

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 19, 2022
8 .
9 .

10 DISCOVERY HEARING (through Zoom)
11 BEFORE THE HONORABLE BRUCE REINHART
12 UNITED STATES MAGISTRATE JUDGE

13 FOR THE PLAINTIFFS: **BRETT STANLEY, ESQ.**

14 Kherkher Garcia LLP
15 2925 Richmond Avenue
16 Suite 1560
17 Houston, TX 77098
18 713-230-8523

19 **ROBERT C. GILBERT, ESQ.**

20 Kopelowitz Ostrow Ferguson
21 Weiselberg Gilbert
22 2800 Ponce de Leon Boulevard
23 Suite 1100
24 Miami, FL 33134
25 305-384-7270

MICHAEL L. McGLAMRY, ESQ.

Pope McGlamry P.C.
3391 Peachtree Road NE
Suite 300
Atlanta, GA 30326
404-523-7706

FOR THE DEFENDANTS: **PATRICK OOT, ESQ.**

Dechert LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
215-994-4000

PAIGE H. SHARPE, ESQ.

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

MICHAEL B. SHORTNACY, ESQ.

King & Spalding LLP
1180 Peachtree Street Suite 1600
Atlanta, GA 30309
404-572-4600

ALSO APPEARING:

SEAN BURSTYN, ESQ.

Burstyn Law PLLC
1111 Brickell Avenue
Suite 1550
Miami, FL 33131

WILLIAM J. EGAN, ESQ.

Robinson & Cole LLP
One Boston Place
Boston, MA 02108
617-557-5945

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

1 THE COURT: Good afternoon. Why don't we let all of
2 the folks in in the waiting room.

3 This is case number 20-02924, In Re: Zantac
4 (Ranitidine) Product Liabilities Litigation, as well as case
5 number 21-82184, Bretholz versus GSK. I will note that the
6 latter case is being cross docketed into the MDL case. So, for
7 purposes of today's hearing, we are going to treat this as one
8 proceeding within the MDL, and we will produce one transcript
9 of the hearing, which can be cross filed in the other case.

10 My understanding is the issues relating to Mr.
11 Bretholz may overlap with some of the discussion in the
12 Valisure matter, and it is efficient then to maintain one
13 record and keep everything in one place.

14 We set aside this afternoon for a series of discovery
15 hearings. It is my understanding, and what I am prepared to
16 address today, there are four matters.

17 First is a matter relating to an interrogatory
18 relating to Boehringer Ingelheim relating to desiccant
19 utilization in bottling. We will do that first.

20 The second issue will relate to Sanofi,
21 non-preservation of emails, and the upcoming 30(b)(6)
22 deposition, so I will deal with that issue second.

23 The third issue will be the third party subpoena to
24 Valisure, and the last matter will be the third party subpoena
25 to Michael Bretholz.

1 To be clear, I will not be addressing today anything
2 to do with Emery Pharma. I found out this morning that Judge
3 Rosenberg ruled that the Court does have jurisdiction and has
4 referred back to me a resolution of the Emery Pharma discovery
5 matter. That will not be addressed today. We will deal with
6 that separately and set a separate hearing on that matter.

7 With that, let me ask the parties in the first matter,
8 the desiccant interrogatory issue, to please come on the
9 screen, and let me allow the Plaintiffs to make their
10 appearance.

11 *MR. STANLEY:* Good afternoon, Judge Reinhart, Brett
12 Stanley, on behalf of the Plaintiffs.

13 *THE COURT:* Good afternoon. On behalf of Boehringer
14 Ingelheim?

15 *MR. SHORTNACY:* Good afternoon, your Honor, Michael
16 Shortnacy for Boehringer Ingelheim.

17 *THE COURT:* I will try to make clear each time what I
18 have received and what I have reviewed. I did receive a lot of
19 material in preparation for today's hearing.

20 For this issue, I received Plaintiffs' PTO 32
21 submission, which was two and a half pages, a copy of the
22 interrogatory that was served, as well as the Boehringer
23 Ingelheim response, which was also about two pages.

24 So, did either party submit any other materials
25 relating to this particular dispute? Mr. Stanley?

1 MR. STANLEY: No, Judge, that is what the Plaintiffs
2 have submitted.

3 THE COURT: Mr. Shortnacy?

4 MR. SHORTNACY: No, your Honor, that is the sum total
5 of BI's submission.

6 THE COURT: As I read the materials, it appears the
7 issue is that Plaintiffs have requested information relating to
8 whether Boehringer Ingelheim utilized desiccant, which I
9 understand to be a drying agent, in manufacturing certain
10 bottles -- I am sorry, bottles that were used to hold
11 prescription drugs during the relevant time periods, that
12 Boehringer Ingelheim has submitted a sworn response to the
13 interrogatory saying that no desiccants were used for any
14 bottles that were used to hold Zantac, and yet the Plaintiffs
15 are requesting more information above and beyond that response.

16 With that, let me turn to Mr. Stanley. If you can
17 articulate for me what it is you are asking the Court to order
18 today and what it is you are looking for.

19 MR. STANLEY: Judge, we would like the Court to order
20 Boehringer Ingelheim to identify other drugs that they used
21 desiccants in in finished dose form that were bottled in high
22 density polyethylene bottles, HDP bottles. HDP bottles are
23 semipermeable, they allow moisture and light to get in.

24 One of the central themes of this case is protection
25 of Zantac, which is a moisture sensitive, light sensitive, heat

1 sensitive drug, against these agents, because the sensitivity
2 leads to degradation and we believe the formation of NDMA.

3 The use of desiccants in bottles, in HDP bottles, is
4 always for the same goal, to reduce moisture inside the bottle.
5 It does not matter which type of drug that you are talking
6 about, when a desiccant is used in an HDP bottle, whether it is
7 a sachet, which is a packet, or a cannister type desiccant, it
8 is used to keep the atmosphere inside the bottle dryer to
9 reduce or lessen the potential harm of degradation of the pill
10 or interaction with moisture of the pill.

11 That is what we seek. Jumping beyond the form
12 argument that this interrogatory was beyond that allowed by the
13 rules, and into the substance, as you know, Judge, and as you
14 discussed with the parties often, proportionality goes to the
15 claims Defense has made in the case, and the relevance, and the
16 burden, and we believe that all of this is part of BI's duty to
17 respond to this despite being a different drug.

18 I can talk to the --

19 *THE COURT:* Wait, let me push back in that respect.
20 Let me get some clarity from you. You say you want them to
21 identify other drugs that use desiccants. What I understood,
22 at least in part of their response was they are objecting to go
23 back -- are you asking for all other drugs where they used it?
24 Are you asking for an example, multiple examples? What exactly
25 are the Plaintiffs asking for?

1 It is my understanding, at least in part, BI's
2 objection was if they have to go back and identify every single
3 prescription drug for which they used a desiccant in a bottle
4 that is unduly burdensome. So clarify for me, what exactly is
5 it are you asking for?

6 *MR. STANLEY:* Sure. Ultimately, with all of the
7 Defendants, we offered if they could identify an exemplar drug
8 that used a desiccant can't in an HDP bottle from the relevant
9 time period, and with that, identify the type of desiccant and
10 the cost, then that would satisfy what we are looking for on
11 this interrogatory, and that was not something that was agreed
12 to by BI, while the others did agree to do that.

13 That was the way that we thought we could minimize the
14 burden here, and we thought it was a great compromise to allow
15 for that identification.

16 *THE COURT:* Again, are you asking me -- that is what I
17 am asking, are you asking me to order them to do that, or are
18 you asking me to order them to respond in full to the
19 interrogatory as drafted?

20 *MR. STANLEY:* The compromise we would ask for you to
21 order is to identify from 2006, hopefully, but during the
22 relevant time period, which is from 2006 to 2016, where a
23 desiccant was used inside the bottle, and identify what type of
24 desiccant and the cost per use of the desiccant, and the others
25 have been able to find some cost information to say we bought

1 this amount, and just simple math gets you down to the price
2 per unit or widget that goes into the bottle.

3 *THE COURT:* Thank you. Let me turn to Mr. Shortnacy
4 and let him respond to that.

5 *MR. SHORTNACY:* Your Honor, thank you. I appreciate
6 Mr. Stanley's, you know, sharpening the request at this point,
7 and I just want to reiterate a couple of points that I think
8 are relevant to the Court's analysis.

9 First of all, BI has already responded to north of 250
10 interrogatories, and as a part of a compromise on this specific
11 issue, without requiring specifically they get leave of Court
12 to do so, we responded to what, arguably -- and I still don't
13 agree that it is necessarily relevant to issues in this case,
14 but we provided information regarding OTC Zantac. We believe
15 with that we have complied with any arguable duty to provide
16 responsive information to the Plaintiffs' request.

17 What we are talking about now is the world outside of
18 that with other products, and now Mr. Stanley has sort of
19 narrowed the rabbit hole, but we believe that just because
20 something is narrower doesn't make it relevant.

21 Your Honor, I have this in the papers, but the
22 decision to place a desiccant in a product is a very technical
23 thing, it's subject to scientific study, and it depends on the
24 chemical composition and molecular structure of the API and
25 excipients in the product and the packaging presentation and

1 formulation.

2 All of those things are all very different, so what
3 they are asking us to do, even in a very narrow request, is to
4 basically provide irrelevant information.

5 I will also say that even a narrowed request on its
6 face maybe seems like it is subject to the Home Depot easy
7 button, in fact it isn't. What Mr. Stanley is asking is that
8 we go back to 2006. BI, of course, divested its entire CHC
9 business, so there are challenges with going back in time for
10 those periods. Products may have been made overseas, products
11 may have been made by other affiliates that are no longer
12 affiliates, documents from that time period may not exist.

13 When we start to peel back that onion, it becomes
14 difficult. Even something as narrow as Mr. Stanley is framing
15 it to be right now, it can be deceptively difficult to unwind.

16 I will make one final point, your Honor, if I may.
17 They are also asking us to identify what is an "exemplar
18 product" which in and of itself is putting on us the burden to
19 kind of assess and establish what is an exemplar, and there
20 may, in fact, be no exemplar.

21 This is outside of my area, I am not an expert in
22 these matters, but each product is unique, the formulations and
23 presentations of products are unique. So, that already is
24 doing more than something that, again, appears perhaps on its
25 face as sort of an easy button task. It really isn't when you

1 look at it.

2 *THE COURT:* You used the term CHC. For the record,
3 what are you referring to?

4 *MR. SHORTNACY:* I apologize. That is the consumer
5 health care business that BI divested in around 2016 to Sanofi,
6 with that the entire business and all of -- most all of the
7 people that worked in the business. Part of the business was
8 to sell Zantac, that was one product.

9 *THE COURT:* So the records from the relevant time
10 period are in the possession of Sanofi, your co-defendant?

11 *MR. SHORTNACY:* I don't know that to be true, your
12 Honor, and I don't know if those records would have rolled
13 through that 2016 transaction. I didn't mean to imply that.

14 I only meant to imply that the relevant people who may
15 have knowledge of those former consumer products may in fact no
16 longer be with the company.

17 *THE COURT:* Okay. Are they still at Sanofi, your
18 co-defendant?

19 *MR. SHORTNACY:* It would depend on who the person is.
20 I do not know if -- not all of the BI people transferred to
21 Sanofi, but it is possible.

22 *THE COURT:* I will be clear, BI played this game with
23 me once before having to do with Promeco records where they
24 claimed you had to get permission from some unnamed third
25 party, who turned out to be tour co-defendant. I didn't

1 appreciate it then and I don't appreciate it now. You can ask
2 Ms. Sharpe, Mr. Agneshwar, you can ask any of the 50 lawyers on
3 this case who represent Sanofi to give you this information.

4 So, don't suggest to me that it is going to be so
5 difficult to find it because you sold your products to somebody
6 else. You sold it to your co-defendant who you talk to every
7 day.

8 I will overrule that objection.

9 MR. SHORTNACY: Understood, your Honor. I apologize,
10 I appreciate that your Honor is frustrated. I didn't mean to
11 imply that that was a reason we are not providing information,
12 because we are saying that it doesn't belong to us any more.

13 I am simply saying -- I'll reiterate the points I was
14 trying to emphasize, I apologize for side tracking. Really
15 what we are focusing on is the relevance of the information,
16 which we believe it is not relevant to the issues in this case.
17 This is information about other products. We have provided the
18 information --

19 THE COURT: The Plaintiffs argue that it is relevant
20 because if you can do it for another product, you could have
21 done it for Zantac, and therefore they get to argue to the jury
22 that if Zantac got undue moisture because you didn't put a
23 desiccant in it, that was your choice and you are responsible
24 for the choices you make.

25 Why isn't that a theory of relevance that would adhere

1 in this case?

2 MR. SHORTNACY: Well, your Honor, we would argue that
3 that is not relevant because those decisions are unique to each
4 product. So, the fact that you didn't do it in one formulation
5 versus another would not be relevant to that.

6 And I would also focus on one other thing that we have
7 in our papers, this information is available to Plaintiffs to
8 make the argument that desiccant is available in the industry
9 and desiccant had a cost. Those arguments can be made and
10 don't require going through, you know, the sort of efforts and
11 try to discern what, A, an exemplar product would be, and B,
12 what its unit cost was.

13 In order to do that we would have to get the
14 packaging, its formulation, figure out the cost allocation.
15 There are steps involved in that process, your Honor, so that
16 does create burden for us.

17 THE COURT: I understand. Let me go back to Mr.
18 Stanley.

19 MR. STANLEY: Judge, I think you have an idea of our
20 claims that we are making from our amended complaint, but we
21 haven't talked about the defenses, and why this is relevant to
22 their defenses as well, and that goes to why this should be
23 produced.

24 In Defendants' amended answer to the Plaintiffs'
25 personal injury complaint filed on August 23, 2021, the 14th

1 affirmative defense found at page 455 states, "Any acts
2 performed by BI in the design, manufacture, and marketing of
3 the product at issue were in conformity with the state of the
4 art existing at the time of such design, manufacture, and
5 marketing, and public policy should hold that liability not be
6 imposed on BI for untold risk not known at the time of design,
7 manufacture, and marketing of the product at issue."

8 Also at page 455 is the 18th affirmative defense which
9 states, "The methods, standards, and techniques utilized by BI
10 in designing, formulating, manufacturing, and/or marketing the
11 product at issue and in issuing warnings and instructions with
12 respect to use are proper and in conformity with the generally
13 recognized, reasonably available, and reliable state of
14 knowledge in the field at the time the products were
15 manufactured."

16 If you bear with me, I have two more to identify.

17 The 19th affirmative defense states, "The injuries
18 and/or damages claimed by Plaintiff were the result of
19 unavoidable circumstances that BI could not have prevented."
20 That is also at page 455.

21 Finally, page 457, the 30th affirmative defense,
22 that's three zero, "At the time the product left BI's control
23 there was not a practical and technically feasible alternative
24 design that would have prevented the harm without substantially
25 impairing the reasonably anticipated or intended function of

1 the product."

2 Any evidence about the state of the art goes to
3 whether or not they used a desiccant at the time in other
4 products. BI has a duty to lessen the damage that could occur
5 due to degradation if they know that it can occur. The
6 evidence shows that they did know that the pill was subject to
7 degradation for moisture, and if the state of the art said at
8 the time to use a desiccant, then that is relevant and should
9 be information that we can receive through discovery.

10 *THE COURT:* Thank you very much.

11 I am going to overrule the objection based on
12 relevance grounds. I do find this information is relevant, and
13 I will order BI to produce -- was it an interrogatory -- to
14 supplement their interrogatory response to identify -- I don't
15 know that it has to be an exemplar drug, they just need to
16 identify the name of the drug that they packaged in a bottle
17 that had a desiccant in it.

18 Mr. Shortnacy, I am not requiring you to produce an
19 exemplar suggesting that it has any direct connection to Zantac
20 at all. The relevant fact is that BI did manufacture bottles
21 using desiccants, they had the capability to do it, and what it
22 would have cost them to do it.

23 So, I will order a supplemental response to the
24 interrogatory disclosing that information.

25 *MR. STANLEY:* Judge, if I may, to the extent exemplar

1 was a term of art, it wasn't intended to be that, just an
2 example.

3 *THE COURT:* I understand. I just wanted to be clear
4 because Mr. Shortnacy had raised that issue. I wanted to make
5 sure I addressed that, I agreed with him on that issue.

6 The other thing is, to the extent BI is objecting that
7 Plaintiffs are utilizing too many -- that this was an improper
8 use of an extra interrogatory, BI waived that argument. A,
9 they waived it by responding in the first place; and B, I would
10 otherwise find it to be a proper exercise of an additional
11 interrogatory and I would authorize it for that reason, as good
12 cause has been shown. That will be my ruling as to that issue.

13 I will thank the parties and move on to the next
14 issue.

15 *MR. SHORTNACY:* Thank you, your Honor.

16 *THE COURT:* Thank you very much. Have a good
17 afternoon, everybody.

18 The next issue is the Sanofi email issue. Good
19 afternoon Mr. Gilbert and Ms. Sharpe. If you want to enter
20 your appearances, please.

