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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

FEDERAL TRADE COMMISSION,

Plaintiff,

CIVIL ACTION NUMBER:

vs.

2:20-cv-18140-JMV

HACKENSACK MERIDIAN HEALTH,
INC., and ENGLEWOOD
HEALTHCARE FOUNDATION, INC.,

Telephone Conference

Defendants.

Frank R. Lautenberg Post Office and Courthouse
Two Federal Square
Newark, New Jersey 07102
January 4, 2021

B E F O R E:

THE HONORABLE JOHN MICHAEL VAZQUEZ,
UNITED STATES DISTRICT COURT JUDGE

**** ALL PARTIES PRESENT VIA TELEPHONE CONFERENCE ****

A P P E A R A N C E S:

FEDERAL TRADE COMMISSION
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19 **A L S O P R E S E N T:**

20 Emily Bowne, Esq., FTC
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22 Christopher Caputo, Esq., FTC
23 Cathleen Williams, Esq., FTC

24 Kerry C. Donovan, Esq., Englewood
25 Heather P. Lamberg, Esq., Englewood
Jeffrey J. Amato, Esq., Englewood
David E. Dahlquist, Esq., Englewood
Joanna Hudgens, Esq., Englewood

1 (PROCEEDINGS held via telephone conference before
2 The HONORABLE JOHN MICHAEL VAZQUEZ, United States
3 District Judge, on January 4, 2021.)

4 THE COURT: Good afternoon. This is Judge Vazquez.
5 We're on the record in the matter of the *Federal Trade*
6 *Commission vs. Hackensack Meridian Health, Inc., and Englewood*
7 *Healthcare Foundation*. The civil number in this case is
8 20-18140.

9 Could I please have appearances, starting with the FTC.

10 MR. LASKEN: Yes, Your Honor, Jonathan Lasken,
11 counsel for the FTC. With me on the line is Emily Bowne,
12 Christopher Caputo, Lindsey Bohl, and Cathleen Williams.
13 Thanks, Your Honor.

14 THE COURT: Good afternoon.

15 And could I have counsel for Hackensack, please.

16 MR. SAINT-ANTOINE: Good afternoon, Your Honor. This
17 is Paul Saint-Antoine from Faegre Drinker Biddle & Reath on
18 behalf of Hackensack, and joining me is my partner Ken
19 Vorrasi.

20 THE COURT: Good afternoon.

21 MR. SAINT-ANTOINE: Thank you.

22 THE COURT: And for Englewood.

23 MR. GENOVA: Good afternoon, Your Honor. This is
24 Angelo Genova of Genova Burns here in Newark who entered his
25 appearance today. I'll be serving as local counsel for

1 Winston & Strawn.

2 I can identify those from Winston & Strawn as a matter
3 of efficiency for you, Your Honor. Jeffrey Kessler from
4 Winston & Strawn, Heather Lamberg, David Dahlquist, Jeffrey
5 Amato, Kerry Donovan, and Joanna Hudgens, Your Honor.

6 THE COURT: Good afternoon, Counsel.

7 Counsel, before you speak today, please say your name,
8 just so we have a clear record.

9 The purpose of today's call is to review the disputes
10 the parties are having as far as scheduling this matter. By
11 "scheduling," I mean not only dates but also substantive
12 disagreements as to the, for example, amount of depositions,
13 number of witnesses, and so forth.

14 In preparation, I did review the joint letter that was
15 submitted at Docket Entry 45 along with the attachments. The
16 attachments include the joint status report and proposal for
17 case management order.

18 I was going to take the issues in order. I know that
19 there are several other minor issues not addressed in the
20 December 31st letter but which are highlighted in the proposed
21 scheduling order.

22 Do the parties want to address any issues before we
23 take them one by one, starting with the date of the hearing?

24 MR. LASKEN: Your Honor, this is Jonathan Lasken for
25 the FTC.

1 There are one or two other things not related to the
2 CMSO that we might want to raise but can do that at the end
3 from our perspective.

4 THE COURT: Does either Hackensack or Englewood have
5 anything that they would like to put on the record before we
6 start going through the issues?

7 MR. SAINT-ANTOINE: I don't think so, Your Honor.
8 This is Paul Saint-Antoine on behalf of Hackensack. I do
9 think it might make sense to start with the overall scheduling
10 issue.

11 THE COURT: Okay.

12 MR. KESSLER: This is Jeffrey Kessler for Englewood.

13 We also are fine proceeding with the issues as they are
14 set forth in order in the letter.

15 THE COURT: Let me ask, as to the date of the
16 hearing, I've already entered the stipulated TRO, so my
17 understanding is that the parties are in agreement that the
18 stipulated TRO is going to stay in place until the preliminary
19 injunction hearing is held and a decision is rendered.

20 MR. LASKEN: This is Jonathan Lasken for the FTC.

21 Yes, Your Honor, that's correct, from our perspective.

22 THE COURT: And for the defendants, is that also your
23 understanding?

24 MR. SAINT-ANTOINE: Yes, that is our understanding,
25 Your Honor.

1 MR. KESSLER: It is, Your Honor, Englewood, as well.

2 THE COURT: With that being said, I know that the ALJ
3 has this scheduled for June 15th of this upcoming year, 2021,
4 but if the TRO is in place, given the breadth of information
5 that the parties want to review, can I ask the FTC what's the
6 push for the hearing?

7 It seems as though you already have the temporary
8 restraints. Why push the preliminary injunction so quickly in
9 light of the amount of information the parties are trying to
10 exchange?

11 MR. LASKEN: I think, Your Honor -- this is Jonathan
12 Lasken.

13 I think, Your Honor, we would sort of answer that
14 question in two parts, right? The first is the hearing is set
15 by the commissioners and is the trial on the merits, so if
16 we're going to have an ancillary preliminary injunction
17 proceeding, we think it needs to happen before, not at the
18 same time as the hearing -- as the trial on the merits.

19 Doing them at the same time I think has obvious
20 problems related to witnesses trying to testify in two places
21 at once, you know, counsel trying to be in two places at once
22 and so forth.

23 So our view is and the traditional way this is done and
24 in fact other than one or two instances, which I'll talk about
25 in a minute, the only way this has ever been done is for the

1 preliminary injunction to be treated as a preliminary
2 proceeding that happened before the trial on the merits
3 because that's simply, you know, what the statute authorizes.

4 Now, we referenced the *Tronox* matter. Our view is, if
5 the defendants are happy to wait with the TRO in place, we
6 think the appropriate thing to do is actually delay the
7 hearing even further than what they're proposing and just go
8 ahead in the administrative action and have their trial on the
9 merits.

10 And if they can't stay separate until Judge Chappell is
11 able to rule, then we would come back to Your Honor and we
12 would have a much more abbreviated hearing as was the case in
13 *Tronox* where we knew the parties were not going to merge or we
14 thought they were not going to merge until after the trial on
15 the merits. And then at the last minute it turned out they
16 were and so we had to come in to get the preliminary
17 injunction.

18 So that is sort of our view. And the reason we have
19 made our proposal is -- our understanding is the defendants
20 want to have a preliminary injunction proceeding and that
21 they're not willing to sort of hold off their merger, you
22 know, to go to the ALJ.

23 But from our perspective, you know, it's just
24 inefficient to do two proceedings, a hearing and a trial on
25 top of each other. We should do either the preliminary

1 injunction as a preliminary injunction, or we can come back to
2 Your Honor with the record that is developed in the trial of
3 the merits if the defendants are going to sort of force our
4 hand in needing the preliminary injunction.

5 THE COURT: First of all, I do agree that doing
6 them both at the same time or nearly at the same time is
7 unworkable, not for me and probably not for the ALJ but for
8 the parties, so I don't disagree with that view.

9 Let me ask you, though, as far as the ALJ proceeding,
10 I know it's up to the ALJ but what's the normal amount of
11 time -- or I shouldn't say "normal." On average, how long do
12 the parties wait before they get a decision from the ALJ?

13 MR. LASKEN: Your Honor, let me -- there is actually
14 a time in the CFR and it's not registering off the top of my
15 head. It's a couple of months.

16 I can get back to you with a specific answer. I think
17 it's about three months. There are other folks on the call
18 who may jump in that have it in their mind.

19 The ALJ hearing is a 210-hour trial on the merits, so
20 it's a very different proceeding from this with a lot more
21 substance.

22 THE COURT: Let me ask you, the scope of discovery in
23 the proceedings before the ALJ, how does it compare vis-à-vis
24 the Federal Rules of Civil Procedure?

25 MR. LASKEN: It's very similar to that. It's

1 actually even a little broader. I believe there's no limit on
2 the number of depositions, for example, in that proceeding.
3 They would have the same interrogatories and so forth, so it's
4 very similar.

5 I can give you -- you know, we call it Part 3, but
6 I can get you the actual citation in the CFR for it if you'd
7 like to look afterwards.

8 THE COURT: That's okay. That's all I need. Part 3
9 in the CFR. I can take a look at that. Thank you.

10 Now, let me ask defense counsel, if you want to propose
11 having a preliminary injunction hearing on June 21st, if this
12 trial date holds on June 15th and you're going to be able to
13 get more discovery than what you would have in my case -- if
14 you're already willing to wait until June 21st, does it make
15 sense to have your trial, you'll have a full record, and then
16 if need be you can come in with a full record and we can have
17 a preliminary injunction hearing?

18 MR. SAINT-ANTOINE: Your Honor, this is Paul
19 Saint-Antoine.

20 Let me start -- on behalf of Hackensack -- and just
21 say that what counsel for the plaintiff is proposing is not
22 consistent with the sequence in merger cases generally, and
23 the one exception he's identified is distinguishable in a very
24 important respect.

25 THE COURT: I don't -- I'm going off your date, not

1 his date. His date was April 6th. He wants to do this
2 earlier. The FTC wants to do it earlier.

3 The trial date is June 15th. The date provided by the
4 defendants was June 21st. I'm working off of your date.

5 If you want to start on June 21st, my question is does
6 it make sense to let you do the trial? You'll have a full
7 record, and if you don't want to wait until the ALJ issues his
8 decision, you come before me for a preliminary injunction.

9 MR. SAINT-ANTOINE: The issue for us, Your Honor, is
10 we don't necessarily get the same amount of discovery in the
11 Part 3 proceeding as defendants have traditionally received in
12 Federal Court.

13 It's also the case that, while we agreed to a TRO, we
14 didn't agree to an indefinite stay on this transaction. This
15 is very important --

16 THE COURT: Hold on. That's why I started off by
17 asking does the TRO stay in place until we do the preliminary
18 injunction hearing, and you said yes. And then your proposed
19 date is June 21st, which is after the start of the trial date.

20 It sounds like you're arguing against yourself based on
21 what I've already asked you. I'm asking a very common-sense
22 question which is, if you want to start this preliminary
23 injunction hearing after the trial, does it make sense to let
24 the trial go, you'll have a full record, and then you can come
25 to me on the preliminary injunction?

1 Why are we going to have two hearings -- a full trial
2 and then a hearing on a preliminary injunction?

3 MR. SAINT-ANTOINE: Under our proposal, Your Honor,
4 we would have the preliminary injunction proceeding as in
5 other cases in June and then Your Honor would decide based on
6 that record whether or not we could close on the transaction
7 or not.

8 As in other merger cases, if the injunction is denied,
9 the parties could immediately close. And in this particular
10 transaction, a decision from this Court is the last obstacle
11 for that closing.

