June 22, 2026

Re: *United States v. The New York and Presbyterian Hospital*, No. 26 Civ. 02480 (S.D.N.Y.)
Initial Pretrial Conference

Dear Judge Engelmayer:

Plaintiff United States of America ("United States" or "Plaintiff") and Defendant The New York and Presbyterian Hospital ("NYP" or "Defendant") (collectively, the "Parties") respectfully submit this joint letter, pursuant to your Individual Rule 2.D.1, ahead of the Initial Case Management Conference scheduled for June 25, 2026 at 11:00 a.m. (ECF 24).

1. Description of the Case

United States's Description. The United States brings this antitrust action to enjoin anticompetitive provisions in Defendant's contracts with commercial health insurers. Although the specific language varies from contract to contract, these provisions principally require insurers to include Defendant, at the most-favorable benefit level, in each of the health plan networks that the insurers sell to New York employers and individuals. Defendant's contract provisions harm hospital competition by restricting insurers from offering to New York healthcare consumers budget-conscious health plans and health plan features that provide incentives to choose less-expensive hospitals than Defendant's hospitals. Without Defendant's restrictions, New York healthcare consumers would have greater freedom to choose health plans that do not include all hospitals in the New York City area, or plans with different levels of benefits at different hospitals, like plans offered to consumers elsewhere around the country. Employers and unions who offer health insurance to their employees and members have shown interest in such plans. As Defendant acknowledges, it operates one of the country's pre-eminent hospitals systems, making it necessary for insurers to include Defendant's hospitals in at least some of its provider networks to competitively sell to New York consumers. Defendant leverages this market power in insurer negotiations to prevent insurers from creating budget-conscious plans for New York consumers.

Defendant has negotiated high hospital prices with insurers. In a market undistorted by Defendant's restrictions, consumers of hospital services could choose whether to pay more for care at Defendant's facilities or choose less expensive, high-quality care elsewhere. Not so with Defendant's anticompetitive restrictions. The restrictions do not allow the opportunity for incentives for consumers to choose money-saving alternatives. As a result, the restrictions insulate Defendant's high prices from competition from high-quality, lower-priced hospitals. This distorts the basic competitive process that would otherwise allow competitor hospitals to win more business through low prices. This lessening of hospital competition harms consumers of hospital care, resulting in higher prices than there would be without Defendant's contractual restrictions.

On March 26, 2026, Plaintiff filed a complaint asserting a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, and requesting injunctive relief to prohibit Defendant from enforcing these allegedly unlawful contract restrictions and engaging in similar contracting practices in the future.

Defendant's case description is full of fact-bound claims that either will be disproven at trial or have no bearing on the illegality of Defendant's anticompetitive contract provisions. On the law,

Defendant misleadingly quotes from Supreme Court case law that *actually* says: "there is nothing inherently anticompetitive about **Amex's** antisteering provisions." *Ohio v. American Express Co.*, 585 U.S. 529, 551 (2018) (emphasis added). In any event, Defendant's contract provisions do not receive a free pass from scrutiny. They are subject to the rule of reason. "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007). The relevant markets in this case–inpatient hospital services–are not the type of credit-card two-sided platforms at issue in *Amex*.

NYP's Case Description. As the Supreme Court stated, "there is nothing inherently anticompetitive about … anti-steering provisions." *Ohio v. American Express Co.*, 585 U.S. 529 (2018).[1] This case must be evaluated against that backdrop.

NYP is one of the country's pre-eminent hospital systems, providing cutting-edge treatment through its flagship Columbia and Weill Cornell hospitals, and is one of nearly 200 hospitals in the tri-state region, including about 70 hospitals in the city alone. It operates in the 11th *least* concentrated hospital market in the country and accounts for less than 1% share of insurers' healthcare spend. NYP must negotiate with insurers to be included in their networks, and insurers regularly threaten exclusion – a credible threat that they have used to create the very plans the DOJ says NYP's contracts foreclose. NYP negotiated network placement provisions based on the incremental volume at issue, offering rate ***concessions*** consistent with pro-competitive principles of *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008), and *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc*., 920 F. Supp. 455 (S.D.N.Y. 1996).

The DOJ does not allege otherwise, conceding that five major insurers "***dominate***" the commercial health insurance market but arguing the provisions are facially anticompetitive anyway. To steer patients to their preferred providers, insurers employ a panoply of interrelated incentives and penalties (styled as "plan benefits"), and they use the threat of steerage to extract discounts based on network design. That reflects *insurer power*, not *provider power*. Indeed, the DOJ previously admitted that the ***same*** "All Products" clause it challenges here is ***actually*** a tool insurers use to exercise monopsony power, "depress[ing] reimbursement rates" below competitive levels and "leading to a ***reduction*** in quantity and a ***degradation in quality***." *See U.S. v. Aetna*, 99-cv-1398, ECF 1, ¶¶ 32-33 (N.D. Tex.).

The All Products clause is the antithesis of a restraint; it is ancillary to the rate negotiations insurers insist upon. Their effect is to create "Open Access Networks" that give patients *choice* and *maximize* price competition among providers. It grants no exclusivity or preferential treatment; it simply prevents discrimination against NYP and penalization of patients. The DOJ does not contend otherwise, and has not alleged – and cannot show – that any provider was excluded from the market, prevented from entering, or deprived of scale economies. The DOJ also claims – inaccurately – that insurers are proscribed from incentivizing low-cost facilities. Insurers

[1] The DOJ argues that because *Amex* evaluated a different two-sided market than present here, its holding is not instructive and NYP's omission of the party name "Amex" is misleading. That is not how the law works. The anti-steering provisions in *Amex* – focused on anti-steering provisions in the two-sided market of merchants and cardholders – are indistinguishable from contract provisions here.

are free to have coinsurance provisions in their plans, or use price transparency efforts that would give patients insight into the relative cost of different providers.