21 *MR. GILBERT:* Good afternoon, your Honor, Robert
22 Gilbert on behalf of the Plaintiffs.

23 *MS. SHARPE:* Good afternoon, your Honor. This is
24 Paige Sharpe on behalf of Sanofi. If I may, your Honor, I
25 would like to request one moment for a preliminary matter

1 before argument begins.

2 *THE COURT:* Okay. Go right ahead.

3 *MS. SHARPE:* Your Honor, I just wanted to reiterate
4 the concerns that we expressed at the last discovery conference
5 for the privacy of individuals who might be implicated by the
6 email issues. We are assuming that the parties will use the
7 same process here today that you outlined at the last discovery
8 conference where individuals will be referred to by title or by
9 some other generic reference and not by name.

10 We don't think initials are necessary, as Mr. Gilbert
11 used at some points last time, but we would ask if the Court
12 would again reiterate that is the process that should be
13 followed.

14 *THE COURT:* That is my expectation. Mr. Gilbert gave
15 me his word last week that was how he was going to act. I
16 believe Mr. Gilbert is going to do what he said, so I don't
17 think it is necessary for me to reiterate it, but your point is
18 taken.

19 I know there are five people at issue here. I know
20 there is the individual who is directly responsible -- supposed
21 to be responsible for taking certain action and then four other
22 colleagues who worked with that person, and the Plaintiffs
23 requesting access to the emails of those other individuals.

24 Your point is well taken, but I have no doubt that Mr.
25 Gilbert was going to do it anyway.

1 *MS. SHARPE:* Thank you.

2 *THE COURT:* With that, let me just review. I did
3 receive the PTO 32 submission from the Plaintiffs which also
4 attached a couple of emails that were marked as highly
5 confidential so we can discuss if the parties want to move to
6 seal those. I received a separate submission from Sanofi which
7 also appended some email correspondence back and forth.

8 Mr. Gilbert, did you submit anything other than what
9 I have already referenced?

10 *MR. GILBERT:* No, your Honor, we did not.

11 *THE COURT:* Ms. Sharpe, did you submit anything other
12 than what I already referenced?

13 *MS. SHARPE:* No, your Honor, that was everything.

14 *THE COURT:* Great. Mr. Gilbert, I think this is
15 primarily your ask so let me allow you to go first.

16 *MR. GILBERT:* Thank you, your Honor, may it please the
17 Court. Again, this is Robert Gilbert representing the
18 Plaintiffs.

19 Without repeating everything in our PTO 32 submission,
20 allow me to frame this for your Honor in a way that I hope will
21 make it clear why this ask is not only reasonable, it is
22 difficult for us to understand how in good faith Sanofi could
23 refuse to provide the information.

24 First of all, under PTO 54, Defendants are obligated
25 to produce custodial files at least 15 days before scheduled

1 depositions and to make their best efforts to produce custodial
2 files 21 days before scheduled depositions.

3 More specifically, under the agreement that we
4 negotiated with Sanofi regarding its spoliation of the employee
5 emails at issue here, under the agreement that was entered into
6 on May 5, 2021, Sanofi agreed in paragraph seven of that
7 agreement, and it was attached as an exhibit to our prior PTO
8 32 submission which we incorporated by reference, Sanofi agreed
9 that it would produce all non-objected to responsive documents
10 at least 14 days prior to the first of the two depositions.
11 The first of the two depositions.

12 The first of the two depositions that we are referring
13 to was the deposition of the gentleman who we talked about last
14 time who worked in the IT department at the time. His
15 deposition was taken on December 14, 2021. If you work back 14
16 days from that, all of their documents should have been
17 produced by December 1st, 2021.

18 Moreover, let me jump forward, on June 26, 2021, after
19 spending two months meeting and conferring with Ms. Sharpe and
20 her colleague to try to narrow the scope of the documents and
21 topics for these two depositions, we served our formal request
22 on June 26, 2021, and the requested issue here is set forth
23 verbatim on page two of our PTO 32 submission, and that
24 requested all documents and communications the Rule 30(b)(6)
25 designee reviewed, received, or prepared in order to prepare

1 and/or educate himself or herself to testify on behalf of
2 Sanofi at this deposition.

3 They responded, Sanofi responded on July 13, 2021.
4 Their initial response indicated that they would produce all
5 documents that were not objected to with regard to the Rule
6 30(b)(6) designee that were reviewed or prepared in order to
7 prepare and/or educate himself or herself to testify on behalf
8 of Sanofi at this deposition.

9 Their amended and supplemental response served on
10 December 7, 2021, which coincidentally fell on or about the
11 same date that they first disclosed to us that Jamie Brown was
12 going to be their hired Rule 30(b)(6) expert designee for this
13 deposition, they said that none -- no documents were being
14 withheld based on privilege.

15 And yet today, 12 days before the deposition of
16 Sanofi's Rule 30(b)(6) designee is scheduled to begin by
17 agreement, by stipulation, we have not received the documents
18 by acknowledgment of Sanofi that Ms. Brown -- all the documents
19 that she used to prepare and/or educate herself to testify on
20 behalf of Sanofi at this deposition.

21 What we are talking about specifically here are the
22 documents that Ms. Brown prepared that were referenced in the
23 declaration that Sanofi filed with its PTO 32 submission on
24 January 4th.

25 Let me just say this to you, Judge, because I am not

1 sure that this was clear when we met last on January 5th.

2 The very first time I saw Ms. Brown's declaration or
3 heard about its existence was sometime on January 4th, when
4 Sanofi submitted its PTO 32 submission, one day before the
5 hearing before your Honor.

6 So, we received Ms. Brown's declaration as part of
7 Sanofi's PTO 32 submission, we reviewed it, and she referenced
8 at paragraphs two and 12 the extent to which she had conducted,
9 not conducting, but conducted interviews of members of Sanofi's
10 ITS department, including the gentleman who I deposed back in
11 December, including his supervisor on his legal hold
12 responsibilities, and other members of the messaging team
13 responsible for the automated script. All of this is in
14 paragraphs two and 12.

15 After the hearing we had before your Honor on
16 January 5th, I requested that Sanofi provide us with the names
17 of all of those people that Ms. Brown interviewed, that they
18 provide us with the notes that she made from those interviews
19 in preparation to educate herself to testify on January 31st,
20 and any documents that she received from them or reviewed in
21 connection with those interviews to the extent they have not
22 already been produced.

23 Sanofi's response, wait until the day before the
24 deposition or two days before the deposition.

25 Your Honor, you and this Court have been all about

1 transparency throughout this process. Suggesting that they can
2 wait until the day of, or one business day before Ms. Brown's
3 deposition is supposed to be taken over the course of 11 hours
4 on issues relating to the spoliation of thousands of company
5 emails is the antithesis of transparency and fair play.

6 Under PTO 54, under the discovery agreement we entered
7 into on May 5, 2021, frankly, they should have produced this
8 document if it already existed on December 1st, 2021, based on
9 the agreement that we entered into on May 5th. But if it
10 wasn't prepared by then, the latest they should have provided
11 these documents, based on PTO 54, would have been January 16,
12 three days ago.

13 We haven't received it. They have told you in their
14 submission that as a show of good faith -- and I am using the
15 air quotes here -- they offered to produce it on Friday,
16 January 28th, one business day before this deposition is due to
17 take place.

18 The individuals that Ms. Brown interviewed are the
19 very same individuals, your Honor, that we were asking you to
20 compel Sanofi to produce responsive emails during our
21 January 5th hearing.

22 We didn't know that until we got their submission the
23 night before your hearing. We still don't know it because they
24 haven't identified those employees except one by title. You
25 denied our request then, but to allow Ms. Brown to have had

1 access to these people, to hold her notes and her outline until
2 the last day before the deposition, and to also deprive us of
3 the opportunity to have those emails from the employees
4 themselves doesn't seem fair and equitable and appropriate in
5 accordance with the way this Court has conducted and overseen
6 discovery.

7 We would ask that your Honor order Sanofi to produce
8 the information regarding Ms. Brown that we set forth in our
9 PTO submission immediately so that we have it and we can
10 proceed with our preparations for the January 31st deposition
11 as scheduled. Thank you.

12 *THE COURT:* Thank you, Mr. Gilbert. Just so I am
13 clear, what you are asking me to order them to produce are the
14 names of the people, any notes that Ms. Brown took during those
15 interviews, any documents she used to prepare and conduct those
16 interviews, to the extent those documents have not already been
17 produced. Am I correct that that is the ask?

18 *MR. GILBERT:* That is the ask, your Honor.

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

20 Ms. Sharpe.

21 *MS. SHARPE:* Good afternoon, your Honor. Again this
22 is Paige Sharpe on behalf of Sanofi.

23 Let me start by responding to a few of the points that
24 Mr. Gilbert made, a few of which I don't think were in their
25 submission, but I do think warrant a response.

1 First, Mr. Gilbert referenced PTO 54. He was talking
2 about the production of custodial files. This is not a Sanofi
3 custodian, as Mr. Gilbert knows. The 30(b)(6) witness is a
4 nonemployee that Sanofi has brought in to serve as a 30(b)(6)
5 witness, she does not have a custodial file to produce here.

6 What we are talking about are reliance materials that
7 she is putting together in preparation for the deposition.

8 Second, with respect to the argument that Sanofi
9 agreed to produce documents 14 days in advance of the first of
10 the two depositions, which would have been sometime in early
11 December, Sanofi can't produce what it can't have.

12 The witness has been in the process of preparing over
13 the past few months for her deposition, and she certainly did
14 not finish preparation as of the beginning of December so that
15 we would then provide her reliance materials for a deposition
16 that is not set to take place for two more months. That is
17 simply an impossibility that we could have provided the notes
18 at that point.

19 In fact, your Honor, the witness' preparation is
20 continuing even now, it is going to continue up until the eve
21 of the deposition. We have an obligation to have a witness who
22 is educated on a wide array of topics related to Sanofi's
23 processes, to the preservation issue, to the remediation, and I
24 can assure you that there is significant preparation that is
25 ongoing with respect to what the witness is doing.

1 With respect to the declaration that the 30(b)(6)
2 witness provided in support of the last discovery conference,
3 she does not reference documents there. She says that she
4 conducted interviews of people. There is no reference to notes
5 of those interviews, and I can tell you she did not review any
6 notes to prepare the declaration.

7 The declaration was based on her recollection of
8 interviews that she has conducted over the course of the
9 investigation, and Plaintiffs will have ample opportunity
10 during the deposition to probe on the adequacy of her
11 preparation.

12 So, you know, honestly, Judge Reinhart, we are at a
13 little bit of a loss to understand why there is a dispute here
14 because we are not disagreeing to provide reliance materials,
15 the question here is really just one of timing. And given that
16 the witness is continuing her work, continuing her preparation,
17 we think the proper process is the one that is followed as a
18 matter of course in 30(b)(6) depositions where the witness
19 provides reliance materials either at the deposition, that is
20 not infrequent at all, or shortly before the deposition when
21 they are fully prepared.

22 There is no obligation for a party producing a
23 30(b)(6) witness to provide piecemeal discovery along the way
24 into their preparation process, and that is what we are talking
25 about.

1 The documents that the witness has reviewed, as we
2 have made clear to Plaintiffs, they have been produced to
3 Plaintiffs. The witness has not relied or reviewed any
4 documents that have not gone out the door many weeks ago to
5 Plaintiffs, so that is not an issue here. They have all those
6 documents.

7 In fact, with respect to these -- you know, their
8 request for additional custodial files, it is not the case that
9 the Plaintiff -- I'm sorry, that the witness has reviewed any
10 additional custodial files or emails, if she had requested
11 those and found them to be relevant to her investigation, we
12 would have provided them to Plaintiffs, but there is no reason
13 to think, as your Honor ruled at the last discovery conference,
14 that, um-m-m, these emails would contain anything of relevance
15 here.

16 That is pure speculation, and nothing has changed in
17 the intervening two weeks since we were last before the Court
18 and had extensive argument on why it is not appropriate for
19 them to get additional custodial emails.

20 So, with that, your Honor, I am happy to answer any
21 questions. Again, we would just ask that the Court allow the
22 process to unfold as it should and the witness will prepare her
23 reliance materials and provide them to Plaintiffs shortly
24 before the deposition takes place.

25 *THE COURT:* Thank you, Ms. Sharpe. Let me ask you a

1 couple of followup questions.

2 Mr. Gilbert is asking for three things, the names, the
3 notes, if any were taken during the interviews, and any
4 documents that were utilized to prepare for those interviews
5 that have not been produced.

6 You just told me the third category is a null set,
7 there is nothing in that, right?

8 *MS. SHARPE:* That's correct.

9 *THE COURT:* Are there notes, do they exist? Didn't
10 Ms. Brown take notes during the interviews?

11 *MS. SHARPE:* My understanding -- and these are her
12 preparation materials, not Sanofi's -- she is conducting her
13 own investigation, and that she is taking notes, she is
14 preparing an integrated set of notes that will be provided to
15 Plaintiffs. There are not stand-alone notes for any individual
16 interview that she has conducted, and just -- your Honor, you
17 had mentioned that there are three things.

18 We did offer to provide them the names, and instead,
19 they insisted on going forward with the discovery dispute here
20 today.

21 *THE COURT:* I understand. It sounds to me -- I am
22 going to order you to provide the names. It seems to me there
23 is no harm there. That is a historical fact, these people were
24 interviewed. Mr. Gilbert and his team can go back through
25 their evidence and try to determine if they have relevant

1 materials they want to ask about. I will order that.

2 If you are telling me, as to the third category, there
3 is nothing to order, then I can't order. The only issue for me
4 to decide today is at what point in time should Sanofi be
5 required to produce any notes that are specific to the
6 interviews of those other individuals.

7 With that narrowing, let me go back to Mr. Gilbert and
8 allow him to get the final word.

9 *MR. GILBERT:* Thank you, Judge.

10 Ms. Brown is not only hired to be the 30(b)(6)
11 designee for Sanofi, but by her own admission in her
12 declaration she has been retained as an expert by Sanofi in
13 connection with the email issues that are before the Court.

14 This Court would not countenance an expert showing up
15 and providing his or her report to the other side the day of
16 his or her deposition for the first time so that in our
17 adversarial system the person who is taking the deposition was
18 forced to read, digest, comprehend, think about, and prepare
19 for that deposition on the fly. And the fact is nothing -- the
20 same rule should be applied here.

21 We are talking about the most important deposition
22 regarding Sanofi's spoliation of these emails, what is going to
23 answer questions that this Court will have, that we will have,
24 that all of the litigants will have about why these emails
25 suddenly disappeared from Sanofi's email server.

1 For us to receive this outline from Ms. Brown on the
2 day of her deposition, or one business day before, is an
3 affront to the process. I would suggest that you could get to
4 the bottom of this very easily. You could say, hypothetically,
5 Sanofi, you have two choices, give Mr. Gilbert and his team the
6 outline 14 days before Ms. Brown's deposition takes place, or
7 give it to them on January 31st, and her deposition will be
8 rescheduled for 14 days later.

9 I'll bet you, because she will have to be done with
10 her preparation by then, Judge, since that is when her
11 deposition is going to be taken, I'll bet you if you give them
12 that choice, we will get to the bottom of this issue quickly.

13 *MS. SHARPE:* Your Honor, if I may respond, because Mr.
14 Gilbert raised several additional points there that he had not
15 raised before.

16 *THE COURT:* Yes, you may.

17 *MS. SHARPE:* Your Honor, Ms. Brown is serving as a
18 30(b)(6) witness for the purposes of this deposition. That is
19 stated in her declaration. This is not an expert deposition,
20 this is a 30(b)(6) deposition. She is not serving an expert
21 report in advance of that deposition.

22 Mr. Gilbert is now asking for something else, an
23 outline. It sounds like he is now asking for something other
24 than the notes of any interviews, he is asking for any other
25 reliance materials and preparation materials, which we are

1 hearing that for the first time as well.

2 Again, she is still in the process of finalizing these
3 materials, and she has the ability to do that, I would even
4 suggest the obligation to be as fully prepared up to the date
5 of the deposition as she should be, and so that is simply the
6 process that is playing out here, your Honor.

7 *MR. GILBERT:* Judge, forgive me for interrupting. It
8 is inaccurate for Ms. Sharpe to say that I am asking for
9 something for the first time today.

10 In our PTO 32 submission, on page one we said, as well
11 as Ms. Brown's notes or memos regarding such meetings.

12 *MS. SHARPE:* I am sorry, Mr. Gilbert, if I
13 misunderstood. You referred to an outline and I understood you
14 to be referring to something other than notes of the interviews
15 that she has taken, which was clearly what I think both Judge
16 Reinhart and I were contemplating based on the previous
17 comments today.

18 *THE COURT:* I understood the issue. Mr. Gilbert had
19 been very clear to me, he was asking for the notes or
20 memorialization -- maybe notes is not the right word because it
21 may be memorialized some other way -- but the memorialization,
22 if there is one, by Ms. Brown of what she heard, whether she
23 wrote a formal memo, whether she wrote handwritten notes,
24 whether she dictated something. It was very clear that is what
25 he was asking for, and that is what I am ruling on.

