IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
CIVIL ACTION NO. 5:24-cv-00028-KDB-SCR

FEDERAL TRADE COMMISSION

Plaintiff,

v.

NOVANT HEALTH, INC.

and

COMMUNITY HEALTH SYSTEMS, INC.,

Defendants.

[PROPOSED] JOINT STIPULATED CASE MANAGEMENT ORDER

The parties—Plaintiff Federal Trade Commission ("FTC" or "Commission"), Defendant Novant Health, Inc. ("Novant") and Defendant Community Health Systems, Inc. ("CHS")—have met and conferred regarding a Joint Stipulated Case Management Order. Consistent with the parties' February 1, 2024 joint submission reflecting their intent to offer additional case management suggestions to the Court, the parties jointly submit the following. This submission is organized as follows: Section I contains the parties' proposed case schedules, followed by the provisions the parties have agreed upon and respectfully request that the Court enter. Section II identifies areas of disagreement and the parties' positions in support of each. Text highlighted in green reflects Plaintiff's proposal(s) and text highlighted in blue reflects Defendants' proposal(s).

I. SUBJECTS OF AGREEMENT AND PROPOSED SCHEDULES

A. CASE SCHEDULE

1. Unless otherwise specified, days will be computed according to Federal Rule of Civil Procedure 6(a). The Court hereby adopts the following case schedule:

Event	Defendants' Proposal	Plaintiff's Proposal
Discovery Commences	Monday, February 5, 2024	
Defendants File Answer	Thursday, February 8, 2024	
Exchange of Initial Disclosures	Thursday, February 8, 2024	
Simultaneous Exchange of Initial Fact Witness Lists	Friday, February 16, 2024	
Plaintiff Files Memorandum in Support of Preliminary Injunction Motion	Wednesday, March 6, 2024	
Simultaneous Exchange of Initial Expert Reports	Wednesday, March 6, 2024	
Simultaneous Exchange of Supplemental Witness Lists	Friday, March 8, 2024	
Close of Fact Discovery	Thursday, March 27, 2024	Tuesday, March 5, 2024
Defendants File Opposition to Plaintiff's Preliminary Injunction Motion	Tuesday, March 27, 2024	
Plaintiff Files Reply to Defendants' Opposition to Preliminary Injunction Motion	Monday, April 8, 2024	
Simultaneous Exchange of Expert Rebuttal Reports	Monday, April 8, 2024	
Exchange of Exhibit Lists	Wednesday, April 10, 2024	
Close of Expert Discovery	Monday, April 15, 2024	
Exchange of Final Witness Lists	Thursday, April 11, 2024	

Motion *in Limine* Deadline	Friday, April 19, 2024
Parties Exchange Objections to Exhibit Lists	Wednesday, April 17, 2024
In Camera Designation Deadline	Wednesday, April 24, 2024
Motion *in Limine* Response Deadline	Tuesday, April 23, 2024
Pre-Hearing Conference	Subject to the Court's availability
Evidentiary Hearing Begins	Monday, April 29, 2024
Post-Hearing Proposed Findings of Fact and Conclusions of Law	10 days after close of evidentiary hearing

B. TEMPORARY RESTRAINING ORDER

1. The Court entered the Stipulation and Temporary Restraining Order on January 29, 2024. Under that Temporary Restraining Order, the Defendants cannot close their transaction until after 11:59 PM Eastern Time on the 5th business day after this Court rules on Plaintiff's motion for a preliminary injunction pursuant to Section 13(b) of the Federal Trade Commission Act or until after the date set by the Court, whichever is later.

C. DISCOVERY

1. Schedule. All discovery requests must be issued in time to allow for completion by the close of fact discovery. However, to the extent a third-party deposition is properly noticed in accordance with this Order and the third party's schedule cannot accommodate a deposition before the close of fact discovery, a later deposition may occur with the agreement of both sides. No party may unreasonably withhold agreement.

2. Initial Disclosures. The parties shall serve upon each other initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1)(A)(i) by February 8, 2024. The disclosures shall include the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claim or defenses in this action. If the parties need to supplement or correct their disclosures during the pendency of this action, they will do so pursuant to Federal Rule of Civil Procedure 26(e). For the avoidance of doubt, the parties need not supplement their initial disclosures with third-party witnesses timely disclosed through the witness list exchange processes in this Civil Case Management Plan and Scheduling Order.
3. Motion to Dismiss. Defendants do not intend to file a motion to dismiss.
4. Pre-Trial Discovery Conference. This stipulated Order satisfies the parties' obligations under Federal Rule of Civil Procedure 26(f) and Local Rule 16.1 to file a certificate of initial attorney's conference and to meet and confer about scheduling and a discovery plan.
5. Third-Party Discovery. The parties agree to forego the three (3) calendar day notice period for third-party subpoenas set forth in Local Rule 45.2. The notice requirements of Federal Rule of Civil Procedure 45(a)(4) shall apply. No party issuing a third-party subpoena for the production of documents or electronically stored information shall request a return date sooner than seven (7) calendar days after service. Every documentary subpoena to a third party shall include a cover letter requesting that (1) the third party Bates-stamp each document with a production number and any applicable confidentiality designation prior to producing it and (2)

the third party provide to the other parties copies of all productions at the same time as they are produced to the requesting party. If a third party fails to provide copies of productions to the other parties, the requesting party shall produce all materials received pursuant to the third-party subpoena, as well as all materials received voluntarily in lieu of a subpoena, including declarations or affidavits obtained from a third party, to all other parties within three (3) business days of receiving those materials. Production shall occur in the format the materials were received, except that in the event a third party produces documents or electronic information that are not Bates-stamped, the issuing party receiving the documents shall use best efforts to promptly Bates-stamp the documents or electronic information and re-produce them with Bates-stamps within seven (7) calendar days of receipt. If a party serves a third party with a subpoena for the production of documents or electronically stored information and a subpoena commanding attendance at a deposition, the deposition date must be at least seven (7) calendar days after the return date for the document subpoena, including any modifications or extensions for the document subpoena. Each side shall serve subpoenas for the production of documents upon no more than five entities or individuals, except that each side may serve subpoenas for the production of documents on any:

a) Entities or individuals who appeared on either side's preliminary witness list or supplemental witness list; or sat for an investigational hearing during Plaintiff's investigation (FTC File No. 231-0068); or who received a FTC Civil Investigative Demand during Plaintiff's investigation (FTC File No. 231-0068); or

b) Entities affiliated with the entities or individuals identified in the immediately preceding subsection (a).