Instead, the DOJ seeks to create by judicial decree a world in which competing providers ***pay*** insurers to exclude NYP from their networks, with NYP being unable to offer even a penny discount in its own defense, all while it conflates cost savings to *patients* with cost savings to *insurers and self-funded plans* under the vague threat of costs to the "healthcare consumer." The DOJ believes this would lead to more Restricted Choice Networks – networks that *penalize* patients for using *their* preferred providers. The DOJ sees this as a good thing. It would benefit *insurers* who supposedly may (or may not) pass some savings to employers who may (or may not) decide to raise employees' salaries.[2] But it is unrealistic, addressing competition in an unalleged downstream health insurance market, and does not justify judicial interference with the free market contracting choices of NYP, other providers, and the insurers themselves. The free market should prevail.

2. Contemplated motions

One letter motion – concerning the Parties' respective proposals for entry of a protective order – is pending. *See* ECF 20, 24. Beyond that, the Parties are continuing to work through various discovery issues. At this time, the Parties do not know what, if any, motion practice relating to party or non-party discovery will be required. Plaintiff is contemplating two discovery motions. The Parties have not yet reached an impasse on the issues as the meet-and-confer process is ongoing.

3. Prospect for settlement

The Parties have engaged in a couple of settlement discussions. After the complaint was filed, the Parties discussed settlement by videoconference on May 14 and in-person on June 3.

Respectfully submitted,

FOR PLAINTIFF

By: s/ Paul Torzilli
PAUL J. TORZILLI
KARL D. KNUTSEN
JESSICA HOLLIS

FOR DEFENDANT

By: *s/* Colin Kass
Colin Kass
Vinay Kohli

cc: All counsel of record (via ECF)

[2] Since the DOJ bears the burden of proof, its argument that NYP's case is description "full of fact-bound claims" has no merit. A case description is not limited to the plaintiffs' allegations.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. THE NEW YORK AND PRESBYTERIAN HOSPITAL, Defendant.	1:26-cv-2480 Hon. Paul A. Engelmayer, USDJ Hon. Ona T. Wang, USMJ

CIVIL CASE MANAGEMENT PLAN AND SCHEDULING ORDER

This Civil Case Management Plan (the "Plan") is submitted by the parties in accordance with Fed. R. Civ. P. 26(f)(3). The parties' proposed schedules are contained in Exhibit A.

1. The parties do not consent to conducting all further proceedings before a Magistrate Judge, including motions and trial. 28 U.S.C. § 636(c).

2. This case is not to be tried to a jury.

3. Amended pleadings may not be filed and additional parties may not be joined except with leave of the Court. Absent good cause, any motion to amend or to join additional parties shall be filed within 30 days of this Order.

4. Initial disclosures, pursuant to Fed. R. Civ. P. 26(a)(1), shall be served no later than five (5) business days from the date of this Order.

5. Fact Discovery[1] shall be completed no later than May 14, 2027.[2]

6. The parties are to conduct discovery in accordance with the Federal Rules of Civil Procedure and the Local Rules of the Southern District of New York, except as modified herein or by further order of the Court. All interim Fact Discovery deadlines, as set forth below, may be extended by written consent of the parties without application to the Court, provided that all Fact Discovery[3] is completed by the date set forth in paragraph 5 above.

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[1] Plaintiff proposes inserting the following language after "Fact Discovery": ", other than Newly Disclosed Witness Discovery,"

[2] Plaintiff proposes an additional fact discovery period for Newly Disclosed Witness Discovery. The parties' positions regarding that proposal are discussed below.

[3] Plaintiff proposes inserting the following language after "Fact Discovery": ", other than Newly Disclosed Witness Discovery,".

a. Initial requests for production of documents have been served. All requests for production of documents to be served no later than March 19, 2027.

b. Interrogatories to be served no later than March 19, 2027.

c. Depositions to be completed by May 14, 2027.

d. Requests to Admit to be served no later than March 19, 2027.

7. All Expert Discovery shall be completed no later than [United States's Proposal: October 22, 2027] [NYP's Proposal: October 15, 2027]. Expert discovery shall proceed as set forth below.

8. All motions and applications shall be governed by the Court's Individual Rules and Practices, including the requirement of a pre-motion conference before summary judgment is filed. Pursuant to the authority of Fed. R. Civ. P. 16(c)(2), any motion for summary judgment will be deemed untimely unless a request for a pre-motion conference relating thereto is made in writing within fourteen (14) days following the close of Expert Discovery.

9. All counsel must meet face-to-face for at least one hour to discuss settlement within fourteen (14) days following the close of Fact Discovery.

10. a. Counsel for the parties have had preliminary settlement discussions, but have not reached any agreement as of the submission of this Plan. The parties believe that no informal exchange of information is needed for the parties to have productive settlement discussions.

b. Counsel for the parties have discussed the use of the following alternative dispute resolution mechanisms for use in this case: (i) a settlement conference before a Magistrate Judge; (ii) participation in the District's Mediation Program; and/or (iii) retention of a privately retained mediator.

c. Counsel for the parties recommend that they revisit whether the dispute resolution mechanisms designated in paragraph 10(b) be employed after the close of Expert Discovery.

d. The use of any alternative dispute resolution mechanism does not stay or modify any date in this Order.

11. ***The Final Pretrial Order***. The Parties dispute the timing and content of the Final Pretrial Order.

