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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 20-md-02924-ROSENBERG

IN RE: ZANTAC (RANITIDINE) .
PRODUCTS LIABILITY . West Palm Beach, FL
LITIGATION. . June 1, 2022
.

DISCOVERY CONFERENCE (Telephonically)
BEFORE THE HONORABLE BRUCE REINHART
UNITED STATES MAGISTRATE JUDGE

FOR THE PLAINTIFFS:

ROBERT C. GILBERT, ESQ.
Kopelowitz Ostrow Ferguson
Weiselberg Gilbert
2800 Ponce de Leon Boulevard
Suite 1100
Miami, FL 33134
305-384-7270

FOR THE DEFENDANTS:

PAIGE H. SHARPE, ESQ.
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue NW
Washington, D.C. 20001
202-942-5000

ANAND AGNESHWAR, ESQ.
Arnold & Porter Kaye Scholer LLP
250 West 55th Street
New York, NY 10019
212-836-8011

Official Court Reporter: Pauline A. Stipes
HON. ROBIN L. ROSENBERG
West Palm Beach/Ft. Pierce, FL
561-803-3434

1 *THE COURT:* All right. Good afternoon, everyone.
2 This is case number 20-2924, In Re: Zantac (Ranitidine)
3 Product Liability Litigation.

4 We scheduled a discovery hearing today on the
5 Plaintiffs' expedited motion to compel participation in the
6 deposition tomorrow of the Sanofi employee.

7 I obviously wanted to get you in and talk to you
8 before the deposition occurs tomorrow.

9 Let me start with appearances for the Plaintiff.

10 *MR. GILBERT:* On behalf of the Plaintiffs, your Honor,
11 Robert Gilbert, Plaintiffs' co-lead counsel.

12 *THE COURT:* On behalf of Sanofi.

13 *MS. SHARPE:* Good afternoon, your Honor, this is Paige
14 Sharpe from Arnold and Porter on behalf of Sanofi.

15 *MR. AGNESHWAR:* Your Honor, Anand Agneshwar on behalf
16 of Sanofi. Ms. Sharpe is doing the argument.

17 *THE COURT:* Good afternoon. Here is my first
18 question. Mr. Gilbert, this is your motion, we have a
19 deposition in a case not in the MDL, not proceeding under the
20 Federal Rules of Civil Procedure. What authority do I have to
21 order anything having to do with this deposition? Putting
22 aside whether I should or shouldn't, what authority do I have
23 to tell a judge in Illinois how to run his lawsuit?

24 *MR. GILBERT:* Thank you for the question, your Honor.
25 The authority you have is clear based on the agreement that was

1 entered into between the MDL Plaintiffs and Sanofi one year ago
2 that provided, at your direction, for discovery to be conducted
3 in Sanofi's spoliation of internal emails.

4 We are not asking you to compel the judge in Illinois
5 State Court to allow us to participate in the deposition. We
6 are asking you to compel Sanofi, which is subject to your
7 jurisdiction and before the Court in connection with this MDL,
8 to allow us to participate in this deposition by Sanofi either
9 cross noticing it in the MDL or allowing us to cross notice it
10 in the MDL.

11 *THE COURT:* Why do you need my permission to cross
12 notice in the MDL? Have I limited your deposition that relates
13 to discovery or was there an agreement to that effect?

14 *MR. GILBERT:* There was an agreement that was entered
15 into in May 2021 between us and Sanofi's counsel that provides
16 limited discovery to be conducted into email destruction
17 issues. That agreement provided that the deposition of the
18 then former IT employee who Sanofi alleges was solely
19 responsible for this mishap would be conducted along with the
20 deposition of a Rule 30(b)(6) designee that Sanofi would
21 produce and it goes to depositions that would presumptively be
22 the entirety of the deposition discovery that would be provided
23 for in connection with the MDL.

24 That agreement further provided that in the event that
25 we sought to take further discovery, that it would be done

1 either only upon mutual consent of the parties or upon good
2 cause shown -- in the event of the absence of mutual consent,
3 upon good cause shown being made to the Court.

4 That is what we have done. We have asked Sanofi's
5 counsel to allow us to take one hour of testimony tomorrow
6 following the conclusion of the deposition questioning by
7 counsel in the Illinois State Court case, which I believe is
8 scheduled to take place for approximately three hours -- excuse
9 me -- which I believe is scheduled to take place for
10 approximately three hours.