6. Party and Third-Party Document Production. The parties shall serve any objections to requests for the production of documents no later than ten (10) calendar days after the date of service of the document requests to which they assert objections. Within three (3) business days of service of any such objections, the parties shall meet and confer in a good faith attempt to resolve the objections. The parties shall substantially comply with requests for production no later than twenty-five (25) calendar days after the date of service. In response to any document requests, the parties need not produce to each other in discovery in this case any documents previously produced by Defendants to the FTC in the course of the investigation of the proposed transaction between Novant and CHS (FTC File No. 231-0068). The parties agree to make best efforts to produce documents on a rolling basis and prioritize data productions. The parties agree to make best efforts to substantially produce documents for each deponent no later than seven (7) calendar days before the deponent's deposition.

i. Document Productions shall be sent to the attention of:

1. To the FTC:

Nathan Brenner (nbrenner@ftc.gov)
Nicolas Stebinger (nstebinger@ftc.gov)
Karen Hunt (khunt@ftc.gov)
Ryan Maddock (rmaddock@ftc.gov)
Jeanne Nichols (jnichols@ftc.gov)
Karthik Pasupula (kpasupula@ftc.gov)
Afraa Syed (asyed@ftc.gov)
Qwai-Zia Pennix (qpennix@ftc.gov)
Teresa Martin (tmartin@ftc.gov)

2. To Novant:

Heidi Hubbard (hhubbard@wc.com)
Beth Stewart (bstewart@wc.com)
CJ Pruski (cpruski@wc.com)
Liat Rome (lrome@wc.com)
Kaitlin Beach (kbeach@wc.com)
Altumash Mufti (amufti@wc.com)
Brian Cromwell (briancromwell@parkerpoe.com)
Caroline Barrineau (carolinebarrineau@parkerpoe.com)

3. To CHS:

Michael Perry (mjperry@gibsondunn.com)
Jamie France (jfrance@gibsondunn.com)
Scott Hvidt (shvidt@gibsondunn.com)
Thomas Tyson (ttyson@gibsondunn.com)
Logan Billman (lbillman@gibsondunn.com)
Connie Lee (clee2@gibsondunn.com)
Connor Leydecker (cleydecker@gibsondunn.com)
David Lam (dlam@gibsondunn.com)
Adam Doerr (adoerr@robinsonbradshaw.com)
Kevin Crandall (kcrandall@robinsonbradshaw.com)

In the event that any documents are too voluminous for electronic mail, the parties may serve an electronic version of the papers on opposing counsel via an electronic file transfer platform.

7. Requests for Admission. Requests for admission shall be limited to requests for admission related solely to the authenticity of a document or the admissibility of documents, data, or other evidence.

8. Expert Reports. The parties shall serve their initial expert reports by March 6, 2024. The parties shall exchange any rebuttal expert reports by April 8, 2024. Each side shall be limited to serving expert reports from no more than three (3) expert witnesses. The parties may seek leave to exceed this limit for good cause shown.

9. Expert Materials Not Subject to Discovery. Expert disclosures, including each side's expert report(s), shall comply with the requirements of Federal Rule of Civil Procedure 26(a)(2), except as modified herein:

a) Neither side must preserve or disclose, including in expert deposition testimony, the following documents or materials:

i. any form of communication or work product shared between any of the parties' counsel and their expert(s), persons assisting the expert(s), or consultants, or between the expert(s) or consultants themselves; or between any of the experts themselves;

ii. any form of communication or work product shared between an expert(s) and persons assisting the expert(s);

iii. expert's notes, unless they are expressly relied upon and/or cited in support of an opinion or fact;

iv. drafts of expert reports, analyses, or other work product; or

v. data formulations, data runs, data analyses, or any database-related operations not relied upon by the expert in the opinions contained in his or her final report, except as set forth in the following paragraph, Section C(9)(b) of this Order.

b) The parties agree that they will disclose the following materials with all expert reports:

i. a list by Bates number of all documents relied upon by the testifying expert(s); and copies of any materials relied upon by the expert not previously produced that are not readily available publicly;

ii. for any calculations appearing in the report, all data and programs underlying the calculation, including all programs and codes necessary to recreate the calculation from the initial ("raw") data files; and

iii. notwithstanding the provisions of Section C(9)(a)(i), any communication from a party's counsel that forms the sole basis for an opinion, assumption, or fact stated in the expert's report.

10. Depositions.

a) *Number of Depositions.* Each side may depose any witness who is listed on either side's preliminary or supplemental witness list, who provides a declaration, affidavit, or letter of support, or who sat for an investigational hearing during Plaintiff's investigation (FTC File No. 231-0068). Each side may take a maximum of five (5) depositions of fact witnesses beyond those listed on either side's preliminary or supplemental witness list, who provides a declaration affidavit, or letter of support, or who sat for an investigational hearing during Plaintiff's investigation (FTC File No. 231-0068), or who received an FTC Civil Investigative Demand during Plaintiff's investigation (FTC File No. 231-0068). A 30(b)(6) deposition counts as no more than one deposition, regardless of whether a party or third party designates multiple individuals. Cross-notices of depositions will not count against the above totals. Additional depositions of fact witnesses shall be permitted only by agreement of the parties or by leave of the Court for good cause shown.

b) *Notice*. The parties may not serve a deposition notice with fewer than seven (7) calendar days' notice. The parties shall consult with each other prior to confirming any deposition to coordinate the time and place of the deposition. The parties shall use reasonable efforts to reduce the burden on witnesses noticed for depositions and to accommodate the witness's schedule. If the third party fails to timely comply with the document subpoena, the parties shall consult regarding whether to reschedule the deposition and shall not unreasonably withhold consent. If a third-party deposition is properly noticed pursuant to the above, but the third party's schedule does not reasonably accommodate a deposition before the end of fact discovery, a later deposition may occur upon agreement by the parties.

11. Expert Depositions. One 7-hour deposition of each expert shall be allowed. Expert depositions must be completed on or before April 15, 2024, the close of expert discovery.

12. Discovery Uses. All discovery taken in the above-captioned litigation can be used in connection with the Part 3 administrative proceeding relating to Novant's acquisition of CHS assets (FTC Docket No. D09425). Only discovery obtained by a party in the Part 3 administrative proceeding (FTC Docket No. D09425) before the close of fact discovery in the action before this Court may be used in this action before this Court.

13. Resolving Discovery Disputes. Before filing a motion to compel or any other motion related to a discovery dispute, the parties are required to schedule and submit to an informal conference with the Court. Such conferences will be conducted by conference call and need not be recorded. A motion to compel or any other motion

related to a discovery dispute may only be filed, if needed, after the informal conference. A motion to compel or any other motion related to a discovery dispute must include a statement by the movant that the parties have conferred in good faith in an attempt to resolve the dispute and are unable to do so. Consistent with the spirit, purpose, and explicit directives of the Federal Rules of Civil Procedure and the Local Rules of the Western District of North Carolina, the Court expects all parties and counsel to attempt to resolve discovery disputes in good faith without the necessity of Court intervention. Nothing in this provision shall waive either party's ability to argue for exclusion of evidence in a motion *in limine* or any pre-trial brief or post-trial briefing.

D. MOTIONS AND BRIEFING SCHEDULE

1. Plaintiff will file its memorandum in support of its motion for a preliminary injunction by March 6, 2024. This brief is not to exceed thirty-five (35) pages.
2. Defendants will file their opposition to Plaintiff's motion for a preliminary injunction by March 27, 2024. This brief is not to exceed thirty-five (35) pages.
3. Plaintiff will file its reply memorandum in further support of its motion for a preliminary injunction by April 8, 2024. This brief is not to exceed fifteen (15) pages.
4. The parties' proposed findings of fact and conclusions of law shall be filed by ten (10) calendar days after the close of the presentation of evidence at the evidentiary

hearing. Each side's proposed findings of fact and conclusions of law shall not exceed 100 pages.

E. PRELIMINARY INJUNCTION EVIDENTIARY HEARING

1. Pursuant to the Court's February 1, 2024 order (Dkt. No. 27), an evidentiary hearing will be held on Plaintiff's motion beginning on April 29, 2024, and concluding on a date subject to the Court's availability. Defendants and Plaintiff shall split the time available at the hearing evenly, with both direct examination and cross-examination of witnesses counting against the party conducting the examination. Unused time by one side shall not revert to the other. Plaintiff may reserve a portion of its time for rebuttal. Opening statements will count against each side. Closing arguments will not count against each side. The parties will confer on the following day's usage of time at the close of each day's testimony. The parties will meet and confer to schedule closing statements, subject to the Court's preferences and availability.

