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
BUREAU OF COMPETITION, BY:
JONATHAN LASKEN, ESQ.
600 Pennsylvania Avenue, NW
Washington, DC 20580
jlasken@ftc.gov
(202)326-2604
appeared on behalf of the Plaintiff;

/S/Lisa A. Larsen, RPR, RMR, CRR, FCRR
Lisalarsen25@gmail.com
(630)338-5069

Proceedings recorded by mechanical stenography.
Transcript produced by computer-aided transcription.

A P P E A R A N C E S: (Cont'd.)

FAEGRE DRINKER BIDDLE & REATH LLP, BY:
PAUL H. SAINT-ANTOINE, ESQ.
600 Campus Drive
Florham Park, NJ 07932
Paul.Saint-Antoine@faegredrinker.com
(973)549-7000
and
FAEGRE DRINKER BIDDLE & REATH LLP, BY:
KENNETH M. VORRASI, ESQ.
1500 K Street, NW, Suite 1100
Washington, DC 20005
kenneth.vorrasi@faegredrinker.com
(202)842-8800

appeared on behalf of Defendant Hackensack Meridian Health, Inc.;

GENOVA BURNS LLC, BY:
ANGELO J. GENOVA, ESQ.
494 Broad Street
Newark, NJ 07102
agenova@genovaburns.com
(973) 533-0777
and
WINSTON & STRAWN LLP, BY:
JEFFREY L. KESSLER, ESQ.
200 Park Avenue
New York, NY 10166
JKessler@winston.com
(732)778-8578

appeared on behalf of Defendant Englewood Healthcare Foundation, Inc.

A L S O P R E S E N T:

Emily Bowne, Esq., FTC
Lindsey Bohl, Esq., FTC
Christopher Caputo, Esq., FTC
Cathleen Williams, Esq., FTC

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

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

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

Could I please have appearances, starting with the FTC.

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

THE COURT: Good afternoon.

And could I have counsel for Hackensack, please.

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

THE COURT: Good afternoon.

MR. SAINT-ANTOINE: Thank you.

THE COURT: And for Englewood.

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

Winston & Strawn.

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

THE COURT: Good afternoon, Counsel.

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

MR. KESSLER: This is Jeffrey Kessler for Englewood. We also are fine proceeding with the issues as they are set forth in order in the letter.

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

MR. LASKEN: This is Jonathan Lasken for the FTC. Yes, Your Honor, that's correct, from our perspective.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In contrast --

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

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

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

We lose significantly the advantage that's built into

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

So while we --

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

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

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

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

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

those third parties.

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

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

THE COURT: Sure.

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

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

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

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

That is also in the transcript. The administrative law

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

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

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

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

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

I haven't seen that type of information where these

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

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

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

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

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

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

Another reference point I can provide to Your Honor

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

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

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

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

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

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

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

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

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

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

THE COURT: Sure, go ahead and respond.

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

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

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

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

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

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

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

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

THE COURT: Let me --

MR. KESSLER: Your Honor --

THE COURT: Yes.

MR. KESSLER: This is Mr. Kessler.

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

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

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

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

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

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

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

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

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

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

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

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

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

opinion and I'll give you my reasons.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. SAINT-ANTOINE: Understood.

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

THE COURT: Mr. Kessler, yes.

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

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

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

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

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

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

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

THE COURT: Then I'll go in order for the defendants.

Mr. Saint-Antoine?

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

THE COURT: Okay. I certainly understand things

could arise, particularly during this time.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. LASKEN: This is Jonathan Lasken again.

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

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

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

Is that what you're indicating?

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

one longer period and everyone can respond to each other.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Sure.

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

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

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

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

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

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

Would that be acceptable?

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

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

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

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

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

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

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

MR. KESSLER: Your Honor --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

MR. LASKEN: Sure, Your Honor.

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

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

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

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

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

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

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

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

THE COURT: Okay. All right.

Mr. Saint-Antoine?

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

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

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

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

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

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

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

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

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

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

communicating with these third parties for nearly a year.

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

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

What type of payors dominate in this particular transaction?

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

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

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

THE COURT: You said --

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

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

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

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

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

THE COURT: Sure.

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

Can I just follow up on that last point?

THE COURT: Sure.

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

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

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

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

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

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

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

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

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

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

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

sometimes clear a merger.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Yes.

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

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

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

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

list.

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

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

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

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

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

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

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

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

MR. SAINT-ANTOINE: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

THE COURT: Sure.

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

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

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

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

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

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

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

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

That's just an aside.

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

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

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

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

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

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

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

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

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

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

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

MR. KESSLER: So, Your Honor, this is Mr. Kessler. I think the answer is it will depend.

THE COURT: Okay.

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

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

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

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

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

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

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

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

MR. LASKEN: Your Honor --

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

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

THE COURT: The date to disclose it.

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: To January 29th?

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

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

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

Early next week I think would be very doable for the

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

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

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

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

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

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

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

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

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

has submitted a declaration or affidavit.

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

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

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

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

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

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

seems to work with defendants' view.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

affidavits of support for the FTC.

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

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

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

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

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

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

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

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

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

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

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

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

The reason we have objected on admissibility grounds is

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

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

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

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

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

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

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

bases for that view.

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

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

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

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

THE COURT: It does. I understand.

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

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

introduce the declarant's testimony.

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

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

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

Those are the declarants you're talking about?

MR. SAINT-ANTOINE: Yes.

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

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

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

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

THE COURT: Sure.

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

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

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

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

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

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

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

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

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

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

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

Are there any other issues that we have not discussed?

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

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

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

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

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

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

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

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

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

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

those individuals.

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

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

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

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

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

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

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

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

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

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

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

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

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

Does it make sense in the first instance to provide

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

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

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

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

THE COURT: Mr. Vorrasi.

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

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

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

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

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

MR. LASKEN: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Anything else, Mr. Lasken?

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

supports the case.

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

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

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

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

THE COURT: My pleasure.

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

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

THE COURT: Mr. Kessler?

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

THE COURT: My pleasure.

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

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

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

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

MR. LASKEN: Thank you, Your Honor.

MR. SAINT-ANTOINE: Thank you.

MR. KESSLER: Thank you.

(Which were all the proceedings had in 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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