UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: TEPEZZA MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION This Document Relates to All Cases	No. 1:23-cv-03568 MDL No. 3079 Judge Thomas M. Durkin Magistrate Judge M. David Weisman

PLC's Motion for Entry of Order to Remedy Improper Deposition Conduct by Horizon's Counsel

Discovery is a search for the truth. Efforts to obstruct that process frustrate the fair administration of justice. The plaintiffs in this multi-district litigation have come to this Court for fair adjudication of their claims against Horizon. Consolidation of their cases into an MDL means that the PLC gets one chance to depose each corporate witness and cover all topics and documents that might be implicated by hundreds of people's claims.

When Horizon attempts to interfere with testimony through tactical antagonism, the ramifications of failing to take remedial action are serious. The disruptive behavior of Horizon's counsel during the deposition of Nicole Potthast—Horizon's Directory of Regulatory Affairs in the lead up to FDA approval of Tepezza—portends devolution of these proceedings. To remedy the conduct detailed below and protect the fundamental truth-seeking function of the deposition process, the PLC respectfully seeks entry of Judge Seeger's Standing Order on Depositions (Ex. 1) or, in the alternative, appointment of a special master to monitor the depositions of Horizon's corporate witnesses (current and former).

SUMMARY OF RELEVANT FACTS

During Ms. Potthast's deposition, Horizon's counsel engaged in witness coaching, speaking objections, incessant foundation objections, unnecessary colloquy, and generally uncivil conduct.[1] An egregious example occurred when the PLC attempted to examine the witness regarding draft minutes for a meeting she attended. (Potthast Tr. at 156:19–165:17; Becker Decl. Ex. A). **Clip 1** displays the obstructionist nature of Horizon's conduct. (Becker Decl. Ex. B.)

Before the PLC even asked a question, Horizon's counsel interjected that "[t]his is a draft exchange between two other people, so there's no evidence that she saw this document that's attached." (Potthast Tr. at 157:1–4.) The barrage of objections continued, even after the deposing attorney pointed out that (1) he had not yet asked a question, (2) Horizon was coaching the witness, and (3) the document had her name on it despite Horizon's representations otherwise. (*Id*. at 157:11–19, 157:5–6, and 158:2–14.) Later in **Clip 1**, Horizon objected that "there's no evidence that this was the final minutes that went to her." When deposing counsel asked, "Do you see the slides on .4?" the witness took counsel's lead and volunteered that while she saw them, she "[didn't] know that they were the final presented slides." *Id*. at 160:8–161:5.

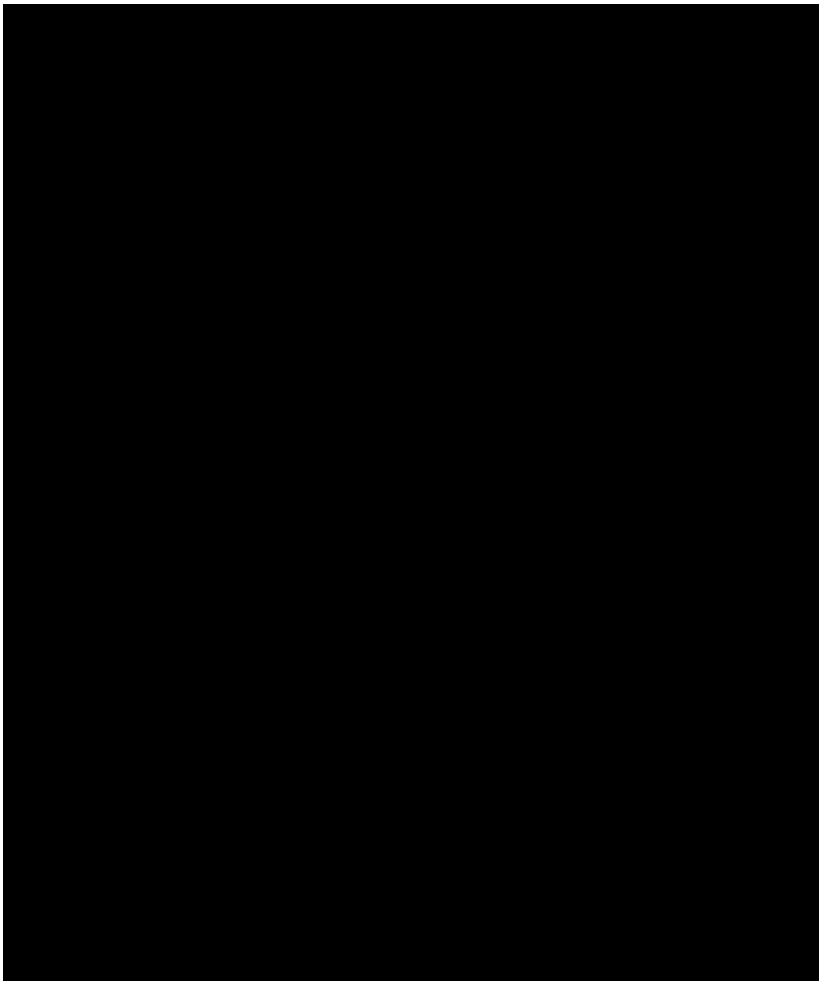
Counsel's speaking objections influenced the witness's answers to other questions as well. She routinely adopted the objections as part of her answer by agreeing with them and incorporating them in her answers:

[1] The entire deposition transcript is attached as Ex. A to the Declaration of Timothy Becker, which is attached as Ex. 2 and filed under seal per ECF No. 244. The exemplar video clips referenced are attached as Exs. B–H to the Becker Declaration and likewise filed under seal.

(*Id*. at 53:6–53:17; **Clip 2**; Becker Decl. Ex. C.)

