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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 v.

26 Civ. 2480 (PAE)

6 NEW YORK PRESBYTERIAN
7 HOSPITAL,

8 Defendant.

Conference

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9 New York, N.Y.

10 June 25, 2026

11 11:05 a.m.

12 Before:

13 HON. PAUL A. ENGELMAYER,

14 District Judge

15 APPEARANCES

16 U.S. DEPARTMENT OF JUSTICE
17 ANTITRUST DIVISION

Attorneys for Plaintiff

18 BY: PAUL J. TORZILLI

JESSICA HOLLIS

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20 BY: COLIN R. KASS

MARK R. ROSMAN

21 DAVID A. MUNKITTRICK

22 RICHARD WESTLING

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1 (Case called)

2 THE DEPUTY CLERK: Counsel, starting at the front
3 table, please state your appearance for the record.

4 MR. TORZILLI: Good morning, your Honor.

5 Paul Torzilli, on behalf of the United States.

6 THE COURT: All right. Good morning.

7 MR. KNUTSEN: Karl Knutsen, also for the United
8 States.

9 THE COURT: Good morning.

10 MS. HOLLIS: Jessica Hollis, for the United States.

11 THE COURT: Good morning.

12 MR. JONES: Matthew Jones, for the United States.

13 THE COURT: All right. Good morning.

14 You may all be seated.

15 And for the defense.

16 MR. KASS: Good morning, your Honor.

17 Colin Kass for NYP.

18 THE COURT: Good morning.

19 MR. ROSMAN: Mark Rosman, for NYP.

20 THE COURT: Good morning.

21 MR. MUNKITTRICK: David Munkittrick, for NYP.

22 THE COURT: Good morning.

23 MR. WESTLING: And Richard Westling, for NYP, your
24 Honor.

25 THE COURT: Very good. Good morning.

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1 You may all be seated.

2 I take it, counsel, there are people in the audience
3 here who are in one way or the other affiliated with your legal
4 teams or clients?

5 MR. KASS: Most of them are; some of them are not.

6 THE COURT: Okay. With just a show of hands, who's
7 affiliated then with the defense table?

8 All right. Let me thank all of you for being here. I
9 don't know whether you are associates, summer associates, or
10 whatnot, but I very much appreciate the turnout. I'm going to
11 have some words to say in a moment about the quality of the
12 submissions I received, but I'll just say at the outset that
13 the work this good on both sides undoubtedly was done with the
14 assistance of junior people who aren't at the table on both
15 cases. And you have my thanks for the really top-quality work
16 that's been done by everybody in this case.

17 All right. Good morning, everyone.

18 I want to begin by welcoming counsel for both sides.
19 And I want to begin, as I said, with some compliments for you.

20 The submissions I have received from both sides have
21 been first-rate. I read with interest and admiration both the
22 complaint and the answer. They are both extremely well-done.
23 And I appreciate the parties' diametrically different
24 perspectives on the business practice at issue and how it
25 measures up under Sherman Act Section 1.

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1 Of particular relevance here, I want to thank counsel
2 for all the hard work and thoughtful work that went into
3 preparing for this conference. Together, you have given me a
4 carefully thought out case management plan. The parties agree
5 on a lot of aspects of it. The parties have not reached
6 agreement on others, which happens. But on the issues that
7 divide the parties, you've taken the trouble to set out with
8 clarity your respective positions. I really appreciate the way
9 you went about this. It is a model for how counsel should
10 approach an initial conference in a complex case.

11 I should add that when thoughtful and skilled counsel
12 come together and have reached agreement on points, and do so
13 based on their deep understanding of the demands of a
14 particular litigation, courts should approach those agreements
15 with a healthy degree of respect and deference; and I expect to
16 do so here on the points where there is consensus, such as the
17 fact discovery deadline and the intermediate dates on which you
18 have agreed.

19 Here's how I propose to proceed today: I intend to
20 focus the conference of helping you all get out of the gate
21 smoothly as you move into what is bound to be a lengthy and
22 complex discovery process. I will have some initial questions
23 for counsel about discovery and related matters. These are
24 largely nitty-gritty questions. But they will help me inform
25 myself about the case and potentially about the open issues in

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1 the case management plan.

2 I will then turn to those open issues. I don't expect
3 we will be able to resolve all of them today. Some are not
4 ripe yet; some may present differently as the case moves
5 forward; on some you may later reach agreement. And it may be
6 that it makes sense a couple of months from now to reconvene to
7 take up case management plan issues that can go unresolved
8 today. But I do hope to resolve today those issues as to which
9 a prompt resolution is apt to help you move smartly forward.

10 As your homework coming out of this conference, I will
11 ask you together to file a revised case management plan that
12 incorporates the decisions that are made today, while
13 identifying the open issues that will require later resolution.