Plaintiff's Position. Plaintiff recommends that the Court adopt its standard procedures for the Final Pretrial Order as found at Paragraph 11 of the Court's model Case Management Plan and Section 5 of the Court's Individual Rules and Practices in Civil Cases, with limited adaptations. This includes filing the Joint

Pretrial Order thirty (30) days after expert discovery closes.[4] Defendant proposes to add *four months* between the conclusion of discovery and pretrial submissions for no good reason. Plaintiff's case involves *ongoing harm to New York consumers* of healthcare and should be tried promptly. Moving the case quickly to trial adheres to Congress's intent that courts "proceed, as soon as may be, to the hearing and determination of the case." 15 U.S.C. § 4.

Defendant's Position. The DOJ asserts that NYP seeks to "add four months." But that is untrue. NYP's overall schedule is no longer than, and potentially shorter than, the DOJ's schedule.

The dispute over the timing of the Final Pre-Trial Order simply concerns whether certain activities – like the exchange of witness lists, trial exhibits, and deposition designations – should occur before or after the pre-trial order. NYP believes it should occur first, so the parties have time to meet and confer, raise objections, and incorporate such evidence in their pre-trial submissions, including the pre-trial.

The DOJ's proposal does not work. Under the DOJ's proposal, the exchange of trial exhibits, deposition designations, pre-trial briefs, conclusions of law, and findings of fact would all be due the same day, and just 30 days after the close of expert discovery. That is not a realistic timeline.

Indeed, the DOJ, in a footnote, recognizes that its proposal is unworkable. The DOJ now suggests that the exchange of trial exhibits and witness lists should occur a month before the Final Pre-Trial Order. Aside from the fact that would make such exchanges due the same day expert discovery closes, it does not build in an adequate time to serve objections, meet and confer over such objections, or to incorporate such materials into the parties' other pre-trial submissions.

Nor is there merit to the DOJ's argument that there is a need for a rush to judgment. These provisions have been in place for 20 years. Before the Court restructures the entire healthcare contracting landscape, it should have the benefit of a well-developed record. In any event, as noted at the outset, NYP's proposed schedule is as quick, if not quicker, than the DOJ's proposed schedule.

12. Counsel for the parties have conferred and agree that their present best estimate of length of the trial is eighteen (18) court days.

[4] Plaintiff proposes requiring the parties to exchange trial exhibits and opening deposition designations twenty-eight (28) days before the Joint Pretrial Order date, and to exchange objections and deposition counter-designations fourteen (14) days before the Joint Pretrial Order date. This sequencing will provide adequate time for the parties to work together to prepare the Joint Pretrial Order. Plaintiff also proposes that the parties submit a proposed order regarding trial confidentiality as part of the Joint Pretrial Order.

13. Other Items

Pursuant to Fed. R. Civ. P. 26(f), the parties have met and conferred and have reached agreement about several additional discovery issues. The parties, however, also have several areas of disagreement, as described below. Since the disputed issues below impact certain interim discovery deadlines, the parties have prepared a side-by-side comparison of the proposed schedules attached as Exhibit A.

a. ***Newly Disclosed Witness Discovery (Disputed).***

Plaintiff's Position. A 30-day Newly Disclosed Witness Discovery period shall occur immediately after Fact Discovery closes. The Newly Disclosed Witness Discovery period is limited to discovery on any person appearing on an adverse party's Preliminary Fact Witness List (see item b below) who has not yet been deposed in this action.

Plaintiff requests this provision to avoid unfair prejudice from late disclosures of witnesses. The period for Newly Disclosed Witness Discovery will take place immediately following Fact Discovery and before Expert Discovery commences. (A 30-day period is reasonably required, rather than a shorter period, to enable the un-deposed person's documents to be produced, if the documents have not yet been produced.) Allowing this limited supplemental fact discovery enables parties' experts to address any factual information uncovered and protects against the need to reopen that Fact or Expert Discovery at a later time. Allowing time for fact discovery after the exchange of Preliminary Fact Witness Lists is common in complex antitrust litigations including in this District. *See e.g., United States v. Visa*, 1:24-cv-07214-JGK, ECF 100, § 8 (S.D.N.Y. Aug. 1, 2025) [hereinafter *Visa*] (ordering parties to exchange preliminary fact witness lists 3 months prior to close of fact discovery). There is no prejudice to Defendants who agree additional depositions are likely but argue they could be held during Defendant's proposed four-month period between the end of expert discovery and the Final Pretrial Order. Plaintiff submits that providing for limited additional discovery before expert reports is more efficient. Depositions taken in Newly Disclosed Witness Discovery would not count towards the deposition limit applicable to Fact Discovery.

Defendant's Position. NYP does not believe there is a need for supplemental fact discovery period. Effectively, the DOJ seeks to extend the fact discovery period to 12 months, with a requirement to provide a preliminary witness list during the midst of fact discovery. But, Rule 26(a) Initial Disclosures already require disclosure of potential witnesses. As such, we believe that, when fact discovery is done, it should be done.

NYP, however, is amenable to permitting any non-deposed witness who appears on an adverse party's witness list to be deposed before trial. Under NYP's proposal, that pre-trial witness list would be due *four* months before

the Joint Pre-Trial Order. That provides plenty of time to depose any witness that was not previously deposed. For that reason, there is no need to delay the overall schedule to address the hypothetical possibility of a surprise trial witness.