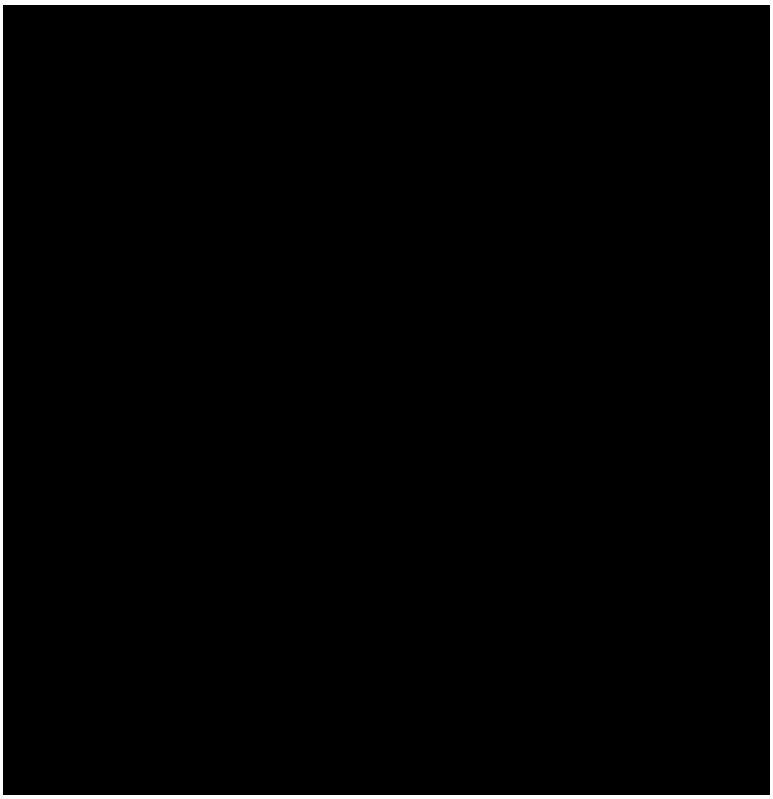
(*Id*. at 56:3–13; **Clip 3**; Becker Decl. Ex. D.)

(*Id*. at 70:14–71:4; **Clip 4**; Becker Decl. Ex. E.)



(*Id*. at 78:2–79:1; **Clip 5**; Becker Decl. Ex. F.)

Horizon not only coached the witness with premature and repetitive "foundation" objections and clues about how to answer, but slowed the deposition's progress with protracted speeches and attempts to draw the deposing attorney into colloquy. During one notable stretch, Horizon made 27 foundation objections over 9 pages of the transcript. (*Id*. at 156:4–165:18; **Clip 1**; Becker Decl. Ex. B). In one example, Horizon argued about the plain language of the Tepezza label:



(*Id*. at 122:9–123:8; **Clip 6**; Becker Dec. Ex. G.)

The examples noted above are by no means exhaustive. Additional examples are attached to Mr. Becker's declaration. (**Clip 7**; Becker Decl. Ex. H.) Left unchecked, Horizon may continue to interfere with the PLC's attempts to make its record for the people injured by Tepezza who are relying on the orderly conduct of these proceedings to adjudicate their claims. The PLC would rather be taking depositions than asking the Court to intervene (and, indeed, planned to raise the issue with Horizon directly and explore a cooperative solution before Horizon *ex parte* sought an emergency hearing on a scheduling issue before attempting to confer). (Becker Decl. at ¶3.)

LAW & ARGUMENT

A. Orderly disposition of civil cases requires orderly conduct of depositions.

The purpose of the Federal Rules is to "secure the just, speedy, and inexpensive determination" of cases. Fed. R. Civ. P. 1. In depositions, "examination and cross-examination of a deponent proceed as they would at trial." Fed. R. Civ. P. 30(c)(1). They are "question-and-answer sessions between a lawyer and a witness aimed at uncovering the facts in a lawsuit." *Hall v. Clifton Precision*, 150 F.R.D. 525, 531 (E.D. Pa. 1993). When that goal is impeded by "strategic interruptions, suggestions, statements, and arguments of counsel, it not only becomes unnecessarily long, but it ceases to serve the purpose of the Federal Rules of Civil Procedure: to find and fix the truth." *Id.* at 531. "Because depositions take place in law offices rather than courtrooms, adherence to professional standards is vital, for the judge has no direct means of control." *Redwood v. Dobson*, 476 F.3d 462, 469–70 (7th Cir. 2007).

Objections "must be stated concisely and in a non-argumentative and non-suggestive manner." Fed. R. Civ. P. 30(d)(1). "Objections that are argumentative or that suggest an answer to a witness are called 'speaking objections' and are improper under Rule 30(c)(2)." *Specht v. Google*, Inc., 268 F.R.D. 596, 598 (N.D. Ill. 2010) (citing cases). Argumentative, suggestive, and excessive objections are sanctionable. *Craig v. St. Anthony's Med. Ctr.*, 384 Fed. Appx. 531, 533 (8th Cir. 2010).[2]

[2] *See generally Morales v. Zondo, Inc.*, 204 F.R.D. 50, 57 (S.D.N.Y. 2001) (sanctioning deponent's counsel under Rule 30(d)(2) and 28 U.S.C. § 1927 for frustrating examination and prolonging proceedings); *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994); *ORP Surgical, LLP v. Howmedica Osteonics Corp.*, No. 1:20-CV-01450-RBJ, 2022 WL 4298189, at *14 (D. Colo. Aug. 15, 2022), *appeal dismissed sub nom.* No. 22-1289, 2022 WL

Orderly conduct of depositions is not only required by the Rules, but also has a dramatic practical impact on the disposition of cases. More than 99% of all civil cases filed in federal court are disposed of by settlement or partial adjudication. *See* Table C-4 (U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending December 31, 2023) (showing that 0.7% of the cases concluded in 2023 reached trial) (available at stfj_c4_1231.2023.xlsx) (last accessed Oct. 26, 2024). Evidence obtained during depositions frequently drives those results, highlighting the need for depositions to be conducted in an efficient, professional manner.

