in the ordinary course of business, keep track of the
25 dates when our employees read public documents.

1 We did inform the government that he regularly does
2 scientific -- regularly reviewed the documents in the public
3 domain. They keep abreast of what's in the public domain. It
4 is part of their job to regularly review those articles. And
5 we also provided them with the memo from June 2006 which
6 listed some 28 authorities that were among the, quote,
7 abundant, end quote, authorities in the public domain which
8 supported our product. We couldn't include them all, because
9 there are so many articles in the public domain. And also
10 this memo was then signed again in January 2010 by the second
11 scientist confirming that she had read those articles.

12 So those articles, the other stuff in the public
13 domain that was not included, because there are so many
14 articles, and we have a process by which we regularly review
15 articles. And we explained all this in our interrogatory
16 response.

17 What we did not do was indicate the date upon which
18 Bayer first became aware of that information, for a few
19 reasons. Number one, it's unduly burdensome. We didn't
20 record the dates when employees first read public literature.
21 And to that matter, there's nothing requiring us to do so.
22 This is simply something that DOJ wants now. We didn't record
23 those dates. It might be impossible to get them. It might
24 not. We have not contacted some sort of, you know, forensic
25 accountant to review our databases and find out when we first

1 pulled stuff from the PubMed database. So I'm not going to
2 say it's impossible, but, at the very least, it's unduly
3 burdensome. We didn't record the dates.

4 It's also irrelevant, because he has conceded
5 numerous times in letters to Your Honor and elsewhere that we
6 don't have any evidence that meets the government's novel
7 test. Nothing. No evidence whatsoever. So, regardless of
8 when we first read these articles, we're willing to say it
9 again, we don't have any articles that meet the government's
10 novel test. Which is why this case in the end just comes down
11 to the validity and enforcement of that novel test.

12 The government's demand for us to indicate the dates
13 when we read these articles is burdensome, it's irrelevant,
14 it's also beyond the call of duty. We responded in good faith
15 to their discovery demand. It's unclear what else they want.

16 And this ties into the 30(b)(6) again, because --

17 THE COURT: Can I interrupt you just for a moment?

18 MR. COHN: -- we're facing a moving target. The
19 government's briefs, even the most recent one, does not make
20 any mention of this purported obligation, which exists
21 nowhere, for us to record the dates of articles in the public
22 domain. They are trying to create some new issue after they
23 filed their last brief. And this is one of the reasons we
24 have to have a chance to pin them down, because they're still
25 trying to make up new arguments to hold us in contempt. They

1 are trying to sandbag us after the last brief is due.

2 And I don't know what they're going to do at the
3 hearing, but if they're going to present a witness at the
4 hearing to talk about this stuff, we have a right to depose
5 that person.

6 And as for Mr. Scott's point about oral
7 communications. We have no idea what went down in those oral
8 communications. They say that they have told us everything,
9 but I don't think that's right. And if, in fact, it is right,
10 then Mike Davis can say I had no oral communications. But at
11 this point I don't think we should be forced to take the
12 government's word for it, especially since it's a moving
13 target.

14 THE COURT: All right. Let's --

15 MR. SCOTT: Your Honor, for -- can I -- can I just
16 very briefly?

17 THE COURT: Sure.

18 MR. SCOTT: The consent decree requires there to
19 "keep a copy of each advertisement containing any
20 representation covered by the consent decree and all the
21 materials that were relied upon in disseminating such
22 representation." Now, I will grant you the con -- the
23 interrogatory does talk about when they first knew about it,
24 because we weren't sure how else to draft it to be sure we got
25 from them that when -- whether or not they had knowledge of

1 these particular articles or any particular articles when they
2 made the claims. That's just the way we drafted it.

3 What I am looking for and what I don't have is, if
4 Bayer had a substantiation in hand that it was relying on when
5 it made the claims at issue here, we're entitled to know that.
6 If they didn't, we're entitled to know that, too, because that
7 was required by the consent decree. And that's all we're
8 looking for.

9 Their response to us says that nothing more than look
10 our interrogatory number 2, which describes a process by which
11 they supposedly gathered these articles through an automated
12 computer system -- which presumably one would think would have
13 records of it of what they did draft -- and that they
14 regularly monitored research and literature that may
15 (indiscernible) to look at the documents, and we have, and we
16 can't seem to find an answer there as to what substantiation
17 was actually relied upon by them, if any, when they made these
18 claims.

19 So that's what we're looking for. And we haven't
20 changed it. The Court -- this issue is sub -- in the Court's
21 own order on the motion to show cause, the issue in this case
22 is what did they when they made their claims.

23 MR. COHN: That -- I'm sorry. That was -- that is
24 not what the order says. Your Honor, --

25 THE COURT: Wait. Let --

1 MR. COHN: -- another new argument.

2 THE COURT: Wait. Wait.

3 MR. COHN: -- briefly --

4 THE COURT: Wait. Wait. It's my turn. My turn.

5 Mr. Scott, you just said that what you really want to
6 know is whether Bayer had a substantiation in hand when it
7 made the claims. Now, when you say the claims, you mean in
8 each advertisement that it ever put out in the public about
9 the efficacy of this probiotic?

