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February 7, 2014

Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle NE
Washington, DC 20544

RE: Proposed Amendments to the Federal Rules of Civil Procedure

Dear Committee,

On behalf of Sanofi US, we appreciate the opportunity to comment on the proposed amendments to the Federal Rules of Civil Procedure under consideration by the Committee. As set forth in the detailed comments below, Sanofi endorses the Committee's proposed amendments because they will result in a more rational and fair discovery process that will result in greater justice for all parties involved in Federal litigation.

Sanofi is an integrated, global healthcare company focused on patient needs and engaged in the research, development, manufacturing and marketing of healthcare products. We are present in approximately 100 countries on five continents with approximately 111,974 employees. Sanofi employs more than 17,000 professionals in the United States, with employees in practically every state, and with large corporate offices and/or research facilities in Arizona, Georgia, Massachusetts, New Jersey, Pennsylvania and Tennessee. At any given time we are actively engaged in hundreds of matters in the U.S. Federal Courts, both as plaintiffs and defendants, and we readily rely on relevant discovery to protect our legal rights in those matters.

At Sanofi, we recognize that the right to sue and defend in the courts is a right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship.[1] In this regard, full and fair discovery directed toward evidence that the parties will present at trial is essential to a just adjudication of a lawsuit. The discovery system in effect today, however, does not perform this function well.

[1] Chambers v. Baltimore & Ohio Railroad Co., 207 U.S. 142, 148 (1907).

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As the technologies which drive and support our healthcare initiatives have evolved, so too has the amount of electronic information we generate. As currently structured, the Federal Rules permit opposing counsel to target a disproportionate amount of this information during discovery – far in excess of what is probative or relevant to their litigations.

The cost Sanofi faces when made to produce or place electronically-stored information on legal hold, is substantial. These costs are fixed and do not vary with the merits of a given case. In the past five years alone, Sanofi US has produced an estimated 47,095,853 pages of documents in various litigations. The processing, hosting, and production of these pages bore its own cost, an estimated $20,451,633, which was merely an initial fraction of the total expense Sanofi shouldered. This fraction represented only the base cost – before any lawyer reviewed a single document.

Opposing counsel are well-aware of these costs and therefore often employ the strategy of leveraging the high cost of responding to their discovery requests against the value of the case. Indeed, the business distraction and sheer expense associated with excessive discovery all too often drive the outcome of disputes. It is only once Sanofi makes the conscious decision to endure the extortive price tag of currently sanctioned e-discovery practices, that we might hope to eventually defend ourselves in court.

The following illustrates an example of how disproportionate and irrelevant discovery practices are currently being exploited in our system:

> In an active antitrust litigation, the court has permitted substantial disproportionate discovery encompassing personnel records spanning 15 years and focusing on sales representative conduct not remotely relevant to the core allegation. This court-deemed "relevant" discovery is premised solely on a single boilerplate allegation in plaintiff's 111-paragraph complaint – the remainder of which focuses on business contracting terms, independent of any salesperson activities. As a result of this authorized discovery, Sanofi US has produced more than 12 million pages of documents from more than 110 custodians, more than 8.75 million of which were from the custodial files of 75 sales representatives. Sanofi US employees spent over 4,200 hours working to identify, collect, and facilitate production of documents in response to discovery requests from plaintiff, and Sanofi US's counsel has spent over 86,000 hours reviewing and producing these documents. The cost to Sanofi US for these discovery efforts exceeded $10 million. (Coincidentally, despite plaintiff having raised the issue of sales representative activity, having insisted on its relevance, and having cost Sanofi US an enormous amount of time and expense, plaintiff failed to preserve all of its correspondingly relevant custodial files, and has thus evaded such costs.)

The amendments before this Committee represent a significant step toward addressing the high, asymmetrical costs and burdens of excessive discovery. They offer an opportunity to revert discovery to the stated purpose of the Federal Rules – "... to secure the just, speedy, and inexpensive determination of every action and proceeding."[2]

The proposed revisions to Rule 26(b)(1) will help reduce overly-broad discovery requests by requiring parties to tailor their discovery requests to be proportional and relevant to the case.

The proposed changes to Rule 26(b)(1) will encourage parties to hone their discovery requests to take into account the issues of the case and the amount in controversy. By refining the scope of discovery from "matter that is relevant to any party's claim or defense" to "any matter relevant to the subject matter involved in the action" discovery will be properly limited to the parties' claims and defenses. As the Committee Note recognizes, "[p]roportional discovery relevant to any party's claim or defense suffices" because a party may amend its pleadings to add a new claim or defense should that be necessary.[3]

The proposed amendment to Rule 26(b)(1), specifying that "discovery of inadmissible evidence should not extend beyond the scope of discovery simply because it is 'reasonably calculated' to lead to the discovery of admissible evidence,"[4] further focuses discovery on relevant information and discourages courts from authorizing overly-broad document production.

Allocating costs in Rule 26(c) levels the playing field between parties and helps prevent asymmetrical expenses from driving litigation outcomes.

Amending Rule 26(c) to expressly recognize that courts have the authority to fairly apportion the expenses of document production is a significant step toward addressing the inequities in the allocation of discovery costs. By expressly permitting courts to invoke cost-shifting provisions within Rule 26(c) protective orders, opposing parties should be deterred from demanding excessive documents and should instead focus their requests on materials relevant to the claims they are making. This amendment explicitly encourages courts to take an active role in monitoring, and where appropriate, shifting the costs of discovery. As with the Rule 26(b)(1) changes, this amendment supports a judge's authority to command the discovery process.

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[2] Fed. R. Civ. P. 1

[3] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure*, at 297 (2013) (Committee Note to Rule 26(b)(1)).

[4] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure*, at 297 (2013) (Committee Note to Rule 26(b)).

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The right to sue and defend in the courts is one of the highest and most essential privileges afforded under the law. The Federal Rules of Civil Procedure were meant to safeguard and not deter this right. As currently drafted and applied, the Federal Rules afford parties an avenue to manipulate the process of discovery by leveraging the costs associated with excessive document productions against the value of a case.

The amendments before this Committee offer an opportunity to refocus the pre-trial phase of discovery, allowing parties to properly assess the relative strength and weaknesses of each side's case in order to make a balanced decision of whether to exercise their right to proceed to trial.

We thank the Committee for the chance to comment and urge the Committee to amend these rules as proposed.

Respectfully submitted,

Robert DeBerardine, Esq.