B. Horizon's counsel coached his way through the deposition of Ms. Potthast with meritless speaking objections and needless and antagonistic back-and-forth.

As described above, the transcript of Ms. Potthast's deposition is riddled with improper coaching, meritless objections, and needless speeches and colloquy. Taken together, they attempt to steer the witness testimony in the direction Horizon prefers.

19039680 (10th Cir. Oct. 26, 2022) (admonishing counsel for abusively defending deposition and imposing sanctions); *Mills v. General Motors, LLC*, No. 2:17-201-RMG 2017, WL 4279651 at *4, (Sept. 22, 2017 D.S.C.) (allowing second deposition where attorney made >100 speaking objections); *Palmer v. Lampson Int'l, LLC*, No. 11-CV-199-J, 2012 WL 12916805 (D. Wy. Oct. 12, 2012) (defending attorney, whose name appeared on 85% of pages of deposition text, violated Rule 30 with "an excessive number of objections); *Bordelon Marine, Inc. v. F/V Kenny Boy*, No. 09-3209, 09-6221, 2011 WL 164636 (E.D. La. Jan. 19, 2011) (170 objections over 360 pages of text supported sanctions award); *Medline Indus. v. Lizzo*, No. 08 C 5867, 2009 WL 3242299, at * 1 (Oct. 6, 2009 N.D. Ill.) (attorney objecting 250 times during deposition justified second deposition); *Heriaud v. Ryder Transp. Servs.*, No. 03 C 0289, 2005 WL 2230199, at *9 (N.D. Ill. Sept. 8, 2005) (sanctions imposed included reimbursement for attorneys' fees and costs as well as barring witness from testifying at trial). The PLC is not seeking sanctions for Horizon's deposition conduct at this time; the PLC's objective is to conduct these proceedings in an orderly fashion without improper interference by defending counsel.

This not only burns the PLC's deposition time but increases the cost to secure transcripts (charged by the page). In the face of Horizon's interference, the PLC had to spend time asking questions repeatedly, only to arrive at an answer that was the product of coaching. Predictably, Horizon's objections alerted the witness to what Horizon wanted her to say. Horizon continued this course even after deposing counsel noted that speaking objections were improper coaching.

1. Horizon coached its witness to give the responses it desired.

As detailed in the clips above, there is a clear line between the Horizon's objections and the answers of its witness, such as when counsel objected that a question contained an "incomplete hypothetical" and the witness responded that she needed a specific question to answer. Separately, during questioning Horizon's counsel inexplicably "objected" that the witness had never seen the document that was the subject of the line of questioning. Predictably, her response was she did not remember seeing the document.

2. Horizon's meritless objections suggested answers to the witness and obstructed the standard answer-and-answer format.

Horizon's "foundation" objections are improper not only by virtue of their number, but also because Horizon has conflated admissibility with questioning for impeachment or other purposes. Through repeated "foundation" objections regarding individual documents, Horizon prevented fair questioning of the witness about subjects that—as Director of Regulatory Affairs—one would expect her to have knowledge of either directly or as part of supervising subordinates. Indeed, if a witness lacks knowledge of the contents of a document, that can be noteworthy as

well. And the stipulated Protective Order contemplates as much noting documents may be shown to, "*Any person* [who] (d) is or was an employee of the Producing Party and is reasonably believed *to have knowledge* of the matters in the Confidential Information." ECF No.: 63, PageID #: 933 at ¶ 12(g) (emphasis supplied). Here, Counsel attempted to question the witness about draft minutes *from a meeting she attended* yet was stymied in that effort by counsel's conduct. Simply put, the PLC is permitted to ask questions of a witness even if the underlying document is unauthenticated or the foundation for said document was (or will be) laid by another witness.[3] And even if Horizon wanted to object to use of a document for foundation reasons, only one objection is necessary to preserve it. The repeated and increasingly agitated objections disrupted the deposition rather than preserving technical issues for later adjudication.

3. Horizon's needless speeches, colloquy, and insults have no place in complex federal litigation.

Horizon engaged in monologues about the PLC's questioning strategy or use of documents during the PLC's time. In some instances, Horizon engaged the PLC in back-and-forth about the authenticity of documents it had produced. These exchanges occurred even when Horizon had not bothered to state an objection but barreled directly into its issues with the PLC. Continued issues in this vein will lead to arguments about how much time the PLC has used with a deponent and prejudice the plaintiffs in preparing their cases.

[3] *See e.g.,* Fed. R. Evid., Rule 613(b); *see also United States v. Pittman*, __ F.Supp.3d __, No. 22-cr-129-LM-1, 2024 WL 3489989 at * 2 (holding the federal rules do not preclude a lawyer from impeaching a witness with a document *even if* the witness did not prepare it).

CONCLUSION

The PLC has just seven hours of deposition time with each of the limited number of corporate witnesses to prepare a case for all of the plaintiffs whose cases are or will be consolidated for pretrial proceedings in this MDL. Making counsel ask the same question multiple times only to arrive at a coached answer unfairly wastes that time. Horizon's counsel's behavior during the Potthast deposition included "strategic interruptions, suggestions, statements, and arguments of counsel" that subvert the rules and thwart the truth-seeking function of depositions. *Hall,* 150 F.R.D. at 531. It is difficult to envision Horizon's counsel objecting at trial as he did in the Potthast deposition. In front of a jury, there is no shouting, no interrupting, and no insults. The Court should not allow it to continue in depositions.

