

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA
3 WEST PALM BEACH DIVISION

4 CASE NO. 20-md-02924-ROSENBERG

5 **IN RE: ZANTAC (RANITIDINE)** .
6 **PRODUCTS LIABILITY** . West Palm Beach, FL
7 **LITIGATION.** . January 5, 2022
8 .
9 .

10 DISCOVERY HEARING (through Zoom)

11 BEFORE THE HONORABLE BRUCE REINHART
12 UNITED STATES MAGISTRATE JUDGE

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Official Court Reporter: Pauline A. Stipes
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1 *THE COURT:* All right. Good afternoon, everyone,
2 Happy New Year, and welcome to, I guess, our first proceeding
3 of calendar year 2022. We are here in case numbers 20-2924,
4 which is In Re: Zantac (Ranitidine) Product Liability
5 Litigation, and also in case number 21-82184, which is Bretholz
6 versus GSK.

7 So, I set this matter down for a discovery status
8 hearing today on open matters. I asked the parties to notify
9 the special master prior to the new year of any items to be put
10 on the agenda for today, so we have an agenda, it is not a lot
11 of items, but we will put aside as much time to address the
12 items that we have.

13 Let me start, if I could, with Ms. Jung and Mr.
14 Beroukhim. I understand there is a status report on some prior
15 matters that had I ruled on that are still working their way
16 through the system.

17 If you could make your appearances on behalf of your
18 clients, please.

19 *MS. JUNG:* Good afternoon, your Honor, Je Yon Jung on
20 behalf of Plaintiffs.

21 *MR. BEROUKHIM:* Good afternoon, your Honor, this is
22 Alex Beroukhim for the Sanofi Defendants.

23 *THE COURT:* Good afternoon. Ms. Jung, what is the
24 status report that the parties want to bring to my attention?

25 *MS. JUNG:* Thank you, your Honor, Happy New Year. We

1 wanted to raise before you -- to give you a status update. As
2 you know, we had a number of hearings and activity over
3 September and October of last year regarding the product, and
4 we received product from Sanofi. There were issues regarding
5 the chain of custody and documents related thereto. We worked
6 those out for the most part.

7 Recently, on December 20th, we received
8 interrogatories from Sanofi regarding those particular chain of
9 custody forms or inventory or the product that we were
10 receiving, and there are a number of discrepancies and missing
11 information that is related to those interrogatories, as well
12 as Sanofi's adoption of previously emailed or disclosed custody
13 forms that we are hoping that they can simply incorporate into
14 a supplemental interrogatory.

15 That is a minor issue, but I think the issue that we
16 are waiting on from Sanofi, which they have promised to produce
17 in completion by the end of this week, are a number of
18 discrepancies and missing information or corrections that need
19 to be made on that data.

20 It is important, obviously, so we know which product
21 they provided to us and the manufacturing or expiration dates,
22 batch numbers and the like. So, that is where we are, and I
23 wanted to just raise that to make it clear to the Court where
24 we are, and to give your Honor our status.

25 *THE COURT:* Thank you very much, Ms. Jung.

1 Mr. Beroukhim.

2 *MR. BEROUKHIM:* Thank you, your Honor. There is a
3 very small number, I just want to clarify, it is not like we
4 are talking about huge swaths of issues. We have discussed it
5 with Ms. Jung and provided some of the information she asked
6 for. We got some requests for additional information yesterday
7 that we are working towards.

8 I agree with Ms. Jung that the goal here is to get all
9 of the answers to the questions that she has asked to her that
10 are remaining by Friday. Many of the questions that she asked
11 just last week we have already been able to respond to.

12 *THE COURT:* Thank you. It doesn't surprise me that,
13 given the nature of the records and the volume of the records
14 and the age of the records, there is going to be a need to true
15 up the data and that there might be some patches that have to
16 be put on, and I appreciate -- you two have worked well
17 together throughout this process. I appreciate that you are
18 continuing to do so.

19 As always, I am here if you are unable to resolve your
20 differences, but I appreciate the update and the efforts. Am I
21 clear, neither side is asking the Court to rule on anything
22 today, you just wanted to update me on the status? Am I
23 correct, Ms. Jung?

24 *MS. JUNG:* That is correct, your Honor. I don't know
25 if we will have a hearing next week, but if we could -- to the

1 extent that things remain an issue next week, we would raise
2 them formally with you then, your Honor.

3 *THE COURT:* Understood. You are always free to do
4 that. We all know what the procedures are. I am aware of the
5 impending discovery cutoff deadline and the need for the
6 experts, so I am aware of the time sensitivity of some of this
7 information, so I appreciate the update.

8 Thank you all. I excuse both of you unless there is
9 anything further that either side wants to raise.

10 *MS. JUNG:* No, thank you, your Honor.

11 *THE COURT:* Thank you both. Happy New Year.

12 *MR. BEROUKHIM:* Happy New Year to you, your Honor.

13 *THE COURT:* I want to turn now to I guess what are two
14 formal third-party matters, and I understand there is a third
15 third-party matter that I think is bubbling below the surface,
16 but hasn't ripened into a formal request of the Court for
17 anything.

18 Let me start, if I could, with the matter that was
19 transferred in from the Southern District of New York, that's
20 the 21-82184 matter, Bretholz versus GSK. Can I have
21 appearance, please, on behalf of Mr. Bretholz.

22 *MR. BURSTYN:* Good morning, your Honor, this is Sean
23 Burstyn on behalf of non-party petitioner Michael Bretholz, and
24 I just would like to say, I apologize for not wearing a jacket,
25 I just came from a hospital visit, and I mean no offense to the

1 Court's decorum.

2 THE COURT: Not a problem, I hope everything is okay.
3 I am sorry you were at the hospital.

4 MR. BURSTYN: Thank you, your Honor.

5 THE COURT: Welcome to the case and happy to have you.
6 Who is here on behalf of GSK on this matter?

7 MR. SACHSE: Happy New Year, Judge. Will Sachse on
8 behalf of GSK and with me is Patrick Oot.

9 THE COURT: Good afternoon. Okay. This matter was
10 transferred in, and I went back and looked at the docket. I
11 apologize to you, it was transferred in and referred to me by
12 Judge Rosenberg before Christmas and I didn't get to it before
13 the holiday, so I am sure you were all sitting around on
14 Christmas Eve wondering why I hadn't gotten to this matter. I
15 apologize for that.

16 It appears that GSK served a subpoena on Mr. Bretholz
17 as a third party, Mr. Bretholz filed a written Motion to Quash,
18 GSK responded to that. At that point, the matter was stayed
19 pending a ruling on a Motion to Transfer. It has now been
20 transferred. So my question is -- I was thinking about setting
21 this down for a hearing later this week to rule on it.

22 Is there any reason why the case isn't ripe and ready
23 to be ruled on and argued?

24 MR. BURSTYN: This is Sean Burstyn. If I may, your
25 Honor.

1 THE COURT: Go ahead.

2 MR. BURSTYN: It is up to the Court, but I think there
3 may be two reasons that the matter is not ripe for the Court's
4 consideration. The first reason, your Honor, the case was
5 stayed, and the Court made a comment of few minutes ago that we
6 all know what the procedures are. I came into this case via
7 transfer from the Southern District of New York. The motion
8 had not ripened, there is still a reply brief to be filed that
9 I think would narrow -- not narrow the issues, but perhaps
10 sharpen them or put them in better contrast.

11 That is the first item. I don't think that needs to
12 slow things down by much, but it may be of assistance to the
13 Court if the Court wishes for a reply briefing, and Mr.
14 Bretholz would request that.

15 The second item, your Honor, is much more significant.
16 I view Mr. Bretholz, and I think the Court should view Mr.
17 Bretholz, as a non-party to a non-party, and that is the
18 laboratory Valisure. Mr. Bretholz is an attorney and has also
19 an investment relationship with Valisure.

20 His role as an attorney creates significant issues,
21 especially in relation to an eventual privilege log where he
22 would be tasked with determining over 30,000 document hits from
23 GSK's search term list which documents the client will deem as
24 privileged and which the client won't. The client is Valisure
25 and is present here through its counsel, Mr. Bill Egan.

1 I think it would be far more efficient for the Court
2 and for the parties to have Mr. Bretholz's objections resolved
3 either in tandem or subsequent to whatever the Court will do
4 with Valisure's objections, again, because I think it is
5 putting the cart before the horse to hear the attorneys say
6 what the client's privilege assertions will be before the
7 client itself, Valisure, which is here, will do so. I don't
8 think there is an argument that hearing Mr. Brethholz's issues
9 ahead of Valisure's is really more efficient.

10 And I would also add that Michael Bretholz is kind of
11 unique in the sense that he is a true individual. He is not
12 here as part of a law firm, he is not covered by a third party
13 or an insurer, he is not expensing his legal bills. He is an
14 individual human being and going through this process at great
15 expense and we think it is highly duplicative of Valisure.

16 I won't take more of the Court's time on that unless
17 you have questions.

18 *THE COURT:* No. Mr. Sachse, let me hear from you on
19 the issues that Mr. Burstyn raised.

20 *MR. SACHSE:* Sure, your Honor. I won't get into the
21 merits, I think that is for another day, but another day soon.
22 The reason why, fundamentally, is that the parties, as well as
23 some parties who are not here on the MDL, but are in other
24 jurisdictions, have a deposition of the head of Valisure coming
25 up in early February, and so we do agree, we want to get both

1 the Valisure dispute, or as you characterize it, the bubbling
2 under the surface, but I think it is now to the surface
3 dispute, and the dispute with respect to Mr. Burstyn
4 adjudicated as soon as possible.

5 I'd also say we have no objection, of course, if Mr.
6 Burstyn wants to submit a reply brief on behalf of his client.
7 That would be fine with us. Of course, depending on what it
8 says, we may also seek leave to file a supplemental brief, and
9 perhaps -- hope springs eternal. Perhaps the reply brief will
10 significantly narrow the issues such that we would not need to
11 raise any disputes with the Court at the time that we
12 adjudicate the Valisure disputes.

13 I think that we are largely in agreement. We are at a
14 point where we need to have the Court's help to resolve both
15 this and the Valisure issues, so I think we should set it as
16 soon as practical.

17 *THE COURT:* Okay, thank you.

18 All right. Since there is no opposition to the
19 request to file a reply brief, I will grant that. Mr. Burstyn,
20 I will ask you to file a reply brief by noon next Wednesday,
21 the 12th, and I will set this down tentatively for oral
22 argument a week from Friday, Friday afternoon, whatever that
23 day is -- January 14th, I believe. I need to make sure. Let's
24 hold that tentative date. I need to check a few other things,
25 but I want to get this resolved.

1 I hear you, Mr. Burstyn, about the other issues you
2 have raised. Certainly expense and burden of a privilege log
3 go to the merits, so I won't comment on those other than to say
4 you are free to argue that on the merits, and the terms of
5 ordering the order of operations, I don't even know what the
6 Valisure issue is, no one has brought it in front of me. This
7 is, in my view, a discrete issue and I can rule on this as a
8 discrete issue.

9 I will order that Mr. Burstyn is to file a reply brief
10 by noon on January 12th, and we will tentatively set oral
11 argument for January 14th in the afternoon. I will get you an
12 exact time.

13 *MR. BURSTYN:* Thank you, your Honor.

14 *THE COURT:* Not waiving any objections, is there
15 anything else we need to take up in the Bretholz matter, Mr.
16 Burstyn?

17 *MR. BURSTYN:* No. I will put it in a reply and look
18 forward to arguing.

19 *THE COURT:* Thank you very much. Mr. Sachse, anything
20 else?

21 *MR. SACHSE:* Nothing. We were ruthlessly efficient.

22 *THE COURT:* As we always try to be. Mr. Burstyn, if
23 you need to get back to the hospital or otherwise, I will
24 excuse you at this time and thank you for your time.

25 *MR. BURSTYN:* Thank you very much.

1 *THE COURT:* Yes.

2 Okay. The next item I want to take up is the related
3 Valisure matter, to the extent it can be called a matter. I
4 really don't know what it is other than I was told by the
5 special master that there was something related to Valisure
6 that the parties wanted to bring to my attention. I understand
7 Mr. Egan, who represents Valisure, is on the call, so I will
8 hear from the parties on that now.

9 Who is here on behalf of -- I don't even know what the
10 issue is, so I don't know who to call on first.

11 *MR. EGAN:* Good afternoon, your Honor, it's William
12 Egan, or Bill Egan, from Robinson and Cole, representing
13 non-party Valisure. Thank you for letting us join in this
14 conference today.

15 The issue that we have before you I can summarize
16 fairly quickly, unless opposing counsel wants to be heard
17 first.

18 *THE COURT:* Why don't you frame it for me so at least
19 I know who is involved and who is bothering you or who are you
20 bothering.

21 *MR. EGAN:* It hasn't been a bother. I have been
22 dealing mostly with Paige Sharpe and Patrick Oot, and
23 everything has been very cordial. We disagree vehemently over
24 the substance, but everything has been very cordial and I
25 appreciate their time and efforts. We also have been working

1 with Special Master Jamie Dodge, who has been very helpful in
2 trying to narrow and focus issues. So, it has all been very
3 professional and cordial, but we disagree vehemently over this
4 issue.

5 Valisure is a non-party, it's a small lab in New
6 Haven, Connecticut, did some testing with regard to Ranitidine
7 and filed a citizen petition. It is not a Plaintiff, it is not
8 a Defendant, it is not an expert. It was served with a
9 subpoena by Sanofi asking for documents. We did an initial
10 production, two rounds of production last fall. They thought
11 we hadn't been complete in our production, asked for additional
12 documents regarding an additional person who had some emails,
13 and we produced that this past summer, in July.

14 Then we received a request for a much bigger
15 professional outside vendor search, and we hired HaystackID to
16 come in and pull our client's files and do a search, and we
17 have been fighting over the scope of that search and we have
18 been fighting over issues with regard to who is going to pay
19 for all of this.

20 Valisure, at its own expense, made a good faith effort
21 to respond to the subpoena doing an internal search. We
22 reviewed the documents, produced it, and then this past summer
23 they said there is a lot more out there that we want to see.
24 We think a lot of it is irrelevant or not proportional to the
25 needs of the case, and we have made a counter proposal. I can

1 briefly summarize that or I will let the Court go at this point
2 if you want to hear more from the other side.

3 *THE COURT:* I don't know that I need to address the
4 merits, because I'm going to guess this is not an issue that I
5 will address the merits on, but you have very well framed it
6 out.

7 To simplify it, you have been served with a
8 third-party subpoena, you have been meeting, conferring,
9 negotiating, trying to work with the parties that issued the
10 subpoena to cooperatively limit it and reach some agreements
11 about costs and timing and things like that.