2. Hearing Witness Notification. The parties shall provide to one another, and to the Court and the court reporter, no later than 48 hours in advance, not including weekends and holidays, a list of all witnesses to be called on each day of hearing, subject to possible delays or unforeseen circumstances.

F. OTHER MATTERS

1. Service. Service of any documents not filed via ECF, including pleadings, discovery requests, Rule 45 subpoenas for testimony or documents, expert disclosure, and delivery of all correspondence, whether under seal or otherwise, shall be by electronic mail to the following individuals designated by each party:

    a) To the FTC:

Nathan Brenner (nbrenner@ftc.gov)
Nicolas Stebinger (nstebinger@ftc.gov)
Karen Hunt (khunt@ftc.gov)
Ryan Maddock (rmaddock@ftc.gov)
Jeanne Nichols (jnichols@ftc.gov)
Karthik Pasupula (kpasupula@ftc.gov)
Afraa Syed (asyed@ftc.gov)
Qwai-Zia Pennix (qpennix@ftc.gov)
Teresa Martin (tmartin@ftc.gov)

b) To Novant:

Heidi Hubbard (hhubbard@wc.com)
Beth Stewart (bstewart@wc.com)
CJ Pruski (cpruski@wc.com)
Liat Rome (lrome@wc.com)
Kaitlin Beach (kbeach@wc.com)
Altumash Mufti (amufti@wc.com)
Brian Cromwell (briancromwell@parkerpoe.com)
Caroline Barrineau (carolinebarrineau@parkerpoe.com)

c) To CHS:

Michael Perry (mjperry@gibsondunn.com)
Jamie France (jfrance@gibsondunn.com)
Scott Hvidt (shvidt@gibsondunn.com)
Thomas Tyson (ttyson@gibsondunn.com)
Logan Billman (lbillman@gibsondunn.com)
Connie Lee (clee2@gibsondunn.com)
Connor Leydecker (cleydecker@gibsondunn.com)
David Lam (dlam@gibsondunn.com)
Adam Doerr (adoerr@robinsonbradshaw.com)
Kevin Crandall (kcrandall@robinsonbradshaw.com)

In the event the volume of served materials is too large for email and requires electronic data transfer by file transfer protocol or a similar technology, or overnight delivery if agreed by the parties, the serving party will telephone or email the other side's principal designee when the materials are sent to provide notice that the materials are being served. For purposes of calculating discovery response times

under the Federal Rules of Civil Procedure, electronic delivery shall be treated the same as hand delivery.

2. Answer. Defendants shall answer the complaint by February 8, 2024.

3. Nationwide Service of Process. Good cause having been shown in view of the geographic dispersion of potential witnesses in this action, the parties will be allowed nationwide service of process of discovery and trial subpoenas pursuant to Federal Rule of Civil Procedure 45 and 15 U.S.C. § 23, to issue from this Court that may run into any other federal district requiring witnesses to attend this Court. The availability of nationwide service of process, however, does not make a witness who is otherwise "unavailable" for purposes of Federal Rule of Civil Procedure 32 and Federal Rule of Evidence 804 available under these rules regarding the use at trial of a deposition taken in this action.

4. Party and Third-Party Confidential Information. The Interim Protective Order, entered by this Court on February 5, 2024, shall govern discovery and production of Confidential Information unless and until superseded by future order. Any Party serving discovery requests, notices, or subpoenas sent to a third-party shall provide the third-party with a copy of the Protective Order.

5. Privilege Logs. The parties agree to suspend the obligations of Federal Rule of Civil Procedure 26(b)(5)(A) to produce a log of privileged materials withheld from discovery taken in this action. None of the parties must preserve, log, or produce in discovery the following categories of documents:

    a) Documents or communications sent solely between outside counsel for Defendants (or persons employed by or acting on behalf of such counsel) or

solely between counsel for Plaintiff (or persons employed by or acting on behalf of such counsel);

b) Documents or communications sent between in-house counsel (acting in a purely legal capacity) and any party employees or agents related solely to the provision of legal advice, or between in-house counsel (acting in a purely legal capacity) and outside counsel for either Defendant (or persons employed by or acting on behalf of such counsel);

c) Documents or communications sent solely within the FTC (including persons employed by or acting on behalf of the FTC);

d) Documents or communications sent between the FTC and state, local, or federal governmental agencies subject to common interest privilege, law enforcement investigatory privilege, joint prosecution privilege, the work product doctrine, or any other applicable privilege or protection from disclosure; and

e) Materials exempted from disclosure under the Expert Materials provisions of Section C(9)(a) of this Order.

6. Exhibit Lists. The parties shall exchange exhibit lists on or before April 10, 2024. Objections shall be exchanged on or before April 17, 2024.

7. *In Camera* Designation. Parties and third parties shall submit any requests for *in camera* treatment of demonstratives and/or exhibits by the date listed in Schedule A. Each party and third party is responsible for requesting *in camera* treatment of its own confidential materials and information regardless of which side's exhibit list the materials or information appear on. Requests for *in camera* treatment shall be made

in the form of a motion to the Court not to exceed twenty (20) pages.

8. Inadvertent Production of Privileged Material. In accordance with Federal Rule of Civil Procedure 16(b)(3)(B)(iv) and Federal Rule of Evidence 502(d), inadvertent production of documents or communications containing privileged information or attorney work product shall not be a basis for loss of privilege or work product of the inadvertently produced material, provided that the producing party notifies the receiving party within 4 business days of learning of the inadvertent production. When a party determines that it has inadvertently produced such material, it will notify other parties, who will promptly return, sequester, or delete the protected material from their document management systems. Within five (5) business days of identifying inadvertently produced information or documents(s), the party seeking claw-back of such materials shall provide a revised privilege log for the identified information or documents. A party may move the Court for an order compelling production of the material, but such party may not assert as a ground for entering such an order the mere fact of inadvertent production. The party asserting the privilege must file its opposition under seal and submit a copy of the material in question for in camera review.

9. Electronically Stored Information. The parties agree as follows regarding the preservation and production of electronically stored information ("ESI").

    a) All parties have established litigation holds to preserve ESI that may be relevant to the expected claims and defenses in this case. In addition, the parties have taken steps to ensure that automatic deletion systems will not destroy any potentially relevant information.

b) All parties agree that the use of Technology Assisted Review tools may assist in the efficient production of ESI. However, if a party desires to use such technologies, it shall meet and confer with the other side and negotiate in good faith on the reasonable use of such technology.

c) All parties will request ESI in the form or forms that facilitate efficient review of ESI. In general, the parties will produce ESI according to the same ESI technical specifications used by Defendants in the FTC's pre-complaint investigation. PDFs will be produced as colored copies when specifically requested within 48 hours, upon receiving a reasonable request.

10. Modification of Scheduling and Case Management Order. Any party may seek modification of this Order for good cause, except that the parties may also modify discovery and expert deadlines by mutual agreement. Any such modifications must be in writing.

11. Magistrate Consent. The parties do not consent to conducting all further proceedings before a Magistrate Judge, including motions and trial, pursuant to 28 U.S.C. § 636.