1 It seems to me -- and I appreciate, Ms. Sharpe, your
2 witness has to continue to prepare and will continue to prepare
3 up until the minute she walks into the deposition room. It
4 seems to me this is a historical fact. Her notes of interviews
5 that have occurred in the past have occurred, and if she has
6 segregable memorializations of those interviews, I don't have a
7 problem ordering them to be produced a little bit early.

8 I am not sure the rules require it, but under Rule 16,
9 I have broad authority to manage the case. I think this has
10 been, as Mr. Gilbert says, the spirit in which you have always
11 tried to operate.

12 What I don't want is for her to show up on the day of
13 her deposition, she hands over a bunch of materials, and the
14 Plaintiffs, perhaps correctly, come back to the Court and say
15 we want to reconvene the interview because we didn't have
16 enough time to prepare, and we just have a glitch and we waste
17 some time.

18 Whereas, I think the prejudice to Sanofi in requiring
19 a slightly earlier production is not going to be horrifying.

20 I am going to order the production of the
21 memorialization, if there is one, of her interviews of the IT
22 staff employees five business days -- I am sorry, the Wednesday
23 before the deposition. The deposition is to occur, as I
24 understand it, on -- is it January 31st, Mr. Gilbert?

25 MR. GILBERT: Yes, your Honor.

1 *THE COURT:* I am going to order the production by noon
2 on Wednesday, January 26th. That will give Mr. Gilbert and his
3 team two and a half working days, but I know they always work
4 on the weekend, so four and a half days to prepare. That
5 should be sufficient time for them to prepare for that portion
6 of the deposition.

7 That is without prejudice, Mr. Gilbert, if, when you
8 get into the deposition, as with any other topics, if you can
9 demonstrate that you have been prejudiced by not having these
10 materials sooner, I would entertain a motion to reopen the
11 deposition.

12 That will be my ruling as to this issue.

13 The names, Ms. Sharpe produce those by the same time,
14 and since there is nothing else to produce in the third
15 category, I am not going to address the third category.

16 Mr. Gilbert, did you want to be heard further on
17 your request that I reconsider my prior order?

18 *MR. GILBERT:* I would like to be heard, your Honor. I
19 read the response from the Defendant. I don't believe that
20 their position is well taken. We asked you to reconsider based
21 on the very specific statements that Ms. Brown included in her
22 declaration. You can see for yourself -- by the way, I want to
23 say this because it is important to make this record.

24 Mr. Agneshwar, on behalf of Sanofi, stood before your
25 Honor last time and repeatedly said that all of the requests

1 that we are making with regard to these employees was based on
2 pure speculation, and I represented to the Court at that time
3 it was not based on pure speculation. It was based on
4 testimony by their witness, the gentleman who worked there on
5 December 14th, it was based on exhibits marked during that
6 deposition, and I represented that to you. And you asked,
7 well, are those exhibits attached to your PTO submission that
8 we were asked to submit on 24 hours notice, and I told you they
9 were not.

10 Our request for reconsideration, as well as our
11 request for the information from Ms. Brown, attaches three of
12 those exhibits so that you can see for yourself that Mr.
13 Agneshwar's statements about our requests being based on pure
14 speculation comes from a different universe.

15 Those exhibits clearly indicate that there were
16 ongoing communications and discussions taking place between the
17 gentleman whose deposition was taken and several of his
18 colleagues and superiors in the IT department at Sanofi
19 throughout the operative period of the fall of 2019 through the
20 end of 2020.

21 That is who we wanted the emails from, that is who we
22 believe the Court should have ordered the emails from. Under
23 the standards for reconsideration, under the Hood v. Purdue
24 case, the Court always has the opportunity to reconsider the
25 need -- and two of those bases, the need to correct clear error

1 or to prevent manifest injustice.

2 If your Honor was led to rule as you did based on Mr.
3 Agneshwar's statement that our claims were based on pure
4 speculation, or that it was not relevant, or that it was unduly
5 burdensome, clearly, your Honor, we have shown your Honor
6 through what we submitted that that was not the case, and we
7 would ask the Court to reconsider that ruling.

8 *THE COURT:* I will be clear, and I will hear from
9 Ms. Sharpe in a second, to be -- we have been living with each
10 other for almost two years now, and I think I made clear from
11 the beginning that I view all discovery rulings as without
12 prejudice if the situations change, if facts change, or new
13 information develops.

14 I received the materials, you did include the emails
15 that hadn't been included previously. I recognize that the PTO
16 32 process sometimes doesn't give the parties as much time as
17 they might like to develop the record. So, I am happy to
18 consider it, but let me hear from Ms. Sharpe on the merits, if
19 I can.

20 *MS. SHARPE:* Thank you, your Honor. The situation
21 hasn't changed, the facts haven't changed. There is nothing
22 new here that wasn't considered before. Your Honor had before
23 him at the last discovery conference the same declaration that
24 Mr. Gilbert is talking about today, that was part of the
25 record, that was part of the discussion.

1 These emails were also part of the discussion at the
2 last discovery conference. Your Honor might not have had the
3 exact emails before you, but Mr. Gilbert certainly described
4 them to you and he said the same thing about them and what they
5 show as he is saying what they show today.

6 You could look at those emails. From our perspective,
7 they don't suggest anything at all that anyone was aware of a
8 problem here. There are email exchanges between one employee
9 asking another employee for an updated copy of a report. There
10 is nothing more to them than that.

11 There is no suggestion that there was an employee that
12 thought anything had broken down in the legal hold process, and
13 in fact, you have the declaration of the 30(b)(6), which you
14 had before you the last time, where her investigation has shown
15 that no one was aware of this issue. That is also supported by
16 testimony that is in the record as well.

17 And so, it remains -- I will happily adopt Mr.
18 Agneshwar's position that it is pure speculation that there is
19 anything else in other custodial emails, and as I pointed out
20 before, certainly if our 30(b)(6) witness, in the course of her
21 investigation, had identified additional emails or things that
22 she thought she needed to investigate these issues that she
23 thought were relevant, we would have gone and gotten those and
24 produced them to Plaintiffs here.

25 There has been nothing at any point along the way to

1 suggest there is anything additional in other custodial files
2 that haven't been produced here.

3 *THE COURT:* Anything, Mr. Gilbert?

4 *MR. GILBERT:* Yes, Judge. I want to be careful not to
5 quote the documents that were attached to our submission since
6 they have been designated highly confidential. By the way, we
7 are not in agreement with Sanofi on that designation, but they
8 have for the time being designated them as such.

9 Let me say this, your Honor, it is crystal clear from
10 these emails -- and I can direct you where to look -- that
11 there were communications that were taking place, there were
12 meetings taking place regarding legal hold. There were
13 communications taking place about what is the status of the
14 legal hold between the gentleman I deposed, a female colleague
15 of his, his superior, and others.

16 In addition, the gentleman who I deposed testified
17 about having at least one, but he believes more meetings with a
18 gentleman in the Sanofi legal department whose initials I gave
19 you during the last hearing.

20 It is on this record, Judge. For Ms. Brown, the
21 designee, the 30(b)(6) designee, to say that she didn't ask for
22 those emails, that is not the rule we apply. She may have
23 chosen not to ask for those emails because she doesn't want to
24 see what is in them.

25 These three exhibits, the testimony that we cited all

1 make a prima facie showing that colleagues of the gentleman I
2 deposed in the IT department, his direct supervisor in the IT
3 department, and at least one gentleman in the legal department
4 were clearly aware that there were extraordinary delays taking
5 place in this gentleman's work in updating the legal hold list.

6 We should be entitled to see the communications that
7 took place among those people or by those people that did not
8 involve the gentleman who I already deposed.

9 That is what we asked you for last time. You denied
10 that request. We are renewing that request to you. We think
11 it is a meaningful, important, relevant, and proportional
12 request given the limited time frame and the limited number of
13 people. Thank you.

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

15 *MS. SHARPE:* Your Honor, if I may, on a couple of
16 these people that Mr. Gilbert referenced, because I think one
17 point in particular will help short circuit some of this.

18 He referenced and is relying primarily on emails
19 exchanged with a woman, a female colleague who is on these
20 emails, that is the person he is referencing in large part.

21 I can tell you that that person left the company in
22 September 2020. She had no involvement with the Zantac matter,
23 she is not a custodian, and we do not have a custodial file to
24 produce for her. So, it is simply a non-issue.

25 Those are the emails that Mr. Gilbert is referencing,

1 so again, I think it is a non-issue for you.

2 The third email is with a supervisor who did not have
3 supervisory responsibility for the IT individual with respect
4 to legal holds, so there is no reason to believe that he would
5 have additional emails regarding the legal hold process. He
6 didn't have any involvement whatsoever in the legal hold
7 process.

8 *THE COURT:* Thank you. While I appreciate that, Ms.
9 Sharpe, I don't know that I can accept your representations as
10 evidence or testimony that I should rely on in ruling here.

11 I did review the emails that Mr. Gilbert was able to
12 submit with his supplemental request, and I have reconsidered
13 de novo my prior ruling. I am going to adhere to that prior
14 ruling even having considered the additional information and
15 heard additional argument from the parties.

16 Let me clarify a couple of things. First of all,
17 speculation is not the standard, so I don't necessarily find
18 that it is purely speculative that there might be some email
19 communication not involving the individual that Mr. Gilbert
20 deposed that could be relevant to the issues in this case.

21 What I am finding is that the burden and the cost of
22 looking for that and the likelihood that it is going to be
23 found as compared -- the likelihood that it is going to be
24 found, if it exists at all, is outweighed by the costs and
25 burden of having to go look for it, and the likely benefit it

1 would provide to the litigation to go through that exercise.

2 I can see how Mr. Gilbert can read these emails and
3 perhaps draw an inference. He is certainly free to argue that
4 inference. He is free to develop it, and I assume he did
5 develop it with the individual he deposed and he can try and
6 develop it with the 30(b)(6) witness.

7 To be more clear, my specific finding is, applying the
8 Rule 26(b) factors, I find that the cost and inconvenience of
9 conducting this search outweighs the likely benefit from
10 conducting it. For that reason, I will adhere to my prior
11 ruling.

12 Thank you both very much. I will move to the next
13 matter.

14 *MS. SHARPE:* Thank you, your Honor.

15 *THE COURT:* Thank you both very much, well argued.

16 The next matter is relating to the third party
17 subpoena to Valisure by -- the subpoena was actually issued by
18 GSK, but joined in by all the other Defendants.

19 *MR. EGAN:* By Sanofi, your Honor.

20 *THE COURT:* By Sanofi, thank you. Let me have counsel
21 for Valisure make your appearance.

22 *MR. EGAN:* Good afternoon, your Honor, William Egan of
23 Robinson and Cole representing Valisure.

24 *THE COURT:* Good afternoon. And counsel for the
25 Defendants.

1 MR. OOT: Good afternoon, your Honor. Patrick Oot for
2 GSK.

3 THE COURT: Good afternoon. I did have a chance to
4 review the materials. There is a lot, so let me go through
5 what I got.

6 There is a joint summary that was submitted by the
7 parties yesterday. There was a separate document titled Brand
8 Defendants in Opposition to Valisure's Motion to Quash, a
9 16-page document which I did review. GSK also submitted
10 electronically a very lengthy spreadsheet and something called
11 master Valisure exhibits, which are 496 pages. I didn't read
12 those, I will be honest with you. Then Valisure submitted the
13 Motion to Quash along with Exhibits 1 through 11, which I have
14 reviewed.

15 I believe GSK also submitted a timeline as a
16 demonstrative aid, which I have, but I can't say I reviewed it
17 carefully, and I did receive a separate demonstrative aid, but
18 that was relating to Mr. Bretholz.

19 Mr. Egan, did you submit anything else that I have did
20 not referenced already?

21 MR. EGAN: No, your Honor.

22 THE COURT: Mr. Oot, did you submit anything further
23 that I have not referenced yet?

24 MR. OOT: There were exhibits to the opposition, your
25 Honor. We noticed those were not included, but most of those

1 are in the timeline, and we appreciate that you did not go
2 through all of the individual exhibits. They were more for the
3 record to back up the overall timeline, and we thought that it
4 would be helpful to use that timeline to narrow the facts. We
5 had two junior attorneys on the team put that together.

6 *THE COURT:* That is fine.

7 *MR. EGAN:* Briefly on the timeline, your Honor -- I
8 apologize.

9 *THE COURT:* I will get to that in a second.

10 When I say I reviewed the exhibits, let me make
11 something clear that I think I made clear earlier in the
12 litigation, but I will say it again now.

13 I don't read your emails. You all send a lot of pages
14 of emails back and forth to each other. I never read them
15 because here is my view: You had your chance to negotiate. If
16 you are in front of me, you need a ruling from me, and how you
17 got here doesn't matter.

18 Unless you are citing me to an email because you are
19 saying they committed to do something that they are today
20 refusing to do, I don't read your emails, I don't care. All I
21 am reading is self-serving emails that lawyers send to each
22 other because they think it is going to influence the judge,
23 and it just does not matter to me. So, that I did not read,
24 but I did read the subpoena, the response, the objections, etc.

25 With that, Mr. Egan, I will hear you on the

1 demonstrative aid.

2 MR. EGAN: Briefly, your Honor, we don't have any
3 objection to their using it. The summaries of the underlying
4 documents that they use I think are not necessarily fully
5 accurate. I don't think they are intended to deceive the
6 Court, but they certainly are shaded in their favor. So, to
7 the extent the Court does review the timeline and the summaries
8 of underlying documents, we disagree that they fully
9 accurately describe the underlying documents.

10 Having said that, I am not accusing Mr. Oot of doing
11 anything improper. You put on your case as effectively and as
12 strong and forcefully as you can, but we disagree as to how
13 some of the characterizations play out, and we ask that you to
14 take that into consideration if you are reviewing the timeline
15 in making your decision.

16 THE COURT: Thank you. To me, it is a demonstrative
17 aid, which means it is not factual evidence. If the
18 representations in the demonstrative aid are not supported by
19 other evidence in the record, then they won't be considered.
20 If they are, they will be considered, and both sides can
21 advocate however they would like to advocate.

22 One other preliminary matter, and I asked the special
23 master to communicate this question to the parties to this
24 matter as well as to the Plaintiffs. It seems to me the
25 relevance theory by the Defendants here is that Valisure has

1 produced a report, study, whatever noun you want to use, which
2 concluded that Ranitidine causes cancer, and the Plaintiffs --
3 the Defendants believe that there was bias and motive to
4 predetermine the outcome of that report.

5 The discovery that is being requested here is to try
6 to challenge the validity and the weight of that report on the
7 grounds that there was bias and a motive.

8 At a very high level, Mr. Oot -- and I will let you
9 articulate this much more fully as we go ahead. At a very high
10 level, is that essentially the relevance theory here?

11 *MR. OOT:* That is at a very high level, your Honor, a
12 good analogy of our position. I should point out that -- and
13 we did appreciate the receipt of your question -- that the
14 Valisure testing permeates throughout this litigation. It was
15 referenced on Science Day, it was -- the testing in the
16 Braunstein 2021 study is actually Valisure's testing.

17 So, I think trying to unbundle Valisure's work from
18 this litigation could be very difficult, and it is our
19 understanding that it is critical to Plaintiffs' case both in
20 the PI matter, and then also the knowledge of the economic loss
21 cross action Plaintiffs that the reason they think they have
22 economic loss related to Zantac is because of the citizen's
23 petition and the underlying testing.

24 *THE COURT:* I understand. I will let you fully
25 develop that argument.

1 Mr. Egan, I suppose, outside of this subpoena, you
2 don't have a dog in that fight. If the Plaintiffs want to try
3 to use the study, they can, and if they don't, they don't have
4 to.

5 MR. EGAN: That is correct, your Honor. We have not
6 been asked to be an expert in this case, testifying or
7 non-testifying. They have not asked us if they can use our
8 report. No dog in the fight is well put.

9 THE COURT: So, Mr. McGlamry or Mr. Gilbert, can I
10 pose the question I want to pose directly to the Plaintiffs.
11 The question is this: Are the Plaintiffs intending to rely
12 upon the results of the Valisure study as substantive evidence
13 to try to prove their claim that Zantac causes cancer?

14 MR. McGLAMRY: Your Honor, this is Mike McGlamry on
15 behalf of Plaintiffs. The answer to your question is, no, we
16 are not.

17 THE COURT: So you are not going to show up at trial,
18 or on Daubert or anything else, and your experts are not going
19 to rely on this Valisure study in any way?

20 MR. McGLAMRY: That is correct, your Honor, and I will
21 just add this. Plaintiffs have not retained Valisure or any
22 person or employee from Valisure as an expert in this
23 litigation. Our experts, as you know, are going to be
24 disclosed next week, and they do not rely on the Valisure
25 citizen's petition, study, whatever you want to refer to it,

1 its testing or data or science in any way to render their
2 opinions on general causation.

3 *THE COURT:* Okay. You are not going to try to
4 introduce the Valisure study, whether as an expert or
5 otherwise, you are not going to try to introduce that to prove
6 your claims.

7 *MR. McGLAMRY:* That is correct.