12 In contrast --

13 THE COURT: Don't you have a June 15th trial date?

14 MR. SAINT-ANTOINE: Excuse me, Your Honor? It would
15 be after a decision after the hearing in June, so in some
16 sense the defendants are trying to strike a balance between
17 having a record to explain the transaction and to show why
18 it's pro-competitive and their interest in closing.

19 That interest is compromised if the transaction is held
20 up until the resolution of a Part 3 proceeding, which if we
21 didn't have the ability to close until that, we're
22 contemplating a trial on the merits followed by a decision by
23 the ALJ followed by an appeal to the full commission followed
24 by an appeal to the court of appeals.

25 We lose significantly the advantage that's built into

1 the system of putting the burden on the FTC to get an
2 injunction -- a preliminary injunction, not just a TRO but a
3 preliminary injunction in a matter of months.

4 So while we --

5 THE COURT: If that's your view, then why are you
6 opposing to their dates and times? I'm getting a conflicting
7 message from defendants here.

8 You're telling me how important it is to have the
9 preliminary injunction hearing, but then you're asking for a
10 much larger amount of discovery and a later date. Those are
11 not --

12 MR. SAINT-ANTOINE: Understood, Your Honor. I
13 appreciate the question.

14 I think what I was saying is, under normal
15 circumstances, our interests would probably be very much
16 aligned in terms of the schedule that the plaintiffs are
17 proposing but we anticipate -- in a merger in the healthcare
18 context, it's going to be extremely difficult to get the
19 necessary discovery from third-party healthcare providers
20 given the current pandemic.

21 And so whereas before this may not be an issue, under
22 the present circumstances we're asking for a little bit more
23 time so that we can accommodate what we anticipate to be the
24 concerns of third parties and to minimize as much as possible
25 the motion practice that we may get when we serve subpoenas on

1 those third parties.

2 MR. KESSLER: Your Honor, this is Mr. Kessler.

3 I think I can address a concern that you raised, if I
4 may.

5 THE COURT: Sure.

6 MR. KESSLER: It would be our intention, if
7 Your Honor agrees with us that the trial should be -- the
8 preliminary injunction hearing should be on June 21st, we will
9 move the FTC to delay administrative hearing until after
10 Your Honor rules with your preliminary injunction decision.

11 This is exactly what the administrative law judge said
12 at our hearing with him that he would expect we would do, that
13 the FTC we would ask to accommodate the courts.

14 The reason for that is very, very practical. In all of
15 these merger cases, it is virtually always the case that the
16 preliminary injunction proceedings decide the entire matter.
17 By that I mean if we go up to the court of appeals and we lose
18 and the preliminary injunction is entered, it is very likely
19 the transaction will be abandoned and there would never be a
20 full administrative trial.

21 Conversely, if Your Honor denies the preliminary
22 injunction and that denial is sustained on appeal in an
23 expedited basis, we would close, and it is very likely that
24 the FTC would not go forward with any administrative trial.

25 That is also in the transcript. The administrative law

1 judge is very familiar with how this works. The reason for
2 this is very practical.

3 The practical reasons are it takes well over a year
4 to go through the FTC administrative trial which then gets
5 appealed to the full commission, as Mr. Saint-Antoine
6 explained, and then goes to the court of appeals first for a
7 resolution. While the preliminary injunction proceedings are
8 expedited, they let the parties either close or not close.

9 So what we would respectfully ask is, if Your Honor
10 agrees that it is not practical, complete this fact discovery
11 of health institutions who are both trying to take care of
12 patients and vaccinate the public during this compressed
13 period of time and ask them to do discovery for this merger in
14 such a compressed period of time in the middle of this health
15 emergency and therefore that June 21st is the much more
16 sensible, practical schedule.

17 We would ask you to order that and then leave it to us
18 to go to the FTC and ask for a delay in the administrative
19 proceeding. I hope that clarifies how at least we would hope
20 that this would work out.

21 THE COURT: Let me ask the defendants. I know that
22 we're in the midst of a pandemic. What the defendants have
23 not provided to me is how the folks who are dealing with the
24 pandemic cross over into the issues raised in this case.

25 I haven't seen that type of information where these

1 folks are going to be critical to our case but they're also
2 critical to dealing with the pandemic. I know that Hackensack
3 is a very large organization.

4 So, while I appreciate the fact that all healthcare
5 entities in the United States, particularly in the hot zones
6 right now, i.e. Southern California, are dealing with an
7 unprecedented surge, what the defendants have not given me is
8 how that impacts the people who are going to be involved in
9 this case.

10 MR. SAINT-ANTOINE: Your Honor, this is Paul
11 Saint-Antoine.

12 One reference point I can provide the Court is we have
13 had a hospital merger case take place in the course of the
14 pandemic through a decision and there was -- as in this case
15 there was contemplated third-party discovery on healthcare
16 providers.

17 There was objections to the discovery by those
18 providers, there was some motion practice in that case. This
19 is the *Jefferson-Einstein* in the Eastern District of
20 Pennsylvania. There was motion practice.

21 Whether through objections or motion practice, those
22 third parties referenced their concerns about diverting
23 resources to respond to discovery while they were trying to
24 address the healthcare concern created by the pandemic.

25 Another reference point I can provide to Your Honor

1 comes from the New Jersey Supreme Court. It reinstated just
2 recently a prohibition on depositions of healthcare providers
3 given the current pandemic.

4 Now, I'm not suggesting that that would preclude the
5 discovery that we are contemplating in this case, but it is
6 emblematic of the types of objections that we anticipate in
7 this case like we received in the *Jefferson-Einstein* matter.

8 THE COURT: Okay. So then we're going to have to
9 have a safety net, so to speak, for issues that arise that are
10 unique to the pandemic. That I don't disagree with. I'd have
11 to see what each of those issues are before ruling on them.

12 Conversely, I know a number of healthcare practitioners
13 who have not been practicing as much during the pandemic.
14 They're just not in the area that deal with COVID-19 or
15 related issues and they have actually seen an opposite -- you
16 know, surgeries put off and so forth. Some of those people I
17 know in the healthcare field have seen actually a significant
18 drop-off during the pandemic.

19 I think that's going to have to depend on the person
20 who is needed for a deposition or the documents that have to
21 be produced, and then I'd have to understand how the person
22 who produces documents is needed to deal with the pandemic or,
23 I guess, paperwork related to the pandemic.

24 In other words, just telling me that there's a pandemic
25 doesn't really answer the question. I'm well aware there's a

1 pandemic, but I need to know more to determine whether the
2 pressures of the pandemic are actually causing a delay.

3 I'm not saying that there won't be, but I would need
4 more before parties just tell me, well, Judge, there's a
5 pandemic delay.

6 You're all on the phone, I'm on the phone, and we're
7 trying to work through this.

8 MR. LASKEN: Your Honor, can I respond briefly?

9 THE COURT: Sure, go ahead and respond.

10 MR. LASKEN: I just wanted to say a couple of things.
11 The case the defendants referenced was a much broader case
12 than this one. It involved the market inpatient rehab, which
13 means nursing homes had to testify, and a lot of those
14 disputes were with nursing homes which are much smaller
15 entities, so I just wanted to flag that.

16 The second point I just wanted to clarify for the Court
17 is we don't have any intention to seek discovery of front-line
18 providers. This is about the leverage of negotiations between
19 hospitals and insurers and this is about those folks, so, you
20 know, we agree with the Court that we think it's unlikely that
21 these people are on the front line, at least from our
22 perspective. We obviously don't know what the defendants
23 will do.

24 THE COURT: I don't know, either. I just don't want
25 to go with an assumption that it necessarily will be. I can

1 certainly envision circumstances where there's going to be
2 somebody who in good faith says this is why I'm not able to
3 comply at this time due to my duties with the pandemic and
4 then there should be other people who don't have that same
5 obstacle.

6 MR. LASKEN: I completely agree, Your Honor. This is
7 Jonathan Lasken.

8 We agree with the approach of dealing with the issues
9 as they arise.

10 MR. SAINT-ANTOINE: Your Honor, this is Paul
11 Saint-Antoine.

12 Just to add, we anticipate if we get those objections
13 from third parties that we would explore solutions. We're not
14 contemplating simply accepting the objections at face value,
15 but what we do anticipate is additional time to meet and
16 confer and attempt to resolve those third-party concerns
17 amicably so that the Court is not inundated with motions for
18 protective order or motions to compel immediately after a
19 response is submitted.

20 THE COURT: Let me --

21 MR. KESSLER: Your Honor --

22 THE COURT: Yes.

23 MR. KESSLER: This is Mr. Kessler.

24 I just was going to indicate that most of the
25 third-party witnesses we need are going to be at the

1 senior hospital level of administration, not on-the-line
2 practitioners, but those very officials are very involved in
3 the issues of vaccine rollout, of surge expansion, of all of
4 these major decisions that are going on right now to actually
5 run the hospitals.

6 We have a very large number of third-party
7 hospitals who are going to be involved, not just in Bergen
8 County but in Hudson County as well as in Manhattan.

9 Given that number and this obvious problem that
10 we're going to face, we believe the schedule we proposed is
11 still extremely expedited and it is just -- you know, we could
12 go through this and serve the discovery and then come back to
13 Your Honor immediately, but I believe it will be far more
14 efficient if we went to the FTC now and asked them to put off
15 their hearing for a couple of months so that we could have
16 this orderly schedule before you.

17 That's going to be a much more efficient and
18 effective way of proceeding than putting this off, in effect,
19 for 30 days from now where we're going to be inundated from
20 requests from these third parties for delay.

21 THE COURT: Mr. Kessler, I'm going to wait and see
22 how that actually plays out. I can certainly foresee it
23 playing out in some circumstances as you're indicating, but
24 I'm not going to make that decision today as far as just
25 anticipating every third party is going to have difficulty

1 because of the pandemic. That I'm going to -- I want to build
2 a record on.

3 You may ultimately prove to be correct, but I'm
4 going to want more evidence to support that argument before I
5 agree with that position.

6 Let me work back and give everybody my preliminary view
7 on timing because I went through this closely before we got on
8 the phone.

9 My preliminary view is, first of all, no in limine
10 motions, no *Daubert* motions. That's going to take up a
11 tremendous amount of time.

12 I'm going to be hearing the preliminary injunction. If
13 you have an objection either on *Daubert* grounds or on
14 in limine grounds, you make it during the hearing and I'll
15 reserve on it.

16 I'm not going to have an entire *Daubert* hearing or
17 concerns -- I don't mind if you submit briefs ahead of time
18 and tell me why you don't think a person is qualified or why
19 you don't think the person's testimony is relevant and so
20 forth and highlight it, that's fine, but we're not going to do
21 a whole round of in limine motions for a bench hearing.

22 You can make a record if you want, but we're going to
23 cut that out as far as delaying the hearing. I'll consider
24 all objections. If I agree with you, it will go into the
25 opinion. If I don't agree with you, it will go into the

1 opinion and I'll give you my reasons.

2 That should take at least some of the paper off this
3 case. Instead, cover it in your brief to me as to what you
4 think you can prove and what you can't prove and what the
5 other side can prove and what the other side can't prove.

6 My preliminary view is, you make the in limine motion
7 to me, I'm going to rule on. I'm already going to know the
8 evidence that I'm ruling on and then I'm going to have to hear
9 the evidence anyway. That just seems, to me, to put an
10 unnecessary step in there.