12. Jury Trial. The case is not to be tried by a jury.

13. Reservation of Rights. Nothing in this Civil Case Management and Scheduling Order shall limit the parties' ability to object to, move to quash, or otherwise challenge any request for discovery or deposition notice under the Federal Rules of Civil Procedure.

II. AREAS OF DISAGREEMENT

The parties have reached impasse on the following areas and seek the Court's guidance:

A. Fact Discovery Deadline

a. Joint Submission: The parties disagree on the date for the close of fact discovery: Plaintiff proposes March 5, 2024; Defendants propose March 27, 2024.

a. Plaintiff's Position. The FTC proposes an expedient, balanced schedule that provides all parties the ability to conduct effective discovery and, only once discovery is complete, present the evidence developed through briefs and expert reports. The FTC's proposed schedule would ensure that the Court benefits from comprehensive briefing reflecting the parties' likely presentation of evidence at the scheduled hearing. This proposal follows standard litigation and briefing practice: first the parties conduct fact discovery, then the parties exchange briefs and/or expert reports. To maximize time for fact discovery, the FTC's proposed schedule contemplates that after the close of fact discovery on March 5, the FTC would only have 24 hours to submit its initial brief and expert report(s). Defendants would then have three weeks to submit their opposition.

Defendants' proposed schedule, in contrast, turns the notion of a discovery period on its head, requiring the FTC to submit its opening brief and expert report(s) nearly three weeks before discovery is complete. Given that the FTC bears the burden in this matter, Defendants' proposal would substantially prejudice the FTC's ability to incorporate all relevant discovery into its initial brief and expert report(s). At best, the FTC's opening brief will reflect an aspirational view of what the FTC could develop through fact discovery, rather than a comprehensive accounting of what fact discovery has revealed. The FTC would then have to use

its limited reply brief to account for nearly all of fact discovery, in addition to rebutting Defendants' response.

No circumstances support Defendants' proposed schedule. Defendants have known the scope and contours of the FTC's case since at least May 2023, when the FTC issued documentary requests as part of its merger review process. Further, throughout the FTC's investigation, staff routinely shared with Defendants the FTC's developing view of the relevant market and the proposed merger's potential anticompetitive effects. Defendants cannot claim surprise, having previously submitted advocacy to the FTC attempting to address the very concerns alleged in the FTC's complaint. Defendants have also had access to the vast majority of the FTC's investigative file long before the FTC even received these materials. Over 99% of the documents in the FTC's investigative file consist of Defendants' own documents. Unlike the FTC, who could only begin to examine Defendants' operations and business strategies in the context of this investigation, Defendants have always had access to their own documents and to their executives. Finally, it bears repeating that this action seeks only a preliminary injunction during the pendency of an administrative proceeding. To the extent Defendants desire broader discovery to defend the merits of their transaction in the underlying administrative proceeding, they are free to seek additional discovery under the rules of that proceeding

b. Defendants' Position. Over the past year, the FTC has engaged in expansive, one-sided discovery of third-parties, including by issuing at least 15 third-party subpoenas and taking 11 third-party depositions. The FTC was not constrained by either rule or regulation in terms of the scope of discovery sought. Defendants, meanwhile, were never placed on notice as to these discovery requests, could not seek and did not receive any third-party discovery during this pre-suit period, and were not permitted to attend any of these third-party

depositions. Nor did the parties have unfettered access to *each other's* documents, as the FTC's position statement appears to contemplate.

To address that fundamental deficiency in the third-party evidence to date, Defendants respectfully request the opportunity to pursue targeted discovery over a more realistic, albeit still extremely compressed, timeframe. As discussed in more detail below, this evidentiary hearing is the only meaningful opportunity for Defendants to put the FTC to its burden. Even so, Defendants' proposal accepts the time constraints both sides are presented with here, and affords Defendants no advantage. For example, whereas the FTC spent nearly a year compelling unrepresentative testimony from dozens of third parties, Defendants propose that they have *only six weeks* to seek discovery from those and other relevant third parties, some of whom will serve as critical witnesses during the preliminary injunction hearing. Defendants also have agreed to reasonable third-party discovery limitations, including regarding the number of parties that the parties can subpoena and the number of document requests in any such subpoena. Defendants' proposal is therefore an attempt to find a proportional middle-ground.

The FTC, in contrast, proposes that Defendants be afforded only a month's time to build their entire defense for a case that will decide the fate of this transaction, during which time the FTC also will be permitted to seek even more discovery beyond that which it has already collected. The FTC's rationale is that it wants the benefit of Defendants' third-party discovery efforts before it submits its opening preliminary injunction brief or its initial expert report. That position is without merit. The FTC already has had ample opportunity to build its case through nearly a year of one-sided party and third-party discovery. There is no reason the FTC cannot file its opening brief and initial expert reports on the basis of that record and the month of additional discovery that the FTC is proposing as sufficient. Even Defendants—who

have had no time at all to seek the discovery they need—also must provide their initial expert reports at the same time as the FTC. Both sides will thereafter have an opportunity to address any new third-party discovery in their rebuttal expert reports, and the FTC will have an opportunity to include that information in their reply brief.

In an ideal world, the parties could follow the "standard litigation and briefing practice" the FTC references above, *supra* pg. 18, but that is not a luxury the parties have here. Defendants' proposal strikes an appropriate balance between providing Defendants time to catch up to the FTC's year-long head-start on discovery, while also affording the FTC ample opportunities to address that discovery before, during, and after the hearing.

B. Party Discovery

a. Joint Submission: The parties disagree on the limit for document requests and interrogatories between the parties. The Parties therefore submit the following competing proposals for the Court, where green highlighting represents Plaintiff's proposed position, blue highlighting represents Defendants' proposed position, and text not highlighted has been agreed by the parties:

> Party and Third-Party Document Requests. [**Plaintiff's Position**: Each side shall be limited to fifteen (15) requests for production to each party, and ten (10) document requests per third-party subpoena.] [**Defendant's Position**: Each side shall be limited to ten (10) requests for production to the other side, inclusive of subparts, and ten (10) document requests per third-party subpoena.]

Interrogatories. [**Plaintiff's Position**: Each side shall serve no more than ten (10) interrogatories on each party.] [**Defendant's Position**: Each side shall serve no more than ten (10) interrogatories on each side.] Interrogatories shall seek only factual information; the parties shall not serve any contention interrogatories. The parties shall serve objections and responses to interrogatories no later than seven (7) calendar days after the date of service. Within three (3) business days after service of any such objections, the parties shall meet and confer in a good faith attempt to resolve the objections. The parties shall serve substantive responses no later than twenty (20) calendar days after service of interrogatories.

b. Plaintiff's Position. Judge Bell's presumptive limitations on discovery permit 25 interrogatories and 30 requests for production of documents. In an effort to compromise with Defendants, the FTC has already proposed significant downward departures from Judge Bell's presumptive limitations. Critically, the FTC requires a reasonable opportunity to serve limited discovery on each Defendant. Novant and CHS possess distinct sets of responsive documents, and thus in many cases the FTC will need to serve mirroring written discovery requests on both Defendants. Defendants, by contrast, offer only 10 document requests and 10 interrogatories to be served *by each party*. In other words, the FTC would be allowed to serve 5 to Novant, and 5 to Community Health Systems. Such limited discovery would severely prejudice the FTC as the party bearing the ultimate burden.