12 We may be reaching the point when the ability to
13 cooperatively negotiate is coming to an end and the parties may
14 need the Court to get involved. Is that kind of the road we
15 are on?

16 *MR. EGAN:* Agreed, your Honor, and we are prepared to
17 file a brief early next week, if that works for the Court,
18 however you'd like to address it.

19 *THE COURT:* Let me come back to that in a second. I
20 heard both Sanofi and GSK mentioned. I don't know if Mr.
21 Sachse or Ms. Sharpe -- who is going to speak? It looks like
22 Mr. Sachse is teed up.

23 *MR. SACHSE:* I will, your Honor. For the record, Will
24 Sachse on this one I think on behalf of all of the Defendants,
25 and I think again I can be efficient.

1 We agree, let's tee this up, and I think the sooner
2 the better. As I mentioned, the deposition of Dr. Light, or
3 Mr. Light, is scheduled for early February, so we would love to
4 get this one resolved as quickly as possible. I do agree with
5 Mr. Egan, although I have not been in the negotiations, I think
6 we are at an impasse.

7 *THE COURT:* This is a third-party subpoena, so
8 technically PTO 32 does not apply in that you are required to
9 use the procedures under PTO 32, but let me ask, what do the
10 parties to this dispute feel is the most efficient way to bring
11 this matter to my attention?

12 Is it to do a joint memo, as we do in the PTO 32
13 procedures? Is it to simply file traditional motion, response,
14 reply? Is it to do kind of simultaneous motions?

15 Mr. Egan, I know you haven't participated in my PTO 32
16 procedures, but do you have a feel for how you think the best
17 way would be to frame the issues for the Court?

18 *MR. EGAN:* I do, your Honor. We have a Motion for
19 Protective Order and Motion to Quash that would ask the Court
20 to do two things, basically two buckets of information that the
21 Defendants are asking for, limit them to certain documents for
22 one, and let's keep the other one to an even shorter easier way
23 of going through that.

24 So, we will file a Motion for Protective Order, if
25 that is acceptable to the Court, sometime early next week.

1 They probably have a Motion to Compel that they would like us
2 to produce a larger bucket of documents or a larger volume of
3 things. I think that we can tee it up through competing
4 motions for protective order/quash and Motion to Compel,
5 followed by oppositions to each other two or three days later,
6 and then a hearing shortly thereafter.

7 I would love to have three days to look at what they
8 have to say and respond, but I understand the Court would like
9 to move quickly.

10 The last issue is the deposition of Mr. Light coming
11 up on February 10th. If they do indeed want 30,000 documents
12 reviewed and produced, we are not going to have them ready by
13 February 10th, and even if they ask for five to 10,000
14 documents, as I said, a small lab, we may not be able to do
15 that.

16 I understand the Court can order anything it wants,
17 but as far as the practicalities of it, we can produce Mr.
18 Light for his deposition that day, but if they would like took
19 documents, we may need a little more time. I don't know if
20 that throws everything else in the works off with regard to the
21 Court.

22 *THE COURT:* I will cross that bridge if I get there.
23 Let me see if I order to produce anything. Those of us who
24 have lived with this case have dealt with this situation
25 before. What I generally say, Mr. Egan, is let's prioritize,

1 let's get the stuff that is necessary for Mr. Light's
2 deposition turned over sooner, and if there are things that are
3 maybe tangential and not directly related to that deposition,
4 we could deprioritize those, if that is a word, and I know Mr.
5 Sachse and Ms. Sharpe are familiar with that procedure and have
6 been able to work it out with other people. I hear you, but
7 I'm going to put that one to the side for now.

8 How do you feel about that procedure where have
9 traditional motion practice on a shortened timeframe, Mr.
10 Sachse?

11 *MR. SACHSE:* Having been dragged kicking and screaming
12 through the PTO 32 process many times. I guess I have gotten
13 used to it, but I will not be a form over substance guy at this
14 point. I think whatever is the most expedient way to get this
15 issue keyed up is going to be fine with us.

16 I don't know, frankly, that we are going to need to do
17 competing motions filed simultaneously versus maybe one party
18 going first and the other responding a few days later. I am
19 sort of agnostic on that. Frankly, I am not going to be the
20 one writing it, so whatever the Court prefers on that.

21 *THE COURT:* Well, Mr. Egan and his client, they are
22 not technically parties to the lawsuit. If you are more
23 comfortable with the standard motion practice, I will be
24 deferential to that.

25 *MR. EGAN:* If I may, your Honor, a motion in

1 opposition is fine. Competing motions is not needed. If they
2 would like to do a motion in op and they can put in things
3 broader than the motion in the op just to get everything
4 resolved before the Court, that is fine.

5 *THE COURT:* My sense is -- I want to make sure I am
6 not misreading the vibe in the room. My sense is that you all
7 know what the other side is going to ask for and what the other
8 side is going to say no to. So, it is not an issue of we have
9 to wait for the other side's pleading to know how to respond to
10 it.

11 Frankly, that is where I have found the PTO 32
12 procedure works well, sort of throw your cards on the table, we
13 just lump it into one big pleading, I give you extra time, and
14 then to me it is a little more efficient.

15 Mr. Egan, if you would be more comfortable -- the
16 concern I have is, whoever goes first is always going to feel
17 like there is something in the next pleading that I didn't
18 expect and I didn't get a chance to respond to it. At least in
19 my procedure everything comes in at the same time and everybody
20 has to show their hand ahead of time.

21 Here is what I will do, I will allow -- what I would
22 like to do is try to do this on a schedule where I can
23 adjudicate this issue the week after next, possibly toward the
24 middle or end of that week.

25 So, why don't I do this: I am going to throw you two

1 back to each other and the special master, and you all decide
2 whatever you think is the best way to get it to me so that I
3 can resolve it in that timeframe. However the parties think is
4 the best way to do it, if it is to do motion, opposition,
5 parallel motions, PTO 32, joint memo, whatever the parties
6 thinks works is fine with me. Just get it to me so I can rule
7 on it the week of the 17th.

8 Is that sufficiently ambiguous, Mr. Egan?

9 MR. EGAN: That sounds fantastic, your Honor. I am
10 looking forward to trying to work this out. As I said, the
11 procedural issues with counsel have never been a problem, so I
12 am looking forward to working with them, and Special Master
13 Dodge has also been very helpful. I think that will work well.

14 THE COURT: Very good. Is there anything else we need
15 to discuss on that, what I will call the Valisure third party
16 matter? No?

17 Thank you, Mr. Egan. You're welcome to stay if you'd
18 like. I'll excuse you if you don't want to be here anymore.
19 Thank you for your time, and I will look forward to seeing
20 you -- once you all confer with the special master, I know I
21 have some time set aside on the 18th, as long as I can corral
22 Ms. Stipes and my courtroom deputy. In your heads think about
23 the 18th or the 19th for a hearing on this matter.

24 MR. EGAN: Very good, your Honor, thank you.

25 THE COURT: Thank you all very much. I will excuse

1 the parties on the Valisure matter.

2 MR. SACHSE: Thank you, your Honor.

3 THE COURT: Okay. The remaining issue, which may get
4 the record for the longest discovery issue pending in this
5 case, is the Sanofi email issue. Let me have the parties in
6 that matter make their appearances.

7 MR. GILBERT: Good afternoon, your Honor, Robert
8 Gilbert on behalf of the Plaintiffs. I am joined by my
9 colleague and co-lead counsel Mike McGlamry.

10 THE COURT: Good afternoon to both of you. Happy New
11 Year.

12 MR. McGLAMRY: Excuse me, your Honor, I know that
13 there is the Emery Pharma issue.

14 THE COURT: Did I skip the Emery Pharma issue? Thank
15 you, Mr. McGlamry, that is why we keep you around.

16 MR. McGLAMRY: The highest investments of my time.

17 THE COURT: Let me excuse the Sanofi people for a
18 second and let me call up the Emery Pharma matter, which is
19 referred to me at Docket Entry 5053. I understand that is BI,
20 is the party that issued the subpoena. Mr. Shortnacy, good
21 afternoon.

22 MR. SHORTNACY: Good afternoon, your Honor, Happy New
23 Year. Michael Shortnacy of King and Spalding on behalf of BI.
24 You are correct, we did serve the subpoenas at issue here,
25 although I do speak on behalf of all of the Defendants.

1 *THE COURT:* Thank you. Counsel for Emery Pharma is on
2 the call, however, they are here, and I will let them say
3 specifically, but my understanding is they are making a limited
4 appearance because it is their intention to challenge the
5 Court's jurisdiction, which is absolutely their right.

6 Let me allow counsel for Emery Pharma to make their
7 appearance and to state whatever limitations they would like to
8 state.

9 *MR. SEDGHANI:* Good afternoon, your Honor, Sami
10 Sedghani of Synergist Law. We are making a special appearance,
11 your Honor, because we don't believe the Court has yet to
12 obtain jurisdiction on this issue, but out of an abundance of
13 caution, we wanted to at least be respectful and attend at your
14 Honor's request to least provide you with insight as to why we
15 believe it is improper.

16 *THE COURT:* Very well. I am not even sure I am going
17 to ask you to discuss the merits, Mr. Sedghani. Am I
18 pronouncing that correctly?

19 *MR. SEDGHANI:* That's right, your Honor.

20 *THE COURT:* Welcome, good to have you. I basically
21 had two questions about this matter. Just as background, I
22 looked at the JPML docket to educate myself, but it appears
23 that the JPML has conditionally transferred -- ordered this
24 matter -- the subpoena to Emery Pharma and to Dr. Najafi has
25 conditionally been transferred here on January 3rd, but there

1 was a seven-day stay to allow a "Notice of Opposition to be
2 filed with the full panel."

3 My first question -- Mr. Sedghani, I understand your
4 seven days have not run so you may not have an answer to this
5 question -- is whether you intend to file a Notice of
6 Opposition to the conditional transfer.

7 MR. SEDGHANI: Your Honor, we do, we are planning on
8 filing that within the seven-day time frame. We informed
9 opposing counsel of that opposition as well.

10 THE COURT: Thank you. So the related question is --
11 and again, I don't want to discuss the merits, I need to tee
12 this issue up. So BI filed a Motion to Compel, that's at
13 Docket Entry 5051, and they take the position that the Court --
14 I don't have to wait, Judge Rosenberg does not have to wait for
15 a formal transfer order from the JPML, and I understand that
16 Emery Pharma and Dr. Najafi disagree, that they believe that
17 until there has been a formal order of transfer, I don't have
18 and Judge Rosenberg does not have jurisdiction.

19 What I wanted to do, Mr. Sedghani, was to give you an
20 opportunity to brief that issue, because it seems to me if I
21 conclude or Judge Rosenberg concludes we do not have
22 jurisdiction, then there is nothing else for us to do other
23 than to wait for the JPML.

24 If, on the other hand, we agree with BI that we do
25 have jurisdiction, then I need to move forward with briefing

1 and preparation of the substantive issue. I don't want to have
2 parties spend time and energy briefing a substantive issue if
3 we determine we don't have jurisdiction. In fact, the Eleventh
4 Circuit says I can't.

5 Mr. Sedghani, how much time would you like to brief
6 the issue of whether this Court has jurisdiction?

7 *MR. SEDGHANI:* Your Honor, on that issue, one of the
8 things I am not sure if you are aware or not, there is a first
9 filed action pending before the Northern District that would
10 resolve and possibly moot this Motion to Compel.

11 So, regardless of whether this Court has jurisdiction,
12 which we believe until the CTO is finalized and there is a
13 consolidation, we think that it -- because we are a third party
14 and we are a small company, it is costly to file these multiple
15 motions, we ask your Honor if you would be willing to at least
16 stay this Motion to Compel pending the outcome of what I
17 understand to be BPI's motion for a transfer of the first filed
18 action, as well as their CTO.

19 So, one way or another, we are going to get a ruling
20 of whether this case is going to be joined with the MDL or not,
21 and we think that there is no need at this juncture to rule on
22 their Motion to Compel.

23 *THE COURT:* You have given me facts I didn't know, so
24 let me turn to Mr. Shortnacy.

25 If I am understanding, have you moved -- I understand

1 you asked the JPML to transfer the case, but did you also move,
2 pursuant to Rule 45(3)(c), to the Northern District to have a
3 direct transfer occur?

4 MR. SHORTNACY: We have not done that, your Honor, but
5 we plan to do that, and we have informed counsel for Emery that
6 we are going to do that. We also asked for his consent so that
7 that motion is not necessary.

8 The opposition, BI's opposition to the Motion to Quash
9 is due today in the Northern District of California, so that
10 will go on file, and we will today or tomorrow make a formal
11 motion if that is required and Emery and Dr. Najafi won't
12 consent to the transfer, which means that we have a proceeding
13 happening in San Francisco, potentially a JPML. You know how
14 this movie ends in my view, and that is in your courtroom.

15 There is a lot of talk, I think, amongst the parties
16 for expedient disposition of these issues, but a lot of
17 satellite proceedings that are inconsistent with that. The
18 short answer to your question is, no, we have not done that,
19 but we intend to do it as soon as possible.

20 THE COURT: You are filing your answer to their Motion
21 to Quash, your response to their Motion to Quash in the
22 Northern District tomorrow. Will part of that answer be the
23 request to transfer or are you going to file a separate motion
24 to transfer?

25 MR. SHORTNACY: At this point, we are going to notice

1 them separately, but effectively I think it will be a cross
2 motion.

3 *THE COURT:* All right.

4 *MR. SEDGHANI:* Your Honor, just for clarification, it
5 is to be filed today, the opposition is due today.

6 *THE COURT:* Okay, I understand. I hear you, Mr.
7 Sedghani, but I am -- if I am going to determine that I have
8 jurisdiction, I don't have to wait for any of these other
9 Courts. I need to do that quickly. I am going to overrule
10 your objection. You don't have to file, you know, a Magna
11 Carta, you can just file what you think I need to know in order
12 to resolve the issue of whether, notwithstanding the face of
13 Rule 45, I still have jurisdiction.

14 How much time would you like to file that?

15 *MR. SEDGHANI:* Your Honor, I can make my position here
16 now and you can rule on that basis alone if you'd like.

17 *THE COURT:* Well, I haven't prepped for that, and I
18 don't think I have given Mr. Shortnacy time to respond or reply
19 to it.

20 Would you be able to file a jurisdictional response by
21 noon next Wednesday?

22 *MR. SEDGHANI:* We could do that, your Honor.

23 *THE COURT:* Very good. Why don't you file that.
24 Maybe in the interim something else will happen, but if not,
25 Mr. Shortnacy, at that point you can either call the question

1 or you can file a reply. I will set this down for a hearing
2 either toward the end of next week or the very beginning of the
3 following week, because I don't want this to drag out.