11 We have asked Sanofi's counsel to allow us one hour at
12 the conclusion of that questioning to ask questions of our own.
13 Sanofi's counsel refused. We filed the motion and ask the
14 Court to compel Sanofi to allow us to do that.

15 *THE COURT:* I got it. Thank you for clarifying the
16 procedural posture. In essence, what you are asking me to do
17 is to authorize an additional deposition pursuant to the good
18 cause provision of the parties' agreement.

19 *MR. GILBERT:* That is correct, with the caveat and the
20 unilateral offer by us that our questioning would not exceed an
21 hour.

22 *THE COURT:* Let me be more specific. You are asking
23 me to authorize a one-hour deposition pursuant to the good
24 cause provision of the parties' agreement from last year.

25 *MR. GILBERT:* That is correct.

1 *THE COURT:* That is why it is properly before me, from
2 your perspective, because I have the authority to do that.

3 I would essentially be authorizing, essentially, a
4 consecutive deposition after the Illinois deposition ends, and
5 that deposition would be in my MDL and therefore I would have
6 the authority to authorize it.

7 *MR. GILBERT:* Correct, your Honor.

8 *THE COURT:* Thank you for clarifying that.

9 Before I get to any further merits, let me turn to Ms.
10 Sharpe and have her respond.

11 *MS. SHARPE:* Yes, your Honor, thank you very much.
12 This is Paige Sharpe on behalf of Sanofi.

13 I would note, your Honor, they did not notice this
14 deposition in the MDL and they haven't cross noticed it either.
15 Their request, as I understand it, is not for an additional
16 hour, but it's to participate in the Culverson deposition and
17 then to add an additional hour onto it.

18 Mr. Gilbert can correct me if I am wrong, but they are
19 seeking more than just an hour of extra deposition that they
20 would be taking; they are asking to be present for and to
21 attend the Culverson deposition and use the entirety of the
22 transcript in the MDL. I just want to make sure that I am
23 clear on that.

24 *MR. GILBERT:* Your Honor, may I respond?

25 *THE COURT:* Yes. Maybe if you could clarify for me

1 who has noticed this deposition in the Illinois case, and are
2 there specific topics that Plaintiffs' lead counsel would
3 expect that they would need to cover that won't be covered by
4 whomever has noticed the deposition for three hours in the
5 Illinois case.

6 *MR. GILBERT:* Robert Gilbert on behalf of the
7 Plaintiffs.

8 I cannot tell you who noticed the deposition in the
9 Culverson case in Illinois State Court because I have not seen
10 the notice. It is my expectation that Plaintiffs' counsel
11 noticed it, and sent the notice to Sanofi's counsel, although,
12 frankly, I have not seen the notice.

13 To respond to what Ms. Sharpe said, we are truly
14 splitting hairs here on something that is so clear. We are
15 not -- first of all, the deposition in the Culverson case is a
16 deposition, whether formally noticed or noticed by letter
17 agreement or email agreement or otherwise, is going to take
18 place tomorrow, as I understand it, somewhere in New Jersey.
19 That is what I understand.

20 I believe -- and this was not part of my motion, I am
21 not here to argue something for the first time. I believe that
22 depositions are generally open to the public unless there is
23 other considerations made, and when I asked to participate in
24 the deposition taking place tomorrow in New Jersey, it wasn't
25 about sitting there and listening to testimony. I frankly

1 think, absent agreement by the parties in that case to not
2 allow somebody, or a court order prohibiting it, I would be
3 allowed to sit in and listen.

4 What I am asking for is the opportunity, as you
5 articulated earlier, to take one hour of testimony after
6 Culverson's counsel has finished that relate to topics in the
7 MDL regarding the email spoliation issue where this witness,
8 who is a Sanofi employee, does not need to be produced more
9 than once, where I would be able to listen to the testimony
10 that is taken beforehand and articulate it and ask essentially
11 non-duplicative questions that I believe are critical to our
12 pursuing the spoliation issues in the MDL.

13 On that point, whether it is part of the Culverson
14 deposition or it is technically noticed separately in the MDL,
15 that is a matter of sending out a notice. I would not have,
16 without the approval of Sanofi's counsel or this Court's
17 approval, unilaterally sent out a notice. So, Ms. Sharpe's
18 point about not having sent out a notice is really much ado
19 about nothing.