Further, it is not enough to say, as Defendants do, that the FTC has had the opportunity to investigate the proposed transaction pre-suit. FTC merger review is meant to aid

in reaching an informed decision on whether to file a complaint, rather than to prove specific elements in court. Defendants also only expressed certain positions toward the end of the FTC's investigation which require further examination. Now that the FTC finds itself in litigation, its goals are distinct and additional discovery is warranted. *See generally SEC v. Sargent*, 229 F.3d 68, 80 (1st Cir. 2000) ("[T]here is no authority which suggests that it is appropriate to limit the SEC's right to take discovery based upon the extent of its previous investigation into the facts underlying its case." (quoting *SEC v. Saul*, 133 F.R.D. 115, 118 (N.D. Ill. 1990))); *United States v. GAF Corp*., 596 F.2d 10, 14 (2d Cir. 1979) ("It is important to remember that the [Justice] Department's objective at the pre-complaint stage of the investigation is not to 'prove' its case but rather to make an informed decision on whether or not to file a complaint." (quoting H. R. REP. 94-1343 at 26, Hart-Scott-Rodino Antitrust Improvements Act of 1976)).

c. Defendants' Position. The FTC has compelled extensive discovery from Defendants over the course of its pre-complaint investigation including serving approximately 70 discovery requests on each party, nearly all of which contained anywhere from 5 to 30 separate subparts. In response, Defendants produced 6 million documents, consisting of 17.6 million pages, from over 100 document custodians. The FTC then took live testimony from nearly a dozen Defendant witnesses, while also holding several additional informal meetings with Defendants aimed at collecting information relevant to its case. Despite this massive pre-suit discovery, the FTC now demands *fifty* supplemental discovery requests, just weeks after concluding its investigation. Defendants do not understand Judge Bell's standing order to contemplate a scenario, as here, where one party has such a significant head start. And the case the FTC relies on is inapposite where, as here, the FTC still is entitled to significant post-

investigation discovery. *See Sargent*, 229 F.3d at 80 (addressing scenario in which the district court denied the SEC *any* post-investigation discovery).

Defendants' proposal—that both sides are equally afforded ten document requests and ten interrogatories—represents a reasonable compromise balancing the FTC's desire for additional party discovery and the impact that expansive party discovery would disproportionately have on Defendants going forward. Unlike Defendants, the FTC will not need to spend any time identifying custodians, negotiating search terms, reviewing documents for responsiveness, confidentiality, and privilege, or any of the other discovery processes producing parties must carry out, all while pursuing third-party discovery.

C. Witness Lists

a. Joint Submission: The parties disagree on the contours of the parties' witness lists. The Parties therefore submit the following competing proposals for the Court, where green highlighting represents Plaintiff's proposed position, blue highlighting represents Defendants' proposed position, and text not highlighted has been agreed by the parties:

Exchange of Lists of Witnesses to Appear at Hearing.

a) *Preliminary Fact Witness Lists.* The parties shall exchange preliminary fact witness lists (to include all potential party and third-party fact witnesses, excluding expert witnesses) no later than 5:00 p.m. Eastern time on February 16, 2024. Lists shall be limited to natural persons or, if unknown for a third-party entity, a corporate representative of a specific entity. The lists shall summarize the general topics of each witness's anticipated testimony, include the name of the employer of and contact information for each witness, to the extent known, and for any third-party witnesses, include a description of the

responsibilities of the third-party witness. Preliminary fact witness lists shall be limited to twenty (20) total witnesses per side, excluding expert witnesses.

b) *Supplemental Witness Lists.* The parties may supplement their preliminary fact witness list with up to five (5) additional third-party fact witnesses by 6:00 p.m. Eastern Time on March 8, 2024. [**Plaintiff's Position**: Supplemental fact witness lists shall include only witnesses who appeared on a side's preliminary fact witness list, timely provided a declaration or affidavit, have otherwise been deposed in this action, or sat for an investigational hearing in the FTC's pre-complaint investigation of the proposed acquisition (FTC. File No. 231-0068).]

c) *Final Witness Lists.* Final witness lists shall be exchanged on or before 5:00 p.m. Eastern time on April 11, 2024. Final witness lists shall be limited to eighteen (18) per side, which shall include any witnesses one side may call live or present via deposition video, including expert witnesses. [**Defendants' Position**: The final witness list shall only include no more than two (2) fact witness who did not appear on any party's prior fact witness lists and did not sit for a deposition or investigational hearing, subject to the other side's right to depose them, regardless of the close of fact discovery.] Final witness lists shall include only witnesses who appear on a side's preliminary or supplemental fact witness list, timely provided a declaration or affidavit, have otherwise been deposed or sat for an investigational hearing or have served an expert report. Final witness lists shall include for each witness: (a) an indication of whether the witness will offer expert testimony; and (b) a

summary of the general topics of each witness's anticipated testimony. The final witness lists shall represent a good faith effort to identify all witnesses the producing party expects that it will present at the evidentiary hearing, other than solely for impeachment. Additional fact witnesses may be added to the final witness list after the date for the exchange of final witness lists only by agreement of the parties or with leave of the Court for good cause shown.

b. Plaintiff's Position. The FTC proposes an exchange of witness lists that allows each side flexibility to add or remove witnesses while eliminating the opportunity for unfair surprise. The FTC's request is straightforward: That the schedule allow for each witness to be disclosed in a manner that allows the parties to conduct discovery relating to the witness and incorporate that discovery into the briefing ordered by the Court. Under this proposal, Defendants need not make final decisions about their likely witnesses by February 16. Rather, to the extent Defendants wish to add a third party to their supplemental or final witness list who did not appear on their preliminary fact witness list, the FTC's proposed language allows them to depose that individual within the fact discovery period and add the witness by the relevant witness list deadline.

Depending on the date the Court sets for the close of fact discovery, Defendants' proposal would allow for the addition of surprise witnesses on the supplemental or final witness list that had not previously been disclosed, deposed, or made the subject of documentary discovery. Defendants' proposal to allow depositions of two late-disclosed witnesses on the final witness list, after the April 11th disclosure date and on the eve of the April 29th hearing, does little to alleviate the consequence of this surprise. To the extent that Defendants argue that they need such time to understand who the relevant witnesses may be, the FTC contends that

Defendants, as hospital operators familiar with their own businesses and other industry participants and community members, and who already possess the FTC's investigative materials in this case, are already in a better position than the FTC to understand who the relevant witnesses may be.

c. Defendants' Position. Related to the overarching issue of providing Defendants sufficient time to develop their case, Defendants propose that the parties be allowed to supplement their preliminary fact witness lists (due in just 8 days) with up to five additional third-party fact witnesses by March 8, 2024. This date falls well before Defendants' close of fact discovery proposal on March 27. Defendants do not seek to "surprise" the FTC with additional witnesses after fact discovery closes; they simply seek time to discover—within a reasonable fact discovery schedule—who their third-party witnesses may be. Under the FTC's proposal, Defendants would need to know the names of any third party they might call as a witness by February 16, just 8 days from now, or rely only on who the FTC previously chose to depose. That is unfair and not sufficient time.

Similarly, Defendants propose that both sides be permitted to add two additional fact witnesses by April 11, subject to depositions (if requested) of those witnesses. This provision is important for Defendants for the reasons noted above: they have not yet had time to develop their case and, given the compressed discovery period allotted, it is possible that they will identify a critical witness after the close of fact discovery. If that occurs, Defendants' proposal still allows the FTC to take a deposition of that witness out of time. This provision is designed simply to ensure that Defendants are able to meaningfully make use of the evidence they are only now able to develop.