10 MR. SCOTT: Well, that's what the consent decree
11 requires --

12 THE COURT: No, I'm asking you --

13 MR. SCOTT: -- about the --

14 THE COURT: No, I'm just asking you if that's what
15 you're asking for.

16 MR. SCOTT: Well, that's what I am asking for, though
17 I would expect that -- that, you know, they would not
18 necessarily go out and do -- have a new batch for every time
19 they did this. If they had a substantiation, they might --
20 they -- they might be relied upon for some period of time,
21 they might have added more material to it, but what did they
22 have, what were they relying on when they made these claims, --

23 THE COURT: Okay.

24 MR. SCOTT: -- that's all I'm asking for.

25 THE COURT: All right. And Mr. Cohn, have you

1 provided that information or do you say you don't have it or
2 do you say you don't have to provide it?

3 MR. COHN: What we have done, Your Honor, is two
4 things. One, we provided a memo from 2006 which lists 28
5 authorities that we had. That memo makes clear these are not
6 all the authorities, because there's an abundant amount of
7 information already in 2006. It was some of them. The memo
8 also makes clear we had a process. Which is true. It's part
9 of the scientist's job description to regularly review the
10 articles, which they did both before and after the launch.
11 So, we gave them information. We have not done -- given them
12 the dates.

13 And as to his new point about we had to keep a file
14 somewhere, some physical file somewhere of this information,
15 that is not what the consent decree says, it never argued in
16 any brief that's what the consent decree says. This is yet
17 another new argument that DOJ is making beyond the 11th hour.

18 THE COURT: Well -- well, --

19 MR. COHN: If they want to have a new contempt action
20 saying we have to have a physical file of all these articles,
21 they can do that, but that's not what this case is about and
22 that would be an absurd requirement, Your Honor. Putting
23 aside the fact that it's not in the consent decree, as their
24 own expert testified two days ago, there are every day five
25 articles on probiotics. That's close to 2,000 articles a year

1 just on probiotics, not to mention all of the other vitamins
2 and all of our other products.

3 And in Mr. Scott's view, we somehow have to have a
4 warehouse of all of the articles in the public domain. I
5 mean, we are not talking about private science. We are
6 talking about public articles that anyone can pull up on
7 PubMed and he's now saying we have to print them out and put
8 them in a file and then date stamp them to show we reviewed
9 them. His own scientist admitted that's not what scientists
10 do. He doesn't do it. His colleagues don't do it. It kills
11 trees.

12 THE COURT: All right. If -- in terms of this -- in
13 terms of this -- I have the letters in front of me, by the
14 way. I --

15 MR. COHN: It's nowhere in their briefs. They have
16 filed five briefs, they didn't raise it. This is brand new
17 and it just goes back to the point that this is a complete
18 moving target. They are trying to sandbag us and this is not
19 how contempt actions should work.

20 THE COURT: Well, all right.

21 MR. SCOTT: Your Honor, very quickly, because I --
22 I'm -- I feel like I'm being the receipt of an *ad hominem*
23 attack here that we're trying to sandbag him. The point
24 regarding what the consent degree requires is footnote 1 of my
25 Febru -- in footnote 1 of my February 15th letter to you,

1 which started off seeking your assistance in getting this
2 discovery. So I am not raising a new argument, it has been in
3 that front page of our brief, letter brief, since the
4 beginning of this being in front of the Court.

5 THE COURT: I --

6 MR. COHN: The footnote --

7 THE COURT: Here's the problem though. Here's --
8 look. Let -- here's the issue. My job is to determine what
9 you -- is not to determine anything, it's to manage this
10 discovery process which was supposed to be limited. Right now
11 I feel that you're both arguing the merits of your case, and I
12 understand why you're doing that, but all I am trying to
13 determine is whether or not a legitimate question has been
14 asked and a legitimate answer has been given.

15 And I did read the letters and I actually have in
16 front of me and I see footnote number 1, but I also see the
17 answer from -- the statement from Bayer that, quote, "it is
18 undisputed that Bayer became aware of and relied upon the
19 public studies at or around the time of publication." Period,
20 end quote.

21 I don't know if it's undisputed or not, that's what
22 Bayer says, but the point is this was a discovery dispute
23 trying to find out dates of when Bayer relied on documents for
24 its advertisement. That, frank -- that question, frankly, has
25 been answered in these letters and now it's turning into

1 something else. I think that -- I think we're just about
2 finished with discovery. I -- at least preliminary to the
3 hearing.

4 I will issue an order on this one as well within the
5 next day. But I need to talk to Judge Linares and find out if
6 he can give me some time to deal with you on the other issue
7 on the 30(b)(6). Which, frankly, it's not a 30(b)(6) anymore,
8 it's a Mike Davis deposition, if it occurs. Okay?

9 MR. SCOTT: Yes, sir.

10 MR. COHN: Thank you, Your Honor.

11 THE COURT: All right. Thank you.

12 MR. SCOTT: Thank you.

13 MR. COHN: Thank you very much, Judge.

14 THE COURT: All right. Bye-bye.

15 (Conference concluded at 12:11 p.m.)

16 * * * * *

17 C E R T I F I C A T I O N

18 I, TERRY L. DeMARCO, court-approved transcriber,
19 certify that the foregoing is a correct transcript from the
20 electronic sound recording of the proceedings in the above-
21 entitled matter recorded from 11:33:28 a.m. to 12:11:19 p.m.

23 03/16/15

S / Terry L. DeMarco

24 Date

Terry L. DeMarco, AD/T 566

25

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