4 *MR. SEDGHANI:* Your Honor, would we at the same time,
5 in the alternative, be able to move to dismiss based on the
6 first filed action as well?

7 *THE COURT:* You can file anything you want to file.

8 My point is, I am not requiring you to respond on the
9 merits to the Motion to Compel. If you want to, you can, but I
10 am not requiring that. I can't get to that, nor could I get to
11 a Motion to Dismiss until I get to the jurisdictional question.

12 *MR. SEDGHANI:* No, I understand. Our opposition, for
13 the sake of clarity, is multi factorial. One of them is
14 jurisdictional; the other one is, even if this Court has
15 concurrent jurisdiction, if you would, it should still be
16 dismissed in favor of the first filed action which was filed in
17 the Northern District several weeks ago.

18 So, for either reason your Honor could dismiss the
19 Motion to Compel, but we just wanted to avoid having to do
20 burdensome briefing for your Honor.

21 *THE COURT:* Again, all I am ordering you to do now is
22 the jurisdictional brief. If you want to file anything else,
23 it may be irrelevant to the issue that I decide to address, but
24 you can file whatever you want to file. I will give you the
25 opportunity to file a jurisdictional brief by noon on Wednesday

1 and I will take it up immediately thereafter.

2 MR. SHORTNACY: Your Honor, may I make a point on the
3 timing?

4 THE COURT: Yes.

5 MR. SHORTNACY: Mr. Sedghani has indicated he is
6 willing to make his arguments now. I appreciate your Honor
7 allowing me some time to be able to reply and have that be a
8 formal process, so thank you.

9 I would also note for the Court that time is of the
10 essence, and if it is possible to even shrink those times we
11 are prepared to move quickly. What I worry, your Honor, is
12 that this information is necessary for our expert reports, and
13 time is ticking on that, and so -- and if we are talking about
14 just the narrow chunk of jurisdiction, but then we are going to
15 then litigate merits, I fear that is going to eat up a lot of
16 the clock.

17 THE COURT: Fair point. What I will do is, I will
18 order the jurisdictional response by noon on Monday.

19 MR. SEDGHANI: Your Honor, if we are required to file
20 a formal briefing, you know, I think it is only fair to give us
21 at least one week. Given that it is a foreign court, we'd have
22 to find -- so, to counsel's point, the motions are already
23 being briefed, they are filing their opposition.

24 So, to the extent that they are worried about the time
25 clock, the judge may rule on that shortly thereafter.

1 *THE COURT:* The jurisdictional issue is not being
2 briefed. I can't rule on anything until I am satisfied that I
3 have jurisdiction. I need to resolve that issue quickly. If
4 you want to file a jurisdictional brief, I will give you until
5 noon on Monday to file a jurisdictional brief.

6 We can address the merits thereafter. I may determine
7 I do not have jurisdiction and then you all are done with me,
8 but I need to get to that point as quickly as I can. That will
9 be the Court's order today.

10 Is there anything else on the Emery Pharma issue that
11 I need to take up, Mr. Shortnacy?

12 *MR. SHORTNACY:* No, your Honor.

13 *THE COURT:* Mr. Sedghani?

14 *MR. SEDGHANI:* Nothing from us, your Honor.

15 *THE COURT:* Thank you both very much. I will excuse
16 those parties.

17 Now let me go back to the Sanofi email issue. I will
18 invite back Mr. Gilbert and Mr. McGlamry and invite counsel for
19 Sanofi to make their appearances.

20 *MR. AGNESHWAR:* Bobby, are you going to make an
21 appearance?

22 *THE COURT:* I made it for him.

23 *MR. GILBERT:* I'll make it again. Robert Gilbert and
24 Michael McGlamry on behalf of the Plaintiffs. Thank you.

25 *MR. AGNESHWAR:* Your Honor, Anand Agneshwar, Arnold &

1 Porter, on behalf of Sanofi.

2 THE COURT: Good afternoon. I understand you have Ms.
3 Sharpe there with you as well.

4 MR. AGNESHWAR: I do, Judge, just in case.

5 THE COURT: Always a smart move on your part.

6 This is the issue relating to the non-preservation of
7 emails that I think I first heard about almost a year ago, and
8 I commend the parties, you have been working through the
9 process, and as with many other things, you have reached a
10 point where you need my help, so I am here to help you.

11 I understand there are some preliminary issues
12 relating to public disclosures that Sanofi wanted to raise or
13 talk about, and I am happy to address those before we start to
14 talk about the merits.

15 So, Mr. Agneshwar, let me -- let's all -- for the time
16 being, I think we all have a sense of what the issues are that
17 Sanofi has concerns about putting on the public record, so
18 until I rule one way or the other, why don't we stay at a very
19 generic high level and see if we can't have the discussion you
20 need to have.

21 Mr. Agneshwar, let me let you raise the issues you
22 wanted to raise only related to that, not as to the merits or
23 the underlying issue.

24 MR. AGNESHWAR: So, a couple things, your Honor. One
25 is, I appreciate the help with the legal research, and through

1 the special master, your sending over a couple cases. We did
2 look at those cases, as well as did some other research. As I
3 understand the law in the Eleventh Circuit, is there is a
4 distinction between proceedings that are merits based and
5 proceedings that are discovery based, and the right to public
6 access applies when the proceedings are merits based, as in one
7 of the cases involved a preliminary injunction or a TRO.

8 This case -- or this matter falls squarely in the
9 discovery aspect of this. These are Motions to Compel,
10 essentially, they are discovery, this is not being litigated on
11 the merits. So, I think there -- we don't even get to the
12 point where there is that public right of access, so I would
13 ask the Court, based on the case law that applies here, to make
14 these proceedings closed to the public since it is a discovery
15 motion.

16 Beyond that, though, your Honor, I think there are
17 other reasons why this should be a closed proceeding and the
18 proceedings kept private.

19 As the Court knows, there is the PTO 26, there is also
20 Rule 26(c) that allows the Court to close proceedings when
21 necessary, both because of competitive information and for
22 purposes of annoyance, embarrassment, oppression, or undue
23 burden or expense on a party.

24 I want to start with this latter point, too, because
25 that is simply the case here. The submissions in this case

1 implicate not just Sanofi's internal business practices, which
2 are competitive, but also they identify the names of
3 individuals that are kind of stuck in the middle of this thing.
4 These are people who are entitled to some expectation of
5 privacy.

6 Through no fault of their own, either because they
7 were a deponent at a particular time or they were one of the
8 unfortunate people whose emails didn't get -- their auto delete
9 wasn't turned off, their names are out there.

10 What happened a few months ago is that in a motion to
11 extend the schedule on discovery, Plaintiffs put in there some
12 briefing about this email issue in which they mentioned a
13 Sanofi employee by name who was about to be deposed and
14 mentioned that they got a call from us putting off the
15 deposition because we had started to learn about this email
16 issue.

17 Then what happened is that individual, who is really
18 just an innocent victim of this whole thing, is in the middle
19 of it, got written about in an article in Bloomberg News, and
20 it was embarrassing, and now that -- he Googled this person and
21 this article in Bloomberg comes out. It's not the type of
22 thing that should happen. It's not the type of thing that
23 really involves any public right to know in that situation. It
24 is embarrassing and humiliating.

25 Now, I didn't make a Federal case of it then, no pun

1 intended, but what I did do is, professional to professional, I
2 called Mr. Gilbert, who I have a reasonable relationship with,
3 and I said, Bobby, I understand you have to represent your
4 client, but can we not put people's names in submissions like
5 this when they are in the middle of this? Because when the
6 press picks up these things it causes embarrassment and
7 humiliation. I left that call believing that we had an
8 understanding that the Plaintiffs would not do that.

9 Apparently I was wrong about that, because in this
10 submission Plaintiffs requested five pages to address these
11 issues, and literally two and a half pages have nothing to do
12 with the discovery issues that they raised. Instead, the first
13 few paragraphs go on and address the same individual who was in
14 the middle of this whole thing unexpectedly last time around,
15 and it had nothing to do with the discovery motions.

16 What I am worried about is, if these proceedings are
17 open to the public and this is all talked about and these
18 filings are out there, then more articles like this are going
19 to happen that really have nothing to do with the merits of
20 this litigation.

21 Look, I think Plaintiffs have a right to do discovery
22 on these issues, we have tried to accommodate them. They have
23 a right to file whatever substantive motion they want, but they
24 don't have a right under the rules to oppress, humiliate and
25 embarrass innocent people at the companies who this was not

1 their responsibility whatsoever, and I worry, based on what I
2 have seen happening, that is what the intent is, and I don't
3 think the Court should countenance it.

4 *THE COURT:* Okay. Thank you. Let me hear from the
5 Plaintiffs on the issue of the request to close the proceedings
6 to the public.

7 *MR. GILBERT:* Thank you, Judge. Again Robert Gilbert
8 on behalf of the Plaintiffs.

9 Not surprisingly, we do not agree with Mr. Agneshwar's
10 position on a number of levels. First of all, Judge, let me
11 assure the Court that it has never been and is not our
12 intention to embarrass, humiliate, or, to use Mr. Agneshwar's
13 word, oppress any of the individuals from Sanofi that are
14 involved in the facts and circumstances relating to its
15 widespread destruction of emails.

16 That certainly is not the case and I am sure the Court
17 can discern that from reading our five-page submission. The
18 submission lays out the history of what took place here, it
19 identifies people by name where necessary, and when we move
20 forward with the merits of this discussion, I would refer to
21 those people only when necessary.

22 If one takes Mr. Agneshwar's comments to literally
23 their end point, he is suggesting that not only we close this
24 hearing now to the public, not only that our respective
25 five-page submissions -- by the way, they mention names as well

1 in theirs -- not only that those five-page submissions stay
2 sealed and never see the light of day, but he is also
3 suggesting, if this is his position, that ultimately the
4 Court's order addressing the merits of this motion, this
5 discovery dispute, and subsequent disputes that are likely to
6 ensue relating to the spoliation of evidence, he is suggesting
7 that the Court's ultimate orders not be public either.

8 That just flies in the face of not only logic, but it
9 flies in the face of one of the cases that Mr. Agneshwar cited
10 in their PTO submission, the Blue Cross Blue Shield case from
11 the Northern District of Alabama, where the Court wrote a
12 lengthy detailed opinion granting in part, denying in part
13 discovery relating to a spoliation situation, not all that
14 dissimilar from ours.

15 Throughout that opinion the Court identified the
16 various actors involved because it was necessary to do so for a
17 factual basis.

18 So, to close the loop here, Sanofi, in order to try to
19 keep this from the public eye, in order to keep this hidden
20 under the carpet, has literally designated virtually every
21 single document that they produced, a thousand documents -- 330
22 of them were completely redacted, the other 660 that were not
23 completely redacted, virtually every single one has been
24 designated highly confidential.

25 They told us that every single email we exchange is

1 designated as highly confidential. They told us after we filed
2 our submission yesterday that our submission is highly
3 confidential, and essentially we are at a place where they
4 simply are unwilling to acknowledge that, with certain
5 limitations where trade secrets or other protectable rights are
6 involved, that litigation should take place in the public eye,
7 and that is what we believe, and that is what we think should
8 take place here.

9 *THE COURT:* Thank you, Mr. Gilbert.

10 All right. I am going to deny the request to close
11 these proceedings.

12 First of all, there is a general constitutional right
13 of the public to have access to criminal and civil proceedings.

14 Now, the right in a civil proceeding is more limited
15 than it is in a criminal proceeding, but there is still a
16 baseline right to have the Courts of the United States operate
17 in the open eye.

18 Now, they are always subject to the bounds of Rule
19 26(g) -- Rule 26(c) for protective order, so for good cause,
20 items can be sealed, items can be closed off to the public.
21 But as with any other infringement on a First Amendment right,
22 any limitation has to be narrowly tailored to protect only the
23 particular interest at stake here.

24 So, I take Mr. Agneshwar at his word this is causing
25 embarrassment and professional problems potentially for

1 employees of Sanofi. I think that issue can be dealt with
2 rather easily by redacting names and not mentioning names. We
3 have done that before. But I don't think it calls for the
4 wholesale closure of these proceeding to the public, so I deny
5 that request.

6 Let me also explain, the issue of what is marked
7 highly confidential, not marked highly confidential is of no
8 moment to me. As PTO 26 makes very clear, that is between the
9 parties as to how the parties will use discovery material, as I
10 might say, behind the curtain, outside the courtroom. What you
11 are doing in your depositions, what you are doing in your trial
12 preparation, what you are doing not in the public courtroom is
13 bounded by PTO 26.

14 PTO 26 explicitly says that it does not apply to court
15 proceedings and that the court proceedings will be governed by
16 local Rule 5.4. The issue before me is not whether something
17 is confidential or highly confidential, or otherwise; it is
18 whether it should be sealed under the standards articulated in
19 Rule 5.4 and by the Eleventh Circuit.

20 So, for the time being, I think the proper procedure
21 is, and what I will deem to have happened here at least for the
22 time being, that all of the submissions that were made for
23 purposes of this hearing are presumptively being held under
24 seal because they have to be part of a record. If anybody
25 appeals this, the Eleventh Circuit has to have access to the

1 unredacted materials.

2 We will now move into a discussion of what ought to be
3 redacted, what can we talk about, what can't we talk about, and
4 I think at that point we can then talk about the merits, but I
5 want to take this in the correct order so that we are not
6 infringing on anything.

7 I will also note, and I am not concerned about this of
8 any of the parties in this case, that at least under the
9 Florida Bar rules, which do apply to the practice in the
10 Southern District of Florida, Rule 4-4.4(a), as in alpha,
11 states that "in representing a client a lawyer may not use
12 means that have no substantial purpose other than to embarrass,
13 delay, or burden a third party, or knowingly use methods of
14 obtaining evidence that violate the legal rights of such a
15 person."

16 So, it is just the ethical statement of showing
17 respect to third parties and not simply throwing people's names
18 into the public record for the fun of it. Again, I am not
19 suggesting anybody has done that. I just think it is important
20 that we step back and remember that. Also, the standards of
21 professionalism that have been adopted by the Florida Bar would
22 also be something the parties should think about.

23 With that being said, I think the way we deal with --
24 let me turn back to Mr. Agneshwar. In looking at your
25 materials, it seemed to me the areas that were arguably the

1 most sensitive, and I will let you expand on this, were the
2 names of the individuals -- and I think we can deal with them
3 today simply by title -- I think there are only two or three
4 that popped to my mind. There's the gentleman who was supposed
5 to flip the switch and didn't flip the switch, and there was
6 this other gentlemen whose deposition had been set, but never
7 taken. Those may be the only two name I recall seeing in
8 looking through the materials.