11 Every party will be able to make appropriate arguments.
12 I'll be aware of it before the hearing, I'll hear the
13 arguments during the hearing, and when I issue an opinion, I
14 will also address those arguments. I just want to make sure
15 that once we start we keep going through the hearing and get
16 the testimony in.

17 I'm contemplating a hearing on May 10th and then
18 work -- and before we get to the numbers, because I know there
19 are disputes as to the numbers, closing fact discovery on
20 March 5th and then experts -- plaintiff's experts on
21 March 22nd, defendants' experts on March 29th, any reply
22 April 1st.

23 Again, to give you those dates, March 10th start the
24 hearing -- May 10th start the hearing, March 5th close fact
25 discovery with the clear proviso that if there's difficulties

1 with third parties for any reason, obviously including the
2 pandemic. But even if there's not a pandemic-related issue,
3 if there's a problem in getting information from the third
4 parties, let me know two weeks before that close date so we
5 can adjust that. I'm willing to be flexible here.

6 I don't necessarily agree or disagree with defendants
7 or plaintiffs on this issue. I just want to know who is
8 having trouble and what's the reason they're having trouble
9 producing information and then we can deal with those issues.

10 If it becomes too much of a problem, they're going to
11 have to come before me and I'm going to ask them the same
12 question as to what the difficulty is with production.

13 So let's talk first about the dates, and then I'll talk
14 to you about the other issues that came up. It's not what
15 either party proposed, but I'm trying to give consideration
16 and work in some extra time from the beginning because of the
17 pandemic, realizing I may have to work in more time or other
18 issues.

19 Let me hear first from the FTC as to the proposed date
20 of May 10th. If you object, other than the fact that it's not
21 the date you propose, can you give me your reasons why that's
22 an unworkable date.

23 MR. LASKEN: Your Honor, we have no objection to
24 May 10th. I think we would want to address, kind of, the
25 expert piece, and I can give you more information on what

1 actually happens in that piece in a case like this, but the
2 May 10th date is fine with us.

3 THE COURT: Defendants, I know you don't want that
4 date, you want about a month later, but besides that, any
5 objections if I set it down May 10th for the start of the
6 preliminary injunction hearing?

7 MR. SAINT-ANTOINE: This is Paul Saint-Antoine, and
8 we appreciate the Court striving to reconcile the competing
9 interests.

10 I think the only thing we would ask for clarification
11 is do we have an opportunity to come back to Your Honor in the
12 coming weeks if there are problems meeting our discovery
13 requests where we think we need --

14 THE COURT: Absolutely. The answer to your question
15 is you can always come back. Just give me the reasons.
16 Everybody try to be reasonable.

17 If there's a real reason, you know, you're going to get
18 a sympathetic ear. If it's just, well -- I won't give you
19 some of the reasons that I've heard recently, but if it's not
20 a reason backed up of what's happening in the case, you're
21 less likely to get a sympathetic ear.

22 MR. SAINT-ANTOINE: Understood.

23 MR. KESSLER: Your Honor, this is Mr. Kessler.

24 THE COURT: Mr. Kessler, yes.

25 MR. KESSLER: The May 10th date works for us. We

1 appreciate the Court's consideration, and we will only come
2 back on that date if it turns out that we do run into those
3 insurmountable problems, but we appreciate the Court finding a
4 way to give us some extra time, which we will try to meet.

5 THE COURT: All right. We'll set down 5/10 with the
6 understanding that this may be a very fluid situation for a
7 number of reasons, chief among them the pandemic.

8 Now let's talk about the close of fact discovery before
9 I get to the expert issue.

10 Again, it's kind of between the two parties' dates, but
11 I was proposing March 5th. That would be the first Friday in
12 March. It's two weeks later than what the FTC had originally
13 requested.

14 Let me start with the FTC as far as March 5th for close
15 of fact discovery.

16 MR. LASKEN: We have no objection to that date,
17 Your Honor. This is Jonathan Lasken.

18 THE COURT: Then I'll go in order for the defendants.
19 Mr. Saint-Antoine?

20 MR. SAINT-ANTOINE: Yes, Your Honor, very similar
21 view. Again, we appreciate the Court trying to strike the
22 right balance, and as long as we have an opportunity to come
23 back and address what you described as a fluid situation,
24 we'll take it from there.

25 THE COURT: Okay. I certainly understand things

1 could arise, particularly during this time.

2 Mr. Kessler, with that proviso in mind that if you have
3 good cause you can always come before me, is March 5th
4 acceptable?

5 MR. KESSLER: Yes, Your Honor. The only thing I
6 would ask is that I think there would still be room with
7 Your Honor's new trial date to advance it one week to
8 March 12th.

9 I don't know what other dates Your Honor has in mind,
10 but I think even that one additional date could be very
11 helpful in getting this resolved and I think it would fit in
12 with the schedule. But if Your Honor concludes that it should
13 be March 5th, we'll certainly work within that.

14 THE COURT: Before I consider that, let me ask
15 Mr. Lasken.

16 Mr. Lasken, what did you want to raise with me as far
17 as the expert issues? because I'm going to have to fit that
18 into the scheduling. Let me understand those issues.

19 MR. LASKEN: Sure. So, often in these cases we
20 actually do the expert report and the briefing simultaneously
21 so the first thing is I noted from your schedule I think you
22 were putting the expert reports in front of the briefing, is
23 my guess, but the thing I wanted to raise was these are often
24 quite lengthy, what we receive from the defendant, and the
25 case that defendants reference, leaving aside the nursing home

1 piece, we got 454 pages of report involving numerous data runs
2 in a past case, advocates that they have referenced, that was
3 337.

4 I don't think we're going to be able to respond to that
5 in two days, but I do think that that can overlap with the
6 briefing, and that's traditionally how we've done it. I think
7 it would be very hard for us to respond to their disclosures
8 that fast just given the nature of the reports in a case like
9 this.

10 THE COURT: Let me ask you this: I know that the FTC
11 investigated this matter and I know based on the proposed
12 scheduling order one of the areas the parties agreed upon is
13 that the defendants would not have to provide additional
14 information that they have already provided.

15 Given the fact that the FTC does have certain
16 information already, how long after the close of fact
17 discovery would the FTC need to submit its experts' reports?

18 MR. LASKEN: Often, Your Honor, it's very close to
19 the day that fact discovery closes that we submit them and
20 also the brief, for that matter.

21 The only challenge here is -- you know, in *Jefferson*,
22 the case defendants referenced, some of the depositions ran
23 over, so it's hard for us to actually submit that if we don't
24 have all the fact evidence in. But assuming the fact evidence
25 is in, a week would be plenty, from our perspective.

1 THE COURT: Okay. So if I gave the parties an extra
2 week on fact discovery, which I always prefer to have a
3 little bit more breathing room, not as a judge but for the
4 parties. If that was March 12th, I could do the FTC, the
5 expert brief due on the 19th.

6 The one area, before I get to the experts, is was the
7 FTC's position -- I saw sequential, so you're anticipating
8 your brief's opposition reply? Did I read that wrong? Or
9 were you anticipating both sides submit their expert briefs
10 simultaneously?

11 MR. LASKEN: This is Jonathan Lasken again.

12 Our position was simultaneous, especially at this
13 point. We think with the schedule compressed, that will save
14 time, you know, and give everyone a longer time to respond to
15 what the other side actually puts together.

16 We were simultaneous on expert reports. On the
17 briefing we were sequential.

18 THE COURT: Okay. Now, let me ask you as far as
19 simultaneous on the expert reports, the FTC's view is
20 simultaneous submissions of the expert reports and then there
21 will just be one opposition -- one set of opposition reports
22 filed.

23 Is that what you're indicating?

24 MR. LASKEN: Correct. So instead of having a back
25 and forth on expert reports with two periods we'd have just

1 one longer period and everyone can respond to each other.

2 THE COURT: All right. Let me hear from the
3 defendants, because I know that at least the way I read it
4 they were anticipating a different sequence.

5 MR. SAINT-ANTOINE: So, Your Honor, this is Paul
6 Saint-Antoine on behalf of Hackensack.

7 We have proposed the traditional sequencing in part
8 because it's the plaintiff's burden to find a relevant market
9 and to establish the likelihood of anti-competitive facts.

10 With a proposal of simultaneous expert reports, you
11 create the prospect of the two sides talking past each other,
12 where our own experts don't have an opportunity to evaluate
13 what the plaintiffs think the market realities are.

14 THE COURT: All right. Let me hear from Mr. Kessler.

15 MR. KESSLER: Yes, that's our concern, Your Honor.
16 In fact, since the plaintiff -- since the FTC wants to have an
17 opportunity to do a sequential briefing schedule and it was
18 mentioned that they were thinking of doing the briefing
19 simultaneously with the experts, which I think is possible to
20 do, it would seem to us that they should go hand in hand.

21 In other words, at least for my client, if you're
22 going to do sequential briefing, then you would do sequential
23 experts at the same time so that you could have the FTC file
24 its motion papers with their experts and then we would file
25 our opposition with our experts and then they could file their

1 reply with any reply experts. That puts it all together in a
2 way that avoids us talking past each other.

3 That is the concern. For us to do expert reports that
4 say, well, we think the FTC's expert is arguing this and here
5 is why they're wrong, only to find out they're not arguing
6 that at all, they're arguing something slightly different,
7 doesn't seem to be efficient for the Court and would end up,
8 you know, I think more disrupting the orderly presentation of
9 the case rather than advancing it.

10 MR. SAINT-ANTOINE: Your Honor, this is Paul
11 Saint-Antoine.

12 I concur with that framework, and certainly I think it
13 would help on the overall schedule. What I would hope that
14 would also accomplish is to create a little bit more of a gap
15 between the submission of the plaintiff's expert report and
16 our opposition report since we will be evaluating their
17 economic and other expert issues for the first time.

18 THE COURT: Right. That I understand. Let me ask
19 Mr. Lasken.

20 Mr. Lasken, if we close fact discovery on the 12th and
21 you believe you're able to get your expert report on the 19th,
22 would that also give you sufficient time for your opening
23 brief?

24 MR. LASKEN: Yes, Your Honor, assuming that the
25 evidence is in, you know, just the caveat I want to make.

1 It's a big assumption but assuming it's in.

2 I do want to say, Your Honor, the FTC has expressed --
3 we're flexible on this. We think simultaneous is the most
4 efficient, but our big concern with sequential is, given the
5 volume of material that we're going to get, we need an
6 adequate time to respond.

7 That's our primary concern with sequential. The briefs
8 will be 50 -- whatever number of pages Your Honor orders.
9 This is hundreds of pages and a ton of metric work, and that's
10 our only concern here.

11 THE COURT: All right. Trying to take into account
12 the work that goes into the briefing along with submitting the
13 expert reports, if we close discovery on March 12th, what if I
14 give the FTC until March 24th, okay, so that will expand it
15 from the 19th and give you to the middle of the following
16 week, give the defendants two full weeks to submit their --
17 that would be April 7th to submit their opposition, both
18 briefing and their opposition experts, and then give the FTC a
19 full week to do their reply which would be the 14th of April.

20 Let's ask the FTC first. Is that proposal acceptable?

21 MR. LASKEN: So, Your Honor, if I could suggest a
22 slight tweak to it?

23 THE COURT: Sure.

24 MR. LASKEN: There actually are some issues the
25 defendant carry the burden on such as efficiencies, and so we

1 actually I think would need less time for our opening set of
2 papers and would find that time important for reply.