14 The one thing I am pointedly not asking counsel today
15 to do is to argue the merits of the case. There will be a time
16 or times for that, and there has been a preview of that in the
17 complaint and the answer, which, again, I valued. But today is
18 not that time. I intend instead for this to be an
19 under-the-hood working conference to get the pillars of a smart
20 case management plan in place.

21 Before we turn to that – this is really switching
22 gears – I have a disclosure to make, which I do not believe
23 impairs the propriety of my presiding over this action, which,
24 of course, is for forward-looking injunctive relief as to
25 contracts with commercial insurers, and not for money damages

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1 by patients or insureds. But I make it in the interests of
2 transparency so that you can reach your own judgment.

3 Here goes: I am a lifelong New Yorker. My family and
4 I have had medical treatment at Weill Cornell. My kids were
5 born there many years ago. At least two doctors I regularly
6 see, my general practitioner and my eye doctor, are affiliated
7 with Weill Cornell.

8 Insofar as this case involves hospital treatment, we
9 have used Weill Cornell for that purpose too. Somewhere in
10 Weill Cornell, for all I know, there still may be my appendix,
11 because it was last seen there in November of 2015. The same
12 goes for my cataracts, which were likewise removed there
13 several years ago.

14 In the event I or my family require hospital treatment
15 during the pendency of this litigation or thereafter, I can't
16 rule out that we would use Weill Cornell. Also as full
17 disclosure, my family's experience as patients at Weill Cornell
18 have been entirely positive and, if relevant, we are on the
19 Blue Cross plan available to federal employees. And I expect
20 that to continue indefinitely.

21 I do not believe that any of this – which may qualify,
22 as my kids say, as TMI, but I don't believe that any of this
23 gives me a stake in this injunctive action, given its nature,
24 that would require recusal or anything close. And I am
25 entirely confident that I can preside over this matter with

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1 complete neutrality and without an appendix. But I wanted you
2 to know all that.

3 If any party has any issue with my presiding over the
4 case, please file a letter on the docket promptly, say by the
5 end of next week, saying so and why. Silence by then will be
6 treated as assent.

7 Does any party require any further factual information
8 from me on this point?

9 MR. TORZILLI: Your Honor, we appreciate the TMI. We
10 appreciate the transparency. I think that's more than adequate
11 information. We appreciate it.

12 THE COURT: I thought it might be.

13 Further details on request. Okay.

14 MR. KASS: Same for us, your Honor.

15 THE COURT: Very good. Okay.

16 So with that, let's get started. And we have till
17 about 12:45, so we've got some time together.

18 All right. The first question involves cases in the
19 Eastern District of New York. I note that there is an Eastern
20 District action – it actually may be actions – that are
21 pending, I believe, before Judge Brian Cogan brought by unions
22 in 2025 against New York Presbyterian that appear to make
23 similar seeming antitrust claims. I note that counsel for New
24 York Presbyterian in that matter or those matters is the same
25 as here. That matter, unlike this one, seeks – although styled

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1 as equitable relief – disgorgement and restitution.

2 I think the best place to start is with defense
3 counsel. Mr. Kass, I take it you'll be taking the lead.

4 What's the relationship between those cases and this
5 one?

6 MR. KASS: So, your Honor, the factual predicate for
7 the allegations are basically the same.

8 THE COURT: It's the same business practice.

9 MR. KASS: Same business practice. There's slight
10 differences in the wording of the allegations, but it's
11 essentially the same.

12 We filed our premotion letter on Monday in
13 anticipation of our motion to dismiss, where we challenged the
14 union's standing, their indirect purchaser status under
15 *Illinois Brick*, and then the merits as well, both market power,
16 exclusionary conduct, and lack of foreclosure. So those were
17 the grounds that we presented.

18 Judge Cogan, after receiving the letter, said that our
19 letter – which was a three-page letter – constituted our motion
20 to dismiss on the grounds stated, and gave the plaintiffs one
21 week to file a fulsome brief in opposition.

22 THE COURT: Fulsome brief in response to a three-page
23 letter?

24 MR. KASS: Correct. Yes.

25 So basically our opening brief was obviated.

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1 THE COURT: Was what?

2 MR. KASS: Obviated. So we don't get an opening
3 brief.

4 THE COURT: Will you get a reply?

5 MR. KASS: We do get a reply brief. So that's how the
6 judge ordered it. And so we'll have one or two weeks after
7 they file their brief for that. That's the current status of
8 that case.

9 If you're asking about discovery --

10 THE COURT: I'll get to that in a moment.

11 Let me just ask you a few questions.

12 Is the United States participating, even as amicus, in
13 that matter?

14 MR. KASS: Not yet.

15 THE COURT: And is it one matter or multiple matters?

16 MR. KASS: There were two cases originally filed;
17 they've now been consolidated into one, and then a third union
18 joined the consolidated complaint.

19 THE COURT: Okay. And, United States, before I
20 continue with Mr. Kass, Mr. Torzilli, I take it you'll be
21 taking the lead.