9 To the extent we can refer to people by either job
10 title or some other generic reference, I think that would be
11 the best practice. That would be my order for us to deal with
12 the matters today.

13 Whether those names should then be redacted in the
14 attachments and the discovery memo should be unsealed, that is
15 my intention. My intention is to unseal all the submissions
16 that were made in support of today's proceedings, but subject
17 to redaction. I think there is a lot of stuff in there that --
18 one of the attachments is the resume of the computer expert who
19 I think Sanofi has retained. I don't see any universe in which
20 that needs to be under seal.

21 There is in there correspondence between the parties,
22 much of which has nothing to do with anything I would think
23 needs to be under seal.

24 I would not foreclose that there are parts of this
25 that should be under seal, but I don't think all of it needs to

1 be under seal.

2 With that rather long windup, Mr. Agneshwar, other
3 than the names of those individuals and I would suspect the --
4 I think it was in your Exhibit A where in the root cause
5 analysis you talked about some internal processes for how
6 Sanofi technologically implements its litigation hold. Other
7 than those two areas, which at least to me struck me as
8 arguably sensitive and arguably subject to sealing, what else
9 is it that you are trying to seal?

10 MR. AGNESHWAR: Your Honor, I think you put your
11 finger on it, certainly the names of individuals, and I really
12 appreciate your Honor's willingness to redact those and have us
13 talk about them by title or some other means, as long as
14 everyone can identify them, but the other thing is exactly
15 that, the internal processes of how the legal hold works at
16 Sanofi.

17 The one other thing is the root cause analysis itself.
18 The root cause analysis reflects an investigation by counsel
19 that was done after this issue was identified, and it was
20 produced to the Plaintiffs with an understanding that it did
21 not constitute a waiver of any -- with an agreement, really,
22 that it did not constitute a waiver of the privilege of any of
23 the underlying conversations, or communications, or
24 investigation that led to that report, but in a good faith
25 effort to try to be very transparent with the Plaintiffs and

1 the Court, we would provide that.

2 I have some qualms about that root cause report being
3 out there in the public record at all. I don't want somebody
4 else to come in who is not party to this agreement and claim
5 that that constituted a subject matter waiver of that material
6 that is addressed to the root cause report.

7 Those, I think, are my concerns.

8 *THE COURT:* To that latter matter, and frankly, I
9 haven't looked at this question, if you think that there is a
10 mechanism under Rule of Evidence 502 where the Court could
11 enter an order that would essentially adopt the agreement of
12 the parties in a way that could be binding on third parties --
13 I seem to have some general recollection that rule 502 may
14 allow for that.

15 I would certainly entertain a motion to that effect if
16 the parties thought that would accomplish something that the
17 parties wanted to accomplish. I am not saying I would grant
18 it, but if that is what you are trying to accomplish -- and I
19 will hear from Mr. Gilbert in a second -- if they don't oppose
20 protecting yourself from other third parties, that may be a way
21 to get there. I appreciate that.

22 Let me hear from Mr. Gilbert on any of the topics we
23 raised.

24 *MR. GILBERT:* Sure, thank you, Judge. For Ms. Stipes
25 purposes, Robert Gilbert on behalf of the Plaintiffs.

1 I have no problem today referring to the individuals
2 involved by a title or some description that will be meaningful
3 enough so that Mr. Agneshwar and the Court know who we are
4 referring to.

5 There are some individuals that we need to talk about
6 who are not identified in the papers that we submitted because
7 they go to the issues -- the merits of the issues, the
8 discovery dispute. I can refer to them by the departments they
9 work in and give their initials, and I think that should be
10 enough so that Mr. Agneshwar will know who they are, and we can
11 supplement the record later so the Court knows exactly what
12 their full name is.

13 I have no problem redacting those names that are set
14 forth in our submission or the other side's submission in the
15 publically filed copy. That was really not a problem for us
16 from the beginning.

17 The balance of the exhibits that are attached to our
18 submission that we put in, as you noted, correspondence between
19 the lawyers, the deposition notices themselves and the
20 responses that Sanofi served where they designated their
21 responses as highly confidential, we would object to those
22 being under seal. There is no good faith basis we can think of
23 for them to remain under seal.

24 If there are names identified in any of those
25 documents and Sanofi wants to redact those names, I won't

1 oppose that for the time being.

2 With regard to the root cause report, your Honor,
3 we --

4 *THE COURT:* I am sorry to interrupt you, Mr. Gilbert.
5 Rather than arguing in the abstract, does it make sense -- I
6 have given you my view and I am not going to seal all of it.
7 Does it make sense, Mr. Gilbert and Mr. Agneshwar, for me to
8 say to Sanofi, I am holding them under seal for now, I am going
9 to lift the seal in X number of days, but in the meantime, I
10 will give Sanofi an opportunity to file a more formal motion to
11 seal where they can identify the specific -- and they can file
12 that motion under seal -- items that they want to continue to
13 be under seal.

14 That way, Mr. Gilbert, you are focusing on a more
15 specific target rather than what you and I thought off the top
16 of our heads today.

17 *MR. AGNESHWAR:* Absolutely, your Honor. I'm sure I
18 can sit down with Mr. Gilbert and probably work out a lot of
19 this and at least narrow it down to one or two things.

20 *THE COURT:* Mr. Gilbert, I didn't mean to truncate
21 your argument, other than I don't want you to spend your time
22 on something today when you could work things out.

23 *MR. GILBERT:* I appreciate you suggesting that, Judge,
24 and I think that is a good idea, so that we are not shooting in
25 the abstract, and Mr. Agneshwar can send us a list of those

1 things that he wants sealed, to remain sealed in part or in
2 full. We will consider it and turn it around promptly, and if
3 we are not in agreement on all of them, he can file a motion as
4 to those that we are not in agreement on and we will respond.

5 *THE COURT:* Wonderful. That will be the procedure
6 that I will instruct the parties to follow. I will instruct
7 the Clerk of the Court to file the Plaintiffs' discovery memo
8 and its attachments, the Defendants' discovery memo and its
9 attachments under seal for the time being, subject to further
10 order of the Court.

11 All right. Finally, let's get to the merits after
12 that long windup. I did have a chance to review the issues,
13 and just so I can make sure that I am looking at the right
14 framework that you are looking at, this was -- the discovery
15 here is directed to help the Plaintiffs determine whether they
16 are entitled to a remedy under Rule 37(e), which deals with the
17 non-preservation of electronically stored evidence.

18 So, the standard under Rule 37(e) is, first, whether
19 the -- in this case Sanofi should have preserved the materials
20 in anticipation of litigation. I don't gather that is really
21 in dispute here. I think Sanofi agrees that it intended to put
22 a hold on, but for whatever reason the hold didn't take effect.
23 Anyway, that is the first thing, do we have a dispute as to
24 whether the evidence in question should have been preserved.

25 The second question is, was it lost because Sanofi

1 failed to take reasonable steps to preserve? I expect that is
2 going to be an issue in dispute that I will have to resolve at
3 a hearing. That's fine.

4 The third question is, if the evidence was not
5 preserved, can it be restored or replaced with additional
6 discovery? I sense that is also going to be a factual
7 question. I saw some remediation reports where Sanofi is
8 taking one position. I think the Plaintiffs are entitled to
9 take some discovery to challenge the position Sanofi is taking.

10 The next issue is, at that point, if the Plaintiffs
11 can show prejudice, what other steps should the Court take that
12 are no greater than necessary to cure that prejudice? Okay.
13 You are entitled to discovery possibly on that.

14 And also if Sanofi acted with an intent to deprive the
15 Plaintiffs of the information, then more significant sanctions
16 can be imposed. It seems to me that is the measuring stick
17 that I have to measure the discovery request against here.

18 Do you agree at least for a framework that is correct,
19 Mr. Gilbert?

20 *MR. GILBERT:* I agree that that is correct, Judge,
21 with one potential caveat, and that is, I am not certain
22 sitting here whether 37(e) is the sole basis that we would be
23 entitled to relief under. There may be other bases for relief,
24 but I do agree with the balance of what you said.

25 *THE COURT:* You can tell me if you want to, you don't

1 have to, but if there is going to be some other basis that you
2 are going to be seeking potentially a remedy and you are going
3 to argue that the evidence you are looking for today may not be
4 relevant to a Rule 37(e) analysis, but might be relevant to
5 some other analysis, you will need to tell me that at the
6 appropriate time.

7 *MR. GILBERT:* I understand.

8 *THE COURT:* Hold on one second, my computer is about
9 to run out of juice. Pardon me.

10 All right. With that, I appreciate the Plaintiffs
11 have laid out their requests. Very simply, there are five
12 issues that they want to address, some of them are overlapping.
13 If we can, Mr. Gilbert, let's use your -- first of all, before
14 I do that, Mr. Agneshwar, do you agree I at least have the
15 right framework for purposes of the discovery analysis that I
16 need to make?

17 *MR. AGNESHWAR:* Yes, your Honor.

18 *THE COURT:* Okay. The first issue that the Plaintiffs
19 wanted to raise has to do with Sanofi's position that the only
20 custodian for which they should have to produce Rule 37(e)
21 related discovery is the individual who was responsible -- the
22 individual in the IT department who was responsible for
23 implementing the hold.

24 So, Mr. Agneshwar, let me hear from you as to why it
25 is that you believe -- I guess it's Mr. Gilbert. Mr. Gilbert,

1 let me hear from you as to why you think that objection should
2 be overruled.

3 MR. GILBERT: Yes, your Honor.

4 Let me cut to the chase because the hour is late, and
5 I think that you've obviously had an opportunity to review our
6 respective submissions. You understand the background to how
7 we got here. We have also taken that individual's deposition a
8 couple weeks ago where we gleaned some additional information.

9 So, let me tell the Court straight up, there are
10 approximately five other individuals, it may be six, who we
11 believe should have been searched with regard to responsive
12 documents as to certain of the document requests that are at
13 issue here.

14 They are three people in the IT department, there are
15 two people in the legal department. Two of the people in the
16 IT department are the individual -- the direct supervisors of
17 the individual who we deposed, one of them goes by the initials
18 JN, the other by the initials TR. There is a coworker in the
19 same department who is engaged with the individual who we
20 deposed, she goes by the initials of SH.

21 These three individuals, according to the testimony of
22 the person who we deposed last month, according to the
23 documents that were marked as exhibits during his deposition,
24 according to the documents that have been produced to us, the
25 600 some-odd pages of documents we reviewed, these three

1 individuals were involved with the gentleman whose deposition
2 was taken on an ongoing regular basis in connection with all of
3 his duties and responsibilities at Sanofi, but in particular,
4 the female individual was involved with him directly on issues
5 relating to the Zantac legal hold.

6 Our position is that with respect to request numbers
7 3, 7, 9, 10, and 23 through 27, that there is simply no way
8 that Plaintiffs could have sufficient opportunity to discover
9 the facts that would enable us to make a good faith showing,
10 under Rule 37(e) or any other basis, any other subsection of
11 Rule 37, that would entitle us to relief absent discovery of
12 this information.

13 I am not going to get into what Mr. -- I appreciate --
14 let me digress for just a second.

15 You noted earlier in your opening remarks, and Mr.
16 Agneshwar noted as well, we have worked reasonably well
17 together. There is a lot we agree upon and a lot we are able
18 to get done, but at the end of the day, we represent different
19 sides, and each side has very different positions on these
20 issues, and I respect Mr. Agneshwar's positions and I know he
21 respects ours.

22 The issues that -- the position that they are taking
23 that it was their understanding -- and he was very careful and
24 I appreciate his candor in their submission -- that it was his
25 understanding, because there was never an agreement, it was his

1 understanding that they were only going to have to look at the
2 one individual's custodial file for responsive documents was
3 never an agreement that we reached.

4 It is nowhere memorialized in any of these documents.

5 *THE COURT:* Let me cut to the chase with my question,
6 Mr. Gilbert, which is, these other four or five people, the
7 evidence you want to get from them, does that pertain to
8 prejudice to you? Does it pertain to whether Sanofi took
9 reasonable steps to preserve? Does it pertain to whether this
10 evidence can be restored? What does it pertain to under Rule
11 37? What is it relevant to?

12 *MR. GILBERT:* It relates to whether Sanofi took
13 reasonable steps to protect and preserve this information.

14 *THE COURT:* Why do you believe that there would be
15 evidence that you would obtain from these other individuals
16 that would be not -- that would be additional to what you have
17 already gotten from the one person who apparently was supposed
18 to be doing this?

19 What I am gathering is, what you would really get
20 there is the communications among these people to which this
21 targeted individual was not included, and the supervisors, you
22 would get those, which is what you are not getting. Why would
23 that show failure to take reasonable steps?

24 *MR. GILBERT:* Because, Judge, when the entire story is
25 told, what the Court will hear is that this one low level

1 employee working in the IT department, the access management
2 department, was charged with responsibility for taking data
3 that was supposed to be uploaded weekly, sometimes it didn't
4 happen weekly, sometimes it happened every other week, uploaded
5 on a periodic basis by the legal department, checking that data
6 against other data that was already in existence for
7 individuals who were already on a preexisting hold, updating
8 the information in the system so that the newly added
9 individuals were in the queue to be added to the legal hold, it
10 is inconceivable that a company of Sanofi's stature and size
11 could have left the responsibility or ensuring that it complied
12 with court preservation orders which exist in this case, as
13 well as its own common law legal obligation to preserve, could
14 have left this entire responsibility on the shoulders of this
15 one, frankly, low level individual without any supervisory
16 functions being undertaken either by the one or two individuals
17 in the legal department who were in charge of implementing the
18 legal holds, and/or by the three individuals in the IT and
19 access management department who were responsible for and
20 communicated with this individual on a recurring basis
21 regarding the ongoing status of legal holds.

22 For example, there is a reference in our submission to
23 a document that was marked as an exhibit during the deposition.
24 Mr. Agneshwar asked right before the hearing to submit it to
25 the Court, and we have no objection to it being submitted to

1 the Court.

2 That email thread marked as an exhibit during this
3 recent deposition clearly demonstrates that the female member
4 of the access management department was inquiring of the
5 individual who we deposed as to the status of his updating of
6 the legal hold information.

7 There are similar emails back and forth between the
8 two gentlemen who are the direct supervisors for this
9 individual, and to suggest that we should only get emails that
10 are from -- that where the gentleman who we deposed was either
11 the sender, the recipient, or a CC on that email is -- doesn't
12 make sense.

13 There would never have been an email where Mr. I was
14 copied or was a sender or recipient where his supervisors were
15 saying, oh, this person didn't do this, what are we going to do
16 to cure it? This person didn't do this because we have a
17 system that is not working, or we have a system that is
18 archaic, or whatever the explanation is.