3 Often, for example, the amount in the CMSO that we sent
4 to the Court was even time on the sequential exchange, 14 days
5 each. I would just ask that we move it all up a little bit
6 and give us, you know, more like 14 days to reply. 17 would
7 be ideal but 14 we could live with.

8 THE COURT: Let me make that change and then I want
9 talk to defendants.

10 It will be 3/19 still for your initial briefing
11 submission. I'll give the defendants two full weeks to
12 April 2nd, and then I would give the FTC two weeks until
13 April 16th.

14 Let me ask defense counsel, starting with
15 Mr. Saint-Antoine.

16 Would that be acceptable?

17 MR. SAINT-ANTOINE: I think we're getting, you know,
18 in the right ballpark given the overall schedule, Your Honor.
19 I do think that -- what I thought I heard from Mr. Lasken was
20 he didn't need as much time between the close of fact
21 discovery and his initial report.

22 THE COURT: You heard him right. That's why I moved
23 it back from March 24th to March 19th. I gave him a week.

24 MR. SAINT-ANTOINE: I guess I would hope we could
25 have perhaps until April 12th instead of the 9th. If I

1 understand, Your Honor was proposing the 9th for the
2 defendants' opening report. That would give us that
3 additional weekend.

4 THE COURT: Actually, I was proposing April 2nd,
5 which is two weeks.

6 MR. SAINT-ANTOINE: So it would be the 5th.

7 THE COURT: I can move yours to the 5th, and then
8 I can move the FTC to the 19th.

9 MR. KESSLER: Your Honor --

10 THE COURT: I'm sorry, Mr. Kessler. Go ahead before
11 I give the dates out again.

12 MR. KESSLER: Your Honor, again, I'm going to
13 advocate if it's possible to give us until the 9th, and the
14 reason for that is, just like the FTC needs time to study the
15 very limited issue on which we have the burden of proof
16 regarding efficiencies, we are going to have to have our
17 experts evaluate all of their analyses we're going to see for
18 the first time.

19 So, if it's possible to get three weeks to do that and
20 we'll do our briefing, as well, I think that would work in the
21 schedule again because the FTC can have the additional time
22 and then we'll still get this to Your Honor significantly in
23 advance of the hearing dates for Your Honor to live with that.
24 I hope you'll be able to give us the three weeks, if possible.

25 THE COURT: If I give you the three weeks, then I'm

1 going to give the FTC the 17 days they asked for which would
2 bring them to the 28th.

3 If the parties need the time, I'd rather have you --
4 I know you're all going to be working, but if you need a few
5 extra days to do a better work product and represent your
6 clients, I think it makes sense.

7 Let me ask, then, the FTC with this time frame and see
8 if there's any objections.

9 MR. LASKEN: We don't have an objection, but let me
10 just ask to make one request. Our brief will cite the expert
11 reports, so if possible, can we just move all the briefs back
12 one day from when the reports are due so we can get the
13 citations in?

14 THE COURT: Yes. I don't have any issue with that.
15 You want to do expert reports on the 19th, and then your brief
16 would be on 3/22. Opposition expert reports on the 9th,
17 opposition briefs on the 12th, and then FTC reply expert
18 report on the 28th and reply brief on the 29th.

19 MR. LASKEN: Yes, Your Honor, for the FTC.

20 We'll depose -- we obviously have to depose the
21 experts, but I believe there should be time for that in those
22 10 days, especially without *Dauberts* being filed in advance.

23 THE COURT: To be clear on *Daubert*, if you think it
24 needs to be in writing, that's fine. If you think you can do
25 it verbally, that's fine, too.

1 I'm not going to preclude anybody from making an
2 appropriate argument as to why I should not consider an
3 expert's testimony. I just don't want to go through whole
4 separate rulings on in limines and *Dauberts* when I think I can
5 handle that simultaneously with the actual hearing as far as
6 hearing the arguments, understanding them, and then reserving
7 on them until I do the opinion.

8 MR. LASKEN: Understood, Your Honor, yes. Jonathan
9 Lasken for the FTC.

10 THE COURT: Okay. Will that provide the defense --
11 does that schedule work for the defense?

12 MR. SAINT-ANTOINE: Your Honor, this is Paul
13 Saint-Antoine.

14 We will certainly work with it. I think whatever
15 experts we have they will naturally want more time, but we'll
16 have to work with the schedule.

17 THE COURT: Okay.

18 MR. KESSLER: Your Honor, we'll do our best to make
19 the schedule work, Your Honor. Thank you.

20 THE COURT: That leads us now to -- before we get to
21 the number of depositions, it leads us to the preliminary
22 witness list and the final witness list. I know we have other
23 issues, as well. I'm trying to deal with the big issues.

24 As far as the preliminary fact witness list, plaintiffs
25 propose no more than 10 individuals appear on the other sides'

1 individual fact witness list but each side may supplement
2 their list by adding up to 5, so that's a total of 15.

3 Defendants' position is 25 on the preliminary fact
4 witness list and then supplement up to 5. So we have the
5 difference between a total of 15 -- potential 15 and 30.

6 I'd like to discuss this in context with the final
7 witness list, as well, and that's the difference between 10
8 for plaintiff and 20 for defendants.

9 What I'd like the parties -- when you address these
10 issues, I understand that it's a useful measuring stick that
11 both sides have pointed to prior cases and what was used in
12 those particular cases, but when you do that, please also talk
13 about how you see this particular case playing out and why you
14 think your number is correct.

15 I appreciate the analogy to other cases, but I'd also
16 like to know a little bit more as to why you believe it's
17 appropriate in this case.

18 I'll start with the FTC, preliminary witnesses and
19 final witnesses.

20 MR. LASKEN: Sure, Your Honor.

21 So, in terms of the preliminary witness list, you know,
22 as you know we've had an investigation so we have an idea of
23 how many, you know, people we would call. We know it's less
24 than 15, but we understand the need to make those lists
25 larger.

1 Our particular proposal here is based on
2 *Hershey-Pinnacle*, which also had 15 witnesses on the
3 preliminary fact witness list, and we think that's a very
4 similar case.

5 It was a single-product market, single-geographic
6 market, non-urban, you know, suburban in this case, area and
7 that ended up with at the trial 14 total witnesses, including
8 experts.

9 In addition, we've agreed to a six-day hearing, so we
10 don't see any realistic way that we would ever get anywhere
11 close to 30 witnesses. So, you know, I guess I'm a little
12 hesitant to completely lay out exactly who our witnesses would
13 be, but I think we anticipate somewhere in the neighborhood of
14 8 witness at the end of the day, Your Honor, so that's why
15 we're proposing 10 per side for final and 15 preliminary in
16 this case consistent with past cases that have been similar.

17 Our concern is kind of twofold with this. One is, if
18 they're on the witness list, we need a deposition of them
19 because we don't control any of these witnesses. We don't
20 have executives in play and so forth. Our feeling is that,
21 you know, having these very large witness lists is going to
22 result in potentially a surprise for us at the hearing.

23 One final point I want to make is I think that the
24 defendants mentioned they're contemplating a lot of witnesses
25 who are not in the market, you know, New York City and Hudson

1 County. We don't see that necessary as part of the case, to
2 sort of blanket providers in New York City with subpoenas.

3 The reality is we don't view those witnesses as
4 credible replacements in the event of a small price increase,
5 which is what we're talking about. Especially during the
6 pandemic, we should make an effort to tailor discovery towards
7 the witnesses who we think are going to be called.

8 THE COURT: Okay. All right.

9 Mr. Saint-Antoine?

10 MR. SAINT-ANTOINE: So, Your Honor, a couple of
11 thoughts in response to Mr. Lasken's point.

12 First, as he pointed out, we are differently situated.
13 The plaintiff has had nearly a year of pre-complaint discovery
14 that it's taken and it was substantial, Your Honor;
15 10 investigative hearings, 4 of which were third parties.
16 They have gotten 7 declarations and discovery, either
17 testimony or documents, from 13 third parties.

18 I think it's important to point out they have
19 identified 32 entities on their initial disclosures which
20 encompasses 46 individuals, so even by their own standards
21 this is a significant case.

22 Also another -- I understand that the plaintiff wants
23 to view the market as small but that goes to a merits issue.
24 We don't think -- it's a critical issue. We don't think that
25 the market is Bergen County.

1 My one reference point, New York Presbyterian Hospital
2 is closer to Englewood, just across the George Washington
3 Bridge, than the flagship Hackensack Hospital. I know
4 Mr. Lasken references New York hospitals.

5 We're not contemplating taking discovery of every
6 New York hospital, but there are some, in our view, that are
7 definitely within the market.

8 This case, because of the nature of the transaction,
9 has at least four categories of relevant witnesses. There are
10 the party witnesses themselves, so for the combination of
11 Hackensack and Englewood already adds several witnesses to our
12 contemplated lists.

13 Then, given the nature of competition in the healthcare
14 context, there are two levels of competitors. There are the
15 insurance providers, the payors, and that could be both
16 insurance companies like Horizon Blue Cross but it could also
17 be self-insured employers who also have a stake in the
18 transaction and both are relevant sources of discovery.

19 Then you have the competing providers which have
20 relevant information about the marketplace. Are they or are
21 they not competing with Hackensack and Englewood and are they
22 or are they not potential members of any insurance network?

23 When you add in those categories, you quickly get up in
24 terms of the numbers as you go into discovery, and we simply
25 don't know. We don't have the advantage that the FTC has of

1 communicating with these third parties for nearly a year.

2 Putting that aside, we also don't have the identity of
3 interest. They want to keep this small for the sake of the
4 merits, and we want to develop the market realities consistent
5 with our view of the market.

6 THE COURT: Who were the primary -- I know that
7 you've indicated the two types of payors; the insurance
8 providers, either government or private, and self-insurance
9 employers.

10 What type of payors dominate in this particular
11 transaction?

12 MR. SAINT-ANTOINE: The largest one is Horizon Blue
13 Cross, Your Honor, the largest commercial payor. In fact,
14 they're actually supportive of the transaction. They have
15 gone on record in support of it.

16 But the FTC has already obtained declarations from
17 other payors such as Cigna. Aetna is another payor. These
18 are -- given the nature of competition, these are -- I don't
19 think there's any disagreement from FTC these are the
20 customers. The line of competition are the insurance payors.

21 And we contemplate that the FTC will rely upon their
22 testimony in support of their case, and we are very interested
23 in probing their testimony and exploring their declarations.

24 THE COURT: You said --

25 MR. LASKEN: May I respond briefly, Your Honor?

1 THE COURT: Absolutely. Let me just ask one last
2 question.

3 There are no big government payors in this case, then?
4 It's all primary private insurance?

5 MR. SAINT-ANTOINE: Their market appears to be
6 commercial insurance, Your Honor. They have also raised some
7 allegations about Medicare Advantage programs, but those are
8 sponsored by private insurers.

9 MR. KESSLER: Your Honor, if I may, just before the
10 FTC goes so they can then respond to both of our comments, if
11 that's all right with Your Honor?

12 THE COURT: Sure.

13 MR. KESSLER: Two things I'd like to add. First of
14 all, with respect to the trial witness list, you should note
15 that our proposal includes experts in our 20 witnesses per
16 side proposal.

17 That's important because it may very well be that
18 defendants will be calling four or five experts in this case
19 through the trial and they will be extremely important.