22 Are you, in fact, not participating in that matter?

23 MR. TORZILLI: We are not participating in that
24 matter.

25 THE COURT: But you are aware of the matter.

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1 MR. TORZILLI: We are aware of the matter. We are
2 aware of the motion practice Mr. Kass just referred to.

3 THE COURT: Okay. Thank you. Helpful.

4 Mr. Kass, correct that discovery is stayed in that
5 matter or not?

6 MR. KASS: So in our view, the discovery is stayed.
7 The Court ordered the exchange of a single document from each
8 side, which was the governing contract, both between us and
9 Empire — that's Blue Cross — and between Empire and the
10 plaintiff unions. And our view was that that was incorporated
11 into the complaint. So the judge granted the exchange of that
12 document.

13 THE COURT: It's not so much discovery as it is an
14 incorporated document.

15 MR. KASS: Exactly. And that was it.

16 THE COURT: Okay. I don't know what's going to happen
17 in that case, but has any thought been given, if that case
18 reaches full discovery, to coordinating across that case and
19 this?

20 MR. KASS: We've not had discussions yet. But as you
21 can see from the protective order submissions that the parties
22 submitted, there is a paragraph in there that contemplates
23 coordination of discovery and the exchange of materials that
24 would be in our protective order. And we would have a parallel
25 one in the class action, but we have not heard back from the

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1 plaintiffs yet on that provision or any other aspect of a
2 protective order.

3 THE COURT: Okay. You're referring to it as a class
4 action. I confess, I hadn't focused on whether it was brought
5 as a class or by the union per se.

6 MR. KASS: It is a class action.

7 THE COURT: Okay. Look, I take it you more than
8 anybody have an interest in the coordination just because it
9 stands to reason that most discovery will be outgoing -- most
10 party discovery will be outgoing from you. But I want to make
11 sure everyone understands that if that case proceeds to
12 discovery, I expect everyone to work in an orderly way together
13 just to minimize, for example, the retrieval costs of
14 e-discovery for relevant custodians and the like. I don't need
15 to lecture you all about that, but just putting that out there
16 that I expect that.

17 Continuing on with you, Mr. Kass.

18 Some of the grounds that you identified for dismissal
19 in that case would appear to be particular to the nature of
20 that case, the union standing and the like. Are there any
21 grounds that are being articulated there that would be
22 dispositive here as opposed to informative here?

23 MR. KASS: They would be dispositive here as well. I
24 mean, other than it's a different court.

25 THE COURT: I got it. Assuming I was bound to follow

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1 what came out of that court, is there anything that would be
2 dispositive?

3 MR. KASS: Yes. There are three grounds that we
4 presented. One is market power, that's whether -- and I can go
5 into detail, if you want.

6 THE COURT: Just high-level.

7 MR. KASS: So market power is one. The other one is
8 whether the provisions at issue are exclusionary. And number
9 three is whether or not there is foreclosure of competitors.

10 THE COURT: Okay. I note that in the case management
11 plan here there was no anticipation of a motion to dismiss.

12 MR. KASS: Correct.

13 THE COURT: And I have planned my guidance in this --
14 my review of the issues in this case on the premise that there
15 would be no motion to dismiss brought.

16 I guess the question that naturally presents is
17 supposing Judge Cogan were to rule on the motion to dismiss in
18 the E.D.N.Y. in your favor on an issue of equal applicability
19 here, what would, if anything, that mean here? Would we still
20 be proceeding with discovery? Would you be then seeking to
21 revisit the case management plan? I'm just trying to
22 understand how these relate.

23 MR. KASS: So our thought is that it is clearly
24 persuasive, would be persuasive authority, and we would alert
25 the Court to it. Whether that would mean that we would move

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1 for early summary judgment, that may be. That's not
2 currently -- I hadn't contemplated that, but that's something
3 we could do, is move for summary judgment on those grounds.
4 But we wouldn't try to bring a 12(c) motion; I think we would
5 have already waived our 12(b)(6) motion.

6 THE COURT: Okay. All right. Fine.

7 Look, I'm not inviting you to do something you didn't
8 seek to do; but on reading the complaint, there was a
9 sufficiently clear similarity, in that underlying both cases is
10 the legality under Section 1 of the identical business practice
11 that I thought I'd ask.

12 MR. KASS: Correct.

13 THE COURT: All right. Very good. Thank you. That's
14 helpful.

15 Anything else from either of as to the Eastern
16 District case and any possible implications of the coexistence
17 of it? Mr. Kass, anything further on that?

18 MR. KASS: I don't believe so.

19 THE COURT: And Mr. Torzilli?

20 MR. TORZILLI: Just to underscore an obvious point, we
21 would want an opportunity to be heard, of course, on the three
22 issues that are viewed to be in common. And we think that both
23 of our pleading and the evidence in this case would overcome
24 any sort of dispositive motion on any of those three issues.

25 THE COURT: Thank you.

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1 Look, right now the defense table isn't proposing –
2 even committing – to move here, even if it ran the table in the
3 Eastern District. But he's reserving the right, and that's
4 fine. And, of course, you'd have the opportunity to be heard.