19 My point is that we have been given literally a
20 keyhole to look through, but the door hasn't been open, and we
21 are not seeking to open the door and to go into every single
22 room in the house. We are seeking to get information from the
23 key people involved in this so that we can understand the full
24 facts surrounding how this, frankly, massive email destruction
25 occurred, how it wasn't picked up sooner, why it wasn't picked

1 up sooner, why other steps weren't taken to prevent it from
2 occurring this way, all part of our required showing under Rule
3 37(e) or any other subsection of Rule 37.

4 *THE COURT:* Thank you. Let me hear from Mr.
5 Agneshwar.

6 *MR. AGNESHWAR:* Thank you, your Honor. When the Court
7 asked Mr. Gilbert what is your basis to think that there are
8 other relevant materials there, I think his answer, if I could
9 sum it up, is it is just incredulous that there wouldn't be
10 other materials there. I submit, your Honor, that that is not
11 showing a particularized need for more information.

12 Just to take a step back to 30,000 feet here, when I
13 first came to your Honor with this information, when we first
14 identified what happened, we learned that there were two steps
15 in a process that let this happen.

16 One, an individual who was supposed to enter a script
17 that would set in motion an auto delete to be turned off for
18 people on hold didn't do his job properly. Several months went
19 by without him doing his job.

20 And the second thing was a quirk in the Microsoft
21 Office 365 software where the script to auto delete didn't
22 happen.

23 We then spent months doing a root cause analysis, and
24 we came up with -- we confirmed that is what happened. We sent
25 it to the Plaintiffs, we told them this is what happened. We

1 told them nobody else knew that this guy in IT was not doing
2 his job so the auto delete function wasn't being turned off,
3 and then we produced this individual for deposition to the
4 Plaintiffs and we had a 30(b)(6) witness interview all the
5 relevant people to do an investigation that the Plaintiffs
6 could probe into.

7 All of this confirmed the same thing, that this
8 individual was not doing his job on a regular basis to set in
9 motion the turning off of the auto delete function.

10 Mr. Gilbert questioned him a couple weeks ago, he
11 testified in no uncertain terms that it was his failure to do
12 it, and he didn't tell anybody. Nobody knew it other than him.

13 We put in a declaration from our 30(b)(6) witness, and
14 that person who interviewed the relevant people said that
15 nobody else knew about this other than this individual who did
16 that.

17 Mr. Gilbert may be incredulous, but those are the
18 facts and there is no evidence to suggest that that is not the
19 facts and his incredulity is not a basis to allow more
20 discovery on this issue.

21 Now, Mr. Gilbert said one other thing and I think it
22 harkens back to what you said at the beginning, they have a
23 burden here. They have a burden to show that we did not take
24 reasonable steps to preserve evidence.

25 Now, I agree that they are entitled to take discovery

1 to see if they can meet that burden. We have already told them
2 that we weren't preserving these emails the way we should have
3 been because this issue is happening.

4 The question then becomes what were the processes that
5 we had in place? How could this happen? Were those processes
6 reasonable, not that this was something that legitimately fell
7 through the cracks, or was it something that we had
8 unreasonable processes in place and it shouldn't have fallen
9 between the cracks?

10 That is substantially the question in issue number one
11 in this analysis, and we recognize that, and we are producing a
12 30(b)(6) witness, the witness is scheduled on January 31st and
13 February 1st, over two days, to answer any of Mr. Gilbert's
14 questions about what he is saying to your Honor, how could this
15 happen, what were the parts of the process.

16 His speculation that somebody might have known things
17 in the face of all the evidence does not justify more
18 discovery.

19 The last thing I want to say is that this was not a
20 unilateral decision by Sanofi saying we are only going to give
21 you one custodian. We have bent over backwards, literally it
22 has been -- I looked back at the transcript, funnily enough, it
23 is a year ago and we were all saying Happy New Year to each
24 other last year, and you can read it in the transcript, and now
25 we are doing it again.

1 Well, why has it been so long since we were here?
2 Because we have had meet and confer after meet and confer after
3 meet and confer and we have been getting Plaintiffs things over
4 and over again. We have done searches for processes, and we
5 discussed -- we told them we were going to provide this IT
6 individual's file. We even had discussions and negotiations
7 about the search terms we were going to be using to search this
8 individual's files.

9 The Plaintiff served a subpoena to the contracting
10 company that employed this individual and placed him at Sanofi
11 and got documents from there, too. At no point did the
12 Plaintiffs say -- and they knew what our story was, what
13 happened, since we gave them the root cause analysis. At no
14 point did they say, you know what, that individual is not
15 enough, we need to see some other custodians, so let's start
16 talking about search terms for that.

17 The five or six people that he is talking about today,
18 I am hearing it for the first time today, and this is two weeks
19 before discovery is closed.

20 Your Honor, based on what we produced, based on the
21 root cause analysis, based on the sworn testimony of their IT
22 employee, based on the declaration submitted by our 30(b)(6)
23 witness, there is no cause for any additional discovery on this
24 issue.

25 MR. GILBERT: Judge, may I?

1 *THE COURT:* Yes. Let me let Mr. Gilbert get the last
2 word.

3 *MR. GILBERT:* Judge, several things. Number one, they
4 attached to their submission yesterday the declaration of their
5 hired gun, 30(b)(6) designee, their paid expert who is serving
6 as their 30(b)(6) designee when we take her deposition later
7 this month. In it, as Mr. Agneshwar acknowledges, she
8 interviewed the supervisor and other employees that work with
9 this individual, so she has been allowed to interview those
10 employees, but we are not being afforded the opportunity to
11 look at what they said in real time about what Mr. I was or was
12 not doing. That is not fair.

13 Number two, the period of time -- I realize that when
14 we served the deposition notices we asked for a broader period
15 of time, but we have made it clear to Sanofi's counsel that we
16 are looking at a very narrow window period here. It starts
17 basically on September 1, 2019, two weeks before the legal
18 holds for Zantac were implemented, and it ends in late 2020,
19 when Sanofi's counsel claims they discovered this issue.

20 We are talking about 13 or 14 months of five
21 individuals who played a direct role and had responsibilities
22 far greater than this one low level IT person who was supposed
23 to open this information from legal.

24 It is fundamentally, in our view, unfair to allow one
25 side to keep possession of this information when the burden

1 falls on us to try to make the showing that Sanofi did not
2 exercise reasonable care in implementing and effectuating and
3 fulfilling its legal hold obligations.

4 And the last point I would say is this: If the Court
5 wants to get a vignette into what we are talking about, I would
6 be happy for your Honor to look at the six or seven -- I think
7 it was a total of ten exhibits marked during this recent
8 deposition. They include most of the individuals' names who we
9 are talking about here.

10 I would be happy for you to look at them so that you
11 can educate yourself to see how these individuals clearly are
12 in the loop, and we don't know what they were saying or not
13 saying behind the scenes.

14 *THE COURT:* You gave me 151 pages with your
15 submissions. Did you give he me those exhibits? I would have
16 looked at them if you had given them to me. Were they
17 included?

18 *MR. GILBERT:* They were not included, your Honor. We
19 referenced one of them by Bate stamp number, but the deposition
20 and the exhibits just came in literally over the new year. We
21 did not include them in our submission. As I said before, Mr.
22 Agneshwar asked before this hearing to submit the one exhibit.
23 I would be happy to submit them all to the Court.

24 *THE COURT:* I am not criticizing, I just wanted to
25 make sure I didn't miss them.

1 Look, it seems to me here is where we are, and this is
2 not unusual in a lot of the discovery I do, on the one hand we
3 have people on the Sanofi side who -- the 30(b)(6) witness will
4 testify, the individual has testified under oath to facts, and
5 we have the Plaintiff saying that is all fine and good, they
6 are saying that today, but we would like to look at their
7 emails and communications in real time because it is easy to
8 say something today that is different from what you said back
9 then.

10 The crystal ball that I have to look into is to say,
11 well, how likely is it? Is that worth the exercise to go and
12 dig out a bunch of emails to see if we are going to find this
13 needle in a haystack? And I recognize the Plaintiffs have the
14 burden here, and I recognize, you know, sometimes that is a
15 tough burden to overcome.

16 I just don't see that this is proportional to the
17 needs of the case at this point. You have the procedures, they
18 have testified to what they did. I think we are looking for a
19 needle in a haystack, and I simply don't have enough evidence
20 to suggest to me that that inference is likely, that we are
21 likely to find something where they are going to say, hey, look
22 at what Mr. X is doing, and good for him, he should keep doing
23 it because that is going to keep the other side from getting
24 evidence, or hey, did you hear what he's doing, oh my God, but
25 don't tell the boss because we are not going to do anything

1 about it.

2 That would be purely speculation on my part to
3 conclude that that sort of evidence is likely to be found. So,
4 I find it is too speculative and not proportional, and so I
5 will sustain the objection as to requiring production from the
6 additional custodians.

7 Let's go to the next issue, which is documents and
8 communications that identify each Sanofi employee who was
9 subject to a legal hold.

10 Why is that relevant to one of the four or five
11 factors that you have to prove under Rule 37?

12 *MR. GILBERT:* Again, your Honor, it goes to two
13 factors here. It goes to the factor relating to steps that
14 Sanofi should have taken and did not take to fulfill its
15 obligations under the legal hold and the preservation orders.
16 It also goes to the issues of remediation and the pool of
17 documents from which Sanofi has drawn.

18 Our expert, who will submit his own declaration at the
19 appropriate time, when we get to the point of filing a formal
20 motion, believes that it is critical to have the opportunity to
21 evaluate the success or lack thereof of Sanofi's remediation
22 program to weigh the information regarding when these
23 individuals were identified to be on legal hold, when they were
24 actually placed on legal hold, when their auto delete function
25 was disabled, and when they were transferred from the old

1 Sanofi system, old legal hold system to the 0365 system.

2 Those are the four elements we have asked for. Sanofi
3 agreed to provide that information, but they only agreed to
4 provide it for the tranche one and tranche two custodians,
5 approximately 50 percent of whom are affected by the email
6 destruction.

7 So, we need that information from the other Sanofi
8 custodians who were placed on legal hold because they pulled
9 emails as part of their remediation program from this entire
10 universe. We need to see the dates that those things occurred
11 with regard to the other custodians so that we can evaluate the
12 success or failure of their remediation program, as well as
13 whether or not the hold itself was implemented through
14 reasonable steps.

15 *THE COURT:* If I read the materials correctly, and I
16 understood them, what you were provided with was a spreadsheet
17 that was redacted. Am I correct in that? And the tranche one
18 and tranche two custodian entries were not redacted, and these
19 other folks that you want were redacted. Did I read that
20 correctly?

21 *MR. GILBERT:* We were provided with a spreadsheet
22 where the tranche one and tranche two custodians were not
23 redacted. The other custodians on the Sanofi legal hold were
24 redacted, but beyond that, there are many other people who were
25 redacted because they are on a different legal hold. We have

1 no issue with that.

2 Let me be clear, we are not looking for information
3 about employees of Sanofi who were not on a Zantac legal hold.
4 We are only interested in employees at Sanofi, there are
5 approximately 388 of them, and approximately 200 of them had
6 their emails destroyed in whole or in part.

7 We believe that we are entitled that information. We
8 believe that information is relevant to the analysis here both
9 with regard to the root cause, as well as to the remediation,
10 and that is what we have asked them to do, give us the same
11 information for all 388 that you gave us for the 30 that were
12 the tranche one and tranche two custodians, and it is all there
13 in the spreadsheet.

14 *THE COURT:* Understood. Again, this is something your
15 expert says your expert needs to complete their analysis.

16 *MR. GILBERT:* Correct.

17 *THE COURT:* Thank you. Mr. Agneshwar.

18 *MR. AGNESHWAR:* Yes, your Honor, just to make a
19 clarifying point, there was no expert declaration attached.
20 Even in the submission that Mr. Gilbert provided yesterday,
21 there was no reference to an expert's need for this in
22 remediation, it wasn't a basis at all.

23 The sole basis Mr. Gilbert and the Plaintiffs made in
24 their submission yesterday was transparency. That was the
25 argument, beginning, middle and end, that they made in

1 yesterday's submission. So, there is no record here that any
2 expert needs this for remediation, nor does it make any sense.

3 As we have explained at length with the Plaintiffs,
4 the way remediation was done in this case was we had -- look,
5 we had the affected custodians, so we put them over here, and
6 then we looked at everybody else who was on the Zantac
7 litigation hold, and we searched their documents and combined
8 all their documents, and then we de-duped those documents.

9 So, we stripped out duplications, and that is a
10 standard practice, and we were left with a set of documents.
11 You cannot tell from those documents whose custodian files they
12 originally came from because they were de-duped, and so they
13 are just kind of generic documents.

14 Then, how we renamed them was, we assigned them to the
15 affected custodian who was to, from, CC'd, or BCC'd, so we
16 would know, say, of employee X who was affected we recovered X
17 number of emails that were to, from, CC'd or BCC'd to him or
18 her. So, that's how we did the remediation. We never did it
19 custodian by custodian, that data is not just there. It would
20 have been way too complicated.

21 This did come up in our discussions. Based on
22 yesterday's paper, I thought the Plaintiffs had abandoned this
23 argument based on what we told them. So, we asked them -- we
24 told them this is how we did remediation. We gave them a whole
25 remediation report for both tranche one and tranche two. We

1 said, maybe we are missing something, maybe there is some other
2 reason you need this for remediation. Tell you what it is.
3 Crickets, we haven't heard anything from them, including in
4 yesterday's submission.

5 There is also -- so I don't think remediation is an
6 argument at all. It is not in the submission to your Honor,
7 they can't make it up today.

8 Let's go back to what are they really getting at, and
9 what it is, your Honor, is a fishing expedition to see if they
10 can create additional legal hold issues. The general rule is
11 you don't get discovery on discovery; you get discovery on
12 discovery when you see something happening like emails being,
13 you know, not saved or whatever.

14 Here, just very simplified, there are two steps in the
15 process of this Sanofi legal hold. One is the step of outside
16 counsel and in-house counsel doing their investigation of the
17 case and identifying employee A, B, and C need to be on legal
18 hold. That is step one.

19 Step two in Sanofi's system is, the IT people take
20 that information and then they are supposed to effectuate
21 turning off the auto delete function.

22 What I have said from the beginning of this case --
23 not the beginning of the case, from last year around this time,
24 is that where things went awry here was not in step one, but
25 was in step two.