20 What we are really here to talk about is whether, over
21 Sanofi's objection, the Court will grant us one hour to ask
22 questions of this witness so we don't have to have him come
23 back a second time sometime in the future since he is already
24 appearing tomorrow in the Culverson case.

25 *THE COURT:* As I understand it, this witness -- I am

1 not going to use specific names, but this witness is the
2 supervisor of the other individual who has already been
3 deposed. Am I correct about that, Mr. Gilbert?

4 *MR. GILBERT:* That is correct, he is the supervisor of
5 that individual. There was another person who was another
6 member of this department who was the immediate supervisor of
7 the individual alleged to have been the sole cause of this
8 problem, but the testimony that we have cited, and there is no
9 dispute on this particular point, the testimony that has been
10 adduced thus far shows that the gentleman who is being deposed
11 tomorrow was the head of the section and the direct supervisor
12 of this person on related issues.

13 *THE COURT:* By this person, you mean the other
14 employee who has already been deposed?

15 *MR. GILBERT:* Correct.

16 *THE COURT:* All right. I understand. I will turn
17 back to Ms. Sharpe in a second.

18 There are a couple of issues I want to explore. First
19 of all, Sanofi hasn't objected, or maybe it has been
20 overruled -- the deposition is going to go forward tomorrow and
21 somebody aligned with the Plaintiff is going to ask these
22 questions. Is Sanofi objecting, then, to that testimony later
23 being used if Mr. Gilbert wants to make a motion in the MDL for
24 some remedy, or is it just a question of you don't think that
25 they should get more than three hours, or even if I limit them

1 to three hours, that Mr. Gilbert should get to ask any
2 questions?

3 Ms. Sharpe, could you just clarify for me your
4 position on those things?

5 *MS. SHARPE:* Yes, your Honor, I'd be happy to. I
6 apologize, I got briefly disconnected at the very end of Mr.
7 Gilbert's comments. I hope I didn't miss anything critical.

8 To answer your question, your Honor, number one, we
9 reached an agreement in the MDL to put up a primary fact
10 witness on this issue and we agreed to put up a 30(b)(6)
11 witness to testify soup to nuts about every aspect of the email
12 preservation issue. We prepped that witness and she testified
13 for two full days on these issues. She spent 250 to 275 hours
14 preparing for that deposition, and our position is, she covered
15 everything completely.

16 We have an agreement in the MDL that we would put up
17 those two witnesses and we separately reached an agreement in
18 the Culverson case and, you know, despite what Mr. Gilbert is
19 now saying, he expressly represented to us -- because of our
20 concerns about trying to undo the MDL agreement through this
21 additional deposition in Culverson, he expressly represented
22 they would not sit in and they would not seek to participate,
23 and they would not use the deposition transcript in the MDL.

24 Our position is they should be held to both
25 agreements. We entered those agreements in reliance on those

1 representations, and we have held up our end of the bargain,
2 and they should be held to those agreements equally because
3 otherwise it is prejudice to Sanofi.

4 *THE COURT:* Okay. You do agree -- again, I don't have
5 it in front of me, but you don't contest that there is a good
6 cause provision in the agreement. If I find there to be good
7 cause, I could authorize them to either use this deposition in
8 lieu of taking one themselves, or to participate in the
9 deposition.

10 Do you believe I have that authority or do you not
11 believe I have that authority?

12 *MS. SHARPE:* There is certainly a good cause provision
13 in the agreement we entered in the MDL. I think not only have
14 they not met that good cause standard, but there are also these
15 procedural issues they are requesting that are untimely under
16 the fact discovery deadline in the MDL, under the local rule
17 provision that we cited in our brief, as well as the use of the
18 MDL being in contravention of the agreements we have reached.

19 *THE COURT:* Okay. I understand.

20 Let me go back to Mr. Gilbert.

21 Mr. Gilbert, from what I know about this witness, I am
22 hard pressed to believe that there are three hours worth of
23 questions to ask this person, so why do you need four? Why
24 can't everything be covered with this person in three hours,
25 assuming I let you either participate directly or use whatever

1 colleagues in Illinois -- who is taking the deposition? Who is
2 the Plaintiffs' lawyer that is taking the deposition?