8 *THE COURT:* Other than maybe as background to explain
9 why certain conduct was undertaken?

10 *MR. McGLAMRY:* That is correct, your Honor. If you
11 will recall, in the master complaint it is referenced because
12 it is a point in time of things that happened, and it is a fact
13 that it happened, and the Defendants have so answered in their
14 answer to our complaints that those things did happen, but we
15 are not relying upon it in our case.

16 *THE COURT:* I understand. To use a different
17 analogy -- I want this to be very clear on the record, because
18 I think this is a significant position that the Plaintiffs are
19 taking, and I don't want there to be any question going
20 forward.

21 This strikes me as a lot of what I used to see as a
22 prosecutor where the police would come in and say we had a
23 confidential informant who told us that John Smith is a drug
24 dealer, and so we sent an undercover officer to John Smith's
25 house and he bought drugs from John Smith.

1 All we are going to introduce at the trial is what
2 happened with the undercover officer. The confidential
3 informant is not going to be mentioned, the confidential
4 informant is not going to come up. If the confidential
5 informant comes up, it will just be to explain why we did what
6 we did, and the judge will instruct the jury that is not
7 admitted for the truth, that they cannot draw any inference
8 based on that, that it simply could be true, could not be true,
9 it doesn't matter.

10 Am I correct, Mr. McGlamry, that is where we are?

11 *MR. McGLAMRY:* Yes, your Honor, you are absolutely
12 correct.

13 *THE COURT:* Okay. Thank you.

14 *MR. McGLAMRY:* Can I disappear, then?

15 *THE COURT:* You may, you have answered my question.

16 *MR. OOT:* Your Honor, may I respond to that?

17 *THE COURT:* Yes. Mr. Oot, given that concession, why
18 are we going down the road here with Valisure and Mr. Bretholz?

19 *MR. OOT:* First of all, the Braunstein 2021 study that
20 was previously mentioned, that is Valisure testing, and it is
21 one of the studies that was referenced in Science Day. The
22 underlying -- liquid -- how do we do this -- the liquid
23 chromatography mass spectrometry testing component of it
24 actually was completed by Valisure.

25 So, the Braunstein research and testing is actually

1 Valisure testing, so if Mr. McGlamry is confirming that that is
2 no longer a study that they are going to be relying on, it was
3 one of the ten studies referenced on Science Day, that would be
4 helpful to clarify.

5 *THE COURT:* Just so I am clear, what I was
6 questioning -- maybe I need to get Mr. McGlamry back. What I
7 was questioning about was, the original Valisure study which
8 led ultimately to the citizen complaint, etc. etc., if somebody
9 else had retained Valisure as a third party laboratory to
10 provide laboratory services, I don't know that.

11 Mr. McGlamry, I don't know if you want to respond to
12 that or not.

13 *MR. McGLAMRY:* Your Honor, I am not sure how I am
14 supposed to respond to that. What you are hearing is what they
15 brought up, not what we brought up. Again, we are not relying
16 in any way on the citizen's petition or expertise of Valisure.

17 So, beyond that, I will be honest with you, I did not
18 participate in the Braunstein deposition, which they took, not
19 us, and it is not something we are relying on.

20 *THE COURT:* Okay, I understand. Thank you.

21 *MR. OOT:* Your Honor, can I cite the Braunstein
22 deposition? Again, it is something that they are relying on.

23 "Question: Valisure alone performed the laboratory
24 analysis described in the research letter, correct?"

25 The answer from Dr. Braunstein is: "Correct."

1 The published Braunstein 2021 actually contains the
2 LCMS SGF study because his epi study was removed. The quote
3 from the deposition actually ends at yes.

4 Just to confirm, is the gas chromatography mass
5 spectrometry -- I am going to butcher this, your Honor.

6 *THE COURT:* I think it is spectrometry.

7 *MR. OOT:* And the simulated gastric fluid study was
8 included in the underlying Braunstein research which came from
9 Valisure.

10 *THE COURT:* Okay, we will get to that in a second.

11 So, let me ask, Mr. Oot, if you could address these
12 two issues separately.

13 Assume that -- assume away the Braunstein study.
14 Okay? What is the relevance of what you are asking for from
15 Valisure. If you want to show that Valisure is in cahoots with
16 the Plaintiffs' lawyers, and they are engaged in some sort of
17 conspiratorial behavior to try to gin up these lawsuits so they
18 can make money and the Plaintiffs' lawyers can make money and
19 everybody can make money, therefore they would have a motive to
20 falsify their initial study, if that initial study is not part
21 of the litigation, what is the relevance of whether there is a
22 conspiracy or not?

23 *MR. OOT:* You will also see from the timeline, your
24 Honor, that there was influence from Valisure all through, you
25 know, lobbying, they hired Tom Daschle's group to speak to

1 Congress, to influence the FDA to head in a certain
2 direction --

3 *THE COURT:* I am sorry, let me simplify this
4 hypothetical for you.

5 Assume everything you say is true, Valisure is out to
6 set you up, set up your clients, do horrible things and falsify
7 every data that they possibly can to make you look bad, but the
8 jury is never going to hear that Valisure ever produced any
9 study.

10 Why is it relevant to get into that area of inquiry?

11 *MR. OOT:* So, your Honor, I think the underlying
12 conduct that the jury should hear, the marketing campaign that
13 went into filing this litigation, and the conduct around it, I
14 think the facts associated with this litigation are underlying
15 that it started from a petition. It is almost like a bait and
16 switch, you can't file a complaint -- it is still in the master
17 complaint, and it is also across the country referenced in the
18 State cases as well, as the reliance on what Plaintiffs are
19 relying on here.

20 So, the position that the jury will never see this, I
21 think we are talking about discovery here and whether it is
22 relevant to the defenses. Our defenses include exactly what
23 you said, your Honor, that this is ginned up litigation, and
24 the underlying science is almost a bait and switch at this
25 point where if they are not relying on this, what are they

1 relying on?

2 We see, again, through the timeline that they -- that
3 Valisure had knowledge, including, by the way, Ron Joffe, who
4 we will talk about very soon, I am sure, with Mr. Shortnacy on
5 the deposition subpoena and the subpoena for Emery.

6 That is one of their experts, and you also see in the
7 timeline Ron Joffe telling Valisure that their research is
8 flawed, that their testing methodology is flawed. They knew
9 this and they filed this citizen petition anyway.

10 We can walk through the timeline, your Honor, but I
11 think that is extremely relevant that the expert that they are
12 using, that we are litigating over as we speak, whether or not
13 that expert and the materials associated with that expert
14 should be produced. I think that underlying information is
15 important to expose, you know, just the timing of, again, when
16 Emery also understood that the testing methodology is flawed.

17 *THE COURT:* Like I said, I am going to let you fully
18 develop your argument, but I just wanted to address that
19 initial subject.

20 Let me turn to -- Mr. Egan, let me start with you
21 because it is your Motion to Quash technically.

22 So, from reading your papers and looking at the memo,
23 it looks to me that you want me to do two things in the
24 alternative. One is to either quash the subpoena in full, or
25 in the alternative, that there is a more limited universe of

1 evidence that you would be willing to cull through, and then I
2 should order that any further discovery be limited to only that
3 smaller use of documents, and that other areas of factual
4 development could be handled through sworn statements,
5 interrogatories, declarations, or other non-production
6 documents.

7 *MR. EGAN:* Or at the deposition that is scheduled for
8 February, correct.

9 *THE COURT:* Or through the 30(b)(6) deposition. Is
10 that still your request today?

11 *MR. EGAN:* Yes, your Honor. My client did produce
12 about 1600 documents to begin with, and from what you see in
13 the brief that's been filed with the Court and the timeline you
14 are about to see, it looks like they have plenty of evidence to
15 challenge what appears to be, confirmed now by Mr. McGlamry, as
16 just background.

17 Yes, we would like you to quash the subpoena entirely,
18 except for, obviously, what we have already produced, and say
19 we are done. That would be terrific.

20 But to the extent that the Court does have an interest
21 in allowing the Defendants to explore things further, you saw
22 reference to a 51,000 line hits list and a smaller hits list
23 that we did on a more focused search, our request is that they
24 select up to a thousand documents from the smaller list, but if
25 they are only selecting a thousand, it doesn't really

1 matter which list they use.

2 *THE COURT:* The way you got to the smaller list, as I
3 understand it, is you applied a delimiter that was designed to
4 limit it only to Zantac or Ranitidine and to carve out benzyne
5 and some other --

6 *MR. EGAN:* Benzyne, metformin and APAP are three other
7 citizen petitions my client was involved in.

8 My client asked me to emphasize that we are not in
9 the citizen petition business as our primary function, but we
10 have filed them. They don't want to be seen just as a
11 Plaintiff's firm lab, that is not what they are, and they asked
12 me to enforce that.

13 Yes, what we did is we knocked out benzyne, which is
14 in sun screen, metformin, which is a separate drug dealing with
15 diabetes, and APAP, which is in rapid acting Tylenol.

16 *THE COURT:* You also knocked out anything else that
17 didn't reference Ranitidine with --

18 *MR. EGAN:* Your initial statement is right, yes. We
19 also took out newsletters. If there is a Google letter that
20 mentions Zantac was pulled off the shelf in some Arizona
21 pharmacy, it is a newsletter, that's not a communication or an
22 analysis. We pulled that.

23 *THE COURT:* And these 10,000 or 50,000 documents that
24 you are talking about, is this primarily email, or is it other
25 electronically stored data, or is it custodial, noncustodial

1 files? What is it?

2 MR. EGAN: It is emails, your Honor, and it is also a
3 bunch of underlying documents, attachments to emails, and
4 separate reports, Word documents that were prepared. Mr. Oot
5 has been through the spreadsheet and he may have some
6 additional comments for what he has seen on there. Yes,
7 everything on the Valisure server that was pulled by an
8 independent vendor that we hired, that they approved, called
9 Haystack, and using a hit search, they came up with that list,
10 not limited to email.

11 THE COURT: What is your legal objection in support of
12 the request that you are making?

13 MR. EGAN: The legal objection, your Honor, is that it
14 is overbroad and that -- two things primarily, it is not
15 relevant to the issues in the case. The documents that they
16 are requesting, they are asking for documents from citizen
17 petitions that have nothing to do with Ranitidine. They are
18 asking for documents having to do with our investors and
19 sources of income that have nothing to do with Ranitidine.
20 They are asking for all sorts of business plans and
21 communications that, again, have nothing to do with the testing
22 or analysis of Ranitidine.

23 They may be able to get a little bit of leeway with
24 regard to the question of bias or influence, but asking for
25 a -- using the 51,000 hits list search, they have asked us to

1 review privilege log and produce 29,000.

2 Given what we just heard, that this is just background
3 for the case, that is not proportional to the needs of this
4 case. It has cost us a fortune to get here and it is going to
5 cost another fortune to get there if we do all that, and this
6 should not be imposed on my client. We will address costs
7 later, but just the effort of going through that is not
8 proportional to what is required here.

9 If they want to go after the science behind the
10 Plaintiffs' expert report, fine. I think Mr. Oot said if they
11 are not relying on Valisure, what are they relying on? I think
12 Mr. McGlamry made it clear they are relying on their own expert
13 report.

14 *THE COURT:* Thank you very much. Let me turn to Mr.
15 Oot to respond. What is your objection to them using the
16 delimiter that takes the hits down from 51,000 to 10,000?

17 *MR. OOT:* Your Honor, generally, we have not been
18 objecting to a process to whittle down the documents. E
19 started with 100,000 documents. We -- the research terms
20 generated 50,000. We went through the metadata report and that
21 culled it down to around 30,000 documents, is what I think the
22 number is.

23 The issue that we had with Mr. Egan's proposal was the
24 connector. So, in other words, if Ranitidine and the word
25 benzyne appears in the same document, that would automatically

1 be excluded. So, that was an issue that we thought that
2 wouldn't be resolved by the connectors that Mr. Egan proposed.

3 So, the answer there is also on proportionality
4 grounds, they are objecting to the subpoena. They had four,
5 you know, senior level people working on the citizen petition,
6 so Mr. Egan's firm had two partners working on the citizen
7 petition. Mr. Frank Gregory -- sorry, Gregory Frank was also
8 working on the citizen petition.

9 So, Valisure has spent a considerable amount of money
10 in building this litigation where the litigation is really
11 getting ahead of the science, is what it is sounding like to
12 me. We also don't have an answer of whether or not the
13 Braunstein study is in because the underlying testing is
14 Valisure testing.

15 As we'll see in the timeline, too, your Honor, the
16 influence that Valisure played in the science generally, it is
17 not just the citizen petition, it is the influence of David
18 Light telling Braunstein not to publish the Kanter study, and
19 again, these topics all come through in the timeline and -- the
20 overall demonstratives, by the way, your Honor, they are not
21 emails back and forth between Mr. Egan and I, they are actually
22 substantive evidence from this litigation and things that have
23 been produced by other parties, but have not been produced by
24 Valisure.

25 If it would be helpful, I could walk through the

1 timeline.

2 *THE COURT:* If it will be helpful to you, it will be
3 helpful to me.

4 *MR. OOT:* Great. Mr. Cummings will be sharing the
5 screen to run through that.

6 *THE COURT:* Wonderful. How long do you think it will
7 take to run through the timeline, Mr. Oot?

8 *MR. OOT:* I am hoping to get through it in less than
9 five minutes, your Honor.

10 *THE COURT:* At some point, I wanted to take a break
11 for Ms. Stipes. Why don't we go through the timeline and
12 perhaps that will be a good breaking point. Then we will take
13 a short recess. Take whatever time you need to go through the
14 timeline. I don't mean to rush you.

15 *MR. OOT:* If Mr. Cummings could switch his screen so
16 it is in the slide show mode.

17 *THE COURT:* I did print out the timeline.

18 *MR. OOT:* The first slide that we are looking at here
19 is the September 2018, when Valisure was formed. The reason we
20 are showing that, your Honor, is we just don't have any
21 information about Valisure's, you know, prelaunch fund raising
22 stages, and it is important to us where that money is coming
23 from because, again, it is -- the litigation is getting ahead
24 of the science.

25 So, if they are taking out Valisure and suggesting

1 that the study is no longer going to be used, and the
2 underlying testing, again, is in multiple additional studies
3 after the citizen's petition, I think it is going to be really
4 challenging to exclude all of that Valisure testing information
5 because it is referenced and cited elsewhere.

6 Just jumping to the next slide here, again, we don't
7 have documents related to the Adam Bretholz, Michael Bretholz's
8 brother, of the -- why he was paying a thousand dollars to
9 Valisure so he could test Ranitidine, another fact that is
10 important because of Valisure's influence not just on their own
11 science, but other science as well.

12 The next is very important, your Honor. This is
13 March 29th, and remember, the citizen petition was filed in
14 September. Emery's retention and testing is important here
15 because it shows that Valisure knew its method was inaccurate
16 and still submitted it to the FDA and publicized it anyway.

17 So, now we are involving Emery, who is a player in
18 this litigation, if not a Plaintiffs' expert.

19 April 1st, Light tells Emery that the testing
20 methodology, it knew its testing methodology was accurate
21 related to the super heating. Jumping to April 4th, it shows
22 Valisure's attempt to influence the science on Ranitidine and
23 being able to deny direct funding.

24 The next is Valisure came to learn of the flaws in Dr.
25 Mitch's studies, yet relied on it anyway to bolster its

1 material.

2 The next is April 19th, this shows the involvement of
3 Plaintiffs' attorney, class action Plaintiffs' attorney,
4 influencing Valisure, who is also influencing other science.

5 Again, jumping to April 30th, it shows Valisure's
6 knowledge of flaws related to the 2016 Mitch study, and then on
7 May 2nd, it shows direct involvement in the citizen's petition
8 by Plaintiffs' attorney, including directly developing the
9 content of the petition.

10 So, again, I will go through this quickly, your Honor.
11 The first here is May 8th, this is involving Mr. Bretholz.
12 This is Mr. Bretholz advising Dr. Braunstein to delay telling
13 his colleagues or anyone else about the risk of Ranitidine
14 because they have upcoming meetings with the White House and
15 the FDA. Again, continually affecting science in this
16 litigation.

17 MR. EGAN: Your Honor, if I may, we disagree with some
18 of the content that is being summarized here, or at least how
19 it is. I will let Mr. Oot continue.

20 MR. OOT: The exhibits are directly referenced in the
21 tab marks, so you can review the record yourself and make a
22 determination based upon what you see on the timeline.

23 That is why we included the overall -- the large
24 master exhibit list, so if you had a question, you could go
25 back to that exhibit and look at that exhibit directly.

1 THE COURT: Thank you.

2 MR. OOT: May 8th, showing Valisure's lobbying
3 campaign with the FDA to take action, as well as the PR
4 campaign. Remember, they hired Tom Daschle's group, they are
5 spending a lot of money to push this litigation forward and
6 influence the science, not just with Valisure, but with other
7 scientists.

8 Jumping to May 13th, this again shows that Valisure
9 had knowledge that its testing was inaccurate, coming from
10 Emery, and then on May 23rd, Light asks Emery to exclude
11 information about the method and shows it knew that its testing
12 was inaccurate.