For the reasons stated above, the PLC respectfully requests that this Court adopt Judge Seeger's Standing Order on Depositions attached as Ex. 1 to apply to all depositions conducted in this MDL (regardless of who is questioning). That Order, if followed, would address the behavior outlined above and allow the PLC to build its record unfettered by improper deposition conduct. In the alternative, the PLC requests appointment of a special master to oversee depositions of Horizon employees (current and former) to avoid further impediments to the orderly progression of this litigation.

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Exhibit 1

Depositions

This Standing Order applies to all cases assigned to Hon. Steven C. Seeger, including any cases referred to the Magistrate Judges for supervision of discovery. The Court enters this Standing Order to exercise reasonable control over the mode of witness examinations and the presentation of evidence, so as to promote the search for truth, avoid wasting time, and protect witnesses from harassment and undue embarrassment. *See* Fed. R. Evid. 611(a); Fed. R. Civ. P. 30(d)(3)(B).

1. First and foremost, discovery is about the search for truth. *See* Fed. R. Civ. P. 1; Fed. R. Evid. 102. Depositions, in turn, are one of the primary tools for unearthing the truth. Depositions also help parties streamline cases, narrow disputes, avoid surprises, and prepare for trial. Simply put, depositions are one of the most valuable parts of litigation.

2. This Court will consider any effort to obstruct a deposition – say, by making speaking objections, or giving improper instructions not to answer, or coaching the witness – as an attempt to undermine the truth-seeking function of litigation.

3. "Litigation is not a contest to see how much trouble you can cause your opponents. Those who treat it as such do so at their peril." *See Hal Commodity Cycles Mgmt. Co. v. Kirsh*, 825 F.2d 1136, 1139 (7th Cir. 1987).

4. Counsel who wish to participate in depositions, and experts who hope to testify at trial, must comply with this Standing Order.

Civility

5. Counsel must behave professionally at all times during depositions. Depositions must be civil, and attorneys must be respectful to witnesses, to the court reporter, and to other attorneys. Counsel must conduct themselves as if the Court were present, and as if the jury were watching. *See* Fed. R. Civ. P. 30(c)(1).

6. Don't be rude. Don't fight. Don't obstruct.

Questioning the Witness

7. Treat the witness with respect at all times.

8. Counsel must not interrupt a witness who is answering the question. By asking a question, counsel has passed the baton (and the microphone) to the witness. Let the witness finish.

9. If the questioning attorney interrupts, the attorney for the witness can insist that the witness be allowed to complete his or her answer.

10. If the witness repeatedly filibusters, the witness may become eligible for extra deposition time. *See* Fed. R. Civ. P. 30(d)(1). So there is no reason to interrupt.

11. A questioning attorney should not ask the same question over and over again. But if the attorney does so, the remedy is to invoke the rule of completeness at summary judgment or trial. *See* Fed. R. Civ. P. 32(a)(6). If necessary, counsel for the witness can seek a protective order if the questioning attorney "unreasonably annoys" or "oppresses" the witness. *See* Fed. R. Civ. P. 30(d)(3)(A).

12. Do not deliberately mislead the witness with false information. Do not mischaracterize what the witness previously said. Do not attempt to trick the witness. If the attorney for the witness believes that the questioning attorney is deliberately mischaracterizing the facts or the testimony, counsel should take a break and confer. After the deposition, the Court may entertain a motion as necessary.

13. Counsel taking and defending the deposition should avoid reiterating or paraphrasing what the witness just said. It almost always creates confusion and trouble. When the questioning attorney paraphrases the testimony, it is common for the summary to be not quite accurate or complete, which only leads to disputes. The transcript will speak for itself. On the flipside, the attorney defending the deposition should avoid repeating prior testimony because it can be a way to signal what future testimony should be. Avoid saying "you previously told me 'X,'" or "the witness already testified that 'Y.'"

14. Don't make faces. Don't roll your eyes. Don't laugh at the witness. Don't make editorial comments.

Objections

15. All too often, attorneys make lengthy objections to coach the witness, suggest answers, burn the clock, or throw the questioning attorney off track. The Court will view such objections as an attempt to undermine the truth-seeking function of depositions.

16. Counsel shall not make speaking objections. *See* Fed. R. Civ. P. 30(c)(2). Counsel must not coach witnesses, make lengthy objections, or say anything that interferes with the fair examination of the deponent.

17. Counsel may object to the form of a question by making short, simple objections. Objections must be "concise[]," as the Federal Rules command. *See* Fed. R. Civ. P. 30(c)(2). Acceptable objections include "object to the form," "objection; form," and "object to the form of the question." Such short-and-simple objections preserve any and all objections to the form of the question, *see* Fed. R. Civ. P. 32(d)(3)(B), including (1) leading; (2) vague; (3) ambiguous; (4) argumentative; (5) lack of personal knowledge; (6) lack of foundation; (7) calls for speculation; (8) calls for a legal conclusion; (9) assumes facts not in evidence; (10) misstates the facts, or the testimony; (11) hearsay; (12) compound; (13) the document speaks for itself; and so on.

18. Unless expressly asked, counsel shall not object by articulating all of the many reasons why a question is perceived to be defective. Making one specific objection – such as "objection; leading" or "objection; foundation" – is acceptable. A single, targeted objection gives the questioning attorney an opportunity to cure. But stringing together more than one specific objection is not. If counsel has more than one objection to a question, simply say "objection; form." Examples of inappropriate objections include:

- "Objection, form, lacks foundation, calls for speculation, and legal conclusion."
- "Objection. Incomplete hypothetical, completely irrelevant and not reasonably calculated to lead to the discovery of admissible evidence and the form of the question. Go ahead and do what you can."
- "Objection. That completely mischaracterizes what he just said, and we can read it back. He just testified that 'X.'"
- "Objection. I'm objecting to the form and the foundation and it mischaracterizes his testimony. It would be one thing if he had said 'X,' but that's not what it was. He asked 'Y,' and your question intentionally muddies that and mischaracterizes it so there's no foundation and I object to the form."