3 *MR. GILBERT:* I believe that the Plaintiffs' lawyer
4 that is taking the deposition is Mr. Snidow, S-N-I-D-O-W, but I
5 can't say that with certainty because I was unable to reach him
6 earlier this morning to confirm that.

7 *THE COURT:* Okay. Can you address my other question
8 about the scope of the deposition? Why do you think it needs
9 to be more than three hours long? As I understand it from
10 Sanofi's briefing what this person is likely going to say is, I
11 didn't really have a whole lot to do with it, and you may want
12 to confront that person with some other materials. Why is it
13 going to take more than three hours to do what needs to be done
14 here?

15 *MR. GILBERT:* Judge, respectfully, I don't know what
16 Mr. -- assuming Mr. Snidow is the deposition examiner, I don't
17 know what Mr. Snidow's deposition outline looks like. I don't
18 know what the Illinois standard for spoliation is, which I
19 understand is a different standard than we are dealing with
20 here in Federal Court.

21 I am not here to take away time from Mr. Snidow's
22 properly agreed upon deposition, which I believe Sanofi has
23 told the Court and me is limited to the three hours under
24 Illinois State practice or State rules.

25 I am here asking the Court to give me in the MDL up to

1 one hour to ask non-duplicative questions on issues that relate
2 to the matters that we need to address here in this MDL under
3 the Federal rules, under the Federal standards, related to
4 Sanofi's email spoliation.

5 So, respectfully, I can't sit here and tell you why
6 Mr. Snidow needs three hours because, frankly, I think he might
7 tell you if he were under the gun here he wanted more than
8 three hours, but they agreed to do it under the Illinois rules.
9 I am asking you for 60 minutes of our own time to examine this
10 witness and no more.

11 *THE COURT:* Okay. Ms. Sharpe, let me give you the
12 last word.

13 *MS. SHARPE:* Your Honor, again, we entered these
14 agreements to avoid the death by a thousand paper cuts approach
15 to discovery. That is why we put up the 30(b)(6) witness to
16 testify on all these issues. She spoke at length with the
17 individual who is being deposed tomorrow, she interviewed him
18 to prepare for her deposition, and she testified as to what he
19 knew about this issue, which was nothing.

20 So they have that testimony, and despite Mr.
21 Gilbert's, you know, conclusory statement that they might need
22 this testimony to make out a spoliation claim, I am hard
23 pressed to think of what they could possibly ask this
24 individual that would go to the elements of their claim.

25 They say they need to know if he had a particular

1 meeting on a particular date with the individual at issue. I
2 don't understand what that has to do with them making out a
3 claim.

4 So we feel like we have, again, fully complied with
5 what we agreed to do in terms of putting up a witness on these
6 issues, and we think that they have not shown good cause, you
7 know, to do this whatsoever.

8 *THE COURT:* Thank you very much.

9 *MR. GILBERT:* Judge --

10 *MS. SHARPE:* And it is untimely.

11 *THE COURT:* Thank you, Ms. Sharpe. Mr. Gilbert.

12 *MR. GILBERT:* Judge, I don't want to go into great
13 detail about the papers, but since we filed our reply last
14 evening -- and I don't know whether the Court had an
15 opportunity to review that, it was filed under seal.

16 I just want to the briefly say the following: Number
17 one, there is absolutely no question that the request is
18 timely, we addressed that in the reply. Number two -- in my
19 supporting declaration.

20 Number two is, we came before your Honor in advance of
21 the 30(b)(6) deposition, we told the Court that we thought the
22 Court should compel Sanofi to produce emails for four or five
23 additional custodians beyond the one gentlemen whose emails
24 they produced. Based on the objections that Sanofi proffered
25 to the Court, raised with the Court, the Court sustained their

1 objection and found that producing those emails was not
2 proportional.

3 We took the deposition testimony of the then former
4 employee, since rehired, we took the deposition of the Rule
5 30(b)(6), an outside expert who was hired. We got as much as
6 we possibly could from both of those, and it is clear, based on
7 the emails that we saw, based on the emails that were marked as
8 exhibits during some of those depositions, that there were
9 communications between the gentleman who was deposed in
10 December, the former IT employee, and this person who is being
11 deposed tomorrow on issues pertaining to legal holds, on issues
12 pertaining to the former IT person doing his job, keeping up
13 the legal holds, and what we are asking for, in a story that is
14 our burden to carry here, is the opportunity for 60 minutes to
15 take this testimony.