5 Okay. Very good.

6 All right. Next question is I want to understand a
7 little more about -- you may be seated. I want to understand a
8 little more about concretely what fact discovery consists of
9 here. On this part, I'll start with the government.

10 Let me begin with was this a case in which there was
11 investigative discovery taken by the United States prior to
12 filing the lawsuit here?

13 MR. TORZILLI: The answer to that is yes, your Honor.

14 THE COURT: And, big picture, what did it consist of,
15 nature and scale?

16 MR. TORZILLI: Sure. It consisted of both document
17 discovery of New York Presbyterian, of the defendant, of the
18 party; and document discovery of third parties that are
19 stakeholders or market participants in the market that appears
20 in the complaint.

21 THE COURT: Other than document discovery, was there
22 deposition discovery?

23 MR. TORZILLI: Yes.

24 THE COURT: Tell me about that.

25 MR. TORZILLI: There was deposition discovery of three

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1 of New York Presbyterian's employees.

2 THE COURT: Anything else?

3 MR. TORZILLI: No.

4 THE COURT: Okay. What's the scale, if you will, of
5 the document discovery you took of New York Presbyterian?

6 MR. TORZILLI: It's significant. It's what would be
7 along the lines of a substantial pre-complaint document
8 discovery investigation in a case like this.

9 THE COURT: Same question as to third-party market
10 participant discovery.

11 MR. TORZILLI: We have document discovery.

12 THE COURT: How voluminous was it?

13 MR. TORZILLI: Less voluminous than the discovery that
14 we've received and was produced by New York Presbyterian.

15 THE COURT: Okay. So then continuing with the United
16 States, and focusing for a moment just on discovery that you
17 propose to take of New York Presbyterian, broadly, what does it
18 consist of and how does it relate to the investigative
19 discovery you've received?

20 MR. TORZILLI: Sure. A couple of things.

21 One, there are what I'll call just kind of filling
22 some holes or filling some gaps in what we received
23 pre-complaint; so some time periods and subjects, both if I can
24 call it, on a go-get basis, so sort of discrete requests for
25 documents that can be complied with without a custodial set of

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1 custodians.

2 And then we anticipate propounding RFPs that would be
3 more custodial-based, that would go potentially beyond what we
4 received in pre-complaint discovery to address issues that have
5 emerged since we completed the investigation, including
6 information that's raised both by their answer – which is, as
7 your Honor noted, quite substantial and raises factual issues –
8 and also other information that we might obtain, for example,
9 from third-party discovery.

10 THE COURT: Safe to say – continuing with a focus
11 being on party discovery – that you're likely to go back to
12 some, if not all, of the custodians whose records you
13 previously harvested to top up the productions as to them, as
14 well as records from custodians whose records you didn't seek
15 during investigative discovery.

16 MR. TORZILLI: Yes to all of that.

17 THE COURT: Okay. And as to the deponents, are you
18 likely to be deposing them again?

19 MR. TORZILLI: At least some of them. I don't know
20 about all of them. But at least our tentative plan would be to
21 conduct depositions of those three deponents.

22 THE COURT: Okay. I ask because, in part, I don't
23 have a familiarity as to how investigative testimonial
24 discovery works when taken by the antitrust trust division as
25 opposed to, for example, the SEC, where I have some experience.

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1 But I'm mindful that the range of motion — the latitude that
2 opposing counsel has — to put questions, for example, to a
3 witness in investigative testimony, is quite more limited than
4 in the context of a civil adversarial action.

5 The issue would likely be mooted in the event that all
6 of these same people are going to be subject to civil
7 litigation depositions, and it sounds like that's your
8 intention.

9 MR. TORZILLI: My expectation is at least two of the
10 three, yes. For the third, I wouldn't say no, but I don't want
11 to overrepresent that we'd be deposing that --

12 THE COURT: Okay. Look, just issue-spotting here: To
13 the extent that other person isn't a subject of a deposition in
14 this case, down the road conceivably an admissibility issue
15 might arise based on the investigative nature as opposed to the
16 civil litigation nature of the prior testimony. I'll let you
17 all talk through that, but I'm flagging that as a consideration
18 you all might want to think about.

19 MR. TORZILLI: Yes, that is understood. And that's,
20 as far as my perspective, a fair assessment in terms of, as
21 your Honor said, in issue-spotting.

22 THE COURT: Not holding you to it, but you have more
23 familiarity with this case than a litigant who hasn't had an
24 opportunity to do discovery. Is there any way of quantifying
25 essentially what is about to hit New York Presbyterian when it

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1 comes to the document and deposition demands that would be
2 propounded? What sort of scale are we talking about?

3 MR. TORZILLI: As far as the United States is
4 concerned?

5 THE COURT: Right.

6 MR. TORZILLI: Our plan is for third parties to
7 issue -- we have not issued any third-party subpoenas.

8 THE COURT: No, no, no, I'm sorry.

9 As it relates to the discovery that you're going to be
10 propounding as against New York Presbyterian, how massive is
11 the outgoing discovery from New York Presbyterian likely to be?