20 The reason for that, Your Honor, is that this is not
21 just an issue of price effects, which are important, and that
22 will be addressed at the trial; but this is also an issue of
23 other competitive effects of this merger regarding quality of
24 care, capacity utilization, how healthcare is delivered in
25 this market, as well as efficiencies.

1 Your Honor is going to have to get expert testimony on
2 all of these issues from defendants' point of view, so even
3 before we go too far, we may use 5 of the 20 for experts, at
4 least from our perspective, and that's not uncommon in terms
5 of other cases that have had these complex issues.

6 The second part of this is, while we appreciate that
7 the FTC would like this market to be Bergen County alone,
8 the reality is that this is an urban area where the
9 interconnection between Hudson County and Bergen County and
10 parts of Manhattan and the flow of patients in healthcare is
11 quite significant and probably the most important issue
12 Your Honor is going to have to address.

13 The fact that Bergen County, which goes back to the
14 1600s, has a particular political scope doesn't tell you
15 anything as to whether or not that would be equivalent to the
16 economic scope of competition for evaluating this merger.

17 This involves the whole future of our client, how
18 they're going to continue and to provide healthcare in this
19 market and survive and grow, and so it's very important that
20 we be able to call enough witnesses from third parties,
21 whether they're payors or whether they're hospitals; and we're
22 going to need hospitals in Bergen County, Hudson County, and
23 Manhattan, we're quite sure, in terms of gathering the
24 evidence.

25 We won't have them all testify at trial. Some of that

1 evidence we could submit through depositions, some of it we
2 could submit through our experts, but that's why we need the
3 30 to start, to be able to go in there and determine who might
4 have this evidence, and we haven't had all the investigation.

5 Then eventually we'll cut it down and make sure our
6 witnesses fit within the five or six days of trial that we've
7 been discussing.

8 Thank you, Your Honor, for giving me a chance to add in
9 some additional perspective. Thank you.

10 THE COURT: Okay.

11 Mr. Larsen -- I'm sorry. I was thinking of my Court
12 Reporter, Ms. Larsen. I meant to say "Mr. Lasken."

13 MR. LASKEN: That's fine, Your Honor. I've been
14 called much worse.

15 We agree the focus is on the insurers, and we think
16 other than Horizon, who is actually a joint venture partner
17 with Hackensack, they're going to hear pretty much uniform
18 testimony about concerns with this transaction and what
19 Hackensack has done in the past with the leverage it already
20 has and what it may do in the future with that leverage.

21 We agree that's where the focus is. We don't think
22 that justifies a 30-person witness list, but we agree with
23 that.

24 The point that Mr. Kessler made I actually think is
25 important and it's a point that I want to flag, which is, if

1 they are putting on 4 to 5 experts, that will use most of
2 their time at the hearing and they know who those witnesses
3 are, which means that on their final witness list proposal
4 they are going to have 15 witnesses for 2 to 3 people who will
5 actually be called.

6 From our perspective, that is going to impede our
7 ability to properly prepare for trial. That's exactly --
8 our concern is that the list we get will not be a fair
9 approximation of who is expected to be called and so we will
10 not be in a position to prepare appropriately for those
11 witnesses.

12 On the 30 witnesses per side, the only thing I want
13 to say is Hackensack, you know, competes in this market.
14 Hackensack knows who their competitors are or they should. I
15 don't think that -- although we certainly have had an
16 investigation, the vast majority of the material from the
17 investigation, I think all than -- less than maybe a half of a
18 percent of the documents came from the defendants so they
19 obviously have that information.

20 They don't need to go fishing through the files of
21 every hospital in Hudson County and New York City to try to
22 find out who competes with them. If they think they are
23 competing with people, I think they can tailor it to the
24 people who they are competing with or that they believe
25 they're competing with.

1 I don't think that's unreasonable. And especially, as
2 I said, in a pandemic, you know, we would suggest that sort of
3 containing the case to a reasonable level while permitting
4 them discovery that they need in these markets is the right
5 way to do this.

6 MR. SAINT-ANTOINE: Your Honor, this is Paul
7 Saint-Antoine.

8 Can I just follow up on that last point?

9 THE COURT: Sure.

10 MR. SAINT-ANTOINE: You know, we do have a sense of
11 who our competitors are, and then there's a significant
12 difference of view between us and the FTC on that issue. The
13 question is, do we have an opportunity to take and present
14 evidence to establish our view about the broad range of viable
15 competitors?

16 Because we're competitors, we don't have access,
17 obviously, to these other health systems' internal
18 documentations and we don't speak with them about competitive
19 issues that go to the core of this case.

20 It's going to be up to the attorneys using appropriate
21 discovery tools to get that evidence so that the Court will
22 have the benefit of evidence to decide that issue about
23 whether we're right or whether the FTC is right about who are
24 the group of viable competitors in this.

25 THE COURT: Okay. Let me ask the FTC. I understand

1 you're saying the vast majority of information -- documents
2 I'll say, whether it's the electronic form or otherwise that
3 you received -- came from the defendants.

4 Are you also turning over documents or ESI from who you
5 believe to be the competitors in this case? In other words,
6 have you already received that information?

7 MR. LASKEN: Yes, Your Honor, the FTC have already
8 turned over its files. We turned that over on December 16th,
9 so defendants have had that for two weeks. They have had the
10 declarations, the documents, the data. They have what we have
11 and they have had it for a couple weeks now.

12 The only other thing I do want to mention, I forgot to
13 say this, our initial disclosures are a list of every person
14 we ever talked to in the investigation. The defendants have
15 listed 16 executives on their initial disclosures.

16 I don't know that I would equate initial disclosures to
17 a witness list under the circumstances. I doubt they intend
18 to call 16 executives. They are just different, in my mind.

19 THE COURT: So your Rule 26 disclosures, FTC I mean,
20 included everybody you spoke to whether you actually
21 considered their testimony to be favorable or neutral or
22 otherwise?

23 MR. LASKEN: Correct. Parenthetically, Your Honor,
24 we also sometimes take testimony from people -- we're doing an
25 investigation in this case. We're not prosecuting a case. We

1 sometimes clear a merger.

2 It's not as if we spent a year building a case against
3 the defendants. We spent a year investigating a merger to
4 decide whether or not we should challenge it.

5 For example, Horizon is on our initial disclosures and,
6 as the defendants just told you, Horizon supports that. It's
7 not as if our investigation is one-sided discovery. Our
8 investigation is trying to understand the market and whether
9 the merger is a good thing or a bad thing.

10 THE COURT: I'm just trying to get to the point as to
11 whether you disclosed -- you answered the question. You
12 disclosed everybody you came across in the investigation as
13 opposed to normally Rule 26 you have to disclose what's in
14 your possession that you believe goes to help your case, not
15 necessarily anticipate what the other side is going to do.

16 So you gave full disclosure as to everybody you
17 spoke to.

18 MR. SAINT-ANTOINE: Your Honor, I want to point one
19 thing out. This is Paul Saint-Antoine.

20 When we're talking about the size of the preliminary
21 witness list and the final witness list, the initial
22 disclosures on the part of the Federal Trade Commission don't
23 include any of the party witnesses, so to the extent we're
24 talking about the size of our list, we're talking about a
25 reasonable number of party witnesses of which there may be

1 several and then we're adding on top of that the third
2 parties. That's where the FTC's list on top of party
3 witnesses becomes a reference point.

4 The preliminary witness list is framed in that term
5 because it is preliminary. We won't be calling everybody
6 that's been disclosed by the plaintiff at trial, but we won't
7 know who are the relevant and appropriate sources of
8 information until we take appropriate discovery.

9 THE COURT: I'll tell you what, why don't we do this
10 with the witness lists. Why don't we revisit this issue after
11 fact discovery closes on March 12th.

12 Does that make more sense as to when you're going to
13 have to disclose? Because you're going to have your discovery
14 then and you should be in a much better position.

15 I understand both sides' concerns I think. I
16 understand on the one hand there's the argument that the FTC
17 has been investigating this, they have a leg up. It's not
18 like normal civil litigation.

19 I also understand there is a dispute as to the size of
20 the market and defendants understandably don't want to at this
21 stage stop any of their -- foreclose any potential arguments.

22 But also I understand what the FTC is saying, that
23 given the amount of time we're going to have for the hearing,
24 it's going to be unlikely, particularly if you call several
25 experts, that -- the defendants call several experts that

1 they're going to be able to call that many witnesses. And
2 they're worried about, my words, gamesmanship; that there's
3 going to be a number of people on the witness list who they're
4 going to prepare for who the other side really does not have
5 the intention of calling but may call and out of abundance of
6 caution decide to.

7 But does it make sense to finish fact discovery and
8 then we will set up a preliminary fact witness list and then a
9 final witness list?

10 MR. LASKEN: So, Your Honor, this is Jonathan Lasken
11 from the FTC.

12 THE COURT: Yes.

13 MR. LASKEN: I think that makes sense on the final
14 witness list. I think the concern with the preliminary is we
15 would not know who to depose or we'd have to make a very large
16 set of depositions under those circumstances.

17 I think we need some sort of preliminary witness list,
18 but I think it definitely makes sense to defer the final one
19 until after fact discovery and we can get a better sense then
20 of the amount.

21 THE COURT: Let me hear from the defendants on that
22 point.

23 MR. SAINT-ANTOINE: I think this is a point where we
24 have a similar view, I think. Certainly I understand the
25 logic of what Your Honor is proposing on the final witness

1 list.

2 I do think generally speaking we would be in a better
3 position to identify who we need and the number of people we
4 contemplate after the close of fact discovery, so to the
5 extent Your Honor is proposing deferring the final witness
6 list until after the fact discovery closure, that makes
7 eminent sense to us.

8 MR. KESSLER: Your Honor, this is Mr. Kessler.

9 I would agree. I think we're all in agreement to do
10 the final trial witness list after discovery, and no one, I
11 think, has an interest in making that list any longer than
12 will be needed. We will have a limited amount of time at
13 trial, and I think that's very reasonable.

14 To the extent we all agree there should be some
15 limitation to guide us on how many people to depose and who to
16 depose, I would suggest that the larger number we suggested is
17 the right way to handle that.

18 It was actually suggested that there be no limits, but
19 we agree there should be some guidance and we think that the
20 number we suggested would give the parties the necessary
21 guidance.

22 Again, no one wants to take unnecessary depositions,
23 but the reality is there are a large number of insurers,
24 healthcare providers, et cetera, who we have to take in order
25 to then decide who goes on the trial witness list. We're just

1 not going to know in advance without doing that type of
2 discovery.

3 THE COURT: This is just for preliminary fact
4 witnesses. That is not -- I know an expert witness can
5 conceivably also be a fact witness, but this is just for fact
6 witnesses we're talking about; right?

7 MR. SAINT-ANTOINE: Yes, Your Honor.

8 MR. LASKEN: That's right, Your Honor.

9 THE COURT: Okay. So it's 15 versus 30. I
10 understand the FTC's concerns. I'm going to give more,
11 though, than the FTC is requesting, not the full 30.

12 I think at this stage defendants have a right to seek
13 what they believe to be pertinent evidence. We will certainly
14 tighten it up for trial and I'll talk to the parties.

15 At that point if the parties are convinced, you know,
16 we're calling so many experts and we're calling so many
17 experts, we can work back as to how much time they're going to
18 have, but at this stage I don't want to unnecessarily
19 hamstring the defendants.