16 It is clearly proportional. There is no imposition
17 here, the gentlemen is being produced tomorrow for deposition
18 in another case. We are trying as best we can as advocates
19 here to pursue this story to get to the truth.

20 I just am, frankly, flabbergasted that we are having
21 to argue this motion. What we are asking for is not a seven
22 hour deposition of this gentleman, but 60 minutes to nail down
23 open issues, and we would respectfully ask the Court exercise
24 its discretion to allow us 60 minutes to ask these questions
25 tomorrow so that this gentleman doesn't have to be produced at

1 a later date.

2 *THE COURT:* Thank you very much.

3 *MS. SHARPE:* Your Honor, if I may. Thank you.

4 You know, we disclosed this issue to Plaintiffs a year
5 and a half ago. We have been in discovery with them, you know,
6 since that time. Ms. Brown, the 30(b)(6) witness, was deposed
7 at the end of January, January 31st and February 1st, and we
8 did not hear a word from Plaintiffs with any complaints about
9 that deposition for months.

10 The time for them to ask for this deposition was then,
11 and the remedy that they should have sought would be to reopen
12 that deposition if they thought her testimony was deficient.
13 They haven't done that. This is a fishing expedition at this
14 point. Your Honor, I think, recognized months ago that at some
15 point Sanofi would say enough is enough with respect to
16 discovery into the spoliation issue.

17 Your Honor, from our perspective, we are past that
18 point, enough is enough.

19 *THE COURT:* All right. Thank you.

20 All right. Let me start with this. I take some of
21 the blame because, for better or for worse, I never set any
22 sort of parameters or deadlines for discovery and pleadings
23 relating to this non-preservation issue. That is on me, I
24 should have done that. I will do it today. I should have done
25 it before, but I didn't.

1 So, looking to tomorrow, we have come this far, I
2 don't believe it is any prejudice to Sanofi, you are already
3 going to be there, the witness is already going to be there. I
4 am going to limit Mr. Gilbert to no duplicative questions. If
5 Sanofi believes a question that Mr. Gilbert asks is duplicative
6 of something that was previously asked, by the usual rule, you
7 can instruct the witness not to answer and I will rule on it,
8 and if the witness should have answered it, then we will have
9 to get back together again. I will give you that power if you
10 want to use that.

11 I am hard pressed to believe it will take four hours
12 to take the deposition, but I will give Mr. Gilbert one hour to
13 ask non-duplicative questions. I do find it is proportional to
14 the needs of the case and that there is good cause to allow
15 them to tie up whatever loose ends they think they need to tie
16 up.

17 So I will grant the motion for one hour of deposition
18 time to be used by Mr. Gilbert. If the other guy stops after
19 two hours, Mr. Gilbert doesn't get two extra hours. He gets
20 one hour total for his questioning and it cannot be duplicative
21 questioning.

22 With that, let's set two deadlines here.

23 Mr. Gilbert, if you are going to file a motion and
24 seek a remedy, it is time. How much time do you need after
25 tomorrow to file an affirmative request for a remedy that you

1 would like?

2 *MR. GILBERT:* Given the current deadlines that are in
3 place with the Court, I would say -- on the Daubert related
4 issue, I would say September 1st.

5 *THE COURT:* Okay. Ms. Sharpe, what is your feeling?

6 *MS. SHARPE:* My feeling is that that is way too long.
7 You know, our feeling is this has been hanging over our heads
8 for a year and a half, we need to put this to bed. If they
9 have a motion to file, they need to get it on file. They
10 should file it within the next couple weeks.

11 *THE COURT:* I agree, Mr. Gilbert, especially if you
12 are seeking non-monetary remedies here, potentially that could
13 affect the Daubert motions and Judge Rosenberg needs to know if
14 I am going to impose by order some sort of a non-monetary
15 remedy, give you an adverse instruction or presumption, or
16 something else.

17 I think 90 days is too long. I will give the
18 Plaintiffs until July 15th to file any motion seeking relief to
19 the non-preservation.

20 Ms. Sharpe, how much time would you like to respond?
21 Usually I give you two weeks, but I am willing to give --

22 *MS. SHARPE:* I would say 30 days, your Honor.