12 MR. TORZILLI: They have seen our first set of
13 document requests; and we've had a meet-and-confer with them,
14 so they do have a reasonable sense of what that looks like.

15 For the follow-ups, we expect to have a significant
16 set of RFPs out the door and served on them in the relatively
17 near future that will be focused, like I said, on not only the,
18 sort of, follow-up issues, but also on new issues that have
19 been raised by the pleadings.

20 THE COURT: And totally understand. Look, this is not
21 a criticism at all; I'm just trying to get a sense of scale,
22 because it has implications for some of the disputes that we'll
23 be turning to.

24 Without holding you to it, but based on the knowledge
25 you have, any ballpark as to the number of likely fact

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1 deponents from within New York Presbyterian? Fact deponents as
2 opposed to expert witnesses or third parties.

3 MR. TORZILLI: For party fact deponents, we are
4 budgeting in our minds 10 to 12.

5 THE COURT: All right. I'm not holding you to it;
6 it's just a useful guide.

7 MR. TORZILLI: I appreciate that.

8 And as your Honor has noted, this is an antitrust case
9 so there are going to be, you know, important issues that need
10 to be fully developed through discovery.

11 THE COURT: Completely understand and respect that.

12 Now let's pivot to third parties.

13 Just give me a little more texture as to what types of
14 third parties you have in mind.

15 MR. TORZILLI: Yes.

16 I think first and foremost, your Honor, are the two
17 sets of market participants. There are health insurers. And
18 the defendants have served subpoenas for documents on the most
19 major insurers; and we expect to do so as well in the
20 relatively near future.

21 THE COURT: How many insurers is that roughly?

22 MR. TORZILLI: It's five. And then my expectation is
23 we may have third-party document subpoenas, potentially for
24 some other insurers that may be smaller, and expectation would
25 be potentially a volume of documents that's smaller.

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1 THE COURT: And I take it then there's a prospect of
2 depositions, 30(b)(6) or otherwise, one or more people from
3 each of those insurers.

4 MR. TORZILLI: Yes.

5 THE COURT: And what about other third-party
6 recipients of discovery?

7 MR. TORZILLI: A couple of categories of those, a few
8 categories of those. One are other hospitals in the New York
9 metropolitan area.

10 THE COURT: And what's the -- I think I get it, but
11 just in a couple of sentences, how do they shed light on the
12 controversy?

13 MR. TORZILLI: How do they fit in or how are they
14 relevant?

15 THE COURT: Yeah.

16 MR. TORZILLI: Some of those hospitals are in the
17 market that we have pleaded; so they are competitors. They
18 compete against New York Presbyterian for hospital services.

19 THE COURT: And what types of issues would you likely
20 be exploring with them? Is it whether they have comparable
21 practices, is it -- help me.

22 MR. TORZILLI: Sure.

23 Their contracts; what's in them and what is not in
24 them. These are examples -- I'm sure there are more -- but
25 certainly that.

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1 How they view the market, how they view competition,
2 and how they negotiate with the insurers whose contracts with
3 New York Presbyterian are the challenged restraints at issue in
4 this litigation.

5 THE COURT: How many, ballpark, hospitals are we
6 talking about here, or hospital systems, if that's the better
7 way to put it.

8 MR. TORZILLI: It would be single digits, I think.

9 THE COURT: And safe to assume that there's a good
10 chance of at least a 30(b)(6) and maybe more from each of those
11 systems?

12 MR. TORZILLI: Yes. My hesitation is what form they
13 would take, whether it would be a 30(b)(6) versus an individual
14 deposition. I think we just aren't there yet.

15 THE COURT: But a deponent at least.

16 MR. TORZILLI: Yes, one or potentially two, maybe
17 three, depending on the circumstance, would be the order of
18 magnitude for each of those.

19 THE COURT: Okay. So other than health insurers, but
20 potentially other insurers, and other than other New York
21 hospitals or systems, are there other third parties you have in
22 mind?

23 MR. TORZILLI: Yes. They would be unions, including
24 potentially unions that are parties in the litigations that
25 your Honor talked about.

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1 THE COURT: Where do they fit in? I appreciate
2 they've got claims that are brought, but where do they fit into
3 this litigation?

4 MR. TORZILLI: They are purchasers of health insurance
5 that they purchased from the defendant – albeit I understand
6 there's an argument whether it's direct or indirect and so
7 forth. And they also participate in the market for hospital
8 services, so they may potentially be relevant. I don't want
9 to, you know, overstate it, but as far as planning for
10 discovery purposes, that will be another facet of discovery.

11 THE COURT: So document discovery from them and some
12 prospect of at least a witness from each such union.

13 Other third parties?

14 MR. TORZILLI: If there are, they will be one-offs, I
15 think. I think as far as the major categories, that largely
16 covers it.