20 I'm going to come up with a different number but I
21 want -- I know defendants are also -- I don't anticipate that
22 they're going to want to take depositions for the sake of
23 taking depositions.

24 What I will say at this point is -- it's not an even
25 number but disclosure witnesses it will be 17 each and then

1 you can also supplement it with 5 for a total of 22. I do
2 think that it will give defendants more flexibility, but I'm
3 also cognizant that you're never going to be able to take that
4 many depositions, I don't think. I shouldn't say "never," but
5 it will be very difficult to do this.

6 I'm asking both parties to work in good faith, but I'm
7 also trying to work in the uncertainty that the defendants
8 face at this point and to the FTC, as well. I would believe
9 the FTC would be in a much better position right now to
10 understand exactly how they intend to prosecute this case from
11 a civil sense. So we'll do 17 and 5 for a total of 22.

12 MR. SAINT-ANTOINE: Your Honor, this is Paul
13 Saint-Antoine.

14 Can I raise a related issue to the preliminary witness
15 list?

16 THE COURT: Sure.

17 MR. SAINT-ANTOINE: We find ourselves on -- you know,
18 when we come up with a list, we're going to identify third
19 parties where we're confident, based on what we know, that
20 they're a good target of discovery, but we won't necessarily
21 know who the individual person within that corporate entity or
22 that healthcare system is the right person to testify at
23 trial.

24 Normally what would happen is we would serve a 30(b)(6)
25 deposition notice on that entity, they would tender somebody

1 who is knowledgeable, and it would be in the course of that
2 deposition that we would know who the appropriate hearing
3 witness would be. Oftentimes it's the 30(b)(6) deponent
4 himself or herself but not always the case.

5 What we would like the opportunity to do is -- in the
6 first instance, whenever our preliminary witness list is due,
7 be able to identify an entity, and then at some point after we
8 take the 30(b)(6) deposition substitute the name of the entity
9 with name of an actual person so the FTC would know who the
10 hearing witness would be.

11 Again, it would often be the same 30(b)(6) deponent but
12 not necessarily 100 percent of the time.

13 THE COURT: Before I ask the FTC for their position
14 on that -- because I know they wanted natural persons. Before
15 I do, I encourage everybody to take a look at the new
16 amendment to 30(b)(6).

17 I think it will be very helpful, particularly in this
18 case, where you have a meet-and-confer component now. I guess
19 nationwide there were too many shenanigans being pulled with
20 30(b)(6) witnesses.

21 Take a look at that amendment that just recently came
22 into effect because it should be -- particularly if you're on
23 a tight time frame. Not only do you have to follow it because
24 it's the rule, but it should be very helpful so that you're
25 getting the right person and asking about the right topics.

1 That's just an aside.

2 Let me hear from the FTC. I know you wanted natural
3 persons. Defendants say, well, we may not know who the
4 natural person is within an entity at this point.

5 MR. LASKEN: Yes, Your Honor. This is Jonathan
6 Lasken.

7 My experience with this is slightly different from
8 Mr. Saint-Antoine. The process he described I think takes a
9 bit of time and, you know, in a 30(b)(6) setting we can't bind
10 the fact witness. We then have to go back and re-depose the
11 fact witness to actually know what they're going to say or
12 we'd need more time.

13 My experience with this is they should have an idea of
14 who it is because it's the person they negotiate with. And if
15 they're wrong, we'll work in good faith with them to get the
16 right person and the entity is going to tell them because the
17 third party doesn't want to waste their time either.

18 I guess our view or my view -- and this is my time in
19 private practice, not just my time in the Government -- is
20 that we should work in good faith to get the witnesses who
21 have the evidence, including the evidence they want to put in
22 to the Court.

23 But, you know, we don't know how to depose a 30(b)(6)
24 or a corporate representative on their witness list in a way
25 that lets us know what's going to be said at trial.

1 I guess that's a way of saying I don't think we're
2 really in that different of spots. I just would ask that they
3 make a good-faith effort to identify the person rather than
4 just listing a corporation because that puts us in a bit of a
5 difficult spot ourselves in terms of making sure we have a
6 deposition in the time frame for the hearing.

7 MR. SAINT-ANTOINE: There's a natural incentive if we
8 can, Your Honor, to identify a natural person because we don't
9 want to take both a 30(b)(6) and a natural person's deposition
10 separately.

11 I'm not as confident as Mr. Lasken that we are going to
12 know for the third parties who the appropriate witness would
13 be. That's why -- we understand we want to give disclosure,
14 but we think that that disclosure should be after the
15 30(b)(6).

16 THE COURT: Let me ask you folks something. I know
17 what you mean when you say "natural person, 30(b)(6)" but in
18 reality a 30(b)(6) is a natural person. The difference being
19 that, if a person is called, generally he or she can only
20 testify based on his or her personal knowledge. A 30(b)(6) is
21 a unique creature in that those answers will bind the entity
22 itself.

23 Is that what defendants want in this case? Do you want
24 competitors or -- whatever entity it is, do you want the
25 entity, somebody making statements on behalf of the entity?

1 MR. KESSLER: So, Your Honor, this is Mr. Kessler.

2 I think the answer is it will depend.

3 THE COURT: Okay.

4 MR. KESSLER: Let me give you an example. When we're
5 going to be deposing a competitor, for understandable reasons
6 they may not be as forthcoming to their competitor, and then
7 we get their documents and do a 30(b)(6) deposition and in the
8 course of that deposition we find identified in the documents
9 a person who has written to some degree about the competition
10 between that entity, either my client or Hackensack or both.

11 And it appears we then learn through the 30(b)(6)
12 deposition that that would be a very knowledgeable person
13 while we were not able to identify that person prior to the
14 30(b)(6) deposition and we just didn't have the way to know
15 that until the deposition itself took place.

16 In other instances it may be that we'll be relying on a
17 third party just to verify their records and their reports or
18 other things, and we may conclude that's all we need and the
19 30(b)(6) witness will be totally appropriately within that
20 institution.

21 That's all we're saying. The FTC wants us to say we'll
22 work in good faith. Of course we'll work in good faith.

23 We will identify if there's any additional natural
24 person as soon as it's reasonable to do so. That's all we
25 need in terms of the order.

1 THE COURT: I'll give the defendants the flexibility
2 on this issue. It's implicit that you will work in good
3 faith, but I can understand why limiting it at this point
4 without knowing more -- truthfully, your last point is what I
5 anticipate being more of an issue, Mr. Kessler, than the
6 pandemic, and that is competitor, underline the word
7 "competitor," trying to get information.

8 Although, I was not a member of the antitrust bar so
9 maybe you have better relationships for these types of issues
10 that come up. I can certainly see it being more of an issue
11 of a competitor disclosing information.

12 I'm going to give the defendants the flexibility for a
13 30(b)(6) opportunity if necessary. Obviously, please work in
14 good faith.

15 MR. LASKEN: Your Honor --

16 THE COURT: Go ahead, Mr. Lasken. Also, when you
17 answer this question, Mr. Lasken, please let me know what's
18 your proposal for disclosing the preliminary fact witness
19 list.

20 MR. LASKEN: I'm sorry, Your Honor. I didn't follow
21 the second part. You mean the date to disclose it or how we
22 disclose it?

23 THE COURT: The date to disclose it.

24 MR. LASKEN: Okay. So the one thing I was going to
25 say, Your Honor, is we would just ask if they are going to

1 split entities that we have an opportunity to depose whoever
2 the witness is, no matter when they disclose the actual
3 witness. That would be our only concern. That's the only
4 thing we would ask.

5 Obviously, if it isn't working out that way, I would
6 ask that the Court allow us to come back to the Court to ask
7 for extra depositions or whatever is necessary to give us an
8 opportunity with the actual witness.

9 THE COURT: That's fair enough, yes. I have a
10 feeling the other side is going to want to depose them,
11 as well. This goes without saying.

12 Except for changing dates that we're going to set
13 forth, to the extent the parties reach an agreement as to what
14 they're exchanging and whether they want to do an additional
15 deposition, if you reach an agreement, I'm fine.

16 If you need to change dates, you need to contact me and
17 I'll hear you and I'll listen to you with an ear towards
18 what's the reason for it. If both sides are in agreement --
19 if you do a 30(b)(6) and both sides agree we need to depose
20 this person, if you agree, you don't have to come back to
21 court for that.

22 MR. LASKEN: So, Your Honor, thank you for that. I
23 think that our suggestion would be on the dates -- we're ready
24 to go. From our perspective, the sooner the better. If we're
25 going to especially permit non-natural person, we would

1 suggest something like January 8th for the first list of
2 17 and then January 22 for the additional 5.

3 That way everyone can get discovery going out to these
4 folks because we'll know where we are rather than sending
5 discovery broader than that. That would be our suggestion.

6 THE COURT: Do defendants have any objection to those
7 dates; January 8 for the initial 17 and then January 22nd for
8 the additional 5 if necessary?

9 MR. KESSLER: Your Honor, this is Mr. Kessler.

10 I think the first designation date is fine. I think we
11 want to leave a little bit more flexibility for the additional
12 five because that we may actually learn of through our
13 contacts with the third parties themselves.

14 I would suggest that we move back the date for the
15 five, you know, another week on that.

16 THE COURT: To January 29th?

17 MR. KESSLER: If that's acceptable to my
18 co-defendant.

19 THE COURT: Let me hear first from Mr. Saint-Antoine,
20 and then I'll go back to Mr. Lasken.

21 MR. SAINT-ANTOINE: Yes, Your Honor, again, with the
22 same sort of general sense as Mr. Kessler. Although I think
23 for the initial date of January 8th I would ask for just a few
24 more days.

25 Early next week I think would be very doable for the

1 initial date. So maybe instead of -- the 8th is Friday, maybe
2 the 12th.

3 THE COURT: Let me ask the FTC. If we did initial
4 disclosures, would that be acceptable, January 12th? I know
5 you're ready to go and could probably do them today, but
6 January 12th and then January 29th for the additional five?

7 MR. LASKEN: Sure, Your Honor. This is John Lasken
8 for the FTC. Yes, Your Honor, that's fine with us.

9 THE COURT: Okay. The next issue, going through the
10 list, is deposition times. So the deposition -- I'm not so
11 sure that these numbers are different but let me check.

12 Plaintiff's position, 5 depositions per side in
13 addition to persons who appear on the witness list or are
14 declarants or affiants; defendants' position, any 30 persons
15 who appear plus 5 additional.

16 We have a number of 22 that are going to be disclosed
17 potentially, 17 I would assume for sure, at least from the
18 defendants. This is my biggest concern, is just giving you
19 sufficient time to get your depositions done.

20 Let me hear from the FTC first in light of the changes
21 that I've made.

22 What's your view as to the number of depositions?

23 MR. LASKEN: So, Your Honor, our view is that the way
24 to do the number is to basically depose everyone who is listed
25 as a potential witness, you know, plus the 5, plus anyone who

1 has submitted a declaration or affidavit.

2 I guess that would make it -- these categories overlap,
3 right? so I don't want to say 22 plus declarants because most
4 declarants will be on someone's witness list, right? Probably
5 22 plus 5 and then there will be overlap on the witness list
6 as well, I expect.

7 We end up putting on our case through hostile witnesses
8 and third parties, so it will be something even less than
9 that. Our main concern and we think the most efficient way to
10 do it and the way we have been doing it recently in cases,
11 actually including in *Jefferson*, as appears in the *Jefferson*
12 CMSO, is we're going to depose the people who might testify,
13 and that's basically the way we propose the limit.