13 So, again, the next is September 13th, your Honor,
14 that is when the citizen petition was filed. I will skip over
15 that, I think that is kind of pretty clear of our position on
16 that, but I think also the important thing, on the very same
17 day that David Light's brother-in-law files the very first
18 case, and David Light is Valisure's CEO, your Honor, in
19 Florida, I believe.

20 So, then again the marketing machine starts to work,
21 and shows that well marketed and well organized coordinated
22 media campaign.

23 Jumping to the 19th, we see Michael Bretholz talking
24 to Congressman -- woman Anna Eshoo. We took this picture off
25 the internet that we found related to those visits to Congress,

1 again to influence the science, to influence the FDA, and then
2 continually talking to Plaintiffs' attorneys.

3 The next is October 1st, after filing the citizen's
4 petition. October 2nd, the FDA criticizes Valisure, and then
5 what we will be talking about shortly is Michael Bretholz's
6 role in all of this. He is playing a nonlegal role and talking
7 to a CEO of a large investment bank and former chair of the
8 Federal Reserve to try and set up a meeting to discuss
9 Valisure, again to influence science, influence powerful people
10 to influence the science and the FDA in this litigation.

11 So, coincidentally, we are talking about
12 proportionality, and the money involved I think is key as well.
13 We see on October 19th, that \$4.3 million in new investments
14 comes in to Valisure. We see the amount of effort and the
15 amount of energy being put in to influence the science related
16 to this litigation is significant and this continues further
17 on.

18 Again, October 17th, FDA emails Dr. Braunstein about
19 FDA's concern about the lab methods.

20 November 6th, this shows Light actively involved in
21 attempting to interfere with science and contradict the
22 narrative built on Valisure's false and misleading test
23 results.

24 December 9th, this shows Light actively attempting to
25 interfere with the FDA's investigation because he feared it

1 would contradict the narrative built on Valisure's false and
2 misleading test results. Emery initially criticized Valisure's
3 citizen petition --

4 *THE COURT:* Can I ask you to slow down a little bit
5 for Ms. Stipes.

6 *MR. BURSTYN:* While Mr. Oot is paused, this is Sean
7 Burstyn on behalf of Mr. Bretholz. Just very briefly --

8 *THE COURT:* Mr. Burstyn, if your point is that you
9 think there are being inaccurate statements made, I understand
10 that is your position. This is a demonstrative aid and I will
11 let Mr. Oot make his argument. If you want to respond to it
12 when it is your turn, I will let you respond to it.

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

14 *THE COURT:* Mr. Oot, please continue, but a little bit
15 slower.

16 *MR. OOT:* Sure. I apologize, your Honor. I am trying
17 to get through this quickly.

18 *THE COURT:* Don't rush. Take your time.

19 *MR. OOT:* That is December 15th, this shows Emery and
20 communication related to Emery showing that this is what
21 happened, the Valisure testing method was garbage and still
22 submitted to the FDA anyway.

23 Again, December 15th, this shows again continued
24 Valisure's lobbying campaign, and the followup from U.S.
25 Representatives showing the success of Valisure's lobbying

1 campaign to influence the science and the FDA related to this
2 litigation.

3 So, again, this is on December 29th, behind closed
4 doors Dr. Braunstein is saying that Valisure's claims are not
5 backed up by real science, and the Braunstein study is still
6 one of the studies that is referenced on Science Day.

7 Jumping down to January 9th, this shows that the
8 scientific community recognized the flaw in this data, and
9 again, June 20th, Light testifies before the Senate Finance
10 Committee, again attempting to influence science, and shows the
11 success of Valisure's lobbying campaign.

12 Coincidentally, on July 14th, they received another
13 \$3.7 million. Profiting from this campaign is important,
14 Valisure started this whole litigation and you just can't take
15 the bias out of -- just by removing Valisure because the
16 underlying campaign and the underlying influence on science
17 from the FDA, and who knows what other scientists, your Honor,
18 we don't have the discovery, that is the whole point of this.

19 Wrapping it up, your Honor, December 30th, the
20 internal message from Valisure's cofounder and chief business
21 development officer, sends an internal email saying that while
22 independent studies can still be useful if they support
23 Valisure's findings, that many lawyers will be paying attention
24 to the findings.

25 So, again, attempting to influence litigation through,

1 you know, what I would argue is junk science.

2 And finally on May 4th, we see Dr. Mitch did the right
3 thing and retracted his study once he conclusively determined
4 that the NDMA testing measured was entirely an artifact.

5 Then May 6th to July 6th, FDA cites Valisure for
6 numerous violations, including failure to validate its
7 analytical methods.

8 Your Honor, it is hard to say that we can remove
9 Valisure from this litigation and really get in a position
10 where the litigation is ahead of the science, because that is
11 really what is happening if we were to take Valisure out
12 because the underlying testing and the underlying model is
13 based upon the Valisure citizen's petition.

14 You see millions of dollars that were spent in
15 lobbying, you see millions of dollars that were spent in this
16 marketing campaign and testimony on the Hill, multiple outside
17 firms.

18 Again, just from the spreadsheet, Exhibit 57, you see
19 two partners from Mr. Egan's firm communicating right around
20 the citizen petition. I am not requesting those documents,
21 your Honor, I am requesting that they be logged. So, we want
22 the documents produced that hit on those terms and also that
23 were whittled down that we think could be relevant.

24 Alternatively, if they are claiming they are
25 privileged, we want them to designate them as privileged and

1 follow the log in process just like we have to.

2 It is challenging to say that we can take Valisure out
3 of this and then we can have this litigation move forward.
4 The FDA citizen petition process is not peer reviewed. The
5 guardrails are 21 CFR 10.30, and that is the
6 certification requirement.

7 This is kind of like the 26(g) requirement that you
8 have to disclose and certify that your representative data
9 includes not just the good stuff, but the unfavorable content
10 as well. We don't think any of that material made its way to
11 the FDA. The FDA is a powerful and influential voice in the
12 scientific community, and we think this discovery is warranted
13 relating to that.

14 Again, I can go further down --

15 *THE COURT:* Let me, if I could, I think Mr. Egan made
16 the alternative argument, which was, Judge, look at the
17 timeline, they sure have a lot of evidence. If they want to
18 make the argument, he just made it to you.

19 Let's assume we get over the relevance hurdle for
20 Valisure, I determine that Valisure is relevant to the claims
21 and defenses going forward. If the argument you want to make
22 is that they knew their testing and data was inaccurate, they
23 went forward anyway, they tried to hide that fact, they tried
24 to influence other people to corroborate it, they tried to
25 raise money from it, they were in cahoots with Plaintiffs'

1 lawyers, what -- so that is what you have so far, and now you
2 want internal documents and internal communications and things
3 like that. Mr. Egan's argument is that is disproportionate.

4 I will give you a chance to respond to that.

5 MR. OOT: We have pointers, your Honor. We don't have
6 the evidence. We have the emails that point to the evidence.
7 Mr. Egan's Exhibit 11, I believe is an attempt to, you know,
8 generalize some of the issues there that he -- there is a --
9 that around 12 percent of the revenue, not the investment,
10 comes from Valisure -- comes from lawyers. You will see in
11 Exhibit 11 that there is a list of investment vehicles and
12 unnamed shell LLC's and high net worth individuals that we
13 don't have an understanding of who those people are and how
14 they relate to this litigation.

15 It is striking, your Honor, that Valisure can raise
16 millions of dollars around this citizen petition and then the
17 science later comes out that it is wrong and it is not
18 something that the Defendants can work up.

19 I think you are getting to that proportionality
20 factor, perhaps if we get through the relevance component of
21 that, I am happy to talk about that, unless Ms. Stipes wants to
22 take a break.

23 THE COURT: I do want to take a break in a second. If
24 I understand your answer -- and I will let you expand upon that
25 if you want to walk through the specific proportionality

1 factors.

2 If I understand your answer, it is we have
3 circumstantial evidence that we can argue from and try to draw
4 inferences from. We don't have any direct evidence, and we
5 believe that there is a likelihood that if we get the
6 production that we are asking for it will contain better
7 evidence to prove what we are trying to prove.

8 Is that fair?

9 MR. OOT: That is correct, your Honor. That is what
10 we need to bring across the finish line the Valisure influence
11 on science, including science that has been used on Science
12 Day.

13 THE COURT: It is 2:40, let's take a ten minute break.
14 We'll come back at 2:50 and continue on at that point.

15 We will be in recess for ten minutes.

16 *(Thereupon, a short recess was taken.)*

17 THE COURT: We are back on the record.

18 All right. Mr. Oot, I think I asked you this, but I
19 may not have asked, I want to be sure. I will let you respond.

20 Your specific request is that I order Valisure to
21 either log or produce the 50,000 -- is it the 50,000 documents
22 or the 30,000 you talked about? Can you just clarify what you
23 are asking for?

24 MR. OOT: It is the smaller set, your Honor, it is the
25 30,000 set, again, that contract attorneys and review that way

1 could be done probably a lot less expensively than it has been
2 handled so far.

3 *THE COURT:* That is what you are asking, okay. You
4 rejected Mr. Egan's proposal to give you declarations and
5 things like that, you just want the documents.

6 *MR. OOT:* Correct, your Honor.

7 *THE COURT:* I appreciate that. If you have any
8 further argument you would like to make, and I will give Mr.
9 Egan the last word. I am going to take this matter under
10 advisement because I have not had a chance to look at the
11 underlying evidence that is cited, the timeline, and now that I
12 have had further clarification from the arguments, I need to go
13 back and think about this further.

14 I am not going to rule today, but I want to make sure
15 everybody has a chance to make their record. Mr. Oot, I will
16 let you finish any additional argument you want to make.

17 *MR. OOT:* I appreciate that, your Honor, and a couple
18 of things to crystalize. One is, there is the underlying
19 Valisure testing that has been used in multiple studies. There
20 is also additional Valisure testing that has been used in other
21 Ranitidine related studies. So, it is not just the citizen's
22 petition. I want to clarify that and I was hoping to get
23 through that on the outline.

24 *THE COURT:* To the extent the argument you're making
25 is other people who may be experts in this case or other

1 evidence in this case may have retained Valisure as a third
2 party laboratory, so therefore Valisure's credibility,
3 integrity, et cetera is in play even if we get beyond the
4 original citizen's complaint and the original study, if that is
5 the point you are making, I get that. I have heard that loud
6 and clear.

7 MR. OOT: I appreciate that, your Honor. Secondly,
8 the influence that I previously described of Valisure on the
9 scientific community, so it is the FDA, there was influence on
10 Dr. Braunstein related to the Kanter study that I pointed out.
11 I want to be sure that we are not just talking about the silo
12 of the Valisure citizen's petition, it is Valisure generally
13 and the influence that they have had on science, the FDA, and
14 the scientific community.

15 For example, we saw that David Light was emailing Dr.
16 Braunstein and attempting to influence him to include or not
17 include one thing or another. We don't know what other
18 influence is out there because we don't have production from
19 Valisure. We are relying on these bits and pieces from other
20 third parties that has really helped us put this story
21 together.

22 We just don't have the direct evidence showing the
23 sort of influence, but for Valisure's money and input, the
24 scientific papers that again still cite the Valisure research
25 and testing would come out one way or another.

1 So, I think it is central to the case, your Honor. I
2 don't think we can have the litigation get ahead of the
3 science, as I was stating earlier, but those are two clarifying
4 points I just wanted to get out.

5 *THE COURT:* I appreciate that, and those are both
6 clear to me. I hear you. That is one of the reasons I want to
7 go back. You gave me 500 pages of exhibits, I am not
8 criticizing you for that, I appreciate it, I just didn't have
9 time to review them.

10 Now that I have seen your timeline and I understand
11 your argument, I will go back and review them, mindful of Mr.
12 Egan's view, which is that the timeline does not accurately
13 reflect what is in that evidence. I always look to the
14 underlying evidence. Thank you, Mr. Oot.

15 Let me allow Mr. Egan to make whatever final arguments
16 he would like to make.

17 *MR. EGAN:* Thank you, your Honor. As you are looking
18 through the timeline, I will raise one example. Exhibit 35 is
19 quoted as saying it is an email from Michael Bretholz to TIAA,
20 possibly to solicit investments in Valisure, possibly. Pure
21 speculation, doesn't say anything about investments in Valisure
22 in it. Could it have been about that? Maybe. I don't know.
23 I haven't looked at it.

24 To take an email and say this is possibly about an
25 investment is the kind of stretching that they do that I don't

1 think is ethically improper, but I would like your Honor to
2 take a careful look at what they say and not just the
3 summaries. I know you said you would do that. It goes to a
4 lot of the underlying issues.

5 Getting back to the overall picture, Valisure's
6 report, Valisure's study, Valisure in general, is background
7 here. It is what you raised yourself, your Honor, they are
8 not -- I take Mr. McGlamry's statement on its face that they
9 are not using our report, not using us as an expert, we are not
10 testifying as an expert, this is all background.

11 Mr. Oot said it well, he said that this is part of how
12 we got here, and that is absolutely fine for background, but
13 you don't need to get into all of the information that they are
14 looking for from Valisure for background.

15 This is not the evidence that is going to be put on to
16 present the Plaintiffs' case. If they want to challenge that,
17 they can, that is not Valisure.

18 *THE COURT:* How do you respond, Mr. Egan, to Mr. Oot's
19 argument that Valisure is somewhat derivative in a lot of these
20 scenarios because investors A and B are going to publish a
21 paper and they may have hired Valisure to conduct the
22 underlying scientific research, and if there is a question that
23 Valisure has a bias or a motive, why can't they be allowed to
24 argue to a jury that Drs. A and B's study is also tainted
25 because Valisure was the underlying laboratory?

1 MR. EGAN: I think what they mentioned was a 2021
2 report by Dr. Braunstein --

3 THE COURT: That is one example he is using, but we
4 heard about that at Science Day. You are new to the case, but
5 we have heard about that. Mr. Oot's point is maybe, likely,
6 probable, possible that Valisure, they are a lab, they sell
7 their services to people, and their services may come into play
8 here. Why isn't that at least relevant --

9 MR. EGAN: I am not saying it hasn't happened, but I
10 am unaware of, since the initial report -- analysis being done,
11 report being prepared, and citizen petition being filed that we
12 were engaged to do additional research for other people's
13 reports. I am not saying it hasn't happened, but I thought I
14 would know about it if it had.

15 If that is a supplemental that I can let the Court
16 know, would that be helpful to the Court?

17 THE COURT: It is your Motion to Quash, you can -- I
18 have let the parties submit what they want to submit.

19 MR. EGAN: If we haven't done anything since the
20 initial report, then I think that goes to your point of they
21 want to get into has Valisure provided additional information
22 for which they want to challenge Valisure.

23 If it all gets back to the initial Valisure report
24 upon which people have done subsequent work, go ahead and
25 challenge the subsequent work of their experts or whatever they

1 are putting in, but they already have enough to say -- they
2 have shown it in all of the exhibits you will read, that
3 Valisure tested Ranitidine by heating it to a certain
4 temperature, they think that doesn't represent the in-body
5 temperature. They think that Valisure relied on reports that
6 since have been rejected or retracted. That is all there, they
7 have it all already.

8 Unless there is something new out there, and I don't
9 know if there is or isn't, I don't think there is, I don't
10 think that we need to get into as deep a dive here as Mr. Oot
11 is suggesting.

12 That is why I raised it and if it would be helpful to
13 your Honor, I can supplement.

14 *THE COURT:* I think parties have burdens in cases like
15 this. For the Court to say it would be helpful to me, unless
16 it is clarifying something that has already been raised, I
17 generally don't go there. I need to let the parties submit
18 what they want to submit and either meet or defeat the burden
19 that the law puts on them.

20 You have answered my question.

21 *MR. EGAN:* Let me finish up with the rest unless you
22 have something else on that.

23 *THE COURT:* No.

24 *MR. EGAN:* Your Honor, I believe they have everything
25 they need to challenge the science of Valisure's report given

1 that we're background. They have plenty of information. You
2 will see it in their timeline and underlying documents that we
3 have relationships with Plaintiffs' firms. We disagree that
4 that is our primary focus or business, but they have enough.

5 If they want to say, ladies and gentlemen of the jury,
6 or your Honor, this whole thing started with Valisure, a
7 company that is in cahoots with the Plaintiffs' Bar and has
8 been influenced by the Plaintiffs' Bar, they have enough to say
9 that without getting disbarred. They don't need to go any
10 farther.

11 We are not in cahoots with, we have relationships with
12 them, and they can explore that further. By why? It is
13 background, it doesn't go to proving the Plaintiffs' case, it
14 doesn't go to defending against it. We stand by our testing.
15 The testing was done according to the methods that we thought
16 were appropriate. Mr. Light can testify to that at his
17 deposition.

18 He is speculating that millions of dollars was spent
19 on publicity. I don't know think my client has millions of
20 dollars to spend on publicity.