1 The issues about whether outside counsel and in-house
2 counsel properly put people on hold at the right time and did
3 their jobs accordingly is not an issue in the case, nor should
4 it be. It is privileged information because when we decided to
5 put employee Joe P. on legal hold involves our thoughts and
6 processes, our mental impressions of the case, our
7 investigation. If they are going to try to get that
8 information they need to have a darn good reason why, which
9 they have not articulated if that is what they want.

10 More than that, your Honor, what we have told them
11 since the beginning is, it didn't work. When legal told the IT
12 department put X, Y, and Z on hold, for a lot of people it
13 didn't happen. So, the real relevant date for all of these
14 individuals is not the date that outside counsel and in-house
15 counsel said we want to put Joe Blow on the legal hold, it is
16 the date their auto delete was actually turned off, because
17 that is the date on which documents finally started to be
18 saved, and we know that before then documents -- emails, emails
19 were not saved.

20 Actually, to resolve this issue I put myself in the
21 Plaintiffs' head and said, okay, maybe that is what they are
22 really looking for, the date that all these people's auto
23 delete was turned off, and we offered to give it to them for
24 all the Zantac custodians, and they haven't done it, they
25 haven't bitten on that. They don't seem to want that

1 information.

2 My big worry here is that they are not satisfied with
3 the extensive discovery they are getting into why the IT
4 department didn't take the steps to turn off the auto delete
5 function for a lot of these people, they are thinking to
6 themselves, maybe we can also create an issue of when the
7 lawyers put people on legal hold, and that is off limits and
8 inappropriate.

9 *THE COURT:* Thank you.

10 *MR. GILBERT:* May I respond, Judge?

11 *THE COURT:* Yes. If you would, address at least these
12 two issues and then anything else you want to address. One is
13 Mr. Agneshwar's argument that you didn't really raise the need
14 for the expert in your papers, and also the question about why
15 is it relevant when a person was directed to be on legal hold
16 as opposed to when their documents were actually preserved.

17 *MR. GILBERT:* I will. First of all, on the issue of
18 remediation, it is not correct to say that we have never
19 discussed it. We discussed the issue ad nauseam over the past
20 four or five months. If it is not in our five-page submission
21 it is only because every time we raise -- we raised it
22 vis-a-vis mediation with them, they say that is not good
23 enough. We raised it for root cause, it is not good enough.
24 When we put together the papers on literally 24 hours notice to
25 submit to the Court, it may not have made it in.

1 Mr. Agneshwar cannot stand here and tell the Court in
2 good faith that we have not discussed it at great length for
3 the past four months, because we have.

4 Number two, why is it relevant? Why is the date that
5 they were put on legal hold relevant? First of all, I am not
6 sure why Mr. Agneshwar is so focused on the idea that we are
7 trying to suggest that he or the in-house colleagues that he
8 works with put people on legal hold too late. That is not why
9 it is relevant.

10 It is relevant because if someone was assigned by
11 legal to be on legal hold on September 20, 2019, but their auto
12 delete device wasn't -- their auto delete function wasn't
13 disabled until January 1, 2020, that is a problem. It is a
14 problem because it shows that a period of four months went by,
15 or three months went by where all of their trailing emails for
16 that period of time, 120 days back, were being deleted at a key
17 time during the course of the development of this case.

18 Why is it relevant? It is relevant because, number
19 one, we need to know how much time lapsed between when the
20 legal department assigned them to be on hold and when the auto
21 delete device was actually disabled or not disabled, and we
22 need to know -- that period of time is critical. It is
23 critical to know it not only to know whether appropriate
24 measures were being taken not just by the one individual
25 involved, but by the legal department overseeing this process

1 and by the IT department overseeing this process, as well as
2 with regard to the remediation so we know how much time passed
3 between when they were put on legal hold and when their auto
4 delete device was disabled.

5 This is not about attacking inside or outside counsel
6 about when they chose to put Mr. X or Ms. Y on legal hold, but
7 without both the numerator and the denominator, you
8 cannot solve the equation.

9 *THE COURT:* Let me have you pause for a second.

10 Mr. Agneshwar, do you dispute that everybody should
11 have been placed on legal hold on September 20, 2019?

12 *MR. AGNESHWAR:* In candor, your Honor, I think
13 probably the majority of people were placed on legal hold in
14 September 2019, but your inquiry doesn't end then. You keep
15 investigating and as you learn more about the case you add
16 people from time to time, and as the Plaintiffs request
17 custodians, you go through that negotiation, they might have
18 identified someone that didn't come up in your investigation,
19 so you add that person later.

20 Here is the deal, your Honor, actually when we -- none
21 of this is in the papers, but when we did our remediation
22 analysis for the affected custodians, we made an assumption
23 that they all should have been placed on legal hold in
24 September 2019, and their emails were essentially missing until
25 April 2020, which was the end date for when we produced

1 documents.

2 The reality is, what we have told Plaintiffs all along
3 is, look, there are two steps in what happened here. The first
4 step was the IT employee not flipping the switch to get these
5 people off auto delete, but the other reality is when he failed
6 to do -- when he came back and did it like every few months,
7 for a lot of these people -- for most of these people it didn't
8 correct the problem because the script was not running on
9 Office 365.

10 So, the reality is most of these individuals, and we
11 have told them that, were only added to the legal hold and
12 their emails were turned off in November 2020.

13 *THE COURT:* I understand. I read the remediation
14 report, I read the submissions, I understand that.

15 For purposes of the discussion Mr. Gilbert is making,
16 he is -- I understand his argument, and it is the argument if
17 you should have put somebody on hold and you waited six months
18 as opposed to you waited a week, it suggests some different
19 intent, possibly. Some different inferences can be drawn from
20 that.

21 For purposes of defending whatever motion they are
22 going to file -- I had assumed Sanofi was taking the position
23 as of September 2019, everybody should have been on legal hold,
24 and if they weren't put on legal hold until October or
25 December or February, or whatever, that was our bad, that they

1 all should have been placed on legal hold in September.

2 Maybe you are right, maybe there are some people
3 around the edges that you and your team and the legal
4 department didn't know about. For purposes of this analysis
5 that I am ultimately going to have to do, are you really going
6 to defend this on the grounds of wait, wait, wait, we can point
7 to three people who actually didn't have to be on legal hold
8 until March, and so when we didn't put them actually on legal
9 hold until April, that's a defense, or are you going to
10 basically eat it for September?

11 *MR. AGNESHWAR:* Exactly, your Honor. We are not going
12 to defend this motion by saying that, oh, you didn't lose
13 anything because most of these people shouldn't have been added
14 on hold until November 2020. This is really the tail wagging
15 the dog, creating a whole lot of extra work for us.

16 The reality is here, the 800-pound gorilla in the room
17 is, and this is when I pull my hair out, is we have come out
18 and told the Plaintiff that most people, of the affected
19 custodians, were not added until November 2020.

20 What more do they need?

21 So, there is one thing they need to know, I will
22 concede, for prong one, which is what were the processes that
23 were in place at the company to control how people were added
24 to the legal hold, and then what happened after -- what should
25 have happened, what processes were in place after they were

1 added to the legal hold for the auto delete to be turned off,
2 and what were the processes to check when that happened.

3 That is all fair game for our 30(b)(6) witness. That
4 is why we negotiated with the Plaintiff that this 30(b)(6)
5 witness will be there to answer these questions about the
6 process so they can try to make the case that we didn't take
7 reasonable steps to preserve documents.

8 But whether Joe Blow was added in October 2019 or
9 March 2020, when we know the lion's share of people were
10 probably added in September 2019, and the lion's share were
11 probably -- the auto delete wasn't turned off until November
12 2020, this is just -- I can't conceive of how it is going to
13 help their case, especially when for remediation you just can't
14 identify the custodians because we pooled all of those
15 documents, we de-duped everyone and we assigned them, not to
16 the custodian from whom the documents came, but the custodian
17 whose documents we were remediating.

18 This is -- all it is doing, and really, your Honor,
19 all it is doing is adding another thing for them to possibly
20 shoot at.

21 Now, if there was a way -- and also, by the way, we
22 have also produced to them in these spreadsheets -- they know
23 all the dates that legal was sending reports to the IT person
24 saying we have added people on legal hold. We know when those
25 reports were done, and we know when the IT person was turning

1 on the switch and not turning on the switch. So, they have all
2 the data there to show you got a report here from legal, you
3 got a report here from legal, what did you do with that. They
4 have all that data.

5 Now, maybe if there was a way to -- by the way, we
6 also told them, would you be willing to agree that if we
7 provided you this data, that you will agree that you are not
8 going to use it to start coming at us and start another front
9 in this war about whether we appropriately added people to the
10 legal hold on a timely basis.

11 At first they said they might consider that and then
12 they wouldn't agree to that, so that, as you can imagine,
13 raised my suspicions even more.

14 Maybe, if there was a way to do this, that we could
15 say this many people -- in September 2019, it was this many
16 people, in March 2020, it was this many people, and we can give
17 it to them by numbers or something, maybe we can do something
18 like that, but this idea of just getting free discovery on
19 discovery that reflects our investigation without any
20 particularized showing by them, without any reason that it
21 applies to remediation, I think is really going too far, your
22 Honor, especially when their one-paragraph submission yesterday
23 provides nothing except the word transparency.

24 *THE COURT:* I get Mr. Gilbert's point, I do limit you
25 on your pages. I am not overly formalistic about that.

1 I will give Mr. Gilbert the final word.

2 MR. GILBERT: Judge, I feel like we are living in an
3 alternate universe here. We didn't create this problem, Sanofi
4 created this problem. We are trying to get to the bottom of
5 the problem.

6 If Mr. Agneshwar and his client are willing to
7 stipulate today that all 388, whatever exact number is, of the
8 custodians that they have identified should have been placed on
9 hold as of September 20, 2019, they don't have to provide us
10 with that particular column, but we do need, for purposes of
11 satisfying our burden, the date that each of those people had
12 their auto delete devices actually disabled, the date that they
13 were transferred to 0365, and there was a third date that I am
14 not remembering now that I articulated earlier.

15 They have previously provided that information. In
16 fact, he has reaffirmed to you today that they are willing to
17 provide that information. And you asked him, are you really
18 going to contest this issue about when they should have been
19 put on hold?

20 If they are willing to stipulate to when they should
21 have been put on hold, then the rest of the information should
22 follow. All they have to do is unredact the rows that they
23 have already redacted. There is no burden here, it is not
24 discovery on discovery. It is discovery to get to the root
25 cause of whether they should have done things differently, how

1 they could have done them differently, and the ultimate impact
2 on the Plaintiffs here for their failure to do so for many,
3 many, many months.

4 *MR. AGNESHWAR:* Your Honor, maybe I can short circuit
5 this. I have an idea based on what Mr. Gilbert is saying.

6 I can't concede that everybody should have been added
7 on the legal hold in 2019, because that is just not the way it
8 happened. We were retained when the first lawsuit was filed,
9 so our investigation took some time, and people were added
10 along the way, though many people were added at the beginning.

11 I probably can work something out with Mr. Gilbert
12 that we are not going to defend against remedi -- we are not
13 going to defend this issue about the execution on the legal
14 hold with an argument that people didn't need to be added to
15 the legal hold until much later.

16 I need to think this through, but if your Honor is
17 amenable to me kind of thinking of a stipulation like that that
18 can satisfy Mr. Gilbert so he doesn't thing that I am going to
19 somehow use it as a sword, I would be happy to give some
20 thought to that.

21 *THE COURT:* I am going to order Sanofi to produce the
22 date on which the auto delete functions were disabled for all
23 of the people who were on the Zantac hold, all 300 and how many
24 there were, and the date on which that data was transferred to
25 Office 365 for each of the -- however many there were.

1 As to the other, I can't make you stipulate for the
2 reasons you say, but I am making -- I am denying the rest of
3 it, and the reason I am doing it, I want the record to be very
4 clear, is on the presumption that Sanofi is not going to defend
5 any motion for sanctions or remedy here on the basis that these
6 other individuals were time -- you know, were timely placed --
7 had their auto delete functions timely turned off.

8 That is a defense I am hearing is not going to be
9 made. You all can paper it however you want to paper it, but
10 that is the basis for my ruling.

11 Mr. Gilbert, if it turns out that either you can't
12 reach an appropriate stipulation or that presumption turns out
13 to be wrong, I will revisit this ruling and deal with it
14 accordingly, but that will be my ruling as to issue number two.

15 MR. GILBERT: Understood, your Honor.

16 THE COURT: Let's turn to issue number three.

17 We'll take a ten-minute break.

18 *(Thereupon, a brief recess was taken.)*

19 THE COURT: The next issue is request for productions
20 number 26 and 27 which relate to the weekly reporting that
21 went, I guess, from the legal department to the IT department.

22 Again, Mr. Gilbert, let me turn to you.

23 MR. GILBERT: Judge, thank you. Issue number three
24 and issue number five go hand in hand. Issue number three
25 relates to the topics and issue number five relates to the

1 deposition topics associated with the documents, so you can
2 consider them both together.

3 Your Honor, consistent with what we understand to be
4 the discussion and your tentative ruling a few moments ago, we
5 believe that Sanofi should be required to provide us with these
6 reports for the periods of time that were listed in our request
7 number 27, not limited to the tranche one and tranche two
8 custodians only, but inclusive of all of the people that were
9 placed on the Zantac legal hold.

10 To be clear, Judge, we learned during the recent
11 deposition that there were a total of 47 reports generated by
12 the legal department to the IT department between September 23,
13 2019 and November 30, 2020. We asked for 16 of those 47.

14 Sanofi arbitrarily chose two exemplars and the two
15 exemplars that they chose, they arbitrarily limited them to the
16 tranche one and tranche two custodians only.

17 That is not appropriate. We think that the 16 that we
18 asked for is appropriate. Mr. Agneshwar and I spoke during the
19 recess, I told him we would be willing to live with even fewer
20 than that so that we can complete the picture. They
21 arbitrarily chose two. We should be able to arbitrarily choose
22 five or six of our own, which would effectively give us a total
23 of eight, so we can see things as they developed in real time
24 on these reports, and they rejected that.

25 So, that is our position. If they are not willing to

1 agree to provide us with six more of our choosing and to
2 unredact them so that it is not limited to the tranche one and
3 tranche two custodians, then we are asking for all 16 that are
4 listed in RFP 27.

5 *THE COURT:* Okay. Just so I am clear, this is the
6 information that would indicate when the IT department was told
7 to place a legal hold on a particular custodian. Am I
8 understanding what these report are?

9 *MR. GILBERT:* No. These are the reports that were
10 created by the IT department putting the people on hold based
11 on the information that had been provided by legal to IT.

12 *THE COURT:* I see. These would have been the reports
13 flowing in the opposite direction. It would have been the IT
14 department saying this week we put Bobby Gilbert and Paige
15 Sharpe and Michael Shortnacy all on legal hold, and that is
16 what you want to see, is the information flowing in that
17 direction.