14 So I guess that's a long way of saying I could make up
15 a number but most of the people --

16 THE COURT: No, no. I understand there may be
17 overlap, but you're saying 22, that would be the people on the
18 preliminary witness list and also declarants or affiants. Or
19 do you also want to work in an additional 5 from that number?

20 MR. LASKEN: We'd like to have the additional 5.
21 Often those become 30(b)(6)'s or other things so we usually do
22 the extra 5 just in case because there could be witnesses who
23 come up, you know. This is a flexibility provision. This is
24 what we would tend to go with.

25 THE COURT: That's fine. I think that given -- that

1 seems to work with defendants' view.

2 I know you wanted 30 originally on the preliminary fact
3 witness, but given that we're doing 22, are defendants in
4 agreement persons on the preliminary witness list, declarants,
5 affiants, and an additional 5?

6 MR. SAINT-ANTOINE: This is Paul Saint-Antoine,
7 Your Honor.

8 Yes, with just one proviso, which is I would say less
9 of a concern with the smaller preliminary witness list. We
10 had proposed exactly what Your Honor described, but then as
11 sort of a safety net a cap on the number of depositions which
12 was equal to the total number on the preliminary witness list.

13 So in that case it would be 22, just to avoid the
14 prospect that one side or the other would notice both the
15 parties on their own witness list plus the parties on the
16 other sides' witness list which would, in our view, amount to
17 an inordinate number of depositions. And we did have that
18 experience in a prior case.

19 It's less of a concern with a smaller preliminary
20 witness list, but that was the source of the proposal.

21 THE COURT: All right. Let me ask Mr. Kessler first.
22 I understand your concern. I'll get back to the FTC on that.

23 Mr. Kessler, are you in agreement with that view?

24 MR. KESSLER: Yes. I think that both parties would
25 be held by some limitation so that, you know, 22 doesn't

1 become 44, which is really not practical in terms of the time
2 that we have in any event.

3 THE COURT: So, Mr. Lasken, are you -- so the
4 question would be 5 plus persons on the witness list but
5 limited to 22 and then declarants or affiants.

6 It just makes clear that when you look at folks who are
7 solely on the preliminary fact witness list you've got 22 that
8 you can take. I assume you'll primarily be taking the other
9 sides' 22, but do you have any issue with that?

10 MR. LASKEN: Yes, Your Honor, this is John Lasken.

11 That's kind of the problem, right? They have clients
12 so they don't need to depose their own executives, but our
13 witness list might include their executives who they haven't
14 listed on their witness list who have to go on as hostile
15 witnesses because of documents they have offered or whatever.

16 The third parties, again, they are not our clients.
17 While I expect that they will notice everyone on our witness
18 list other than their own executives, I don't know that, so
19 that puts me in a position of -- you know, that, to me, is
20 unfair because we then are basically bound to only depose the
21 people on their list.

22 When, as a practical matter, because of our
23 positioning, you know, some of the people on our list may be
24 their own executives, and I think we should be able to have
25 depositions of those people.

1 THE COURT: So you're suggesting more of 5 plus
2 witness list, declarants, affiants, and representatives of the
3 defendants? You'd want to have that included?

4 MR. LASKEN: So I think we're just basically saying
5 anyone on a witness list should be deposed, is sort of what
6 we're saying there. The cap -- I guess that would mean a cap
7 of 44, Your Honor, but it's not really going to be 44.

8 You know, the third parties, again, they're not our
9 witnesses. Some of them -- I think we referenced one in our
10 letter who submitted a declaration for us and a letter of
11 support for the client. That person may be on the witness
12 list, but we would need a deposition of them because we
13 can't -- we don't have access to them in that way.

14 There's no one on my witness list that I can look at
15 and say I don't need testimony from them because they're my
16 client. And I would say, you know, we do try to work around
17 this with the defendants by including provisions that would
18 say where we have testimony from people we're going to treat
19 that as equivalent to a deposition, whether it's a declaration
20 or an investigational hearing, which is the depositions
21 essentially that are taken during the investigative process.

22 The defendants refused those provisions saying they're
23 going to object to all of that later on admissibility and
24 weight. And so I now need that testimony in the case.

25 For me, that's the problem that I face and --

1 MR. SAINT-ANTOINE: This is Paul Saint-Antoine. Can
2 I make a suggestion?

3 What I'm hearing in part is Mr. Lasken just expressing
4 concern about sort of a scenario where he doesn't think he has
5 an opportunity to take enough depositions, and we're
6 expressing a concern about the prospect that we may face too
7 many. It seems like both sides in some sense are anticipating
8 a problem that might not arise.

9 I think what I would propose is maybe this is one issue
10 where we might be better off if we just reserve an opportunity
11 to come back to Your Honor if it in fact becomes a problem.

12 THE COURT: Yes. I'm not going to do it on the
13 witness list. I understand this is where the FTC is at a
14 disadvantage. They have the advantage of the investigation
15 but they have the disadvantage that they're an agency and, as
16 he said, none of the witnesses except for the expert witnesses
17 really, they're all for third parties.

18 Okay. I'm going to leave it as is, understanding the
19 parties' concerns. If it becomes an issue, just give me a
20 call and we'll discuss it. Okay?

21 MR. LASKEN: Yes, Your Honor. Thank you.

22 MR. SAINT-ANTOINE: Thank you, Your Honor.

23 THE COURT: Now, the deposition time split. The only
24 real difference here that I saw was that defendants wanted to
25 have more time in the deposition with parties who gave

1 affidavits of support for the FTC.

2 Let me ask the FTC. That kind of makes sense. First
3 of all, an even split of time but if a third party provided a
4 declaration or letter in support, in favor of the merger or
5 against the merger, it can go both ways, from my
6 understanding, as to what the evidence is.

7 Then, if it's against the plaintiff's position, then
8 the plaintiff will have more time during the deposition. If
9 it's against the defendants' position, then the defendants
10 will have more time in the deposition.

11 MR. LASKEN: So, Your Honor, this is Jonathan Lasken
12 for the FTC.

13 The thing I would say is it's not so much an affidavit
14 of support. Some of them express views on the merger. As we
15 referenced in one case, we received testimony from someone who
16 gave defendants a letter of support.

17 A letter of support for defendants is an unsworn letter
18 basically saying they like the merger. An affidavit for us is
19 kind of a set of market facts that a defendant has put down on
20 our paper for our review. When I say "our review," I mean our
21 review in deciding whether or not to challenge the
22 transaction.

23 I think that's the challenge. How would you understand
24 whether or not these people are supporting us, right? quote,
25 unquote, supporting us? That brings us to them being third

1 parties and the fact that we're going to be told we can't use
2 this evidence or it should be given little weight. When I say
3 "we," they're going to tell you that, and I wouldn't presume
4 on how you're going to rule.

5 So that kind of comes back to if I can't use what
6 I've got, how does that help me when I get to the actual
7 deposition, right? I need it all again essentially, which is
8 not highly efficient.

9 I'm not going to presume nor am I asking Your Honor to
10 decide today, you know, that type of a question. That's the
11 challenge from our perspective and why we think it should be
12 an even split.

13 MR. KESSLER: Your Honor, this is Mr. Kessler.

14 I think the answer to this is -- and this is what
15 marries the concerns -- is that if you have a declaration from
16 a witness or you have a transcript, you can present that as an
17 exhibit to the witness at the deposition fairly effectively
18 and get the witness to affirm that what was in their
19 declaration was truthful and accurate.

20 If that's adopted at the deposition well within
21 two hours but then give the other side the opportunity --
22 because it takes much longer, as Your Honor knows, when you're
23 in opposition to question the witness about what's in that
24 declaration or in that prior testimony.

25 The reason we have objected on admissibility grounds is

1 because the declarations and depositions so far have been
2 one-sided by the FTC.

3 In other words, they prepared their declarations, they
4 took their examinations, but we haven't had a chance to
5 develop the other side.

6 Similarly, if we have declarations, which they have,
7 from others, we only need a short amount of time to get the
8 witness to confirm what they put in the declarations and, you
9 know, any other cleanup beyond that, and then they could have
10 the five hours to cross-examine.

11 I just think it really is the most sensible use of the
12 time, and both sides should be able to deal with it very well.

13 THE COURT: Mr. Lasken, I understand what you're
14 saying, that they're not our witnesses. But at the end of the
15 day, if somebody gave you an affidavit or a declaration or a
16 certification, I would assume generally it's going to fall
17 into one of two -- well, maybe one of three categories;
18 helpful, not helpful, or neutral.

19 But if the information contained within it is
20 consistent with the FTC's theory of the case, doesn't it make
21 sense, then, to give defendants more of an opportunity to
22 explore during deposition?

23 Conversely, if the defendants have whatever it may be,
24 a letter or so forth in support, it would make sense to give
25 you, meaning the FTC, a longer opportunity to explore the

1 bases for that view.

2 MR. LASKEN: So, Your Honor, I have two reactions to
3 that. To give you another example, we have testimony from
4 Horizon, which you heard the defendants earlier say are
5 supporting them.

6 Again, it's the challenge of how do you apply that
7 to the actual bucket of people that we have, right? So let me
8 say that, first off.

9 Second of all, if they really are supportive and they
10 adopt it, I think both sides have proposed unused time
11 reverting, and as a practical matter we're going to end up in
12 the same place because we're just going to allow the time to
13 revert.

14 I think it's a -- I guess my feeling is that this kind
15 of will work itself out on an even foot, but it will become
16 very complicated and contentious if we sort of try to classify
17 the witnesses. I don't know if that makes any sense.

18 THE COURT: It does. I understand.

19 MR. SAINT-ANTOINE: Your Honor, this is Paul
20 Saint-Antoine.

21 Mr. Lasken referenced, you know, the investigative
22 hearings. I think it's really the declarants where we have,
23 we think, more of a compelling need for a disproportionate
24 amount of time. And to Mr. Kessler's point, use that
25 declaration at the deposition in a fairly efficient way to

1 introduce the declarant's testimony.

2 He referenced the investigative hearings, but I really
3 think it's the declarants where it's the primary source of our
4 concern.

5 THE COURT: Just so I'm understanding that correctly,
6 before I get to you, Mr. Kessler.

7 You said there were 10 hearings, 4 of those were from
8 third parties. You're not talking about those. You said in
9 addition there were 7 declarations?

10 Those are the declarants you're talking about?

11 MR. SAINT-ANTOINE: Yes.

12 THE COURT: You view all of them -- all 7 as being
13 contrary to your position?

14 MR. SAINT-ANTOINE: I think that's right, Your Honor.
15 I think it's no coincidence. Mr. Lasken said they have spoken
16 to over 30 entities and they have tendered a much smaller
17 group, 7, as declarants.

18 I think it's because they believe that that subset of
19 the 30 plus are the ones they think support their view.
20 That's what we want to explore.

21 MR. LASKEN: Your Honor, can I respond to that
22 quickly?

23 THE COURT: Sure.

24 MR. LASKEN: That is absolutely not how we decide who
25 to get declarations from. You should not interpret that

1 number that way. It's people who have information that is
2 relevant to the assessment when we talk to them.

3 I would ask that you not adopt Mr. Saint-Antoine's
4 meaning of that number, and I would just flag, as we noted in
5 our letter, there is a declarant who actually wrote a letter
6 of support for the defendant.