The DOJ's reliance on *Visa* is inapposite. *First*, it was a stipulated schedule, which does not suggest a court preference for bifurcated discovery. *Second*, the total fact discovery period in Visa was less than eight months. *Third*, and most importantly, the schedule did ***not*** provide for supplemental discovery after the close of the eight-month discovery window. That is, it simply imposed an obligation to preview trial witness mid-fact discovery. That is inappropriate here because most of the relevant evidence is in the hands of non-parties, making advance disclosures difficult.

b. ***Preliminary Fact Witness List (Partially Disputed).*** The parties agree that in preparing Preliminary Fact Witness Lists, the Parties must make a good-faith attempt to identify the fact witnesses whom they expect to present as live witnesses at trial (other than solely for impeachment). The parties disagree regarding the timing for exchanging Preliminary Fact Witness Lists. The parties' positions are as follows:

Plaintiff's Position. The parties must exchange Preliminary Fact Witness Lists thirty (30) days before Fact Discovery closes. Each party's Preliminary Fact Witness List must include the information prescribed by Fed. R. Civ. P. 26(a)(3)(A)(i). The parties must make a good-faith attempt to identify the fact witnesses whom they expect to present as live witnesses at trial (other than solely for impeachment). Fact witnesses on the parties' final Witness Lists are limited to the witnesses identified on the Preliminary Fact Witness List, absent party agreement or a showing of good cause.

It is necessary to disclose fact witnesses at this time to conduct the depositions of any witnesses not yet deposed in the action, and to obtain the person's documents if the documents have not yet been produced in discovery. The depositions should occur prior to the exchange of any initial expert reports so that experts can rely on the depositions in supporting their opinions. At the time of the Joint Pretrial Order submission, the parties will exchange final Witness Lists, which should comply with Fed. R. Civ. P. 26(a)(3)(A)(i).

Defendant's Position. Parties should exchange witness lists at the close of expert discovery. Once the theories of liability are crystalized through expert reports, identification of fact witnesses can be better tailored. And this will still leave four months between witness disclosure and trial, providing ample opportunity for additional depositions of hypothetical surprise witnesses.

c. ***Deposition Limits (Partially Disputed)***.

i) *Number of Depositions (Disputed)*. The parties agree that this case will require more than the 10 depositions per party specified in Fed. R. Civ. P. 30(a)(2)(A)(i), but disagree as to the number of depositions to be allowed. The parties' positions are as follows:

Plaintiff's Position. During Fact Discovery, each party is permitted to take up to thirty (30) depositions. Each deposition that a party notices counts as one deposition towards this limit, except that any third-party deposition that is cross noticed counts as 0.5 deposition for both the noticing party and the cross-noticing party.

Defendant has made its intent clear through its sixty-five (65) specification third-party document requests that it could pursue discovery relating to numerous local healthcare markets throughout the country. This out-of-market discovery will come entirely from third parties, as Defendant itself only operates hospitals in the New York metropolitan area. Plaintiff must allocate some of its depositions to party deponents. Defendant's proposal of twenty (20) depositions per party will be insufficient to enable Plaintiff to accomplish a reasonable number of party depositions, notice and cross-notice third parties in the New York area, and cross notice out-of-market depositions if such are noticed by Defendant. If Defendant's discovery is more limited, Plaintiff need not use all of its depositions.

Plaintiff does not believe Defendant's proposal to limit party depositions to ten (10) is proper. The Parties should be free to allocate their depositions between party and third-party witnesses as required by the needs of the case and there is no basis at this time for imposing limitations on party depositions. And Defendant's math is unrealistic. Assuming a realistic number of party depositions–twelve (12)–Plaintiff would have up to sixteen (16) third-party depositions it could cross notice. But Defendant could notice an additional twelve (12) depositions for which Plaintiff would be unable to cross notice.

Defendant's Position. NYP believes that each party should be limited to 20 depositions, with no more than 10 depositions of any party or non-party.

This should be sufficient given, as discussed below, the parties agree that any cross-noticed deposition only counts as a half deposition. That is, mathematically, under NYP's proposal, if all non-party depositions are cross-noticed (as they are likely to be), the DOJ

could take between 30 and 40 depositions, depending on how many NYP depositions it decides to take.

The DOJ argues that 20 depositions are insufficient for two reasons. First, it asserts that it may need a large (unspecified) number of NYP depositions. But it has already investigated NYP for over a year, and deposed the people it viewed as the key participants. Indeed, during the investigation, the DOJ *withdrew* 2 of its five requests for depositions because they were unnecessary. The reality is that just ***one*** person at NYP handled almost every aspect of payor contracting negotiations for last 20 years. This is not a case where the conduct is widespread across many locations, departments, and individuals. For that reason, the 10 deposition default rule under the Federal Rules of Civil Procedure should suffice to cover *just* NYP. If more are needed, of course, the DOJ is free to seek leave.

The DOJ's second reason that NYP is seeking evidence that the five dominant insurers use the *same* challenged provisions nationwide is no reason to extend the deposition limit. There are still just five major payors. With each deposition cross-noticed, the DOJ would be able to take between 20 and 30 non-party depositions. Again, if the DOJ finds itself butting up against the limit, it can certainly apply for more.

ii) *Extending Deposition Time (Agreed)*. The parties agree that, absent an agreement or court order, a deposition is presumptively limited to 7 hours in accordance with the Federal Rules. If one party believes it may need more than its allotted time, it must confer with the other party and if applicable, the third party, in a good-faith effort to reach agreement on the deposition's duration. If the parties, and if applicable the third party, cannot agree, the parties shall raise the issue with the court by letter motion in accordance with the Court's rules, and the deposition shall not go forward until the issue has been resolved.

iii) *Allotment of Time for Party Fact Depositions (Agreed)*. Noticing counsel may reserve time for rebuttal from its allotted 7 hours of time for any rebuttal examination. Counsel for the deponent may take reasonable and appropriate redirect examination of their own fact witnesses. On rebuttal, noticing counsel is not limited to topics covered by counsel for a party on redirect. Noticing counsel may utilize any time reserved out of its allotted 7 hours, even if opposing counsel declines to redirect their own witness.

iv) *Allotment of Time for Non-Party Fact Depositions (Partially Agreed)*. The parties agree that, if both parties notice or cross-notice a third-party witness, they shall split the examination time equally absent any agreement to the contrary or Court order. If a third-party's deposition is cross-noticed, each 3.5 hours of testimony shall count as a half deposition towards that party's

limit. If only one party notices a deposition, the entire deposition shall count towards the noticing party's deposition limit.