- "Objection to the form, lack of foundation, objection to the speculation and now argumentative because he's asked and answered that question. You're just arguing with him now."

- "Objection. Mischaracterizes his testimony and mischaracterizes the document. The document speaks for itself."

- "Objection. Lacks foundation. Calls for speculation. If you know, you can say that but no one is interested in you guessing."

- "Objection. Form. Lacks foundation. May call for a legal conclusion. You can answer it if you can and if you know."

19. If the questioning attorney wants clarification about the nature of an objection (say, to cure the problem), then counsel is free to ask. That is, the questioning attorney can ask the objecting attorney to explain the objection and thus request an opportunity to "correct[]" the "form of a question . . . at the time." *See* Fed. R. Civ. P. 32(d)(3)(B)(i). And if the questioning attorney asks for clarification, and thus invites a more fulsome explanation, then the objecting attorney may provide it. Otherwise, counsel must make short, direct objections – and nothing else.

20. The Court will view interjections by counsel such as "if you know," "if you remember," "if you understand," or "if you have personal knowledge" as an attempt to coach the witness. It is unsurprising that witnesses typically testify that they can't remember after they hear "if you remember." And they almost always say that they don't know after counsel blurts out "if you know." Such coaching-by-thinly-veiled-instruction violates this Standing Order.

21. Improper objections are deemed to be no objections at all (when it comes to preservation). At summary judgment or at trial, the Court may treat deposition objections to be waived if they violate this Standing Order.

22. "Asked and answered" is not an appropriate objection during depositions, absent truly abusive conduct in extraordinary cases. It coaches the witness to say nothing more than what he or she has said already. All too often, when an attorney objects "asked and answered" during a deposition, the witness hasn't actually answered the question.

23. As a reminder, the Federal Rules allow an instruction not to answer "only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion [for a protective order] under Rule 30(d)(3)." *See* Fed. R. Civ. P. 30(c)(2); *Redwood v. Dobson*, 476 F.3d 462 (7th Cir. 2007). If there is a dispute about an instruction not to answer, move on and complete the rest of the deposition. Preserve the issue on the record for later resolution by the parties or the Court.

24. Unlike an objection to form, an objection to relevance "is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time." *See* Fed. R. Civ. P. 32(d)(3)(A).

25. There is no reason for multiple parties on the same side to make the same objection. It clutters the transcript, and slows things down. Consider making a stipulation that an objection by one is an objection for all.

26. Counsel have more latitude in making objections on the grounds of privilege. For example, attorneys may instruct a witness that they can testify about "X," but cannot testify about "Y." Counsel retain the ability to make reasonable privilege objections, which sometimes require giving explanations or defining the parameters of testimony.

27. It is acceptable for counsel defending the deposition to make reasonable, succinct requests for clarification. Sometimes questions are generally unclear, and a modest clarification can clear things up. For example, it is acceptable to ask the questioning attorney to clarify what month or year he or she is asking about (if the time period matters), especially when the questioning attorney moves back and forth between different time periods. As a second example, asking the questioning attorney to clarify who "he," "she," or "they" refer to is acceptable, too. As a final example, it is acceptable to ask the questioning attorney about the origin or completeness of an exhibit if, for example, it (1) lacks a bates number; (2) is missing an attachment; (3) appears to be an improper compilation of different documents; or (4) otherwise appears improper, incomplete, or over-inclusive. But such requests for clarification must be unobtrusive, in good faith, and (hopefully) rare.

Evasive or Incomplete Answers

28. Under the Federal Rules, an "evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond." *See* Fed. R. Civ. P. 37(a)(4). Witnesses must give direct answers to straightforward questions. The Court will treat evasive deposition testimony as a failure, if not a refusal, to testify.

29. A witness who gives evasive answers may become eligible for extra deposition time, among other remedies. *See* Fed. R. Civ. P. 30(d)(1); Fed. R. Civ. P. 37.

30. Experts must comply with discovery obligations, *see* Fed. R. Civ. P. 26(a)(2)(B), and must participate in discovery in good faith. That rule fully applies to depositions.

31. Experts have no special license to be evasive. Quite the contrary. The Federal Rules set one rule, and it applies to all witnesses, fact and expert alike: evasive answers are no answers at all. *See* Fed. R. Civ. P. 37(a)(4). An expert who gives evasive answers has, in effect, refused to participate in discovery in good faith.

32. Parties should not expect to call at trial experts who have not participated in depositions in good faith. In rare cases, the Court may take into account the evasiveness of deposition testimony when deciding whether an expert is allowed to take the witness stand.

Depositions under Rule 30(b)(6)

33. Depositions under Rule 30(b)(6) pose special challenges and impose significant burdens. A party who seeks to take a 30(b)(6) deposition must serve a limited number of narrowly tailored requests. The requesting party must specify the topics with "reasonable particularity," *see* Fed. R. Civ. P. 30(b)(6), so that the receiving party has a clear understanding of what information is requested.

34. The number and scope of the topics must be proportional to the "needs" – *needs* – of the case. *See* Fed. R. Civ. P. 26(b)(1).

35. The presumptive limit is 10 topics. Subtopics count.

36. Be reasonable. If the requesting attorney goes overboard on the number and scope of the topics, the Court may decide that the party cannot take any 30(b)(6) deposition at all. So the requesting party has an incentive to seek what it really needs, and nothing else.

37. Depositions under Rule 30(b)(6) are not an opportunity to redo other depositions or obtain a second (sound)bite at the apple.

38. Before taking a 30(b)(6) deposition, consider whether the information "can be obtained from some other source that is more convenient, less burdensome, or less expensive." *See* Fed. R. Civ. P. 26(b)(2)(C)(i).