17 THE COURT: There's a significant scale here, no
18 doubt. Is there anything that adds any other complexity?
19 There doesn't appear to be – I'll just throw out some of the
20 usual complicating factors. This doesn't appear to involve
21 international discovery, it doesn't appear to involve
22 significant foreign language discovery. Is there much medical
23 privacy in the discovery or are we talking at a macro-enough
24 level that we're not, for the most part, dealing with
25 individual patient records?

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1 MR. TORZILLI: The answer on the foreign and
2 international discovery I would say with almost certitude there
3 shouldn't be any of that, including foreign language.

4 There will be within documents potentially individual
5 patient information.

6 THE COURT: How predominant is that going to be?

7 MR. TORZILLI: We have not seen a lot of it. And by
8 that, I say both in the pre-complaint investigation submissions
9 that we received; and then just also personally having worked
10 on cases in this space, I think the discovery we get typically
11 doesn't have a lot of it, but there is some.

12 THE COURT: And, look, some of this was touched on in
13 the letter briefing on the protective order. The point is that
14 there's enough of a risk of it that one needs to handle with
15 care.

16 MR. TORZILLI: It needs to be handled with care. We
17 think the protective order that we submitted as part of our
18 motion and that we're prepared to submit in revised form
19 imminently would be addressing it.

20 THE COURT: What about technical style documents? Is
21 this the sort of case where there's going to be a lot of stuff
22 that needs to -- that's maintained in systems that don't speak
23 normal English? I'm talking about data, not foreign languages.

24 MR. TORZILLI: There will be structured data, I'll
25 call it, that will need to be extracted and produced to us both

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1 by New York Presbyterian and by others, most importantly the
2 insurers.

3 THE COURT: Right.

4 MR. TORZILLI: Insurer claims data we call it.

5 THE COURT: Is there a reason to think any of that,
6 given the sophistication of both tables here, is likely to
7 present much of a hurdle?

8 MR. TORZILLI: Not if I could call it an existential
9 level, no. Because this has been done before certainly by the
10 division and also, I think, by counsel for New York
11 Presbyterian. You know, will there be issues we have to work
12 through? Yes. But I don't think they would be something that
13 would stick out in this case.

14 THE COURT: And as to the third parties, based on your
15 experience, while some discovery disputes are what we do, do
16 you expect anything out of the ordinary in terms of the types
17 of objections we're apt to get with respect to third parties,
18 recipients of subpoenas?

19 MR. TORZILLI: For the subpoenas we intend to issue,
20 the answer is no. Harder for me to speak to the issues between
21 the defendant and the third parties. But as far as what we
22 intend to cover, I don't expect anything other than garden
23 variety issues we'll have to work through.

24 THE COURT: Okay.

25 Anything else you want to tell me about fact

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1 discovery?

2 MR. TORZILLI: No.

3 THE COURT: Let me continue with you as to expert, and
4 then I'm going to have the same conversation with the back
5 table.

6 Expert discovery. What do you have in mind? I'm not
7 holding anybody to anything; it's early days. I am just trying
8 to get a preview.

9 MR. TORZILLI: We will need expert discovery because
10 both sides, as is typical in an antitrust case, will require
11 the assistance of one or more experts to conduct -- I'm sorry,
12 your Honor.

13 THE COURT: Unpack what -- I know there's going to be
14 an economist, I get that. But give me a little more specifics.

15 MR. TORZILLI: An economic analysis of the evidence.
16 So an economic analysis of the market, an economic analysis of
17 the effect of the challenged restraints, the steering
18 restrictions, the effect of those on competition, which is kind
19 of, you know, a core issue in the elements of a Section 1
20 claim, the effect on competition, the effect on prices, the
21 effect on other aspects of competition. So that will be the
22 central key facet of expert discovery.

23 There may be other experts that will be auxiliary on
24 discrete issues. At least standing here right now, I don't
25 have anything concrete to add to that, but that may be another

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1 facet of expert.

2 THE COURT: I appreciate that in the event this gets
3 to a litigated trial, there may be expository experts just to
4 teach your trier of fact about how, in practice, the industry
5 works. As it relates to establishing Sherman Act elements, are
6 we essentially talking about what you just previewed?

7 MR. TORZILLI: An economic analysis, yes.

8 THE COURT: And is that likely to be a single expert
9 broken up into three to four people? Any sense?

10 MR. TORZILLI: My expectation, it would be an economic
11 expert. Whether it's one person or more than one persons, I
12 don't know; but it would certainly be -- economic expert would
13 be the field of expertise that would be brought to bear.

14 THE COURT: Whether it's one or more remains to be
15 seen.

16 MR. TORZILLI: Yes. It is early enough days where I
17 certainly can't commit.

18 THE COURT: Fair enough.

19 Anything else with respect to expertise?

20 MR. TORZILLI: No. And just to be clear both on the
21 fact and expert, other than we put in our papers and
22 submissions.