D. Deposition Time Allocation

a. Joint Submission: The parties disagree on the allocation of time for depositions. Plaintiff has proposed the following green highlighted language in the Case Management Order, which Defendants object to including (Defendants otherwise agree with the remaining language):

> *Format and Allocation of time.* All depositions, including fact and expert witnesses, as well as 30(b)(6) depositions, shall last no more than seven (7) hours on the record. If both Plaintiff and Defendants notice any third-party fact deposition, the seven-hour time shall be allocated evenly between the two sides. [**Plaintiff's Position**: For purposes of allocating deposition time, employees, consultants, agents, contractors, and representatives of a Defendant are considered that Defendant's witness; and former employees, consultants, agents, contractors, and representatives of a Defendant are considered that Defendant's witness if they are represented by Defendants' counsel or if any Defendant is paying for the witness's counsel. Plaintiff shall be allocated the full seven (7) hours of deposition time during a deposition of any Defendants' witness noticed by Plaintiff.] [**Defendant' Position**: If both Plaintiff and Defendants notice any deposition of a former employee of a Defendant, the seven-hour time shall be allocated such that Plaintiff shall have four (4) hours and Defendants shall have three (3) hours.] Nothing in this provision shall preclude a Defendant from conducting reasonable redirect of its own witness. Unused time in any side's allocation of deposition time shall not transfer to the other side. Unless otherwise agreed or with leave of the Court upon a showing of good cause, each side shall have the opportunity to

depose each fact or expert witness only one (1) time. Any party may take a deposition remotely. The parties will negotiate a deposition protocol to govern remote depositions, if necessary.

b. Plaintiff's Position. The FTC's proposed language ensures that Defendants cannot unilaterally cut the FTC's deposition time by cross-noticing depositions of a small subset of former employees who remain closely tied to Defendants. To the extent Defendants seek to present the testimony of their own witnesses, they are free to do so at the evidentiary hearing. But both Defendants have had several relevant senior executives move to new employers within the past few months. To the extent these former employees are represented by Defendants' counsel, or if any Defendant is paying for the witness's counsel, these witnesses should be fairly treated as Defendants' witnesses. For former employees who are neither represented by Defendants' counsel nor have their legal fees paid for by a Defendant, however, the FTC agrees that the parties should have equal deposition time.

c. Defendants' Position. The parties largely agree on the format and allocation of time for depositions. The area of dispute is with respect to former employees. If a witness is a former employee, the FTC submits that Defendants should not be allowed to depose him or her and the FTC alone should get all of the time for that deposition. And the FTC broadly defines a former employee to include former consultants, contractors, agents, and/or representatives. Such a one-sided limitation does not make sense because Defendants cannot compel their former employees, consultants or contractors who live outside of this Court's subpoena power to come to trial. Under the FTC's proposal, Defendants have no ability to obtain deposition testimony from their former employees for use at the hearing. Defendants therefore respectfully request that the Court allow Defendants some time during the depositions

of their former employees, and submit that a 4-hour (FTC) / 3-hour (Defendants) split is reasonable.

E. Evidentiary Presumptions

a. Joint Submission: The parties disagree on whether the following provision should be included in this Case Management Order. Plaintiff has proposed the following additional language in the Case Management Order, which Defendants object to including:

[**Plaintiff's Position**:

Evidentiary Presumptions.

a) Documents produced by third parties from the third parties' files shall be presumed to be authentic within the meaning of Federal Rule of Evidence 901. Any good-faith objection to a document's admissibility must be provided with the exchange of other objections to trial exhibits. If a party serves a specific good-faith written objection to the document's authenticity, the presumption of authenticity will no longer apply to that document and the parties will promptly meet and confer to attempt to resolve any objection. The Court will resolve any objections that are not resolved through this means or through the discovery process.

b) All documents produced by a Defendant either in response to document requests in this litigation, the Part 3 administrative proceeding relating to Novant's acquisition of CHS assets (FTC Docket No. D09425), or in the course of the FTC's pre-complaint investigation of the proposed acquisition

(FTC. File No. 231-0068) or any prior FTC investigation, are presumed to be authentic.

c) Any party may challenge the authenticity or admissibility of a document for good cause shown, and if necessary may take discovery related solely to authenticity or admissibility of documents.

d) In general, the parties will not object to the admission of evidence on hearsay grounds unless there is a specific indication that the evidence is unreliable or untrustworthy. Documents produced by parties and third parties from their own files shall not be excluded solely on the ground that they are or contain hearsay. However, each party reserves the right to argue that particular exhibits or statements are too untrustworthy or too unreliable to have evidentiary value.

e) The parties need not designate portions of investigational hearings or depositions. Full transcripts of investigational hearings or depositions shall be admitted into evidence, except that to the extent a party cites testimony in support of a proposed finding of fact, the Court will assess any objections made on the record at the investigational hearing or deposition in determining whether to accept that proposed finding of fact.]

b. Plaintiff's Position. This case is an action under § 13(b) of the FTC Act, 15 U.S.C. § 53(b), to pause Defendants' proposed transaction while the FTC resolves in an administrative proceeding whether the transaction violates § 7 of the Clayton Act, 15 U.S.C. § 18. The key inquiry for the Court is the FTC's likelihood of success in the underlying administrative proceeding, with an evidentiary hearing scheduled to begin June 26, 2024.

Transcripts of sworn investigational hearings—including testimony of Defendants' employees during which Defendants' counsel was present—in addition to ordinary course documents from the merging parties' and industry participants' files produced during the FTC's investigation are typically admissible in FTC administrative proceedings. To accurately assess the FTC's likelihood of success in the administrative proceeding, the Court thus should consider this full panoply of evidence in reaching its own conclusions. The Court should likewise reject any argument of Defendants that these materials should be excluded under a rigid application of the Federal Rules of Evidence. The issue is ripe for resolution because it will significantly affect the course of discovery and hearing preparation.

This Court has an important but narrow role in a § 13(b) preliminary injunction proceeding. "The district court is not authorized to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in FTC in the first instance." *FTC v. Food Town Stores, Inc*., 539 F.2d 1339, 1342 (4th Cir. 1976) (Winter, J.); *see also FTC v. H.J. Heinz Co*., 246 F.3d 708, 714 (D.C. Cir. 2001) (quoting *Food Town Stores*, 539 F.2d at 1342). Rather, the purpose of this Court's inquiry is simply to determine whether "to preserve the status quo and allow the FTC to adjudicate the anticompetitive effects of the proposed merger." *FTC v. Penn State Hershey Med. Ctr*., 838 F.3d 327, 352 (3d Cir. 2016).

The key factor in determining whether to pause a merger under § 13(b) is the FTC's likelihood of success in the underlying administrative proceeding. *E.g., Food Town Stores*, 539 F.2d at 1343-44. To evaluate the FTC's likelihood of success, this Court should consider the likelihood that "after an administrative hearing on the merits, the Commission will succeed in proving that the effect of the [proposed] merger 'may be substantially to lessen competition, or to tend to create a monopoly' in violation of section 7 of the Clayton Act." *H.J.*

Heinz Co., 246 F.3d at 714 (quoting 15 U.S.C. § 18). This Court need not arrive at a final determination of whether Defendants' transaction is illegal, but rather must "make only a preliminary assessment of the merger's impact on competition." *FTC v. Warner Commc'ns Inc*., 742 F.2d 1156, 1162 (9th Cir. 1984) (citing *Food Town Stores*, 539 F.2d at 1344). "[P]recedents irrefutably teach that in the § 13(b) context 'likelihood of success on the merits' has a less substantial meaning than in other preliminary injunction cases." *FTC v. CCC Holdings Inc*., 605 F. Supp. 2d 26, 36 n.11 (D.D.C. 2009); *accord In re Sanctuary Belize Litig*., 409 F. Supp. 3d 380, 396 (D. Md. 2019), *aff'd sub nom. FTC v. Pukke*, 795 F. App'x 184 (4th Cir. 2020) (per curiam) (FTC demonstrates likelihood of success under § 13(b) if it establishes "fair and tenable chance of ultimate success on the merits").