The parties disagree as to how much time a ***non-noticing*** party may use from the allotted seven hours if it elects not to serve a cross-notice.

Plaintiff's Position. For third-party depositions that are not cross-noticed, the non-cross-noticing side may use up to one hour of examination on the record.

As described above, Plaintiff must ensure it is adequately protected against Defendant's wide-ranging discovery. There will be depositions that Plaintiff cannot cross notice, because it must use some of its allocated deposition slots for party deponents. For depositions Plaintiff cannot cross notice, Plaintiff needs a minimum reasonable amount of time to develop deposition testimony for its case. Plaintiff believes one (1) hour of deposition time is a minimum reasonable time on the record. Thirty (30) minutes is not enough.

Defendant's Position. NYP believes that, if a party has elected not to cross-notice a witness, it should only be permitted to use .5 of an hour of the allotted time. The DOJ can certainly cross notice plenty of third-parties, and – as discussed above – if it needs relief from the limit, it can ask for it. But if it chooses not to cross-notice a witness, then it should not be permitted to eat up the valuable time NYP needs to examine the witness. Indeed, if the DOJ elects not to cross-notice a witness, it is likely that the DOJ either views the witness as unimportant or as a friendly witness hostile to NYP, and likely to show up at trial. It would be manifestly unfair to NYP to deprive it of a full opportunity to depose such witnesses.

v) *30(b)(6) Depositions (Agreed)*. Every 7 hours of 30(b)(6) deposition time shall count as a "deposition" for purposes of calculating deposition limits. The parties shall work in good faith to avoid the need to depose a witness in both a personal and representative capacity at separate times. If a witness is deposed in both a personal and representative capacity, each 7 hours of testimony shall count as one deposition, regardless of the capacity in which the testimony was provided.

vi) *Production of Documents Prior to Depositions (Disputed)*. The parties disagree on setting a deadline for the production of documents for any party witness in advance of their scheduled deposition.

Plaintiff's Position. In order to allow for appropriate time to fairly and adequately prepare for depositions, and to avoid future motions practice regarding productions, Plaintiff believes it is appropriate to add the following requirement to the Case Management Plan for this

action: For any deposition of a party (including any employee of Defendant), the custodial documents and privilege log entries (for all, or any part of, documents withheld on the basis of privilege) for the deponent must be produced to the deposing party at least seven (7) calendar days prior to the deposition, provided that the relevant document requests were served no less than sixty (60) days prior to the deposition date. Unless otherwise agreed by the parties, if any such documents or log entries are not produced seven (7) days prior to the deposition, the deposition may be held open for questioning on the untimely produced documents and entries. The noticing party may schedule the continued part of the deposition for any time after it receives the untimely produced documents and entries and any related topics, including up to fourteen (14) days after the conclusion of Fact Discovery or, if the deposition is being taken during Newly Disclosed Witness Discovery, fourteen (14) days after the conclusion of Newly Disclosed Witness Discovery. The deponent must complete the deposition by the date the noticing party scheduled for the deposition's completion unless the parties working in good faith and with transparency concerning the deponent's availability agree to another date.

Defendant's Position. NYP does not believe this is an appropriate provision for a CMO.

The production of documents will depend on when requests are received, and timing of depositions will depend on when notices are served. If there are disputes about the scope or timing of document production, the DOJ is free to raise such disputes, but it should not be able to use deposition notices – and threats of contempt under the CMO or threats of subjecting NYP to continuing "penalty" depositions – as leverage to resolve any such disputes.

When this issue was raised during the meet and confer, the DOJ responded by adding a "60-day" clock to their proposal. But such artificial deadlines do not solve the problem; they exacerbate it. It creates an untenable system of overlapping, competing deadlines that will inevitably create disputes, particularly if there are many individuals being deposed.

Similarly, the DOJ's demand – which they raised just a few days ago – that a witness *must* be provided on the schedule the noticing party sets is unnecessary, and the "good faith" escape clause just creates ambiguity. The CMO simply does not need to address this issue. The Federal Rules provide adequate mechanisms for addressing discovery disputes as they arise, and the Court should decline to impose this burdensome and one-sided requirement at this stage. The parties are expected to work cooperatively on deposition

scheduling. If a party believes that the other side is not living up to its obligation, that party can raise the issue with the Court.

d. ***Contention Interrogatories (Partially Disputed)***. The parties agree that the Court should order adaptations to Local Civil Rule 33.3(c) that governs contention interrogatories. The parties disagree on the timing of contention interrogatories and answers, and their supplementation.

Plaintiff's Position. A party may serve contention interrogatories no sooner than Friday January 8, 2027, with a deadline of forty-five (45) days to serve substantive responses based on the discovery available at the time of the answer with the right to supplement with additional information. The parties may supplement their answers at any time and may serve answers until thirty (30) days after Fact Discovery closes.