39. A 30(b)(6) deposition is designed to discover facts, not legal theories or contentions. If a party wants more information about another party's positions, serve a contention interrogatory at the appropriate time. A party cannot take a 30(b)(6) deposition on legal theories or contentions without leave of Court.

40. Understand the requirements of the rule. A party requesting a 30(b)(6) deposition is not entitled to select the person who will testify on behalf of the entity. A party requesting a 30(b)(6) deposition is not entitled to the "most knowledgeable" witness, either. Instead, the "named organization" that provides corporate testimony under Rule 30(b)(6) is entitled to "designate" the person who will "testify on its behalf." *See* Fed. R. Civ. P. 30(b)(6). An entity has the discretion to present "one or more" representative deponents. *Id.* The entity must educate the designated witness before the deposition as necessary. A 30(b)(6) deposition is the testimony of the entity itself, not the testimony of an individual. A 30(b)(6) witness does not need to have personal knowledge over the topics. Instead, he or she testifies in a corporate capacity based on "information known or reasonably available to the organization." *Id.*

41. Absent leave of Court or an agreement between the parties, a party must provide a copy of all exhibits for a 30(b)(6) deposition to all other parties at least one week before the deposition.

42. Parties cannot take depositions under Rule 30(b)(6) of government agencies acting in their *enforcement capacity* without leave of Court. For example, a party would need leave of Court to take a 30(b)(6) deposition of the FTC when the FTC files suit to enforce the consumer-protection laws, or a 30(b)(6) deposition of the EEOC when the EEOC enforces the anti-discrimination laws. *See SEC v. Buntrock*, 217 F.R.D. 441 (N.D. Ill. 2003); *SEC v. SBM Inv. Certificates, Inc.*, 2007 WL 609888 (D. Md. 2007); *SEC v. Rosenfeld*, 1997 WL 576021 (S.D.N.Y. 1997); *SEC v. Morelli*, 143 F.R.D. 42 (S.D.N.Y. 1992); *EEOC v. Evans Fruit Co., Inc.*, 2012 WL 442025 (E.D. Wash. 2012); *EEOC v. McCormick & Schmick's Seafood Restaurants, Inc.*, 2010 WL 2572809 (D. Md. 2010); *FTC v. U.S. Grant Resources, LLC*, 2004 WL 1444951 (E.D. La. 2004). The government does not have first-hand knowledge of any facts when it acts in an enforcement capacity. Instead, the government relies on facts gathered during an investigation, often by lawyers. Taking a 30(b)(6) deposition in that scenario inevitably raises work-product issues, and creates far more trouble than it is worth. There are better ways to obtain information from the government. This rule does not apply when the government is a defendant.

Scheduling, Time, and Breaks

43. Counsel must cooperate in the scheduling of depositions. Counsel who serve deposition notices must make reasonable efforts to accommodate the schedules of the witness and other counsel. If the date proposed in a deposition notice is problematic for counsel or the witness, then the counsel or witness with the scheduling conflict must propose several reasonable alternate dates, and do so promptly (*i.e.,* within a few days). There is no pocket veto when it comes to scheduling. A failure to propose alternate dates within a reasonable time may be a waiver of the right to object to the date in the deposition notice.

44. The seven-hour rule under the Federal Rules of Civil Procedure does not include breaks. "Preoccupation with timing is to be avoided." *See* Fed. R. Civ. P. 30 advisory committee's note to 2000 amendment.

45. Cooperate when it comes to allocating time, especially when the case involves multiple parties or the depositions of third parties. Before the first deposition, confer about how to allocate time for all depositions in the case, especially if the parties expect them to last a full day. Be fair and share time.

46. Absent agreement of the parties, or leave of Court, depositions must take place on weekdays (excluding holidays) during normal business hours.

47. A witness cannot take a break while a question is pending (just like trial).

When to Come to Court

48. In light of this Standing Order, the Court expects that conflicts at depositions will be rare. If an attorney violates this Standing Order, the first step for the other attorney is simple: remind counsel of this Court's Standing Order.

49. The Court expects that attorneys will almost never need to enlist the Court's assistance during depositions themselves. If necessary, parties should raise disputes by filing a motion after the deposition. In extreme cases, counsel can call Chambers during depositions. This Standing Order is not an invitation to call the Court anytime an attorney acts improperly. Unless things get truly out of hand, a written motion is a more effective way to present a dispute to the Court.

Summary

50. Above all else, be professional and reasonable, and follow the Rules.

#CMPID1128

Exhibit 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: TEPEZZA MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION This Document Relates to All Cases	No. 1:23-cv-03568 MDL No. 3079 Judge Thomas M. Durkin Magistrate Judge M. David Weisman

Declaration of Timothy J. Becker

I, Timothy J. Becker, state and declare as follows:

1. I am a partner in the law firm of Johnson Becker, PLLC, duly authorized to practice law in the State of Minnesota and before this Court. I am in good standing before both Courts. I have personal knowledge of the facts and assertions set forth below. I gained that information in connection with my role as Co-Lead Counsel and as a member of the Plaintiffs' Leadership Committee. If called to testify I could report on the veracity of the facts and documents set forth below.