Against this procedural background, the Court should consider hearing transcripts as well as Defendants' and nonparties' ordinary-course documents gathered during the FTC's pre-suit investigation when determining whether to grant a preliminary injunction. Defendants have suggested that such materials may be excludable as hearsay under the Federal Rules of Evidence. However, even outside of the § 13(b) context, the Court may consider hearsay in a preliminary injunction hearing. *E.g., Lance Mfg., LLC v. Voortman Cookies Ltd*., 617 F. Supp.2d 424, 428 n.1 (W.D.N.C. 2009). In determining whether to admit hearsay, the Court should evaluate whether allowing this type of evidence is "'appropriate given the character and objectives of the injunctive proceeding.'" *Am. Angus Ass'n v. Sysco Corp*., 829 F. Supp. 807, 816 (W.D.N.C. 1992) (quoting *Fed. Savings & Loan Ins. Corp. v. Dixon*, 835 F.2d 554, 558 (5th Cir. 1987)), *reconsideration granted in part on other grounds*, 1993 WL 368989 (W.D.N.C. June 11, 1993).

In the pending administrative proceeding, investigational hearing transcripts are generally admissible. 16 C.F.R. § 3.43(b). Similarly, documents from Defendants' files are presumed authentic (16 C.F.R. § 3.43(d)(3)) and more generally documents "shall not be excluded solely on the ground that [it is] or contain[s] hearsay." 16 C.F.R. § 3.43(b).[1] Given that the character and objective of the hearing before this Court is to determine the FTC's likelihood of success in the administrative proceeding, *see Am. Angus Ass'n*, 829 F. Supp. at 816, excluding these categories of evidence that may be received in the administrative proceeding would subvert this Court's ability to properly gauge, and prejudice the FTC's ability to substantiate, the FTC's likelihood of success in that proceeding. For this reason, courts considering a request for a preliminary injunction under § 13(b) of the FTC Act routinely consider such materials in evaluating the FTC's likelihood of success. *See, e.g., FTC v. Microsoft Corp*., No. 23-CV-02880-JSC, 2023 WL 4443412, at *3 (N.D. Cal. July 10, 2023); *FTC v. Sysco Corp*., 113 F. Supp. 3d 1, 27 (D.D.C. 2015); *FTC v. ProMedica Health Sys., Inc*., No. 3:11 CV 47, 2011 WL 1219281, at *29-33 (N.D. Ohio Mar. 29, 2011).

Finally, the issue of admissibility of investigational hearing transcripts and ordinary-course documents produced during the FTC's pre-suit investigation is ripe for the Court's determination because it bears on the course of discovery and case management in this action. Whether these materials will be admissible will affect the length, number, and course of questioning in depositions. Further, the Court's determination on this issue will affect which individuals are contemplated as witnesses and the contents of exhibit lists. Given that the FTC's initial brief will be filed on March 6, 2024, the admissibility of these materials will significantly

[1] 16 C.F.R. § 3.43(c) also provides a streamlined process for establishing authenticity of third-party business records.

affect the evidence the FTC may cite for the Court as the most relevant evidence in support of its request for a preliminary injunction.

c. Defendants' Position. Defendants respectfully submit that the Court need not make any ruling at this time about the admissibility of evidence and, further, that any such ruling would be prejudicial to Defendants.

The FTC devotes nearly two pages of its position statement to prematurely brief the Court on its views of the applicable legal standard. Defendants will address that in their Memorandum in Opposition to Preliminary Injunction, in accordance with the Court's briefing schedule. ECF No. 27. One contention, however, deserves clarification now: the Court's role here is anything but "narrow." *Supra* pg. 32. This Court's decision at the April 29 hearing will determine the fate of this merger, just as it has in nearly every other litigated FTC preliminary injunction proceeding in recent history. As courts routinely recognize, the issuance of a preliminary injunction blocking a merger is "an extraordinary and drastic remedy" because the FTC's administrative process exceeds the "life span" of most transactions. *FTC v. Microsoft Corporation*, ___ F.Supp.3d ___, 2023 WL 4443412 (N.D. Cal. Jul. 10, 2023) (quoting FTC v. Exxon Corp., 636 F.2d 1336, 1343 (D.C. Cir. 1980)); *see also FTC v. Foster,* 2007 WL 1793441, at *51 (D.N.M. May 29, 2007) ("No substantial business transaction could ever survive the glacial pace of an FTC administrative proceeding."). Indeed, this transaction already has been on hold for nearly a year, pending the FTC's pre-suit investigation and this proceeding—the parties cannot wait for a multi-year administrative process. That is exactly why the FTC seeks, through evidentiary maneuvers such as these, to lower the "substantial burden" it faces at the April 29 hearing. *FTC v. Great Lakes Chem. Corp*., 528 F. Supp. 84, 86 (N.D. Ill. 1981) (recognizing FTC's "substantial burden" in a preliminary injunction hearing because "the grant

of a temporary injunction in a Government antitrust suit is likely to spell the doom of an agreed merger") (*quoting Mo. Portland Cement Co. v. Cargill, Inc*., 498 F.2d 851, 870 (2d Cir. 1974)); *accord Foster*, 2007 WL 1793441, at *51 ("If Congress did not want federal courts to play some meaningful role in the injunction process, it could have given injunctive power directly to the FTC. Congress did not structure the process that way."). This Court's decision should be made on a full and fair evidentiary record.

The particular issue on which the FTC seeks a ruling on now—i.e., whether it can rely on the one-sided testimony it already has secured instead of presenting that evidence in a manner that comports with the Rules of Evidence—is significantly premature for resolution by the Court. Evidentiary issues are best dealt with in the context of the presentment of particular evidence, not creating a new set of rules in a CMO. And such a presumption would be particularly prejudicial where, as here, the FTC seeks to rely on transcripts from investigational hearings that Defendants were not allowed even to attend, let alone ask questions, such that the transcripts would fairly present both parties' positions. It also would result in significantly more third-party discovery (not less). Defendants would have no choice but to depose, at least, each of the fifteen third-parties that provided testimony so that the prior *ex parte* testimony the FTC now seeks to admit as evidence is put in the proper context. Without such a presumption, the FTC would identify only those witnesses on whose testimony it actually intends to rely at the hearing, so the parties can focus their discovery efforts accordingly.

Defendants expect that evidence admissibility issues will be ripe for decision at the appropriate time, once the parties have completed discovery, and are presenting evidence to the Court in their briefs and at the preliminary injunction hearing. If the Court nevertheless intends to rule on these evidentiary questions at this time, Defendants respectfully request that

the Court adhere to the Rules of Evidence and the Court's standard pretrial order regarding the designation of deposition testimony (sections V.E.3 and V.H), and not allow the FTC to rely on otherwise inadmissible testimony.