21 If they are saying that they want additional documents
22 and if your Honor is inclined to do it, we are glad to log
23 them. We have never refused a log. We have only gotten to the
24 stage of what documents are they requesting and us saying that
25 is too many to request. We certainly will log, that is not an

1 issue. No dispute there. We think that little -- little or no
2 more is needed. That was your initial question, what is our
3 ask.

4 We ask what we have provided so far be deemed to be
5 sufficient and you quash the subpoena in its entirety.
6 Otherwise, if they need a thousand more documents, we can focus
7 on that, that is fine. If they want to take it from the
8 51,000 list, so be it. If you are limiting it to 1,000, they can
9 take it from either list. If they are asking for 29,000, then
10 let's shrink it down and get to the narrower list to choose
11 from.

12 All of this, it appears to my client to be punitive.
13 It looks as if, since we are not a testifying expert, since our
14 report is not being used, that all of the past six months of
15 dragging this out and going through all these negotiations, and
16 all of the reports, and all of the review we have done, and
17 then going through an exercise of preparing draft discovery,
18 which was just completely rejected, even though we provided
19 information, has been to warn Valisure off of trying to do
20 investigations into pharmaceuticals.

21 I don't think that that is what these companies are
22 doing. I don't think that is what Mr. Oot is trying to do
23 here, I think that would be improper, but it feels punitive to
24 my client. The reason it feels that way is, they have spent a
25 ton of money and have spent a ton of time on this for a company

1 that is not a party and is not an expert.

2 Mr. Oot says he needs better evidence. He has plenty
3 of evidence, you said you are going to review it yourself, to
4 do what he needs to do for background information with regard
5 to Valisure. If they want to take a deposition and want to
6 take the documents they have so far and limited additional
7 ones, that's fine.

8 If you want to take a look at our Exhibit 11, if you
9 want us to admit that we have contracts with some Plaintiffs'
10 attorneys, we can do that, whatever they need for the
11 background. But 30,000 documents to review and log and produce
12 won't happen between now and February 10th.

13 You can order it now to be 17 degrees here tomorrow,
14 we can't do it. We can't get that done by then for two
15 reasons. One is, using outside contract attorneys, there is a
16 lot of sensitive documents here, there are some issues in the
17 documents they requested that is privileged, protected, not
18 subject to public disclosure, that we -- using outside
19 attorneys may be very difficult to use for going through those
20 documents.

21 Whatever number of documents we go through, we may
22 have to use internal resources at our firm to do it, and that
23 will take a much longer time than February -- two weeks in
24 advance of February 10th to get those documents out.

25 We ask that if anything more is to be produced, for it

1 be a narrower list just for the proportionality for the case,
2 and for the timing with regard to the upcoming deposition.

3 Finally, with regard to who pays for all of this, your
4 Honor, we spent over \$150,000 in legal fees, which is just --
5 had I known we would be here today, we would have filed this
6 motion back in July or August, but we have been trying to work
7 with the Defendants, and they have been absolutely fine to work
8 with. Mr. Oot and the other folks have been very cordial, very
9 polite. We have worked with Special Master Dodge, she is
10 terrific. We tried to get through all of this, but we spent a
11 ton of money.

12 At this point in time the equities -- when you look at
13 who pays, you said that would be the last thing you're looking
14 at, and if I could briefly summarize our ask, I will do that
15 now.

16 *THE COURT:* Please.

17 *MR. EGAN:* Revenue for Valisure in 2020 was about
18 700,000, they had more investments, a few million in
19 investments that Mr. Oot raised, but the brand Defendants are
20 in the hundreds of billions as far as revenue.

21 As I said, we are not a party, we are not an expert,
22 and we have cited to some cases -- they are trying to say that
23 we are not a classic disinterested party because of our role in
24 the citizen petition. Unlike in the Seroquel case where they
25 had the Harris Company, which wound up splitting its fees,

1 which, if your Honor is inclined to split the fees -- we prefer
2 to have them pay for it all, but a split is certainly
3 appropriate under the law.

4 The Harris Company in that case asked for the
5 subpoenaing party to pay for all of its costs, but the Court
6 said that the Harris Company was actually hired by the
7 Defendant in that case, there was a contract with them. We
8 haven't been hired by the Plaintiffs, we are not going to get
9 reimbursed by the Plaintiffs for our work here. So, we are
10 different than the cases that have been cited with regard to a
11 classic disinterested party still having an interest in the
12 case.

13 Have we gotten publicity, have we gotten some fund
14 raising, have we had other benefits? Sure. We don't get any
15 money from the outcome of this case, and we are not being paid
16 by the Plaintiffs to do this, so there is a distinction. I
17 think that the equities of the size of the companies, the scope
18 of what the Defendants are asking for that they have control
19 over -- they control the scope of what has been asked for, all
20 of that, and the fact that we did do an initial search and an
21 initial production, paid for it ourselves -- Valisure is not
22 asking to be compensated for its initial round of production or
23 our time in reviewing it.

24 This is a huge cost going forward. So, all of those
25 equities, when you do the balance and tests for allocating

1 costs, strongly indicates that the Defendants should pay for
2 all, but at least a significant portion, if not most of the
3 costs incurred by Valisure, and those are two buckets.

4 One is the outside legal fees of about 165,000 since
5 July. We are not asking for anything before that, that was our
6 initial production, but when they went to what we perceive as
7 the overbroad request, we ask them to pay for everything since
8 then.

9 My client did an internal assessment and you will see
10 how they did the calculation in the brief. They spent about
11 \$72,000 internal time for which they are asking to be
12 reimbursed.

13 *THE COURT:* Thank you, Mr. Egan. Mr. Oot, you have
14 not had a chance to be heard on the cost allocation issue. I
15 want to give you a chance to respond.

16 *MR. OOT:* Sure, your Honor. The parties' resources
17 here that Mr. Egan raised, it's important to note that Exhibit
18 37 focuses on the millions of dollars that Valisure raised.
19 The Seroquel case that we both cited in our brief, that we come
20 out differently on that position, just the amount of staffing
21 that we see Valisure putting into the citizen petition and the
22 seniority and fees there, hiring the class action attorney,
23 Gregory Frank, hiring Tom Daschle's group, and I don't know how
24 many time keepers to lobby the citizens petition, and then two
25 different law forms objecting to the requests, both Mr. Glazier

1 and Mr. Egan's firm that were working on this case to object to
2 our request.

3 So, look, we voluntarily agreed to pay half of the
4 eDiscovery Technology fees so we could get this baseline
5 reporting to see what is out there. We had nothing at the
6 time. Right now, at this point, Valisure has produced 3100
7 pages, Mr. Bretholz has produced 72. By contrast, Dr.
8 Braunstein has produced 11,400 and Dr. Mitch has produced 1700.

9 So, we are relying on these disparate sources to build
10 our position, and the underlying fact that, again, the Valisure
11 study is cited in a lot of different science articles where --
12 prior to the FDA's ability to react to it. So we see the
13 Kanter study I referenced, we see the Kim study, the Florian
14 study, the White study, and then the Braunstein study, that we
15 don't -- if we were to take Valisure out it would be very
16 strange because it is cited in all of those cases.

17 So, I really just want to put forward the fact that
18 Valisure and Mr. Bretholz participated in working up this
19 litigation. If we take the citizen's petition out, if we take
20 the science out, I still don't think we have an answer from
21 Plaintiffs related to other testing. If all of the Valisure
22 testing and the studies that rely on Valisure testing is out, I
23 think it is difficult to do because of the influence that we
24 saw with just, again, David Light and Dr. Braunstein on
25 directing the science, the specific direction that aligns with

1 Valisure's flawed science.

2 Your Honor, I am happy to run through the
3 proportionality factors. I know we haven't done that yet. I
4 think it might be helpful for --

5 *THE COURT:* If you would like to. I think I saw it in
6 your submission, but if you would like to do that, I am happy
7 to hear you on it.

8 *MR. OOT:* No, that is great, it is in our submission.
9 The one thing we haven't really discussed is the parties'
10 relative access to the information. We went to the other
11 places, we went to other third parties, and we got what we got.
12 We don't have the information from the most central location,
13 those that were advocating for their position before the FDA
14 and, you know, I think it is very important to focus on the key
15 source, the key players of where this information is coming
16 from.

17 It has been over a year working with Mr. Egan, we have
18 gotten to this point where we have a metadata report where we
19 see bits and pieces of information that would be interesting,
20 and we have done a very good job trying to narrow it down. We
21 even offered to de-duplicate the two sets, the Bretholz set
22 against the Valisure set, so nobody has to look at documents
23 twice.

24 We are really just trying to get a look at the facts,
25 your Honor, and get an understanding of the science, the

1 influence on the science, and there is this issue that the work
2 that was done to promote it, but I can't think that anybody can
3 take the position that this is background.

4 The science is central to this case, we saw it at
5 Science Day. If we go back and look at the most important
6 studies the Plaintiffs cited, some of them do cite Valisure,
7 and the testing was relied upon in at least one of them.

8 I appreciate your time, your Honor, and hopefully we
9 can resolve this, and I look forward to your opinion. We are
10 at sort of a difficult situation at this point because we have
11 Light's deposition coming up, as we pointed out in our summary.
12 I think it is on February 10th to 11th, so we would like this
13 resolved as quickly as possible.

14 *THE COURT:* February 10th is the deposition of Mr.
15 Light?

16 *MR. OOT:* Correct.

17 *THE COURT:* Okay. I am not going to rule from the
18 bench today. I have to read the other materials. I will try
19 to get an order out very quickly.

20 *MR. EGAN:* One last thought, if I may.

21 *THE COURT:* Yes. Mr. McGlamry is raising his hand.
22 Mr. Egan, let me hear from you.

23 *MR. EGAN:* If they will pay for it, we will do almost
24 anything they want us -- if they give us the time and give us
25 the money, we can do almost anything. We have been trying to

1 get this narrowed so it wouldn't be in front of you. We are at
2 this position where, your Honor, if they will pay for it, we
3 will do a much deeper dive or do whatever they want us to do,
4 subject to our right to object to a privileged log, or
5 whatever. If they will pay for it, we will do it. That is a
6 big hurdle.

7 *THE COURT:* You are always free to continue to
8 negotiate. All I can do is rule on the legal issues that are
9 presented to me. If you all want to find a solution that may
10 be better for both of you than what you are going to get from
11 me, I leave that to you. The special master is quite good at
12 that. It wouldn't be any different than a case where the jury
13 returns a verdict and then the parties reach settlement.
14 Getting my ruling might influence further discussion.

15 *MR. EGAN:* Your Honor, we ask that your ruling include
16 past fees that we have incurred and future fees, if you keep
17 that in mind as you are applying whatever future work is to be
18 done, that is our ask and we appreciate it.

19 *THE COURT:* Thank you. Mr. McGlamry, you turned on
20 your camera and raised your hand. What would you like to add,
21 sir?

22 *MR. McGLAMRY:* Your Honor, I just want to clarify
23 something. I think I heard earlier in the context,
24 essentially, it is implied that Valisure did something for an
25 expert for Plaintiffs and that they are not being named as an

1 expert, but they are being utilized by an expert. That is not
2 the case. We are not relying upon them for doing any work for
3 any of our experts. It is not like in some instance you have
4 an expert or somebody that does something, and then an expert
5 relies upon that. That is not the case.

6 The only other comment I would make, your Honor -- and
7 I appreciate you taking this under advisement and looking,
8 because we only got some of this stuff last night, and it looks
9 like they have gone through a lot to piece things together.

10 We are getting fairly much maligned here, which I
11 think is somewhat inappropriate and unnecessary. If you look
12 into some of that you will find that the hand sanitizer
13 litigation, that both the Plaintiffs and Defendants contacted
14 Valisure, and the Defendants actually sent product to Valisure
15 for testing, and that Defendant was represented by two of the
16 law firms involved here on behalf of the Defendants, including
17 one of BI's lawyers and the liaison for the generics.

18 I think that what Mr. Egan was saying earlier, I know
19 they are trying to beat them over the head, but it is not
20 what -- so, I am glad you are looking.

21 *THE COURT:* Look, you have accused them of giving
22 people cancer for 40 years, they have accused you of colluding
23 with the lab and ginning up a bogus lawsuit. I am sure the
24 truth lies somewhere in the middle and we will just leave it at
25 that.

1 While I have everyone here -- Mr. Gilbert is still
2 here and Ms. Sharpe is still here. I didn't address one issue
3 which related to some of the attachments to some of these
4 materials. I see Mr. Burstyn is here as well.

5 What I generally do, if any of the attachments that
6 have been submitted to me with the PTO 32 materials, if they
7 are marked confidential or highly confidential, I ask that the
8 parties in the first instance review them and redact whatever
9 can be redacted such that that designation can be removed by
10 agreement of the parties.

11 If the parties can't reach an agreement and one party
12 believes that the document needs to be filed under seal, I ask
13 the party then file a motion to seal, but in the interim, I
14 hold all of those documents under seal, so that way I can
15 review them before the hearing, I can be fully informed.

16 The public will get their access that they are
17 entitled to, but I will not put something in the public record
18 that then needs to be redacted or sealed later on.

19 There is a lot going on in this lawsuit, you will have
20 a lot of important things to do, so I am not going to put a
21 time limit on when I would ask you to submit either the
22 redacted or motions to seal, but let's not lose track of it,
23 and let's get that done on all submissions.

24 Mr. Gilbert, you raised your hand first.

25 MR. GILBERT: Thank you. Judge, this issue came up,

1 as you recall, on January 5th in connection with the email
2 issue, and you gave the same direction to Sanofi's counsel that
3 you gave today just now.

4 We are now 14 days later, and they have yet to provide
5 a proposal with regard to what could be redacted to move this
6 process along, and I think it would be helpful for the Court to
7 either set a deadline or advise the parties that if it takes
8 more than X, I am going to unseal all this stuff. Because,
9 otherwise, we are going to be in a perpetual cycle of waiting
10 for Sanofi to propose something they would like not to ever
11 come to light.

12 *THE COURT:* Understood. That's fair. Mr. Oot, you
13 had something you would like to say?

14 *MR. OOT:* Yes, your Honor. I would like to point out
15 that a lot of the exhibits in our master demonstrative are
16 referencing third-party documents, so if your entry -- maybe it
17 is a submitted entry, I don't know how your Honor would do it,
18 but it might be helpful to -- I will alert those third parties,
19 but if we had something to point to, I think it might be
20 helpful.

21 *THE COURT:* Okay. We will do a separate order
22 relating to the PTO 32 submissions that will incorporate what I
23 just said. As I think about it, I think Mr. Gilbert's point is
24 well taken, so I will set a deadline, but it is not going to be
25 next week or tomorrow. I know discovery is coming to an end,

1 all of you are rushing to get a lot done, but the public does
2 have a right of access and I need to respect that. I will put
3 a deadline in there, and that is without prejudice if any
4 party, in good faith, can't comply with the deadline that I
5 set.

6 Thank you all very much. Let me excuse the parties in
7 the Valisure matter. I will take that under advisement.

8 Let me turn finally to the last matter on the calendar
9 today. Let me recognize counsel for Mr. Bretholz.

10 *MR. BURSTYN:* Good afternoon, your Honor. Sean
11 Burstyn on behalf of non-party petitioner Michael Bretholz.

12 At the outset, I just wanted to welcome Mr. Bretholz,
13 who has joined us today. This has been an exceedingly
14 burdensome experience for him. He served as legal counsel to
15 Valisure for many years, and I will explain why that is
16 significant.

17 Before I jump in and do that, I want to advise the
18 Court that although we have been communicating with counsel to
19 GSK for the better part of five months, it was just a couple of
20 hours before this hearing that I was emailed a notice of -- a
21 deposition notice that Valisure now intends to take Mr.
22 Bretholz's deposition.

23 *THE COURT:* Valisure does or --

24 *MR. BURSTYN:* I am sorry, excuse me, GSK.

25 *THE COURT:* Before you get started, let me let counsel

1 for GSK make their appearance.

2 MR. OOT: Thank you, your Honor, Patrick Oot for GSK.

3 THE COURT: Mr. Burstyn, back to you. If you got a
4 deposition notice earlier today, it is not before me, I am not
5 going to get involved with that. Talk to counsel.

6 MR. BURSTYN: Right, I shall.

7 Our position is that GlaxoSmithKline's subpoena on Mr.
8 Bretholz is really a case study in what Rule 45 prohibits. To
9 set the table, we understand where Valisure fits or doesn't fit
10 in the universe of this case, and I want to be clear that Mr.
11 Bretholz is counsel to Valisure, he's a low single digit
12 investor in what started off as a startup, and is still a
13 startup, which I don't think is terribly uncommon.

14 Our position and the request that we have is that the
15 Court quash the subpoena in its entirety, or grant our request
16 for protection and award reasonable fees. Rule 45 provides
17 that the propounding party must take reasonable steps to avoid
18 imposing an undue burden, and absent such steps, it falls upon
19 the Court to impose an appropriate sanction and limitations if
20 it does not quash the subpoena.

21 So, with that in mind, like Mr. Egan on behalf of
22 Valisure said a few minutes ago, our position has always been
23 tell us what you are really after and we will discuss how we
24 get it to you. If it is extremely voluminous we will insist
25 that you cover costs for fees and time. Mr. Bretholz is out

1 ten of thousands of dollars in fees, and similarly his own time
2 given to this project.