18 *MR. GILBERT:* I apologize, I am trying to help you
19 understand it.

20 The information went from legal to IT access
21 management. Once it got there, IT access management was
22 supposed to do its thing and deliver it on to messaging. The
23 reports we are asking for are the reports that were created by
24 IT access management that are called the weekly cumulative
25 reports that were created by access management and legal.

1 In other words, access management builds on the
2 information that they receive from legal and then it's supposed
3 to go on to the next step.

4 *THE COURT:* Let me ask Mr. Agneshwar. I know I read
5 this when I read the root cause report. Mr. Agneshwar, do you
6 agree with what Mr. Gilbert has at least described what these
7 document are?

8 *MR. AGNESHWAR:* I was trying to follow that. I think
9 the way he is characterizing these reports, if I am right, as
10 when the IT individual -- I don't want to the over complicate
11 it, but just 30 seconds.

12 Basically, people are put on hold, legal is told that
13 people are put on hold and then they send these names over to
14 IT. IT then creates a report and script that then is supposed
15 to result in the auto delete being tuned off.

16 The problem, and the reason why we lumped this in with
17 two -- we think two, three, five are essentially the same
18 request. What these reports show is when these people were put
19 on legal hold and the dates on which those people were put on
20 legal hold, exactly what I told you I don't see us defending on
21 that, and you said that Plaintiffs are not entitled to because
22 of that.

23 Pursuant to your Honor's prior ruling, we will create
24 a report that has the dates on which the auto delete was turned
25 off for all these custodians and the date on which their

1 mailboxes were migrated to Office 365, but this request is
2 really a back door way of getting the dates on which everyone
3 is added to the legal hold.

4 *THE COURT:* Okay. Mr. Gilbert, let me go back to you
5 and let you finish your argument.

6 *MR. GILBERT:* I appreciate it, Judge. As my colleague
7 just indicated, these reports build on the information that
8 comes from legal.

9 I am looking at the exhibit that was marked during the
10 recent deposition. I don't want to go into detail about it,
11 but basically, assume there is an Excel spreadsheet that comes
12 from legal and it goes to access management.

13 In that Excel spreadsheet it has a long list of names,
14 it has everybody from every prior week in the year that has
15 been put on legal hold, plus anybody who is newly being added
16 to legal hold.

17 That spreadsheet is then supposed to be taken by the
18 individual in access management and reworked and implemented so
19 that the newly added people then have their auto delete
20 functions disabled, and once he was supposed to do that, he
21 then sends it on to the next stop on the journey.

22 So, yes, it may have their legal hold dates, but it
23 also has the accompanying date when this auto delete disabling
24 function was carried out. In some cases, it was in close
25 proximity to one another. In other cases, it was in -- not in

1 close proximity to one another.

2 We need those reports for at least a half a dozen time
3 periods that we can select from this Exhibit 5529 that was
4 marked at the recent deposition so that we have the ability to
5 inquire fully into their Rule 30(b)(6) designee at the end of
6 this month and discuss these issues in full, and it cannot be
7 limited to just the tranche one and tranche two custodians.

8 *THE COURT:* I understand your argument, thank you very
9 much. Mr. Agneshwar, back to you.

10 *MR. AGNESHWAR:* Your Honor, I think Mr. Gilbert is
11 confused about what these things are.

12 So, the spreadsheets -- and I don't think he provided
13 the Court the spreadsheet to look at, but there are two
14 different spreadsheets. This particular spreadsheet simply
15 gives the date on which legal said to the IT department these
16 are people being added to the legal hold.

17 Basically, this is what happened: Every week or every
18 other week legal would send a report to IT with all the people
19 on legal hold and the IT guy was supposed to figure out who was
20 new and make sure those new people's auto deletes were turned
21 off. He wasn't doing that regularly.

22 Here is what the Plaintiffs know already. They know
23 the dates on which legal was sending these reports to IT. They
24 also know the dates on which the IT person was actually turning
25 on the switch, as you said, to get this auto delete function

1 turned off. They know all that.

2 The only thing that he is asking for now that this
3 adds is a back door way of figuring out what is the date all
4 these people were added to the legal hold in the first place.
5 They already have when legal sent the reports without names to
6 IT, when IT sent -- did its thing to turn off the auto delete,
7 and pursuant to your Honor's instructions, they are going to
8 get the date on which all those individual's auto delete
9 buttons were turned off. This is not relevant to that at all.

10 *THE COURT:* Let me go back to Mr. Gilbert, because I
11 don't want to let Mr. Agneshwar recast your argument without
12 giving you a chance to respond.

13 He seems to be saying -- let's forget what the
14 document is called and what it looks like.

15 Mr. Gilbert, Mr. Agneshwar is saying the information
16 you are looking for here, the information that is being
17 requested is simply when was a particular person placed on the
18 legal hold, and Sanofi's position is, whatever document you ask
19 for, if that is the underlying information you are not entitled
20 to that, A, because it is not relevant; B, we are not defending
21 on that ground; and, C, it is privilege.

22 Do you agree with his characterization that that is
23 what the evidence would show, or do you believe the document
24 you are asking for would show something else beyond the date on
25 which the direction was sent to place someone on the hold?

1 MR. GILBERT: I know it will show something else,
2 Judge.

3 Here is what I know. They have given us a two-page
4 document that was used during the recent deposition, I
5 identified it a moment ago, which shows the dates on which the
6 hold lists were sent to IT, and the dates on which that hold
7 list was then converted by the IT individual so that the auto
8 delete function for those people were disabled.

9 We don't know who was on which list or when. Before
10 the break, I believe your Honor ruled that they could not limit
11 this information artificially just to tranche one and tranche
12 two custodians, but had to give the date that the auto delete
13 function was disabled for all Sanofi Zantac custodians and the
14 date that all 300 and some-odd of them were transitioned on to
15 the 0365 system.

16 THE COURT: Correct.

17 MR. GILBERT: By picking -- we don't have that
18 information on either of the two exemplars they have given us
19 because they have redacted everything except for the tranche
20 one and tranche two custodians.

21 So, what I am asking for is that they not only be
22 forced to unredact the remaining Zantac custodians to show the
23 information on the reports they already have given us, plus we
24 get to pick four or five more on dates that we choose, not
25 dates they arbitrarily choose, from Exhibit 5529, and they give

1 us the same information. That is all we are asking for.

2 *THE COURT:* I see. The purpose for which you want
3 that is so that when you take the 30(b)(6) deposition of their
4 designated person that you are allowed to inquire more
5 holistically over the entire set of employees, not just the
6 ones that have been redacted, now that I have ordered that you
7 are entitled to know about the other 330 of them.

8 *MR. GILBERT:* Yes.

9 *THE COURT:* This is really a document you want to use
10 to cross-examine their 30(b)(6) expert about process.

11 *MR. AGNESHWAR:* I wish --

12 *THE COURT:* Hold on.

13 *MR. GILBERT:* I want to know about process, about
14 whether -- how it was implemented, whether it was implemented
15 appropriately, whether it could have been done differently,
16 whether they were all asleep, not just one person asleep at the
17 switch, but whether the company was asleep at the switch, and
18 the impact that not disabling that -- each of these individuals
19 to a certain date has had on us, the prejudice to the
20 Plaintiffs through the remediation.

21 *THE COURT:* Essentially, you want to be able to put
22 this document in front of the 30(b)(6) witness and inquire, you
23 know -- you said, as you say, as an exemplar, a demonstrative
24 way to walk them through -- they are going to testify to the
25 processes. You want to use these documents to put meat on the

1 bones of the processes and inquire, well, here, specifically as
2 to this and this and this, walk us through, just as an example
3 you want to walk through. Is that essentially what you want to
4 do?

5 *MR. GILBERT:* Yes. I want to build my case by having
6 documents in real time to show when these things happened, and
7 not let them choose to -- that is what I want to do.

8 *THE COURT:* I understand. Mr. Agneshwar.

9 *MR. AGNESHWAR:* Again, I think there is some
10 confusion. When Mr. Gilbert started out he said all he wants
11 is what you have already ordered, which is like one document
12 that shows the dates of when these people's auto delete was
13 turned off, and also shows the dates that they were migrated to
14 Office 365.

15 I am happy to provide that, but that is not what this
16 document does. What this document does is show when each of
17 these individuals were added to the legal hold, which is
18 exactly what the Court has said they don't get.

19 *THE COURT:* Let me ask you, the document -- you have
20 given him some examples of these reports, have you not?

21 *MR. AGNESHWAR:* Yes.

22 *THE COURT:* Hold on. He told me he has redacted
23 copies of these reports, but they are redacted so he can only
24 see the tranche one and tranche two custodians. What I am
25 trying to explore here is, given that you have already given

1 him this document, for whatever reason -- I am not saying you
2 have waived anything or agreed to anything, but you have given
3 him this document. Should he be able, at a minimum, to just
4 get the two or three that you have already given him with no
5 redactions in them? That is the first question I want to
6 explore.

7 MR. AGNESHWAR: I don't think so, your Honor, because
8 what that would be doing is undermining the Court's prior
9 ruling. That would be forcing us to give him information about
10 when individuals were added to the legal hold in the first
11 place.

12 THE COURT: Doesn't he have that already based upon
13 the document you have already given him for the tranche one and
14 tranche two custodians?

15 MR. AGNESHWAR: Only for the affected custodians in
16 tranche one and two, because those are individuals that they
17 have actually gotten documents from.

18 We haven't produced documents to the Plaintiffs from
19 all 400 people on the Zantac litigation hold. What we have
20 done is negotiated with the Plaintiffs on a certain number of
21 custodians. At the end of the day it was about 50 custodians
22 that we agreed to actually sweep documents, review for
23 privilege, review for responsiveness, and produce them to the
24 Plaintiffs, and then a subset of those were deposed.

25 The vast majority of the people on the Zantac

1 litigation hold, those document have never been produced to the
2 Plaintiffs because in big litigations like this you always
3 negotiate down to a few custodians.

4 What we said to the Plaintiffs is, look, for those
5 affected custodians where we know you don't have all of their
6 emails because we told you that, because the auto delete wasn't
7 turned off, we will give you these redacted forms that give you
8 that information, but what we can't do, then, is just give you
9 every individual that was put on the Zantac litigation hold and
10 let you know when they were added to the legal hold.

11 *THE COURT:* Maybe I am not following the ask here.
12 Mr. Gilbert is saying there are 15 or 16 of these reports
13 during the relevant time period, and that you have given him a
14 couple, they are redacted, but you won't give him more.

15 It seems to me there are two dimensions here. One is,
16 within any individual report, should they be given the
17 completely unredacted report, and you have articulated for me
18 your position as to why they should not. If you were already
19 willing to give them one or two of these for the tranche one
20 and two custodians, where is the limiting principle why they
21 shouldn't get more? That's where I am confused.

22 *MR. AGNESHWAR:* For the tranche one and tranche two
23 custodians we have basically conceded, okay, for those
24 individuals when they were added to the legal hold and then the
25 whole process is relevant because those are individuals that we

1 know you didn't get the documents that you should have gotten
2 from those individuals.

3 So we are saying, okay, for tranche one and tranche
4 two affected custodians, the ones that we produced documents,
5 and we committed to produce emails to you, but we don't have
6 those emails because of this issue, fine, we will tell you that
7 information.

8 For everybody else that they don't have documents
9 from, and again, it is not relevant to --

10 *THE COURT:* I understand that. Maybe I am misreading
11 RFP 27. RFP 27 asks for you to produce a bunch of weekly
12 cumulative reports. Maybe I am misunderstanding the status of
13 the world. Is Sanofi's view that you have produced all, I
14 guess, 15 of them, you just have produced them redacted to only
15 tranche one and tranche two, or have you produced only a few of
16 them redacted to tranche one and tranche two?

17 *MR. GILBERT:* Two, they produced two, and they are
18 redacted to only -- the name of these reports is not a name I
19 made up. It came right out of the root cause report.

20 *THE COURT:* I am looking at issue number three on page
21 four of your submission, that is what I am reading from. You
22 reprinted the RFP's for me. That was very kind of you.

23 *MR. AGNESHVAR:* I think, your Honor, maybe asking have
24 we produced redacted reports that cover all the affected
25 custodians, I think we have not, but maybe we would be willing

1 to do that.

2 May I consult with Ms. Sharpe for a minute?

3 *THE COURT:* Yes, please.

4 *MR. AGNESHWAR:* Right. What Paige is telling me is
5 that these reports actually do not tell the Plaintiffs the
6 information they are trying to get at. Again, this is getting
7 a little complicated.

8 When the IT employee went back and did his job that he
9 was supposed to do regularly, but didn't do, he -- I don't want
10 to say he backdated it because that sounds nefarious, but he
11 changed the file names -- he added to the file names without
12 changing the date, so it looks like from this report that the
13 auto delete was -- that he did flip the switch on the same date
14 that legal sent over that information.

15 Do you understand? So, this report has the dates that
16 legal sent over this information and it suggests that the
17 switch was turned on on those exact dates.

18 That is why, your Honor, we produced something
19 separate to the Plaintiffs that is much more informative. We
20 produced the underlying metadata that is not transparent from
21 the documents that shows in fact when did -- when were reports
22 coming over from legal, and when did the IT person go in and
23 turn the switch off so that the auto delete function was
24 supposed to kick in.

25 And that we produced to them, and they questioned him

1 on that, and they are able to see when reports came over from
2 legal, when he went back and did the switch to turn the auto
3 delete, and now when -- pursuant to your Honor's direction,
4 when we produce the Plaintiffs the list of when the auto delete
5 actually was turned off, and then the date that people were
6 sent on Microsoft 365, they will have everything they need to
7 make the case as to how late it was, in their view, that these
8 people's emails were finally turned off.

9 The only piece of data that they are not getting
10 through everything I just said is the issue of when people were
11 added to the legal hold, which was already ruled by your Honor
12 that they don't get, and I have committed, at least subject to
13 the words of the stipulation, that I am not going to defend on
14 that basis.

15 *THE COURT:* I understand. Here is what I am going to
16 do as to request 26 and 27. I am going to order that the
17 Plaintiffs should be given three more of the reports that they
18 can randomly select. They have two already. I am going to
19 order that they be allowed three more and they be redacted to
20 only the tranche one and two custodians.

21 That balances the relevance of this, which is, A, to
22 challenge the 30(b)(6) witness as to reasonableness of the
23 steps that were taken, also prejudice -- I will get to that in
24 a second. I think prejudice is really limited to the tranche
25 one and tranche two custodians, but I think limiting Mr. Gilbert

1 to only two exemplars is too limiting.