23 *THE COURT:* Okay. You will file your response by
24 August 15th. Mr. Gilbert, you file the reply by September 1st,
25 and we will be fully briefed by September 1st and I can set it

1 down for whatever further proceedings I need to do at that
2 point.

3 That is what we will do, and as far as I am concerned,
4 after tomorrow discovery in this matter is closed.

5 *MR. GILBERT:* Your Honor, first of all, thank you for
6 your ruling. I want to make sure that the Court is aware of
7 something that may have been missed in looking at both sides'
8 submissions, and I am flagging it for your Honor based on the
9 comment you just made about discovery being closed.

10 Sanofi's counsel and counsel in the Culverson case
11 included as part of their agreement, which is attached as
12 Exhibit B to our motion, a provision. It says, and I am not
13 quoting it here, but your Honor can read it clearly, that after
14 tomorrow's deposition, if they believe that they still need to
15 take the deposition of the legal department employee, his name
16 is disclosed in that agreement, one of the lawyers of Sanofi's
17 in-house legal department related to these issues, and if they
18 are unable to reach agreement on that issue among them that
19 they will come to this Court, to your Honor, and ask your Honor
20 to make a decision on that issue.

21 And if the Court allows them to take that deposition,
22 that the deposition will be noticed in the MDL. That is what
23 their agreement with Culverson's counsel states.

24 I wanted to flag for the record and for the Court that
25 if that request is made of the Court in the Culverson case, and

1 if the deposition is noticed because the Court allows it in
2 this MDL, I am advising the Court that it would clearly at that
3 point be our right to participate and ask questions in that
4 deposition as well.

5 *THE COURT:* It would be your position that it is your
6 right, I understand. Obviously, if any sort of motion to that
7 effect comes before me, that I authorize additional discovery,
8 I will consider it with an open mind.

9 My point in saying discovery is closed as far as I am
10 concerned, at least as far as the MDL currently matter pending,
11 no more depositions, no more interrogatories, no more requests
12 for production. If there are pending discovery requests that
13 are open, obviously those can be brought to their conclusion.
14 I don't want any new discovery propounded without prior leave
15 of Court.

16 *MR. GILBERT:* There hasn't been, your Honor, and there
17 won't be.

18 *THE COURT:* All right. Mr. Gilbert, either by mutual
19 agreement in the Culverson case or any other matter, if a party
20 comes before me and seeks leave to take additional discovery, I
21 will hear that party with an open mind. Okay.

22 Not waiving any objections either party may have to
23 the rulings that have been made today -- first of all, Mr.
24 Gilbert, do you need any clarifications of my rulings or are
25 there any other topics you thought we should address while we

1 are here?

2 *MR. GILBERT:* No, your Honor. I believe I understood
3 your rulings clearly, and whether counsel for Culverson goes
4 two minutes or two hours, I understand that I have one hour
5 only of non-duplicative questions after Culverson's counsel is
6 done.

7 *THE COURT:* That is correct, you understood my ruling.
8 Ms. Sharpe, same question to you, without waiving any
9 objections to the rulings I have made, are there any
10 clarifications or any issues you wanted to raise today?

11 *MS. SHARPE:* Your Honor, for the record, I do want to
12 make clear that I disagree with Mr. Gilbert's characterization
13 of the agreement that we reached in the Culverson case. It is
14 a completely different matter. We would object -- if it comes
15 to it, to, you know, the taking of additional depositions, we
16 are going to object, and with Culverson, we certainly object to
17 the MDL Plaintiffs' participation.

18 I just for the sake of the record wanted to make that
19 clear, but otherwise we understand your rulings, and thank you
20 for your time.

21 *THE COURT:* Thank you all very much. I appreciate the
22 briefing, it was very helpful for me understanding the issues
23 and the background. We will get out a written order
24 memorializing my rulings.

25 I will excuse the parties with the Court's thanks.

1 Have a good day, everybody.

2 MS. SHARPE: Thank you, your Honor.

3 MR. GILBERT: Thank you, your Honor, have a good day.

4 (Thereupon, the hearing was concluded.)

5 * * *

6 I certify that the foregoing is a correct transcript
7 from the record of proceedings in the above matter.

8
9 Date: June 2, 2022

10 /s/ Pauline A. Stipes, Official Federal Reporter

11 Signature of Court Reporter

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