23 THE COURT: Right.

24 Focusing on the antitrust expert, economic expert,
25 what data in fact discovery that you don't already have will be

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1 needed for the economic expert to get out of the gate and do
2 his or her work?

3 MR. TORZILLI: I think the two -- there may be more,
4 but the two sort of central ones will be claims data from
5 insurers, so essentially information about the transactions.
6 And then financial information from New York Presbyterian.

7 THE COURT: And, ballpark, do you have a sense when
8 within the fact discovery appeared it's realistic that you
9 would have the information in hand to enable your experts to
10 meaningfully get to work?

11 MR. TORZILLI: Our plan is to imminently propound the
12 subpoenas and RFPs that seek this information.

13 THE COURT: Okay. But, essentially, until that fact
14 discovery is in hand, the expert can only prepare; there's only
15 but so much they can do.

16 MR. TORZILLI: There are other analyses that can
17 certainly be done. But these are, yes, significant issues that
18 will go into the econometric analyses that are -- you know,
19 will be some of the central features of the expert work that
20 ultimately gets presented at trial.

21 THE COURT: And I'm not asking for names, but at this
22 point do you have a sense of who your economic expert or
23 experts are likely to be?

24 MR. TORZILLI: We have a pretty good sense, yes.

25 THE COURT: All right. Thank you. Very, very

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1 helpful.

2 Let me turn to you, Mr. Kass. And let's, first of
3 all, start with the defensive fact discovery, which is to say
4 what is coming at your client. Defensive party discovery.

5 Anything you want to shed light on? You've gotten a
6 preview at a high level. From what you know, how big a deal is
7 the outgoing discovery likely to be?

8 MR. KASS: So it really depends primarily on how much
9 we have to go back and redo. And you can always go back and do
10 more. I think what the DOJ did was they identified who the key
11 people were, we negotiated that, we produced the documents for
12 the period that they were then interested in. If they change
13 that period -- meaning they want to go back further in time --
14 then you basically have to redo everything. If they just want
15 to top off for when they finish to the present, that's a lot
16 easier. So we don't know exactly -- we've had discussions with
17 them about it, but --

18 THE COURT: In other words, look, to the extent that a
19 timekeeper's materials have been harvested, if you're saying
20 additional search terms apply to that, that's one thing. It's
21 another story reaching forward or backward in time.

22 MR. KASS: Correct.

23 THE COURT: Okay. How many custodians, if you know,
24 had their materials harvested, if you will, as part of the
25 investigative discovery?

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1 MR. KASS: I think six or seven.

2 And let me put this in context just for one second,
3 which is, NYP has had one person who has done virtually all of
4 the contract negotiations for the last 20 years. He was the
5 person that negotiated the original contracts that the DOJ is
6 now challenging. And he was one of the three people that they
7 deposed.

8 We've already produced those documents for the period
9 that they've asked for. I think everything that you get beyond
10 that is sort of nice to have, maybe, but not really the heart
11 of what the issues are in this case.

12 THE COURT: What title does that person have?

13 MR. KASS: He is executive vice president of -- and I
14 don't know exactly the title, but he heads our contracting
15 negotiation department, and he actually is on all the calls
16 with all of the insurers relating to contract negotiations.

17 THE COURT: And does he report to somebody or get
18 direction from somebody or --

19 MR. KASS: He reports to the CEO.

20 THE COURT: All right. With all that, look, I used to
21 do this for a living; I'm just eager to get a sense of how big
22 a scale the outgoing discovery presents to you.

23 MR. KASS: You know, our view is if it's -- if we're
24 just doing some supplementation of what we did, there's plenty
25 of time to do that and we'll be happy to do that. We'll meet

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1 and confer, if they make us -- if they want us to do a whole
2 lot more than that. But, you know, all of that would be
3 encompassed within the period that we have for discovery,
4 because -- and I know I'm jumping the gun a little bit, but
5 insurer discovery is really what's going to take up most of the
6 time.

7 THE COURT: That's helpful to know.

8 Anything else you want to add as to discovery directed
9 to your client?

10 MR. KASS: Not at this time.

11 THE COURT: Okay. So continuing with the discovery as
12 to others, insurer sounds like a big deal, and it sounds like
13 you will equally be engaging in seeking discovery from the
14 insurers. Give me a sense of the scale and nature of that.

15 MR. KASS: It will be very extensive. I don't want
16 any illusions otherwise. They are the ones that have
17 negotiated these provisions; they negotiate not just with us,
18 but they negotiate these same kinds of provisions with
19 hospitals around the country. We have to address issues such
20 as their market power, the two-sided market issues, how they
21 design networks. There's just a lot of information that they
22 have. They have all the claims data that goes not just to NYP,
23 but to other hospitals in the market. It will be extensive.
24 We've already issued a pretty extensive document request or
25 subpoena to each of the five.