Defendant's position on supplementation is untenable as it seeks supplementation *before* the conclusion of fact discovery. Plaintiff expects that many party and third-party depositions, perhaps most of them, will not occur until the very end of fact discovery, and perhaps some of them on or near the last day of fact discovery. This prediction is informed by Defendant's delays in scheduling the few investigatory depositions that were conducted in this matter. Given the likelihood that substantial discovery is likely to be taken at the very end of fact discovery, Plaintiff proposes that completing answers by thirty (30) days after Fact Discovery.

Defendant's Position. The core dispute concerns the *earliest* date contention interrogatories can be served, and when the responding party must provide *preliminary* substantive answers. NYP believes that this date should be about six months into the fact discovery period, which would be after the bulk of document discovery from the parties and non-parties. NYP believes that the parties should further supplement their responses 30 days prior to the close of fact discovery, after most of the depositions have been completed. That will still leave 30 days for the propounding party to engage in any clean-up discovery. Nor does it *preclude* a party from further supplementing the response after the close of fact discovery if new information comes to light.

The DOJ's proposal essentially renders contention interrogatories useless. Under their proposal, a party can't serve contention interrogatories until near the end of fact discovery, and the responding party does not need to respond until 30 days before its end. That is not enough time to even confer over objections, let alone engage in discovery based on the content of the answers. The DOJ offers no good reason for delaying interrogatory responses. At most, they say they may not know enough to respond earlier. But the lack of knowledge about the grounds for their case is not a reason for failing to respond; they should respond with what they do know, and supplement their responses once they know more.

e. ***Third-party Written Discovery (Disputed)***. The parties disagree about the need for third-party document discovery protocols.

Plaintiff's Position. To enable efficient third-party document discovery while minimizing burden on third-parties to the extent feasible as required by Fed. R. Civ. P. 45(d)(1), Plaintiff proposes that the parties should abide by uniform procedures that guide their dealings with third parties in discovery. Plaintiff proposes the following procedures, which is standard in Antitrust Division cases, *see, e.g., United States v. Global Business Travel Group, et al.*, 1:25-cv-215-VM-GS, ECF 63, at 9–10 (S.D.N.Y. Mar. 4, 2025); *United States v. UnitedHealth Group, et al.*, 1:24-cv-3267-JKB, ECF 114, at 10–11 (D. Maryland Feb. 21, 2025).

Every discovery request to a third-party shall include a cover letter requesting that (a) the third-party Bates-stamp each document with a production number and any applicable confidentiality designation prior to producing it, and (b) 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 does not provide copies of productions to the other parties, the requesting party shall provide such copies to the other parties, in the format the productions were received by the requesting party, within three (3) business days of when the requesting party received such materials from the third-party. In addition, if a third-party produces documents or electronically stored information that are not Bates-stamped, the party receiving those materials shall request that the third-party Bates-stamp all documents or electronically stored information and produce such Bates-stamped copies to all parties simultaneously. Each party must provide the other parties with (i) a copy of any written communication (including email) with any third-party concerning any changes to the scope of the subpoena or the timing of the response no later than one (1) business day after the communication; and (ii) a written record of any oral or written modifications to the subpoena, no later than one (1) business day after the modification. For any discovery request made to a third-party in this litigation prior to entry of the Case Management Plan, the party that issued the discovery must within five (5) days of entry to the Plan inform all third parties to which it issued discovery of the terms of this provision.

This provision is intended to ensure the prompt receipt by the parties of relevant discovery material and transparency on the scope, return date, and modifications to any subpoenas, which helps coordination on discovery, prevents confusion by parties and third parties, and assists in minimizing the burden on third parties.

Defendant's Position. NYP is willing to discuss coordination of non-party discovery, but believes there is no need to alter the Federal Rules of Civil Procedure to address this. The DOJ's proposal contains many aspects that could delay discovery and could interfere with a party's ability to pursue

necessary non-party discovery. In particular, Plaintiff's proposal requiring parties to share written communications with third parties concerning "any changes to the scope of the subpoena or the timing of the response" within one business day, and to provide written records of oral modifications within one business day, threatens to hamper negotiations between parties and third parties about the scope and timing of compliance. Considering the parties have not encountered any concrete dispute about third party discovery coordination, this is premature. Moreover, the DOJ's proposal would apply even to non-parties to whom it is not seeking discovery. Requiring NYP to invite the DOJ into those discussions both impinges on NYP's work product and does not reduce or alleviate any burden on non-parties. Accordingly, the Court should wait until a specific need arises, or a concrete dispute is presented, before imposing additional protocols on non-party discovery.

f. ***Expert Discovery (Partially Disputed)***

i) *Expert Reports (Agreed)*. The parties agree that expert disclosure and discovery will be governed by Fed. R. Civ. P. 26(a)(2) and 26(b)(4) except as modified by order of the Court or agreed to by the parties. The parties agree to three rounds of simultaneously served expert reports, and that a party's initial report shall at least cover the issues for which it bears the burden of proof at trial. In Exhibit A, the parties have specified their recommended dates upon which to exchange opening reports. The parties agree to 45-day intervals between the opening and second rounds, and the second and final rounds.

ii) *Expert Depositions (Disputed)*: The parties dispute the timing and length of expert economist depositions.