3 I would also like to add that Mr. Bretholz is an
4 individual, he is not a company that gets to expense these
5 fees. He is not covered by insurance, these are not write
6 offs, this is not investor money. He is a guy who did a favor
7 for a friend who, I think, went to Yale with him and served as
8 an attorney adviser to the company, and now he is getting
9 banged out for tens of thousands of dollars of fees and perhaps
10 tens of thousands of dollars more.

11 Our initial hit report on GSK's search terms yielded
12 over 30,000 documents, which our vendor estimates converts to
13 over 200,000 pages to be reviewed. As Mr. Egan put eloquently,
14 the Court, of course, can't order that it be 80 degrees in
15 Connecticut tomorrow, it would be impossible for us to carry
16 on. Again, as the Court said at the top, the Court is not
17 terribly interested in the self-serving posturing that lawyers
18 do in the months before we get to the Court.

19 We are here -- my understanding is that I am here up
20 against GSK's subpoena as it was served, and my objections to
21 it and the Motion to Quash.

22 *THE COURT:* So, let me double back for a second.

23 You said you want to quash it in its entirety, or in
24 the alternative, provide protection. What protection?

25 *MR. BURSTYN:* Sure. I think now may be a good time.

1 The protection is -- relates to, really, fees and costs. We
2 will find people, we can't really use contract attorneys for
3 some of the reasons that Mr. Egan alluded to. Again, our
4 position -- I think, unfortunately, GSK and myself have perhaps
5 been ships passing in the night. I am going to answer the
6 question, but this is the context that is important.

7 I think GSK has viewed our position as just because
8 Michael Bretholz went to law school, that does not mean every
9 communication that he is on is privileged. I agree, but the
10 fact of the matter is he is counsel to Valisure, and therefore
11 has a duty to review those files for privilege.

12 He cannot waive the client's privilege. The client,
13 Valisure, has gone through many documents and may be ordered to
14 produce many more documents. If it is ordered to produce those
15 documents, and if it withholds any on the basis of privilege or
16 other protections, he will have to log those.

17 To put it perhaps colloquially, it makes no sense to
18 have the lawyer go through the same exercise when the lawyer
19 has to be at least as inclusive in the privilege assertions, if
20 not even more cautious.

21 Ultimately, the protection that we are seeking, as it
22 is laid out in the motion, is a de-duplication of Valisure's
23 documents and log, and coverage for the fees, time, and costs
24 that it will take to do that de-duplication.

25 Secondly, we raised the privilege issues, and the need

1 for de-duplication on essentially day one, perhaps day five
2 into the process, in the first week, and we asked GSK, knowing
3 what you know now, which is our view -- and I will get into it
4 in more detail -- that 27 of the 29 requests for documents in
5 the subpoena are duplicative, and in some cases verbatim
6 duplicative, total copy, paste, will you change your position
7 or do we need to move to quash.

8 We were told, well, maybe we can talk about covering
9 costs, which is vendor costs, which pales in comparison to the
10 fees, but they stood on the full breadth of the subpoena. So,
11 we are here now on the full breadth of the subpoena, and I
12 think if the Court is willing to entertain a compromise
13 position going forward, then everything from now backwards
14 ought to be compensated.

15 If anyone has to pay for taking a reasonable position
16 five months into the process, as opposed to day one, I believe
17 it should be the party that refused until five months in to
18 take that position.

19 If I may share my screen, there is no better evidence
20 here than the subpoena.

21 *THE COURT:* I have a copy here.

22 *MR. BURSTYN:* Okay. Can the Court see the --

23 *THE COURT:* The subpoena was filed at Docket Entry 2-1
24 in case number 21-82184.

25 *MR. BURSTYN:* Right. I will show the Court some

1 excerpts that I think will illuminate what it is that we are up
2 against here.

3 Our position has always been what are you really
4 after? If it is highly voluminous, please pay us to get it.
5 If not, we will try to get it to you. Here is the what is the
6 ask. Throughout the document requests the ask is all
7 communications, all documents, all the scientific data, all
8 relationships between various persons.

9 Look at point two, for example: "Including" should
10 not be construed as limiting the request in any way. So, every
11 now and then we see itemized requests, but they are seeking the
12 full breadth of everything in those document requests that the
13 Court has in the subpoena.

14 The word "relating", which is used and sometimes
15 appears to be a limiter, but it is really not, it includes
16 alluding to, directly or indirectly mentioning, et cetera. I
17 know these are boiler plate terms, but usually five months in
18 they get narrowed a bit, and they haven't been.

19 The next slide, our position is that GSK is openly
20 fishing for irrelevant information, because the subpoena, for
21 many reasons -- one is, the subpoena is not limited to searches
22 for Ranitidine.

23 For example, request number nine seeks all drafts of
24 FDA petitions by Mr. Bretholz, including the documentation,
25 comments, and edits of all drafts, but that is not limited to

1 Ranitidine.

2 Request number 12 seeks Valisure citizen petitions,
3 not limited to the petition related to Ranitidine.

4 Request number 17, all funding that Mr. Bretholz has
5 provided to Valisure irrespective of this case or Ranitidine.
6 Request number 25, the same.

7 They are asking the attorney for the client's business
8 plan, and just to make an analogy, I represent real estate
9 developers, the thought to me that someone would ask me for the
10 blueprints and the engineer reports, when they have already
11 asked the client and the client is working out a method to
12 produce those, frankly, it concerns me.

13 There are a hundred or so lawyers here, the thought
14 that someone would come after a lawyer -- and I will concede
15 not everything that Mr. Bretholz did is privileged, not every
16 email that he is on. Sometimes maybe he is scheduling lunch,
17 or sometimes he is having conversations with third persons,
18 that may not be privileged, but the burden does not end there.
19 The burden ends in the review of all of those documents for
20 privilege, 30 plus thousand documents at over 200,000 pages, is
21 our current estimate, and then logging them, and that only
22 invites the privilege log fight.

23 That in and of itself, I submit respectfully, your
24 Honor, warrants an order quashing the subpoena, but it is
25 compounded even further when Valisure, our position is

1 tangentially related to the ultimate issues in this case at
2 best. I don't think the independence of the United States
3 Legislature is really at issue in the case, and I know that is
4 being taken under advisement, so I won't go further. I will
5 join in Valisure's position on those issues. But it is also
6 compounded by the fact that Valisure itself has been subpoenaed
7 for this information.

8 The next slide gets into some of the 59 combinations
9 of search terms that Mr. Bretholz was asked by GSK to search
10 for. At the beginning I will say the subpoena has no date
11 range whatsoever. We have not been given a counter proposal
12 for a date range. We suggested some dates. I know we are not
13 talking about the positions we took and did not end up agreeing
14 on.

15 We are here now, the subpoena as served has no date
16 range. We said, consistent with our good faith efforts to try
17 to get this narrowed, to try to avoid being in front of your
18 Honor, we said give us some search terms that will limit the
19 scope of the subpoena, and unfortunately what we got reflects,
20 I believe, no effort to narrow the scope of the subpoena.

21 Mr. Bretholz is an attorney. I believe for the
22 majority of his 15 years since he graduated law school he has
23 worked at law firms as an attorney, and when he has taken up
24 opportunities to work for businesses in-house, businesses
25 totally unrelated to this case, he was hired for his skills as

1 an attorney.

2 So, this attorney was asked, without any limiters, any
3 date range whatsoever, to search for the word Plaintiff, to
4 search for the words litigate, litigates, litigated, I won't go
5 on and on, justice, lawsuit, and of course, Valisure. Search
6 terms, if valid at all, should be used to limit the breadth of
7 a search. I could have just handed over all my documents if I
8 was inclined to do that, but I can't, of course, because I have
9 a duty to preserve my client's privilege, so I asked for the
10 search terms to limit the scope.

11 Perhaps most emblematic of the over breadth and the
12 failure under Rule 45(d) to limit the burden on Mr. Bretholz is
13 GSK's request that we search for the words Adam Bretholz,
14 Michael Bretholz's brother. Yes, I think he made or paid a
15 thousand dollars. We have a hundred or so lawyers here. A
16 thousand dollars is a bit of a pittance in the grand scheme of
17 this case.

18 But the fact that they are asking for us to search for
19 every communication that touches on my client's brother, to me
20 again, your Honor, is inconsistent with the requirement that
21 Rule 45 imposes upon GSK to limit the burden, or the next
22 sentence of 45(d) is the Court must impose an appropriate
23 sanction that would include fees for failure to limit the
24 burden over these last five months.

25 I will speak, if I may, your Honor, for a few minutes

1 about the duplicative requests. As I said, 27 of the 29
2 requests served upon Mr. Bretholz are duplicative of Sanofi and
3 BI's two separate subpoenas served upon Valisure. I will show
4 the Court here just a small sample of the duplicative requests.

5 In the left column we have GSK's subpoena to Mr.
6 Bretholz. In the interest of time, I will look at one of the
7 shorter requests. That is in row number two, request number
8 16, all documents related to any funding that you or Valisure
9 received or provided in connection with Ranitidine testing.

10 Let's go to the next column, I think it is verbatim.
11 I think they capitalized the letter R in the request upon Mr.
12 Bretholz for Ranitidine, and in the request to Valisure it is
13 lower case. This repeats itself, this pattern repeats itself
14 27 times throughout the request.

15 Here, on this next image is a pdf that a helpful law
16 clerk put together. We see that they seek as to Valisure a
17 broader set. My cursor is over this request to Valisure
18 seeking all communications or documents related to your testing
19 of Ranitidine. In the left column, it is essentially the same
20 request, they just added some names.

21 I can scroll down and carry on with any of these, and
22 the Court will see, again here, number nine, request number
23 nine as to Mr. Bretholz, all drafts of FDA petitions, again,
24 not related to Ranitidine or limited to Ranitidine. In the
25 column one over to Valisure, again all drafts of the petition,

1 including without limitation all comments and edits from
2 parties outside of Valisure LLC.

3 Our ultimate position, your Honor, again, is such a
4 duplicative subpoena served upon counsel to a nonparty -- we
5 view ourselves as nonparties to a nonparty whose underlying
6 science -- my client is not a scientist, but our client's
7 science may be used by yet another scientist, I think those
8 might be very good questions to ask to Mr. Braunstein.

9 They have a very thorough timeline. I have to say,
10 and I will put it as mildly as I can, we completely disagree
11 with the characterizations and representations that made their
12 way into those timelines, and I think a review of that 400-page
13 packet of source material will elucidate that total
14 disagreement that we have, and I will leave it there.

15 As to those 400 pages, however, I think they speak to
16 another thing, another point, which is this, circumstantial
17 evidence is evidence. I believe that the subpoenas upon
18 Valisure -- I won't speak for Valisure, they have Mr. Egan
19 here. The subpoenas served upon Valisure and my client invite
20 nothing more than a trial within a trial about issues, about
21 information that is not probative of the ultimate issues in the
22 case, as I heard Mr. McGlamry articulate it today.

23 Even if they are probative of the ultimate issues in
24 the case -- and it sounds to me like no juror will find
25 liability, or the absence of liability, based on the strength

1 or weakness of Valisure's science or perhaps on the strength or
2 weakness of other scientists' studies. Even if they are
3 probative, they are not proportional. I don't think the
4 requests are proportional as to Valisure. I think they are
5 even less proportional as to Mr. Bretholz.

6 Now, as to privilege -- and before I get there, I want
7 to reiterate, your Honor, I am certain, because I have heard it
8 from Mr. Oot, that in a few minutes they will talk about Mr.
9 Oot -- pardon me, Mr. Bretholz traveled to Washington D.C.,
10 smiled proudly outside of a Congress person's office. They will
11 say that was not privileged, that he had communications with
12 Mr. Braunstein, who was subpoenaed and was deposed, and those
13 communications are not privileged.

14 Our position is not that all of Mr. Bretholz's
15 communications are privileged. Our position is that he has met
16 his burden of reviewing all those documents for privilege. I
17 also submit that it simply doesn't stand to reason that Mr.
18 Bretholz would have something in these 30,000 documents, that
19 equate to over 200,000 pages, that is so important as to
20 justify the burden of sifting through those. That is literally
21 months and tens if not hundreds of thousands of dollars of
22 work.

23 I cannot believe there is something so important in
24 those documents to justify the burden; and B, that the
25 information would be so important, yet only he would have it,

1 and one of the many other parties, third parties that have been
2 subpoenaed, would not have it, that there is something so
3 important that would justify going through that mountain of
4 documents, that Mr. Bretholz would withhold it and keep it unto
5 himself, and Valisure itself, which is subject to a subpoena,
6 would not have it.

7 The last point on that analytical framework is this:
8 If Mr. Bretholz does have such information, and I am personally
9 not aware of any, it would be protected by the work product if
10 it were that important, by the work product protection, if not
11 outright privileged.

12 With that context, our next slide explains how their
13 subpoena openly requests information that is patently
14 privileged, confidential, or protected by the work product
15 doctrine.

16 Request number 21, this is what they asked of an
17 attorney. They asked for all documents related to your counsel
18 or Valisure LLC's involvement or potential involvement in any
19 litigation related to Ranitidine. Respectfully, they might as
20 well have asked that we hand over all of our work product, and
21 the answer is, we are not going to do that. I believe legally
22 we cannot do that.

23 The next request asks for communications between Mr.
24 Bretholz and Mr. Gregory A. Frank of Frank LLP, an attorney who
25 Mr. Oot said a few minutes ago was counsel to Valisure. They

1 asked for documents sufficient to show all relationships with
2 any law firm or lawyer regarding Valisure LLC and the
3 Ranitidine petition or any other Valisure citizen petition, and
4 they asked for communications with lawyers regarding Valisure
5 LLC testing for impurities or carcinogenicity in a Ranitidine
6 petition or any other Valisure citizen petition.

7 Your Honor, if there is anything limiting or narrow or
8 any contours to this subpoena, I don't know what they are, but
9 they certainly are not limited to non-privileged, non-work
10 product, non-confidential communications, and they are not
11 limited to communications that fall beyond the scope of
12 Ranitidine. They are seeking everything.

13 The next point, your Honor, that we have to make is
14 that, as far as cost and fees are concerned going forward, we
15 would ask that if the Court is going to force -- I am not
16 looking for sympathy. I am very proud to say that as a solo
17 practitioner and Mr. Bretholz as an individual and does not
18 have an army behind him, I think we have been doing a decent
19 job at keeping apace, but for context, we are two individuals,
20 we do not have an army to go through all of this.

21 Every dollar that we are out is a dollar out of Mr.
22 Bretholz's pocket, so if the Court is inclined to say that we
23 do have to go through all of this, that would require us to
24 hire third parties. Legally that would even be advisable, and
25 there are reasons it would not be, because a lot of this

1 information is confidential and sensitive, but we would ask
2 that the financial resources be paid up front.

3 We have an issue with a vendor, which I know Mr. Oot
4 will dispute, and I will handle it gingerly because it is not a
5 personal attack at all, but a vendor did send out an invoice
6 with a two-week turnaround time, and I asked yesterday that --
7 the bill was due to be paid last week. I asked yesterday, has
8 it been paid, and he said no.

9 If Mr. Oot responded to me saying he needs more time,
10 that is fine. It wasn't communicated to the vendor, so now I
11 am in a tough spot, because I asked these people to work --
12 actually it was work over a holiday weekend to get a search
13 term report. Now they came to me and said, hey, are we getting
14 paid? I do not want to be in that position, especially where I
15 am not the one seeking these fees.

16 Mr. Oot has been nothing but civil. I think
17 procedurally we have all been good together. Substantively, I
18 do think that this process has been punitive, and the
19 explanation for why GSK has refused to cover the fees and costs
20 that probably would have been less if we reached an agreement
21 five months ago is this: If your client, Michael Bretholz,
22 wants to be involved representing a company that drums up
23 litigation, a characterization I dispute, then he ought to
24 suffer the consequences.

25 I think that is an inappropriate position to take, and

1 I don't think it is what Rule 45 contemplates at all. Mr.
2 Bretholz did not ask to be here, and he has always said he will
3 comply, he simply needs some cover because he is going
4 significantly out-of-pocket.

5 Now, here is some content that I shared at the top to
6 make sure I didn't lose it, so I won't go through that again
7 except to say a couple of points, your Honor, in response to
8 what we heard today.

9 There is a characterization about millions of dollars
10 being spent on lobbyists. If those characterizations are
11 supported by evidence, I don't know what that evidence is. I
12 am highly doubtful that it exists. To the extent that that
13 argument was made to justify exposing Mr. Bretholz to this
14 significant burden, I think the Court should not entertain that
15 argument.

16 Mr. Bretholz did not -- first of all, I can represent
17 to the Court nobody from Valisure -- Valisure and its personnel
18 did not spend millions of dollars on lobbying. That is not an
19 accurate representation. Whatever Valisure did spend, if it
20 spent anything, and I don't know, that was not spent by Michael
21 Bretholz.