2. I supply this Declaration in support of the PLC's Motion for Entry of Order to Remedy Improper Deposition Conduct by Horizon's Counsel. In my role as Co-Lead Counsel, I observed via videoconference the deposition of Horizon employee Nicole Potthast on October 23, 2024. Based on my personal knowledge, I declare that the exhibits referenced and attached are true and correct documents and video clips:

   a. Attached as Exhibit A is a true and correct copy of the transcript of the deposition of Nicole Potthast (Oct. 23, 2024);[1]

[1] For ease of reference, Clips 1 – 6 are highlighted in the attached depositions.

b. Attached as Exhibit B is a video clip (**Clip 1**) from the Potthast deposition (Tr. 156:19–165:17);

c. Attached as Exhibit C is a video clip (**Clip 2**) from the Potthast deposition (Tr. 53:6–53:17);

d. Attached as Exhibit D is a video clip (**Clip 3**) from the Potthast deposition (Tr. 56:3–13);

e. Attached as Exhibit E is a video clip (**Clip 4**) from the Potthast deposition (Tr. 70:14–71:4);

f. Attached as Exhibit F is a video clip (**Clip 5**) from the Potthast deposition (Tr. 78:2–79:1);

g. Attached as Exhibit G is a video clip (**Clip 6**) from the Potthast deposition (Tr. 122:9–123:8); and

h. Attached as Exhibit H is a series of video clips (**Clip 7**) from the Potthast deposition (passim);

3. Following the Potthast deposition, I directed Liaison Counsel (who has assumed the task of coordinating emails regarding deposition scheduling) to request new dates from Horizon's counsel for the depositions scheduled for October 29, 2024 and October 30, 2024. The three Co-Lead Counsel began to review the rough transcript and discuss how best to approach Horizon to remedy the issues without Court intervention. Horizon did not attempt to speak with me, the other Co-Lead Counsel, or Liaison Counsel before contacting the Court *ex parte* to request an emergency hearing regarding Liaison Counsel's scheduling email. The PLC did not

agree that the issue was ripe for Court intervention before the parties had attempted to meet and confer.

4. On October 28, 2024, the PLC proposed a solution to its concerns regarding deposition conduct. A true and correct copy of the PLC's emailed proposal is attached as Exhibit I (Email from Sletvold to Jensen, *et al*. Oct. 28, 2024).[2] It proposed that that the parties stipulate to the Court's entry of Judge Seeger's Standing Order on Deposition Conduct and to other limits on the deposition process including an agreement to begin redirect examination within 15 minutes of passing the witness and to conclude depositions by 6:00 p.m. local time.

5. On October 29, 2024, the parties met and conferred in an effort to resolve the current dispute. The PLC participants were Ashlie Case Sletvold, Trent Miracle, Jessica Wieczorkiewicz, Alyson Steele Beridon, and me. Horizon was represented by Katherine Sacco Jensen, Grant Hollingsworth, Elyse Shimada, and Carter Thurman. During the course of the meet-and-confer, counsel discussed the proposal the PLC had made via email on October 28. Horizon maintained that its defense of the Potthast deposition was entirely appropriate and professional. Horizon declined to agree to any aspect of the PLC's proposal.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 30, 2024

/s/ Timothy J. Becker

Timothy J. Becker

[2] Ms. Sletvold's email attached Judge Seeger's Standing Order on Deposition conduct, which is attached to this declaration as Exhibit I. It is not attached again.

Exhibit A

FILED UNDER SEAL IN ACCORDANCE WITH LOCAL RULE 26.2

Exhibit B

FILED UNDER SEAL IN ACCORDANCE WITH LOCAL RULE 26.2

Exhibit C

FILED UNDER SEAL IN ACCORDANCE WITH LOCAL RULE 26.2

Exhibit D

FILED UNDER SEAL IN ACCORDANCE WITH LOCAL RULE 26.2

Exhibit E

FILED UNDER SEAL IN ACCORDANCE WITH LOCAL RULE 26.2

Exhibit F

FILED UNDER SEAL IN ACCORDANCE WITH LOCAL RULE 26.2

Exhibit G

FILED UNDER SEAL IN ACCORDANCE WITH LOCAL RULE 26.2

Exhibit H

FILED UNDER SEAL IN ACCORDANCE WITH LOCAL RULE 26.2

Exhibit I

From: Ashlie Case Sletvold
To: Jensen, Kathryn Sacco; Timothy Becker; Trent Miracle; jw@wallacemiller.com
Cc: Johnston, Robert E.; Shimada, Elyse; Hollingsworth, Grant; Thurman, Carter F.; Proctor, Shannon N.
Subject: RE: In Re: Tepezza Marketing, Sales Practices, and Products Liability Litigation
Date: Monday, October 28, 2024 5:17:00 PM
Attachments: image001.png
image002.png
image003.png
Seeger Standing Order (Depositions).pdf

Dear Kathryn:

Let's talk at 9:30 ET tomorrow. We'll circulate the calendar invite.

We plan to propose, and ask that you review in advance of our discussion tomorrow, Judge Seeger's standing order on deposition conduct. It is attached here for your convenience and available on the Court's website. It covers the various areas of concern that we identified in our submission today. We feel that stipulation to have Judge Weisman enter Judge Seeger's order will have a positive impact on conducting the work of this MDL efficiently and without pointless antagonism.

We will also propose some additional guardrails on depositions to ensure they run smoothly. Specifically, we propose that the parties agree to a time limit of 15 minutes between the PLC concluding its questioning and Horizon's commencement of any redirect exam. These are essentially trial depositions, and no one gets an hour after an examination to prepare a redirect.

Relatedly, we will propose that depositions conclude no later than 6:00 p.m. local time to respect the time and commitments of the court reporter/videographer/trial tech team. This will avoid the need to change travel plans and otherwise incur unnecessary expenses. It has the added benefit of ensuring that witnesses and counsel are not unnecessarily fatigued. If the parties are not able to conclude the work by that time, a continuation deposition would be scheduled at a mutually agreeable date.

We look forward to connecting with you tomorrow.