2 So, I will allow him to select three more of his
3 choosing from the remaining 13 or 14. That will be my ruling
4 as to issue number three as to requests for production 26 and
5 27.

6 Mr. Gilbert, you said that also takes care of issue
7 five, so let's go to issue four.

8 MR. GILBERT: Yes, issue four, your Honor, RFP number
9 39, we asked for documents and communication showing when
10 Sanofi first became aware of the deletion or loss of
11 emails that were subject to a Zantac legal hold and all
12 subsequent actions that were taken upon learning of the
13 deletion. Sanofi's response is that is all privileged.

14 We learned about this, according to Sanofi, in
15 November 2020, when outside counsel, Mr. Agneshwar and his
16 crew, became aware of it and conducted an investigation. That
17 is all privileged, you are not entitled to it. But it was
18 going on and it was being discussed at least as early as March
19 2, 2020, as we refer to in our papers, because there were
20 communications back and forth between the gentleman whose
21 deposition was recently taken and one of his colleagues.

22 So, I am not asking for the privileged communications
23 when Mr. Agneshwar and his team discovered this issue and dealt
24 with it themselves. What I am asking for are the
25 communications back and forth between and among the individual

1 that we deposed, the woman who was his colleague, the other
2 people that -- the two supervisors, about what they knew at
3 that time, between September of 2019 and the summer of 2020,
4 about what Mr. I was and was not doing.

5 That is what we are asking for because it is not
6 credible, based on the one email that we cited in the papers,
7 that there were not -- that those folks, those three internal
8 folks that we identified earlier, did not know what was going
9 on. It is not credible.

10 *THE COURT:* Understood. Mr. Agneshwar, let me first
11 start with this, do you object on the relevance grounds, or
12 simply that it's privileged, or that you've conducted a Rule
13 26(g) compliance search and there just isn't anything to
14 respond to?

15 *MR. AGNESHWAR:* I was going to say, your Honor, I
16 think it is exactly the argument I made to issue number one,
17 it's exactly the same thing. He is saying there must be
18 documents showing that other people knew about this. It is
19 argument number one.

20 *THE COURT:* Well, it is, but it is a nuanced and
21 slightly different argument, and that is why I am asking you.
22 We have been down this road in many other hearings. Sanofi can
23 take the position we've looked and there aren't any, or Sanofi
24 can take the position we don't have to look because that is
25 unreasonable and Rule 26(g) does not require us to look, or you

1 can say, yes, we have looked, but it is all privileged.

2 I am just trying to understand what Sanofi's position
3 is on this.

4 MR. AGNESHWAR: There's two components to it. One, I
5 think Mr. Gilbert has backed away from seeking privileged
6 documents, but as I have said ad nauseam since this whole thing
7 came up, nobody knew this issue had happened until we
8 discovered it, outside counsel, in November of 2020, and that
9 is what set in motion the creation of a lot of documents that
10 are privileged and work product.

11 Other than that, we have done an exhaustive -- it's
12 the same argument I made for number one. We have done an
13 exhaustive analysis, we did our root cause report. We had
14 where we did our own investigation, we had our 30(b)(6) witness
15 conduct her investigation, and we talked to Mr. I, as Mr.
16 Gilbert is calling him. We put him under oath where he said he
17 didn't tell anybody about this.

18 There is just -- as your Honor put it, Mr. Gilbert's
19 incredulity as to whether there might be more documents here is
20 not a sufficient basis to look for a needle in a haystack.

21 THE COURT: I understand. I am trying to understand
22 what Sanofi's response -- this is a request for production,
23 they have asked you to give them some stuff. Call Mr. Sachse
24 and Mr. Oot and Ms. Finken, we have had this conversation many,
25 many times. There is only a limited number of ways you can

1 respond to a request like this. I am just trying to understand
2 Sanofi's position.

3 It sounds to me like your position is, we looked, we
4 engaged in a good faith effort to try to see what was there,
5 and it just isn't there. If that is your position, then you
6 need to respond to request for production 39 by saying it,
7 certify under Rule 26(g) that you have conducted the search
8 that you believe to be reasonable.

9 If Mr. Gilbert has an issue with that, he can reraise
10 this issue to me having now firmed that up and gotten your
11 certification that you have done what you need to do.

12 *MR. AGNESHWAR:* I think it is slightly different than
13 that. As I told your Honor earlier, I thought we had an
14 understanding, an agreement that we would produce the files of
15 the IT employee, and we negotiated search terms and there is a
16 burden argument here, too.

17 To search for a needle in a haystack, for us to then
18 go -- just to get the IT employee's file we had to pull -- I
19 think there were 60,000 documents or emails that he had, then
20 we had to conduct a privilege review, then we had to conduct a
21 response review, we had to negotiate search terms --

22 *THE COURT:* I understand. Mr. Agneshwar, you are
23 arguing the merits of the response to the motion that Mr.
24 Gilbert might file saying you didn't conduct a sufficient Rule
25 26(g) inquiry. If he files that motion you will have the

1 opportunity to present evidence on this and we will have a
2 hearing to determine it.

3 If Sanofi's position really is, we have looked for
4 certain things, but it is unreasonable to expect us to look for
5 this needle in a haystack, then you are allowed to take that
6 position, you just need to formalize it in a way that Mr.
7 Gilbert can challenge it.

8 MR. AGNESHWAR: Okay. We'll formalize a response,
9 your Honor.

10 THE COURT: Okay. Let me let Mr. Gilbert respond.

11 MR. GILBERT: With respect, they asserted privilege as
12 the sole basis for not doing this. They didn't look anywhere
13 beyond Mr. I's custodial file. It is not based on my
14 speculation or my incredulity that this argument is being made.

15 I cited one in our papers yesterday, but there were
16 four or five different email threads that were marked as
17 exhibits at Mr. I's deposition that show between late 2019 and
18 the spring of 2020 his communications with others in the access
19 management department about, hey, where are you with the legal
20 hold implementation, words to that effect, they didn't look at
21 any of these other people's files. They say we don't have to
22 look at any of these other people's files.

23 THE COURT: They are allowed to say that, but you are
24 allowed to challenge it.

25 MR. GILBERT: I am challenging it today.

1 *THE COURT:* Hold on. Both of you, stop.

2 You are not challenging it today, because if they
3 haven't given -- I don't have in front of me the emails you are
4 talking about, I don't have in front of me the witnesses that
5 you might want to call, or the witnesses that Mr. Agneshwar
6 might want to call.

7 I will give you a hearing very quickly, and there's a
8 separate rule under Rule 37 that allows for sanctions, or Rule
9 26 that allows for sanctions if they give you a 26(g)
10 certification that is not made in good faith. I will give you
11 a hearing to try to prove that and quickly, I will give you a
12 full hearing to try to prove it, but it is not going to be
13 today. This was not my understanding of where we were going
14 today.

15 That is where we are. I am going to order Defense --
16 Sanofi, within 48 hours, to certify its compliance with Rule
17 26(g) as to request for production 39. If the Plaintiffs want
18 to challenge that, I will give you an evidentiary hearing where
19 you can call witnesses and we will have an interesting day.

20 Mr. Gilbert.

21 *MR. GILBERT:* I understand your ruling, Judge. If you
22 sense frustration on my part, it is only because when a party
23 objects on the grounds of privilege, but then comes to the
24 hearing and argues something else, it is frustrating. We have
25 been at this in a collegial professional manner for the better

1 of six months, since the agreement was reached in May, on the
2 eve of another hearing with you, because at that time they were
3 resisting any discovery at all. On the eve of the hearing,
4 suddenly they were agreeable to limited discovery.

5 From that point forward, we then had to negotiate what
6 the RPs were going to be, the deposition topics were going to
7 be, et cetera, et cetera. We are now here today where they
8 have asserted privilege as the sole basis for their objection,
9 and they are now saying well, we searched other places.

10 Doesn't make sense.

11 *THE COURT:* Again, I am sure in front of me somewhere
12 is their original response to the request for production. Did
13 they only assert a privilege objection to that as well? Just
14 like I gave you some leeway on the fact that you had limited
15 basis, I want to be consistent --

16 *MR. GILBERT:* The RFP number is 39.

17 *THE COURT:* Okay. 39. I am looking at exhibit -- if
18 you have a page number or attachment number -- here it is.

19 *MR. GILBERT:* I think -- I stand corrected.

20 *THE COURT:* Okay.

21 *MR. GILBERT:* I'm looking at page 27 of Exhibit F, as
22 in Frank, and the original response was unreasonable burden,
23 and then they objected on the grounds of privilege, and they
24 said they produced the root cause report and their remediation
25 report to us and that was all they were going to produce.

1 *THE COURT:* Okay. Again, I think you are entitled to
2 challenge that and I will give you the opportunity to challenge
3 that, but they need to formalize it appropriately, as the rules
4 require. Maybe Mr. Agneshwar will take the view -- let me see
5 if he signed this response. The rule says, if you sign the
6 response -- there you go on page 46.

7 By signing the response, they certify, under Rule
8 26(g) they completed their search. They don't have to do a
9 separate investigation, the signature provides that. If you
10 would like to separately notice this, or if you want to wait --
11 you do what you want to do, Mr. Gilbert. If you want to take
12 the 30(b)(6) depo, perhaps you can develop evidence there, and
13 then if you want to file a motion, or not, I will hear the
14 motion whenever you file it.

15 *MR. GILBERT:* I will reserve my right to do so after
16 the 30(b)(6) depo.

17 *THE COURT:* That's fine. You may do that, and you
18 don't have to follow the PTO 32 procedures because that would
19 be a sanctions motion, not a discovery motion. I will allow
20 you to just file the motion if you want to.

21 That will be my ruling as to number four. I think we
22 have the last one, which is number five.

23 *MR. GILBERT:* Number five is the corollary to number
24 three, and is other deposition topics relating to the same
25 subject matter as issue number three.

1 *THE COURT:* So, would it be consistent with my prior
2 ruling to simply say, to the extent I ordered the production of
3 materials as to issue three, they need to have a witness
4 prepared to testify about those same topics, Mr. Gilbert, not
5 waiving your objections to whatever ruling I made on number
6 three?

7 *MR. GILBERT:* I understand.

8 *THE COURT:* Would that be consistent?

9 *MR. GILBERT:* That would be consistent with the
10 Court's ruling as to issue number three.

11 *THE COURT:* Mr. Agneshwar, do you agree that is the
12 logical follow through to my ruling on number three, that you
13 are to have a witness prepared to testify to the topics that I
14 ordered disclosed under issue number three, which I think was
15 the dates when the auto delete function was activated -- now,
16 let's be fair.

17 I don't think it's reasonable to expect a 30(b)(6)
18 witness to have intimate knowledge of all 366 people
19 individually, but I think it would be reasonable to be able to
20 talk about them categorically.

21 Mr. Gilbert, you were about to say something.

22 *MR. GILBERT:* I was going to say it was the date that
23 the auto delete function was disabled in addition to 0365. Of
24 course she won't know the details for every single person, but
25 she should be conversant in the reports that are provided to us

1 so that she is able to speak with authority on behalf of Sanofi
2 as to the information that is set forth in those reports.

3 *THE COURT:* That is reasonable. Mr. Agneshwar.

4 *MR. AGNESHWAR:* Yes, your Honor, we will make sure
5 that the 30(b)(6) witness -- when we provide reports to Mr.
6 Gilbert that say the dates that people migrated to Office 365
7 and the dates on which their auto delete was actually turned
8 off, pursuant to your ruling on question three, we will make
9 sure they have that information, and we will make sure that --
10 obviously, without going person by person, that the 30(b)(6)
11 witness is generally prepared to answer questions about that.

12 *THE COURT:* Very good. That is my ruling.

13 *MR. GILBERT:* Judge, forgive me, you gave us leave to
14 choose three additional reports and we will give those to Mr.
15 Agneshwar within 48 hours.

16 *MR. AGNESHWAR:* Can I go back to four, the one -- I
17 know we talked about it at length.

18 *THE COURT:* Yes.

19 *MR. AGNESHWAR:* There was some, apparently,
20 frustration expressed at me that I feel like I need to respond
21 to.

22 *THE COURT:* Okay.

23 *MR. AGNESHWAR:* It may be neither here nor there to
24 your Honor, but we have been negotiating these things for
25 months and months and trying to get the Plaintiffs what they

1 wanted here. This was a negotiated process, and you produce --
2 you tend to agree in a case like this that you are going to
3 produce custodians, and your best judgment is that this
4 custodian is going to have relevant documents, and based on
5 your investigation, there aren't going to be relevant documents
6 for anybody else.

7 We never told Mr. Gilbert that the only objection to a
8 question for other stuff beyond the IT persons was privilege.
9 We said that it was burden because we had no reason to believe
10 there would be documents of anybody else's based on our
11 investigation, and we said there was privilege because, to the
12 extent documents were created, it was because they were done by
13 attorneys and work product.

14 We are happy to formalize that in a response and --

15 *THE COURT:* I don't think you need to. I think your
16 response said what it said and you signed it pursuant to Rule
17 36(g). That is all you're required to do.

18 Mr. Gilbert is free to challenge that, as he is free
19 to challenge any other certifications that have been made.
20 It's late, I don't want to keep anyone much longer, so let me
21 circle back.

22 Mr. Agneshwar, not waiving any objections you may have
23 to the rulings I have made, do you believe I have at least now
24 ruled on all the issues presented for the Court's attention
25 this afternoon?

1 MR. AGNESHWAR: I do, your Honor.

2 THE COURT: Same question to you, Mr. Gilbert, not
3 waiving any objections, do you believe I have addressed all the
4 issues that you wanted to raise?

5 MR. GILBERT: I do, your Honor.

6 THE COURT: Real quick, I realize this particular
7 issue is a sensitive one. I understand that the Plaintiffs
8 feel very strongly about it, I understand Sanofi feels very
9 strongly about it, and I appreciate the advocacy. I appreciate
10 that the parties are vigorously representing their clients, as
11 they should and as they must.

12 So, I thank you for your advocacy, I thank you for the
13 briefing. It was extremely helpful. I thank you for your
14 patience explaining all of this to me, and I look forward to
15 eventually having a hearing and actually hearing the merits and
16 ruling on this issue. I find it fascinating.

17 So, I thank you all for your preparation and your
18 time, and unless there is anything else, I will excuse the
19 parties.

20 MR. GILBERT: Thank you, your Honor.

21 MR. AGNESHWAR: Thank you, Your Honor.

22 *(Thereupon, the hearing was concluded.)*

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1
2 I certify that the foregoing is a correct transcript
3 from the record of proceedings in the above matter.
4

5 Date: January 7, 2021

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

7 Signature of Court Reporter
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Pauline A. Stipes, Official Federal Reporter

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