22 There was a comment made that Valisure had to pay
23 counsel to assert its rights as to the overbroad subpoena, that
24 was used as an example of, oh, they have resources. I think
25 that turns the analysis on its head.

1 The fact that Michael Bretholz has had to hire counsel
2 and be out a significant sum of money does not indicate that he
3 ought to suffer the consequences. It is really a regressive
4 position to take, that just because you assert your rights,
5 that means now you have to pay for the assertion of those
6 rights.

7 The conclusion of that is that you should just
8 completely fold and give over everything you can, but again I
9 reiterate, your Honor, I would love to if I could, I cannot.
10 My client has professional obligations to his client that
11 require him to sift through those documents.

12 I know I have taken a good amount of time from the
13 Court and I will pause and ask for a couple minutes, and I will
14 be concise, to respond after opposing counsel states his
15 position.

16 *THE COURT:* Thank you very much, very helpful.

17 Mr. Oot, let me give you an opportunity to respond.
18 What exactly is it that GSK is asking me to order? Keep it as
19 short as you can.

20 You are on mute, Mr. Oot.

21 *MR. OOT:* I apologize, your Honor. We are seeking the
22 Court to order Mr. Bretholz to produce, again, relevant
23 information responsive to our requests or a privilege log for
24 those documents.

25 Special Master Dodge can probably provide additional

1 feedback to the meet and confers. We served search terms back
2 in October, I will represent to the Court, and we requested
3 search term hit reports for those search terms, and we didn't
4 get those until the case was transferred down here.

5 I will get more into detail about that shortly.

6 I really want to start with the representation that
7 Mr. Bretholz is serving in a solely legal role for Valisure.
8 The Defendants dispute that. I think the documents that we
9 have seen in the productions from Mr. -- Dr. Braunstein, from
10 Dr. Mitch, and others reflect that Mr. Bretholz is providing
11 legal advice in -- I haven't seen it yet, I guess that is the
12 main point.

13 *THE COURT:* If I could, what is it you think he is
14 doing? What is the evidence you are trying to find here? What
15 do you think Mr. Bretholz is doing in furtherance of the
16 conspiracy that you are trying to prove?

17 *MR. OOT:* Your Honor, I believe that Mr. Bretholz is
18 fulfilling several roles based on the documents. One, there is
19 a -- the lobbying efforts that we previously discussed, that is
20 kind of first and foremost. Mr. Bretholz has been involved in
21 the development of the citizen petition. We see communications
22 with Dr. Braunstein where Mr. Bretholz is copied on.

23 He is also involved in fund raising and putting
24 together the materials that are going out to high net worth
25 individuals. For example, he will communicate with people on

1 his Macquarie account, Macquarie is an asset management firm
2 where Mr. Bretholz is a senior executive, and then pivot to his
3 gmail.

4 So, we want the underlying documents that show the
5 financial relationships supporting Valisure, as opposed to what
6 has been produced so far from Valisure itself. We would like
7 to see those communications. We think we are entitled to them
8 because it shows the scientific bias and the financial
9 influence that Valisure has. I won't go through that again,
10 your Honor, but --

11 *THE COURT:* You believe, and you have evidence from
12 other sources, that Mr. Bretholz is involved in lobbying on
13 behalf of Valisure, that he is involved in development of the
14 citizens petitions, that he has been in communications with Dr.
15 Braunstein, and that he was involved in marketing to high net
16 worth individuals as possible investors.

17 Am I correct?

18 *MR. OOT:* Correct, your Honor, that is what we have
19 found so far.

20 *THE COURT:* All right. Please continue.

21 *MR. OOT:* We just haven't seen an evidentiary basis
22 for how Mr. Bretholz is acting as a lawyer for Valisure, and
23 nevertheless, it doesn't shield somebody from discovery. Just
24 because somebody is an attorney, doesn't necessarily mean de
25 facto that they don't have to fulfill their discovery

1 obligations in the case.

2 So, all we are asking, again, is they produce a log of
3 the information. To unseat the burden associated with that we
4 came up with a bunch of solutions. For example, one solution
5 we spoke about with Special Master Dodge was, after the key
6 word search terms, after the agreed upon key word search terms,
7 that we could technologically de-duplicate that information
8 from what Valisure had provided to us, again, limiting the
9 burden that Mr. Bretholz would have to take to review those
10 materials, and they could do that without actually sharing the
11 documents.

12 *THE COURT:* Let me stop you, though. As I said
13 before, I am not here to negotiate, folks. Just to be clear
14 where we are, you are presenting me with an extreme binary
15 choice, either I am going to order everything produced or I am
16 going to order nothing produced, because that is the two
17 choices I have been presented with.

18 If you two want to negotiate something in the middle,
19 which I strongly recommend that you do, then do it. But don't
20 spend my time this afternoon negotiating through me. I am done
21 with that.

22 You came to me to rule. I am going to rule by giving
23 one or the other of you what you have asked me to give you.
24 You can continue, but I don't want to hear any more about prior
25 negotiations, I don't care. Tell me why you should get

1 everything you have asked for from Mr. Bretholz.

2 MR. OOT: Yes, your Honor. The reason I was
3 referencing that is because Mr. Burstyn referenced the parties'
4 efforts to prevent burden on Mr. Bretholz, and those are
5 strategies that we deployed in conjunction with --

6 THE COURT: Are you offering that now? I asked you
7 what you wanted me to order. You didn't say you should order
8 us to pay for de-duplication, you should order us to hire this
9 person or that person. You said to me, order him to give us
10 everything we have asked for, period, hard stop.

11 Are you asking me to order something different?

12 MR. OOT: Your Honor, everything that we previously
13 offered is still on the table.

14 THE COURT: No, it is not. When I asked you five
15 minutes ago, what is your ask, that is what you told me. I
16 don't know what is on the table between you and Mr. Burstyn,
17 and frankly, I don't care. If you wanted to negotiate this,
18 the two of you should have negotiated this.

19 You have come to me, you have asked me to make a
20 ruling. I am going to pick one option or the other. If you
21 want to expand on what your option is that you are presenting
22 to me, I will hear you on that.

23 I asked you and you said, order him to give me
24 everything I have asked for, hard stop, and Mr. Burstyn said,
25 order us to not have to give him anything, zero, nada, hard

1 stop.

2 MR. OOT: Understood, your Honor. I will make a
3 recommendation, your Honor, if that's okay, that we delay your
4 order and perhaps we can work with Special Master Dodge again.

5 THE COURT: No, no. You have come to me for an order.
6 This matter has been pending, the original subpoena in this
7 case was served August 4th of last year --

8 MR. BURSTYN: August --

9 THE COURT: Excuse me, Mr. Burstyn, I am speaking.
10 It was served five months ago. You litigated this in
11 New York, you litigated the transfer, you are now litigating it
12 in front of me, and that is fine. You have the right to
13 litigate for as long as you want to litigate, but there comes a
14 point when this has to come to an end. It is going to come to
15 an end, I am going to rule.

16 I am not going to get an order out today, I may not
17 get an order out tomorrow, but if you all want to resolve this,
18 you better resolve it, or otherwise I will just rule. Tell me
19 why I should give you what you asked for.

20 MR. OOT: Your Honor, what I am asking for, let me
21 clarify that, I am asking that they give us information that
22 Mr. Bretholz has in his custody that has not been produced by
23 another third party that --

24 THE COURT: How do I write an order that says that?

25 MR. OOT: That Mr. Bretholz should produce --

1 *THE COURT:* How is he supposed to identify what other
2 people haven't produced? How is he supposed to know what is
3 not privileged? How is he supposed to do it, search terms? Is
4 he supposed to look at everything anyway and then decide
5 whether people haven't produced? I have to write an order when
6 this hearing is over. What do you want my order to say?
7 Dictate me my order.

8 *MR. OOT:* Sure, your Honor. There are
9 technological methodologies to de-duplicate information without
10 actually looking at the materials themselves. You can use what
11 is called a hash value to de-duplicate one set from another to
12 minimize the burden on Mr. Bretholz and Mr. Bretholz's counsel.

13 How that would work is, one of the main reasons we
14 thought it was a good idea for Valisure to go first, is to
15 identify the scope of production for Valisure and then,
16 obviously, if Mr. Bretholz has a copy or cc or bcc in those
17 materials, he wouldn't have to reproduce or log that.

18 To the extent that Mr. Bretholz is having Zantac or
19 Valisure related communications with other third parties, we
20 think that they are relevant and we think that they should be
21 produced and logged.

22 That is the offer that is on the table. We are
23 seeking unique information in the custody of Mr. Bretholz that
24 is not privileged, that can be de-duplicated technologically
25 from the productions of other third parties, including

1 Valisure.

2 *THE COURT:* Again what is my order supposed to say? I
3 order Mr. Bretholz to coordinate with Valisure's counsel to
4 de-duplicate the data technologically and then produce what,
5 anything that Valisure is not going to produce?

6 *MR. OOT:* Any unique information, your Honor.

7 *THE COURT:* That is a far cry from ordering him to
8 give me everything I have asked for or log it.

9 *MR. OOT:* I apologize, your Honor, that is what we are
10 asking for. We are asking for unique information that Mr.
11 Bretholz has that we haven't received from other sources, or
12 can't receive from other sources. He is communicating with
13 high net worth individuals, he is communicating with
14 influential people, like people --

15 *THE COURT:* Are you willing to pay for the
16 de-duplication of the information that Mr. Bretholz has and
17 that Valisure has?

18 *MR. OOT:* I don't have authorization for that, your
19 Honor, but I would say that if we could follow the same process
20 technologically that we paid for the discovery costs and those
21 costs are reasonable, we would do so.

22 I think that that has really been the struggle for us,
23 your Honor, is we -- there is a difference in how we have been
24 dealing with Mr. Bretholz than how we have been dealing with
25 Mr. Egan.

1 Mr. Egan has provided us with hit reports, provided us
2 with metadata reports, so we were able to cull down the
3 information from what we actually requested. That is why we
4 are here, and we would be willing to again follow the same
5 process that we agreed with Mr. Burstyn.

6 Related to the invoice, we received that invoice over
7 the holiday break --

8 *THE COURT:* I am not concerned about the invoice, that
9 is between you two. If I order GlaxoSmithKline to pay for
10 something -- I think I read in the paper this weekend Glaxo is
11 talking about selling some division to Unilever for tens of
12 billions of dollars. I think Glaxo is good for the money, so I
13 am not worried about it. That has nothing to do with me.

14 Mr. Burstyn -- let me pause for a second -- Mr. Oot
15 has changed his demand. His demand is now that you get
16 together with Mr. Egan, you de-duplicate the data, see what is
17 left, and then produce or log whatever Valisure is not going to
18 produce.

19 *MR. BURSTYN:* May I address the Court?

20 *THE COURT:* Yes.

21 *MR. BURSTYN:* Thank you. Your Honor, this happens
22 often where parties will draw lines in the sand for months and
23 months and --

24 *THE COURT:* Again, I don't care how we got here. Do
25 you want that deal or not?

1 MR. BURSTYN: If we will be covered for the tens of
2 thousands of dollars we had to pay to get to this position that
3 we should have gotten to on day one, that is the only extent to
4 which I am getting into the history, then we would take that
5 deal, but we had to pay to get to what is now a more or less
6 reasonable position. I don't think we should have to pay for
7 that. I think it is highly prejudicial to my client.

8 THE COURT: Okay, no problem. Okay, let me go back to
9 Mr. Oot and let him finish his argument then.

10 Mr. Oot, back to you.

11 MR. OOT: Your Honor, to be clear, the brand
12 Defendants will cover the technological costs associated with
13 the de-duplication, and the process in one of the reports that
14 Mr. Egan provided to us that we requested back in October; and
15 then secondly, the prior work, we had to go through great pains
16 to get to this point to get jurisdiction over this subpoena.

17 So, I don't think our client should be responsible for
18 attorney's fees for filing motions to object to the subpoenas
19 when we could have had this discussion a long time ago.

20 Turning back to -- just touching on a couple issues,
21 your Honor, and I will be very brief.

22 On the confidentiality issue, we have PTO 26 that
23 addresses trade secret or any other issue for confidential
24 information outside of privilege. The privilege log would
25 cover the privilege. The issue related that these are

1 duplicative of Valisure's request -- or brand Defendants'
2 requests to Valisure, that is turning back to the point where
3 Mr. Bretholz is going to have unique information in response to
4 those requests where there isn't a Valisure person copied on
5 those requests.

6 Mr. Bretholz is using his personal gmail account, he
7 is not using a Valisure email address, so he is the sole person
8 that has custody of some information where he is communicating
9 with third parties. The only thing that we have seen is Mr.
10 Bretholz acting in a business role on communications with Dr.
11 Braunstein and others that indicate that there is a lot of
12 relevant information there.

13 So, I think, obviously, we don't have to rehash the
14 relevance issue that we discussed related to Valisure and how
15 it all ties up to science, and I won't rehash that here, but I
16 will really kind of run through the overall burden of this.

17 Mr. Bretholz isn't really a disinterested party, as we
18 discussed with Valisure. There was a business around building
19 this litigation, there was a business around the citizen's
20 petition, there was a business around the overall science for
21 this that Mr. Bretholz participated in.

22 The materials that we cited, the Seroquel opinion that
23 Mr. Egan and I both relied on in our papers, we think that that
24 is important, too.

25 Also, you know, Mr. Burstyn referenced the parties'

1 resources. He said -- Mr. Bretholz engaged in this conduct, he
2 is a senior executive at one of the largest asset managing
3 firms in the world, and at least from our research, we have
4 seen that he, in 2016, recovered \$1.6 million in a litigation.
5 So, the issue here mostly, your Honor, is that his position, as
6 we have seen in the timeline, he is a key player throughout the
7 litigation, and that is why we sent the request to Mr.
8 Bretholz, and that is why we are taking a deposition of Mr.
9 Bretholz, too.

10 We are hoping to cut through this, get to the
11 information, get to the facts related to the underlying
12 campaign that led to the science, that led to the citizen
13 petition, and the lobbying campaign, your Honor.

14 *THE COURT:* All right. Thank you very much, counsel.
15 Very well argued.

16 I would strongly, strongly, strongly encourage the two
17 of you to meet with the special master in the next 48 hours and
18 try to work this out. I fully expect to get an order out
19 probably by the end of Friday. Like I said, the choice you
20 have given me is not a win, it is a big, big loss for one of
21 you. So, maybe you want to try to negotiate something in the
22 middle, but if not, I will issue my order and you will have to.

23 Thank you, everybody, very well argued by all parties.
24 I will excuse everyone and we will be in recess. Have a good
25 afternoon.

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

2 * * *

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

5
6 Date: January 22, 2022

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

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

MR. BURSTYN: [12] 60/5 60/12 85/9 85/23 86/5 87/24 89/21 89/24 106/7 109/18 109/20 109/25 MR. EGAN: [23] 38/18 38/21 39/20 40/6 41/1 43/4 50/6 50/10 51/5 51/17 52/1 52/12 57/16 68/16 69/25 70/8 70/18 71/20 71/23 75/16 80/19 80/22 81/14 MR. GILBERT: [10] 15/20 17/9 17/15 22/17 27/8 29/6 30/24 31/17 35/3 83/24 MR. McGLAMRY: [8] 43/13 43/19 44/6 44/9 45/10 45/13 46/12 81/21 MR. OOT: [43] 38/25 39/23 42/10 45/15 45/18 46/20 47/6 47/22 48/10 53/16 55/3 55/7 55/14 55/17 57/19 58/1 60/15 60/18 64/4 65/8 65/23 66/5 66/16 67/6 77/15 79/7 80/15 84/13 86/1 101/20 102/16 103/17 103/20 105/1 105/11 106/1 106/19 106/24 107/7 108/5 108/8 108/17 110/10 MR. SHORTNACY: [9] 4/14 5/3 8/4 10/3 10/10 10/18 11/8 12/1 15/14 MR. STANLEY: [7] 4/10 4/25 5/18 7/5 7/19 12/18 14/24 MS. SHARPE: [13] 15/22 16/2 16/25 17/12 22/20 26/7 26/10 28/12 28/16 29/11 33/19 36/14 38/13 THE COURT: [121]	1180 [1] 2/5 11th [1] 80/12 12 [4] 19/15 20/8 20/14 91/2 12 percent [1] 64/9 13 [1] 19/3 13th [2] 58/8 58/13 14 [7] 18/10 18/15 18/15 23/9 28/6 28/8 84/4 14th [3] 12/25 32/5 61/12 15 [2] 17/25 92/22 1550 [1] 2/8 1560 [1] 1/13 15th [2] 60/19 60/23 16 [3] 21/11 30/8 94/8 16-page [1] 39/9 1600 [2] 2/5 50/12 165,000 [1] 77/4 17 [1] 91/4 17 degrees [1] 74/13 1700 [1] 78/8 17th [1] 59/18 18th [1] 13/8 19 [1] 1/5 19104 [1] 1/24 19th [4] 13/17 57/2 58/23 59/13 1st [4] 18/17 21/8 56/19 59/3	2929 [1] 1/24 29th [2] 56/13 61/3 2:40 [1] 65/13 2:50 [1] 65/14 2nd [2] 57/7 59/4
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