Plaintiff's Position. The seven (7) hour limit on depositions, with all seven (7) hours reserved for the party noticing the expert's deposition, is adequate for the parties to obtain reasonable deposition discovery from experts. Defendant offers no justification for the Court to enter an order now—before expert reports have been served—for deviating from the rule. For this reason, Plaintiff recommends that the Court adopt the same Case Management provision that Judge Koetl ordered in *Visa*, that is: "Each expert will be deposed once, and each expert deposition will be limited to one day of seven (7) hours on the record. The parties will work in good faith regarding the timing of expert depositions." *Visa* at ¶ 14.i.[5]

[5] Because of the importance of party admissions and party fact witnesses to this case, if the Court is inclined to grant 14 hours of deposition testimony for experts, Plaintiff requests that the Case Management Plan permit Plaintiff fourteen (14) deposition hours for Defendant's chief contracting executive in his individual capacity.

Plaintiff recommends that expert discovery conclude thirty (30) days after the last report is served. Depositions of each party's experts will be conducted only after disclosure of all expert reports including all backup and supporting materials (such as the backup and supporting materials for the "statistical work" Defendant references) and all other materials required by the Federal Rules of Civil Procedure, or by order of the Court or agreement among the parties.

Defendant's Position. For non-economic experts, NYP agrees that the 7-hour presumptive limit suffices. But since expert economic testimony will be critical in this case, NYP believes that, for expert economists, the examining party should have at least 14 hours of examination time.

The DOJ appears to agree, in a footnote, that 14 hours for expert depositions may be appropriate, but only if the DOJ can depose the *one* NYP witness of significance for 14 hours. It is inappropriate to use a dispute about expert deposition length as leverage to seek additional time for a fact witness. Indeed, the DOJ has already deposed this witness for a full seven hours. And it will get one more such deposition as a matter of course. There is no need for a *third* day of deposition.

The DOJ alternatively argues that the parties should not address deposition length until after expert reports are served. But there will be no time to engage in motion practice over deposition length after the reports are exchanged, given the compressed schedule. Moreover, there is no *doubt* that expert reports in this case will be many hundreds of pages *each*. It would be prejudicial not to afford a reasonable time to allow an opposing party adequate time to examine the expert. These are paid experts whose job responsibilities include sitting for deposition, so it is no prejudice, burden, or undue imposition to sit for a second deposition day.

g. ***Privilege Log Limits*** ***(Agreed)***. Privilege logs shall comply with Fed. R. Civ. P. 26(b)(5) and L.R. Civ. P. 26.2. The following privileged documents, however, may be excluded from a party or third party's privilege log: (i) documents solely between outside counsel for a party or third party (or persons employed by or acting on behalf of such counsel); (ii) documents or communications solely between counsel for Plaintiff (or persons employed by or acting on behalf of the Executive Branch including any federal antitrust agencies); and (iii) documents or communications sent solely among inside counsel (acting in a purely legal capacity), or inside counsel (acting in a purely legal capacity) and outside counsel (or persons employed by or acting on behalf of counsel) for the defendant.

h. ***Non-preservation of Certain documents and ESI (Agreed).*** None of the Parties must preserve or produce in discovery the following categories of documents:

i) Documents or communications sent solely between outside counsel for Defendant (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);

ii) Documents authored by the Parties' outside counsel (or persons employed by or acting on behalf of such counsel) that were not directly or indirectly furnished to any third party, such as internal memoranda, or documents authored by counsel for the Plaintiff (or persons employed by or acting on behalf of the Plaintiff); and

iii) Temporary or cache files, including Internet history, web browser cache, and cookie files, wherever located.

i. ***Nationwide Service of Trial Subpoenas*** (***Disputed***).

Plaintiff's Position. Antitrust enforcement actions brought by the United States differ from other cases in that Congress specifically allows for nationwide service of process in such cases, including for trial subpoenas. 15 U.S.C. § 23. In cases such as this, courts routinely include a provision in their case management orders explicitly (1) authorizing nationwide service of process, and (2) clarifying that the availability of nationwide service does not otherwise impact the procedural and evidentiary rules. Plaintiff proposes the following standard provision, which is drawn from Judge Koetl's Case Management Plan in *Visa*:

To assist the parties in planning discovery, and in view of the geographic dispersion of potential witnesses in this action outside this District, the parties are permitted pursuant to 15 U.S.C. § 23, to issue nationwide discovery and trial subpoenas from 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 those rules or otherwise affect the admissibility at trial of a deposition of a witness.

Clarity on this issue allows for more efficient discovery. The provision does not modify the governing procedural or evidentiary rules but states established law that holds parties may rely on nationwide service of process to procure attendance at trial of witnesses beyond 100 miles from the court *or* may introduce deposition designations. These rules are not mutually exclusive and deposition testimony that is admissible under Fed. R. Civ. P. 32(a)(4)(B) or (D) that is not admissible under Fed. R. Evid. 804, or vice versa, may still be introduced at trial, so long as such testimony would be admissible if the witness were present and testifying.

Defendant's Position. The DOJ seeks to modify both the nationwide service of process statute and the Federal Rule of Evidence. While NYP may be willing to stipulate to certain exceptions on a case-by-case basis, NYP believes it is premature to address the issuance of trial subpoenas or to suspend the operation of Federal Rule of Evidence 804.

As an initial matter, 15 U.S.C. § 23 imposes a "cause shown" standard before authorizing nationwide service of process in civil cases. That inquiry ***must*** be made on a witness-by-witness basis. If "good cause" were presumed in every case – like it is in criminal cases – then the good cause requirement would be superfluous. As such, the Court should not – over an opposing party's objection – issue a blanket order for nationwide service.

Nor will good cause be present for every witness. There may be witnesses for whom the parties can stipulate will appear by deposition – and even without a stipulation, it may be that the deposition is sufficient, such that "good cause" does not exist for the issuance of a trial subpoena.