F. Use of Declarations, Letters of Support, or Affidavits

a. Joint Submission: The parties disagree on whether the following provision should be included in this Case Management Order. Plaintiff has proposed the following language in the Case Management Order, which Defendants object to including:

> [**Plaintiff's Position**: Limitations on Declarations or Letters. No declarations, letters of support, or affidavits, other than declarations relating solely to authenticity and admissibility of documents, will be admitted unless a fair opportunity was available to depose the signatory subsequent to serving the declaration, letter of support, or affidavit on the other side, unless otherwise agreed by the parties. No party may submit as evidence a declaration, letter of support, or affidavit from a party or third-party signatory if such declaration, letter of support, or affidavit was executed or served less than four (4) business days prior to his or her agreed-to deposition date. In any event, no party or third-party declaration, letters of support, or affidavit may be submitted as evidence if it was executed or served less than fourteen (14) calendar days before the close of fact discovery.]

b. Plaintiff's Position. By including timelines for the submission of declarations, letters of support, or affidavits other than those relating to authenticity or

admissibility of documents, the FTC seeks only to ensure the orderly conduct of this action. It is the experience of counsel that defendants in merger cases often promote substantial letter writing campaigns in support of their transactions. The FTC merely proposes that, to the extent Defendants seek to admit such materials or other out-of-court statements in support of their transaction, that those statements be provided to the FTC in time to allow for any necessary related discovery.

c. Defendants' Position. Defendants object to this provision as unnecessary. The existing provisions in the CMO on the close of fact discovery and briefing deadlines already serve as timing limits on declarations and letters of support. It is not necessary to further limit Defendants who already are facing an extremely compressed timeline. To the extent the FTC's proposal addresses admissibility of declarations and letters of support, it appears to be in tension with the FTC's position elsewhere that such out-of-court statements should be admitted wholesale. As articulated above, Defendants believe it is premature to address these evidentiary issues now.

Defendants further object to this provision as unduly prejudicial. Under the FTC's proposal, the deadline for any declarations or letters of support is February 20—less than two weeks from now. That is far too soon for Defendants who, as noted above, have not had the benefit of the FTC's ability to engage with third parties for over a year. This proposal seems intended only to prevent Defendants from having sufficient time to develop support from potential third-party witnesses. Defendants are confident that the proposed transaction here will not only cause no harm to competition, but—more importantly—will improve the quality of care at two otherwise declining hospitals and enhance the intense competition between health systems in the Charlotte area, resulting in procompetitive effects for payors, patients, and the community.

Indeed, the proposed transaction already has garnered significant community support. The FTC's proposed deadline would hamper Defendants' ability to demonstrate that to the Court.

G. Whether The Court Should Limit The Number of Motions *In Limine* That May Be Filed By Either Party

a. Joint Submission: The parties disagree on whether there should be limits on the number of motions *in limine* that they may file. Plaintiff has proposed the following green highlighted language in the Case Management Order, which Defendants object to including (Defendants otherwise agree with the remaining language):

> [**Plaintiff's Position**: No side shall serve more than three (3) motions *in limine*, including any *Daubert* motions.] Any motions *in limine*, including any *Daubert* motions, shall be filed by April 19, 2024. Responses to motions *in limine* shall be filed by April 23, 2024. [**Plaintiff's Position**: Each motion *in limine*, including Daubert motions and any response to a motion *in limine*, shall not exceed 5 pages.]

b. Plaintiff's Position. The FTC seeks reasonable limits on both the number and scope of motions *in limine*. Given that this is a preliminary injunction hearing with no jury, the Court is best positioned to assign evidence the weight it deserves. Reasonable limits on motions practice will permit this matter to proceed both efficiently and quickly, while allowing each side sufficient opportunity to brief a limited number of significant evidentiary disputes.

c. Defendants' Position. The FTC's proposed limitations as to the number and length of motions in limine—including Daubert motions, in a matter where each side may serve reports from up to three experts—are premature. Defendants do not yet know what evidence Plaintiff intends to present to the Court and which, if any, motions in limine will be

necessary. And these provisions are particularly unnecessary because the parties already have agreed upon conservative deadlines for filing and responding to motions in limine.

This order has been entered after consultation with the parties. Absent good cause shown, the deadlines set by this order will not be modified or extended.

IT IS SO ORDERED, this _____ day of _____, 20_____.

Dated: February 8, 2024

/s/ Nathan Brenner
Nathan Brenner (Illinois Bar No. 6317564)
Federal Trade Commission
600 Pennsylvania Avenue
Washington, DC 20580
Tel.: (202) 326-2314
Email: nbrenner@ftc.gov
Counsel for Plaintiff Federal Trade Commission

/s/ Heidi K. Hubbard
Heidi K. Hubbard (admitted *pro hac vice)*
Williams & Connolly LLP
680 Maine Avenue, SW
Washington, DC 20024
Tel.: (202) 434-5451
Email: hhubbard@wc.com

Brian S. Cromwell (N.C. Bar No. 23488)
Caroline B. Barrineau (N.C. Bar No. 51571)
Parker Poe Adams & Bernstein LLP
Bank of America Tower
620 S. Tryon Street, Suite 800
Charlotte, NC 28202
Tel: (704) 372-9000
Fax: (704) 334-4706
Email: briancromwell@parkerpoe.com
Email: carolinebarrineau@parkerpoe.com

Counsel for Defendant Novant Health, Inc.

/s/ Michael J. Perry
Michael J. Perry (admitted *pro hac vice*)
Jamie E. France (pro hac vice forthcoming)
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
Tel: (202) 887-3558

Email: mjperry@gibsondunn.com
Email: jfrance@gibsondunn.com

Adam K. Doerr (N.C. Bar No. 37807)
Kevin R. Crandall (N.C. Bar No. 50643)
Robinson, Bradshaw & Hinson, P.A.
101 N. Tryon St. #1900
Charlotte, North Carolina 28246
Tel: (704) 377-8114
Email: adoerr@robinsonbradshaw.com
Email: kcrandall@robinsonbradshaw.com

Counsel for Defendant Community Health Systems, Inc.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served on the below persons on February 8, 2024, via e-mail and/or CM/ECF at the following addresses:

Heidi K. Hubbard
Williams & Connolly LLP
680 Maine Avenue, SW
Washington, DC 20024
Tel.: (202) 434-5451
Email: hhubbard@wc.com

Brian S. Cromwell
Caroline B. Barrineau
Parker Poe Adams & Bernstein LLP
Bank of America Tower
620 S. Tryon Street, Suite 800
Charlotte, NC 28202
Tel: (704) 372-9000
Fax: (704) 334-4706
Email: briancromwell@parkerpoe.com
Email: carolinebarrineau@parkerpoe.com

Counsel for Defendant Novant Health, Inc.

Michael J. Perry
Jamie E. France
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
Tel: (202) 887-3558
Email: mjperry@gibsondunn.com
Email: jfrance@gibsondunn.com

Adam K. Doerr
Kevin R. Crandall
Robinson, Bradshaw & Hinson, P.A.
101 N. Tryon St. #1900
Charlotte, North Carolina 28246
Tel: (704) 377-8114
Email: adoerr@robinsonbradshaw.com
Email: kcrandall@robinsonbradshaw.com

Counsel for Defendant Community Health Systems, Inc.

/s/ Nathan Brenner
Nathan Brenner (Illinois Bar No. 6317564)
Federal Trade Commission
600 Pennsylvania Avenue
Washington, DC 20580
Tel.: (202) 326-2314
Email: nbrenner@ftc.gov
Counsel for Plaintiff Federal Trade Commission