Thanks,
Ashlie

Ashlie Case Sletvold
Partner

Cleveland Office
6370 SOM Center Road, Suite 108
Cleveland, Ohio 44139

Youngstown Office
101 West Federal Street, Suite 2
Youngstown, Ohio 44503

Main: 216-589-9280 I **Direct:** 216-260-0808

(She/Her/Hers)

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From: Jensen, Kathryn Sacco <KJensen@Hollingsworthllp.com>
Sent: Monday, October 28, 2024 2:58 PM
To: Ashlie Case Sletvold <asletvold@peifferwolf.com>; Timothy Becker <tbecker@johnsonbecker.com>; Trent Miracle <tmiracle@flintcooper.com>; jw@wallacemiller.com
Cc: Johnston, Robert E. <RJohnston@Hollingsworthllp.com>; Shimada, Elyse <eshimada@Hollingsworthllp.com>; Hollingsworth, Grant <ghollingsworth@Hollingsworthllp.com>; Thurman, Carter F. <cthurman@Hollingsworthllp.com>; Proctor, Shannon N. <sproctor@Hollingsworthllp.com>
Subject: RE: In Re: Tepezza Marketing, Sales Practices, and Products Liability Litigation

Ashlie,

We're happy to meet and confer tomorrow. In order for us to have a productive discussion, plaintiffs will need to identify today at least some of the specific transcript sections they plan to discuss with the Court and any proposal you have to resolve the dispute so we can be prepared to discuss.

Thank you,
Kathryn

Hollingsworth LLP
Litigation Matters.®

Kathryn Jensen
Partner
202.898.5872 | KJensen@Hollingsworthllp.com
1350 I Street NW | Washington, DC 20005

From: Ashlie Case Sletvold <asletvold@peifferwolf.com>
Sent: Monday, October 28, 2024 1:57 PM
To: Jensen, Kathryn Sacco <KJensen@Hollingsworthllp.com>; Timothy Becker <tbecker@johnsonbecker.com>; Trent Miracle <tmiracle@flintcooper.com>; jw@wallacemiller.com
Cc: Johnston, Robert E. <RJohnston@Hollingsworthllp.com>; Shimada, Elyse

<eshimada@Hollingsworthllp.com>; Hollingsworth, Grant <ghollingsworth@Hollingsworthllp.com>; Thurman, Carter F. <cthurman@Hollingsworthllp.com>; Proctor, Shannon N. <sproctor@Hollingsworthllp.com>
Subject: RE: In Re: Tepezza Marketing, Sales Practices, and Products Liability Litigation

[External Message]

Kathryn, we are hopeful that tomorrow's meet and confer is successful in resolving the issues identified in our submission to Judge Weisman today. We therefore have not finalized our briefing, including determining precisely which page and line numbers we will cite. Please let us know what time works for you tomorrow morning and we'll circulate a calendar invite.

Thanks,
Ashlie

Ashlie Case Sletvold
Partner

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Cleveland, Ohio 44139

Youngstown Office
101 West Federal Street, Suite 2
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From: Jensen, Kathryn Sacco <KJensen@Hollingsworthllp.com>
Sent: Monday, October 28, 2024 9:37 AM
To: Ashlie Case Sletvold <asletvold@peifferwolf.com>; Timothy Becker <tbecker@johnsonbecker.com>; Trent Miracle <tmiracle@flintcooper.com>;jw@wallacemiller.com
Cc: Johnston, Robert E. <RJohnston@Hollingsworthllp.com>; Shimada, Elyse <eshimada@Hollingsworthllp.com>; Hollingsworth, Grant <ghollingsworth@Hollingsworthllp.com>; Thurman, Carter F. <cthurman@Hollingsworthllp.com>; Proctor, Shannon N. <sproctor@Hollingsworthllp.com>
Subject: RE: In Re: Tepezza Marketing, Sales Practices, and Products Liability Litigation

Ashlie,

If you are not available to meet and confer before the submission is due at noon CST today, can you please provide the transcript cites that you will be relying upon for your argument? Once you have identified those, we are happy to meet and confer tomorrow morning to see if we can reach resolution.

Thank you,
Kathryn

From: Ashlie Case Sletvold <asletvold@peifferwolf.com>
Sent: Sunday, October 27, 2024 9:46 PM
To: Jensen, Kathryn Sacco <KJensen@Hollingsworthllp.com>; Timothy Becker <tbecker@johnsonbecker.com>; Trent Miracle <tmiracle@flintcooper.com>;jw@wallacemiller.com
Cc: Johnston, Robert E. <RJohnston@Hollingsworthllp.com>; Shimada, Elyse <eshimada@Hollingsworthllp.com>; Hollingsworth, Grant <ghollingsworth@Hollingsworthllp.com>; Thurman, Carter F. <cthurman@Hollingsworthllp.com>; Proctor, Shannon N. <sproctor@Hollingsworthllp.com>
Subject: Re: In Re: Tepezza Marketing, Sales Practices, and Products Liability Litigation

[External Message]

Hi, Kathryn, we are open on Tuesday morning concluding by 11:30 ET. Is there a time that works best for you in that window?

Ashlie Case Sletvold
(216) 225-1018

Sent from my mobile device. Please excuse any typos.

Ashlie Case Sletvold
Partner

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From: Jensen, Kathryn Sacco <KJensen@Hollingsworthllp.com>
Sent: Sunday, October 27, 2024 7:23:33 PM
To: Timothy Becker <tbecker@johnsonbecker.com>; Ashlie Case Sletvold <asletvold@peifferwolf.com>; Trent Miracle <tmiracle@flintcooper.com>;jw@wallacemiller.com <jw@wallacemiller.com>
Cc: Johnston, Robert E. <RJohnston@Hollingsworthllp.com>; Shimada, Elyse <eshimada@Hollingsworthllp.com>; Hollingsworth, Grant <ghollingsworth@Hollingsworthllp.com>; Thurman, Carter F. <cthurman@Hollingsworthllp.com>; Proctor, Shannon N. <sproctor@Hollingsworthllp.com>
Subject: In Re: Tepezza Marketing, Sales Practices, and Products Liability Litigation

All,

Are you available to meet and confer tomorrow morning re the disputed deposition issues? Let us know what time works best.

Thanks,
Kathryn

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