But if good cause does exist for issuance of a trial subpoena, then that witness is not "unavailable" under Federal Rule of Evidence 804(a), and thus, such witness would not be permitted to testify by deposition. In response, the DOJ asserts that it "does not [seek to] modify the governing procedure or evidentiary rules." But DOJ expressly asks for an exception to Rule 804, so it is seeking to modify the rules. The Court should decline the invitation, at least at this time.

RESPECTFULLY SUBMITTED,

Dated: June 22, 2026

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EXHIBIT A
PARTIES' PROPOSED SCHEDULES

Parties' Proposed Schedules		
Event	***United States's Proposal***	***NYP's Proposal***
Initial Disclosures Due	Five (5) business days following entry of Case Management Plan and Scheduling Order	Same
First Day to Serve Contention Interrogatories	Friday, January 8, 2027	November 8, 2026 (~ +6 months)
Responses to Initial Contention Interrogatories Due	Monday, February 22, 2027 (45 days after service)	December 23, 2026[6] (~ +45 days)
Last Day to Serve Document Requests, Interrogatories, and Requests for Admission	Friday, March 19, 2027	Same, March 19, 2027
Parties Exchange Preliminary Fact Witness Lists (United States's Proposal)	Wednesday, April 14, 2027 (30 days before Fact Discovery closes)	***See below***
Close of Fact Discovery	Friday, May 14, 2027	Same, May 14, 2027
Close of Newly Disclosed Witness Discovery (United States's Proposal)	Monday, June 14, 2027 (30 days after Fact Discovery closes)	None
First round of exports reports	Thursday, June 24, 2027 (10 days after Newly Disclosed Witness Discovery closes)[7]	June 1, 2027 (~ +2 weeks)
Pre-Motion Letters regarding Summary Judgment and Daubert Motions Due (United States's Proposal)	The date prescribed by the Court's rules.	***See Below***

[6] Responses to contention interrogatories shall comply with Fed. R. Civ. P. 33, except that prematurity shall not be a basis for refusing to answer. Parties shall supplement their responses, consistent with Fed. R. Civ. P. 26(e), by April 14, 2027.

[7] If the Court does not wish to include a Newly Disclosed Witness Discovery period, the Initial Expert Reports would be due Friday, June 11, 2027, twenty-eight (28) days after Fact Discovery concludes.

Parties' Proposed Schedules		
Event	***United States's Proposal***	***NYP's Proposal***
Second round of expert reports	Monday, August 9, 2027 (45 days after prior report is due)	July 16, 2027 (~ +45 days)
Third round of expert reports	Thursday, September 23, 2027 (45 days after prior report is due)	Aug. 30, 2027 (~ +45 days)
Close of Expert Discovery	Friday, October 22, 2027 (29 days after last expert report)	October 15, 2027 (~ +45 days)
Joint Pretrial Order Due (United States's Proposal)	Monday, November 22, 2027 (approx. one month after Expert Discovery closes).	***See below***
Pre-Motion Letters regarding Summary Judgment and *Daubert* Motions Due	The date prescribed by the Court's rules.	November 1, 2027 (~ + 2 weeks)
Parties Exchange Witness Lists, Trial Exhibits, and Deposition Designations	Included in Joint Pretrial Order	November 1, 2027
Objections to Trial Exhibits and Deposition Designations Due	Included in Joint Pretrial Order	January 3, 2028 (~ +60 days)
Joint Pretrial Order Due (NYP's Proposal)	***See above***	March 3, 2028 (~ +60 days)
Pre-Trial Briefs, Findings of Fact and Conclusions of Law, and Motions in Limine Due	Included in Joint Pretrial Order	March 3, 2028
Rebuttal Pre-Trial Briefs, Rebuttal Findings of Fact and Conclusions of Law, and Oppositions to Motions in Limine Due	Filings in Opposition submitted as prescribed by Court Rule 5.D.	April 17, 2028 (~ +45 days)
Final Pre-Trial Conference	To be determined by the Court	May 1, 2028 (~ +2 weeks)
Trial	Set at pre-trial conference	May 15, 2028 (~ +2 weeks)

TO BE COMPLETED BY THE COURT:

The Plan has been reviewed by the Court and, except as modified, is adopted as the Scheduling Order of this Court in accordance with Fed. R. Civ. P. 16(b).

14. [Other]

15. The next Case Management Conference is scheduled for _____ at _____

Unless otherwise indicated, the Case Management Conference will be held **telephonically**. The parties should call into the Court's dedicated conference line at **(888) 363-4749, and enter Access Code 468-4906, followed by the pound (#) key**.

Counsel are directed to review the Court's Emergency Individual Rules and Practices in Light of COVID-19, found at https://nysd.uscourts.gov/hon-paul-engelmayer, for the Court's procedures for telephonic conferences and for instructions for communicating with chambers. All conferences with the Court are scheduled for a specific time; there is no other matter scheduled for that time, and counsel are directed to appear promptly.

All pretrial conferences must be attended by the attorney who will serve as principal trial counsel. **Please email to EngelmayerNYSDChambers@nysd.uscourts.gov, no later than twenty-four hours before the conference**, the names of any counsel who wish to enter an appearance at the conference, and the number from which each counsel will call.

This ORDER may not be modified or the dates herein extended, except by further Order of this Court for good cause shown. Any application to modify or extend the dates herein (except as noted in paragraph 6) shall be made in a written application in accordance with paragraph 1.E of the Court's Individual Rules and Practices and shall be made no less than two (2) business days prior to the expiration of the date sought to be extended.

Paul A. Engelmayer
United States District Judge

Dated: New York, New York