7 I think, again, we're in this world, but maybe there is
8 some subset where we could agree with the defendants that
9 these are -- they could have some extra time or something like
10 that.

11 Again, I think this will work itself out when we get
12 to the depositions because of the practical matter of what
13 they're suggesting is going to happen. We are simply going
14 to -- they're going to have more than 5 hours because the time
15 will revert.

16 MR. KESSLER: Your Honor, this is Mr. Kessler.

17 While I would hope it would work itself out, the
18 problem is we're only likely to get one shot with these third
19 parties for one seven-hour period of time, and if it doesn't
20 work itself out, it's going to be very difficult to try to get
21 Your Honor or some magistrate on the phone to try to work it
22 out on the spot, so at least defendants would prefer that we
23 had some certainty, you know, about this before the
24 depositions.

25 THE COURT: Okay. You know what, I, believe it or

1 not, am convinced this will work itself out. I am going to
2 give you each three and a half per deposition. You don't have
3 to interrupt me during the deposition but if afterwards -- but
4 you could. If you think that you need additional time and you
5 have a reason, I'll give it to you. Okay?

6 MR. SAINT-ANTOINE: Thank you, Your Honor.

7 THE COURT: But I understand that in reality it's
8 really not going to serve somebody's purpose that if they have
9 what I consider to be a favorable witness, not because of bias
10 but because of the actual testimony, it generally doesn't
11 serve that party to go into great detail during the
12 deposition. We'll do it three and a half. I'm aware of the
13 issue.

14 Are there any other issues that we have not discussed?

15 MR. LASKEN: Your Honor, I think there are some --

16 THE COURT: I'm going to set aside 6 days with
17 18 hours each for each side instead of 15, just to give you
18 the extra time.

19 MR. LASKEN: Your Honor, there are a couple other
20 issues in the CMSO. There's paragraph 7 and paragraph 8,
21 which are provisions we suggested just because we find them
22 efficient, but I don't know that we would stand on those so I
23 think we could probably pull those out to just move us
24 forward.

25 The only one that would, I guess, maybe merit a brief

1 discussion is paragraph 25. And I'll defer to my colleagues
2 on whether they want to talk about this more or not, which is
3 the privilege log issue.

4 In the investigation there is an instruction that
5 allows them to submit a partial log on a promise that if we
6 seek the full log in litigation they will provide it. The
7 defendants have proposed an additional clause that would, I
8 guess, let them out of part of that promise for the purpose of
9 reaching a compromise on what privilege logs actually will be
10 produced here.

11 We -- for institutional reasons because people do take
12 advantage of that provision, we're not inclined to make a
13 compromise as to that promise because of our investigative
14 process.

15 Again, I defer to my colleagues on whether that's
16 something that we should continue discussing or whether that's
17 just a disagreement that may lead to no privilege log
18 agreement.

19 THE COURT: All right. Let me hear from the --

20 MR. SAINT-ANTOINE: Your Honor, this is Paul
21 Saint-Antoine. Let me just say this is the issue of the
22 privilege log. What we proposed is that we would -- for all
23 of the individuals from Hackensack that had been identified on
24 our initial disclosures, and that comes to 10 persons, we
25 would provide a log of any privileged communications with

1 those individuals.

2 An unlimited privileged log becomes more of a concern
3 with the more compressed time for discovery. We think it
4 would be very prejudicial to our ability to foresee if we were
5 devoting substantial time on a privilege log with respect to
6 individuals that really have nothing to do with the merits of
7 this case.

8 The number of individuals -- and one of my colleagues
9 can give you the exact number -- is far greater than 10 and
10 includes people that have nothing to do with the relevant
11 issues or testimony. It would be a huge distraction to our
12 ability to get ready for the hearing. That's why we proposed
13 this additional aspect to paragraph 25.

14 THE COURT: Let me just ask, though. The
15 privilege log was required based on the second request, so the
16 privilege log has not been completed yet? It says the
17 request --

18 MR. LASKEN: Essentially, Your Honor, yes. So
19 there's a -- this is Jonathan Lasken. I didn't mean to cut
20 you off.

21 THE COURT: It's okay. I just want to understand the
22 issue.

23 MR. LASKEN: So, during the investigation, they would
24 have been required to produce a full log related to the
25 investigation. We offer defendants -- again, we clear many

1 mergers. Sometimes we challenge mergers and the parties do
2 not litigate.

3 We offer them the ability to submit less than a full
4 log on a promise that if we do actually have to litigate
5 against them we will receive the logs that we should have
6 received in the investigation.

7 The second request is the equivalent of the main
8 discovery request to the defendants in the investigation, and
9 so we don't have the full log in response to that.

10 MR. SAINT-ANTOINE: They do have a log and I'm --
11 some of my colleagues are more in touch with the specifics,
12 Your Honor, but they do have a log.

13 The question is, in this context do they meet and
14 confer with us on a reasonable limitation on any logging
15 responsibilities, which is what happened in the earlier case
16 we talked about, the *Jefferson* case. They did agree to a
17 limitation.

18 From our perspective, that becomes even more important
19 in this case where there's even less time to complete fact
20 discovery and we would be devoting resources to logging
21 individuals that are not going to be witnesses in the case.

22 THE COURT: Does it make sense to -- let me just ask
23 the FTC. I understand the FTC's concern. They don't want to
24 get burned, which is understandable.

25 Does it make sense in the first instance to provide

1 names of the people who would otherwise be on the
2 privilege log other than 10 and then the FTC can look at it?
3 If there's an issue where the FTC believes they do want a
4 privilege log as to a particular person or persons, I'll hear
5 from you.

6 MR. LASKEN: Your Honor, from our perspective, that
7 would be fine. We have the institutional issue of releasing
8 people, but in the spirit of compromise I think we would work
9 with that.

10 THE COURT: Does that work for the defendants?
11 You're not going to have to do a privilege log -- you'll have
12 to do a privilege log as to those persons identified, but you
13 don't have to do a privilege log for additional persons but
14 you have to tell the FTC who those persons are and what
15 position they hold within the organization.

16 MR. SAINT-ANTOINE: I think that would work,
17 Your Honor. I'll invite Mr. Vorrasi to comment. He's closer
18 to the privilege log issue than I am.

19 THE COURT: Mr. Vorrasi.

20 MR. VORRASI: Good afternoon, Your Honor, this is Ken
21 Vorrasi.

22 Yes, that is workable for Defendant Hackensack, as
23 well.

24 THE COURT: My compliments, Mr. Vorrasi. The
25 privilege log is a thankless job but it's an important job.

1 We'll get the names and positions. The FTC can take a
2 look at them. If there's any issues, first please try to work
3 them out amongst yourselves. If not, submit me a letter.

4 Okay?

5 MR. SAINT-ANTOINE: Thank you, Your Honor.

6 MR. LASKEN: Thank you, Your Honor.

7 Your Honor, this is the FTC. I did have some non- --
8 very briefly, because I know we've kept you for quite a
9 while -- some non-CMSO issues I wanted to raise.

10 THE COURT: Before we do that, I'm going to need
11 a Word copy of your proposed case management so I can
12 reconfigure it.

13 If the FTC -- it depends how quickly you want it
14 entered. If the FTC has the information I put in, you're free
15 to do a revision, show defendants, and then send it to me and
16 I can sign it, if you think that will be quicker. If not,
17 I'll just need a Word copy so we can make the changes.

18 MR. LASKEN: Your Honor, we're happy to do that. My
19 team will jump up and tell me if they disagree.

20 THE COURT: We're not going to make Mr. Vorrasi do
21 that. That would be too much.

22 Go ahead. I'm sorry, Mr. Lasken. You have other
23 issues.

24 MR. LASKEN: Related to that, Your Honor, there's a
25 joint motion to open discovery in this case in front of the

1 Court. We were hoping that, given what we're all talking
2 about, we could go ahead and start serving discovery requests
3 after this call.

4 THE COURT: Yes. You don't have to wait for me to
5 enter the order for that. You can start serving your written
6 discovery requests.

7 MR. LASKEN: Then the second issue is, when we had
8 filed the complaint, the Court ordered the clerk to unseal the
9 complaint if no motion for protective order was filed within
10 10 days. We wanted to flag that no motion has been filed.
11 We're able to file an unredacted version or just raise
12 generally that that's the status of that.

13 THE COURT: So no motion -- Defendants, I assume
14 there was no motion because you don't oppose it being
15 unsealed.

16 MR. SAINT-ANTOINE: That's right, Your Honor. This
17 is Paul Saint-Antoine.

18 MR. KESSLER: That is right for us, as well,
19 Your Honor. Jeffrey Kessler speaking.

20 THE COURT: So the complaint will be unsealed, the
21 full complaint. Okay.

22 Anything else, Mr. Lasken?

23 MR. LASKEN: So there's one really small point,
24 Your Honor. We just do want to respond to Footnote 4 of the
25 defendants' letter saying the New Jersey Attorney General

1 supports the case.

2 The recommendation there is from something called a
3 Community Healthcare Protection Act which is to make sure the
4 assets are preserved. It's not an antitrust review, and the
5 order itself withholds for information learned from other
6 cases like this one.

7 It's not a scheduling issue but since it appeared in
8 the scheduling letter, I did want to just, before we go too
9 far down the line, make clear what's going on with that.

10 THE COURT: That's okay. I'd only caution defendants
11 that Mr. Grewal is not an acting AG. He's been AG almost
12 since the inception of this administration. But I'm not
13 going to tell if you don't. I didn't read that as a decision
14 on the merits relative to this case for the FTC.

15 MR. LASKEN: Okay. Thank you, Your Honor. Nothing
16 further from us. Thank you for the time today.

17 THE COURT: My pleasure.

18 Anything else? Let me start with Mr. Saint-Antoine.
19 Anything else?

20 MR. SAINT-ANTOINE: I don't believe so, Your Honor,
21 on behalf of Hackensack.

22 THE COURT: Mr. Kessler?

23 MR. KESSLER: Nothing for us, Your Honor. Thank you
24 so much for your time and helping us to work through these
25 issues.

1 THE COURT: My pleasure.

2 Mr. Genova, welcome to the case. Mr. Genova, that
3 means Mr. Porrino is no longer in the case; correct?

4 MR. GENOVA: Mr. Porrino is no longer in the case.
5 He was so offended by the reference to acting that he just
6 didn't want to have anything do with anything.

7 THE COURT: He was not acting, either. Okay.

8 All right, folks, you can start serving your written
9 discovery now. I will look for the revised scheduling case
10 management order. I will enter it. If there's any issues,
11 just let me know. Okay?

12 MR. LASKEN: Thank you, Your Honor.

13 MR. SAINT-ANTOINE: Thank you.

14 MR. KESSLER: Thank you.

15 (Which were all the proceedings had in
16 the foregoing matter on said day.)

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FEDERAL OFFICIAL COURT REPORTER'S CERTIFICATE

I, **Lisa A. Larsen, RPR, RMR, CRR, FCRR**, Official Court Reporter of the United States District Court for the District of New Jersey, do hereby certify that the foregoing proceedings are a true and accurate transcript of the testimony as taken stenographically by and before me at the time, place, and on the date hereinbefore set forth.

I further certify that I am neither related to any of the parties by blood or marriage, nor do I have any interest in the outcome of the above matter.

/S/Lisa A. Larsen, RPR, RMR, CRR, FCRR
Official U.S. District Court Reporter ~

DATED this January 6, 2021

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