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1 Now, of course, it's only five, so it's not like we're
2 blanketing, you know, the country with hundreds of subpoenas.
3 It's five companies. But it will be extensive from each of the
4 five. It will be akin to party discovery.

5 THE COURT: And it sounds as if one of the issues,
6 maybe who's driving the bus here, which is to say who is the
7 source of the provision at issue? Is this being driven by New
8 York Presbyterian? Is it being driven by New York Presbyterian
9 and like hospitals? Is it being driven by the insurance
10 industry or otherwise? Am I correct to understand that,
11 putting aside the technical economics of it, there's a
12 causation issue here?

13 MR. KASS: Correct. Our view is that the insurers
14 negotiate these provisions to get the best discount. It's a
15 volume discount. They say, We have multiple plans; so we can
16 buy a lot of services -- they are not buying -- but we can
17 contract for a lot of services. If we contract for all of the
18 services that we might want, then you'll get a bigger -- then
19 you'll get a bigger discount. If we contract for fewer
20 services than we can provide, fewer health plans, then the
21 price goes up.

22 Then what happens after they reach the deal, they say,
23 Oh, I know I've offered all of these plans to you to get the
24 best discount. Now I want to take away some of those plans and
25 offer them to some other hospital during the life of the

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1 contract. And that's basically what this case is about, is can
2 they renege from these provisions after having put them in
3 place.

4 THE COURT: There's a separate set of dealings, I take
5 it, between your client and each insurer or insurance group,
6 right?

7 MR. KASS: Correct.

8 THE COURT: Does that mean, then, as part of discovery
9 one is essentially doing some archeology on the course of
10 negotiations and dealings in what amount to five different
11 chapters?

12 MR. KASS: Correct.

13 THE COURT: How many human beings play meaningful
14 roles in each of those narratives?

15 MR. KASS: So, again, on the NYP side there's
16 basically one.

17 THE COURT: Right.

18 MR. KASS: On each insurer's side, because they've had
19 people come and go and they have different divisions, I would
20 say five or six people per insurer.

21 THE COURT: So without limiting anybody, if one wanted
22 to get a comprehensive understanding of – and given the time
23 frame, it may be a number of people – who said what to whom in
24 the history of these terms and novations or whatever, we could
25 be talking about a half dozen fact witnesses between NYP and

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1 the insurers for each of the five relationships, although NYP's
2 person is likely to repeat across all of them. Is that --

3 MR. KASS: I would say for document discovery, it
4 might be more than, you know, five per insurer; but for
5 depositions, it's probably five per insurer or maybe a few
6 less. So, again, I would think, you know, somewhere between
7 ten and 20 depositions of third parties.

8 THE COURT: And what about the hospitals?

9 MR. KASS: So the hospitals, there will be a few
10 hospitals that are highly relevant. For example, there are
11 other large systems in New York: NYU, Mt. Sinai, Northwell.
12 There's a fair number. We might want to take a few of the
13 not-so-big ones, because the insurers use the same kinds of
14 provisions; they want the smaller ones in all of their plans
15 too. So that's in this area in the market that the DOJ has
16 defined.

17 There are some providers outside, slightly outside.
18 So in New Jersey, for example, Barnabas Hackensack.

19 And then there might be a couple of national ones,
20 because NYP is a destination for transplants and others, so we
21 might want to get some documents; but maybe we can get them
22 from insurers, I don't know.

23 There is one provider that we may want to subpoena
24 specifically, which is Atrium. The DOJ, a few years ago,
25 brought a case to challenge their contracts. And they entered

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1 into a consent decree. And our view is that that consent
2 decree didn't change anything; it didn't reduce prices, it
3 didn't do anything. And so that might be a natural experiment
4 in order to get the data for to see even whether it is a
5 natural experiment, we might need to issue a subpoena to that.

6 THE COURT: All right. Unions?

7 MR. KASS: The unions. There's one union that
8 features in at least the class action complaint; it might
9 feature -- I think it might feature in their complaint, too,
10 which is 32BJ. 32BJ excluded itself from NYP, so it's the
11 poster child of someone that the DOJ says, This is a contract
12 that can't happen. It did happen. They are excluded because
13 they wanted to be excluded. And they contract through -- I
14 believe they contract through Empire Blue Cross. And so -- or,
15 no, I think it was -- now I'm confused as to who it was. But,
16 in any event, they contracted through one of the unions, and it
17 switched over time.

18 So we will want to subpoena them most likely.

19 Whether we need to subpoena the plaintiffs in the
20 class action, you know, we have party discovery in that case,
21 and so they will get deposed one way or the other. Would we
22 have to depose them if it weren't for the fact that they are
23 plaintiffs in the other case? I would tend to doubt it.

24 THE COURT: Okay. So relative to the insurers -- of
25 these three buckets, insurers is the big one, then hospitals,

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1 then unions.

2 MR. KASS: Correct.

3 THE COURT: Any other third parties that you can see
4 propounding discovery to?

5 MR. KASS: Not at this time.

6 THE COURT: I asked the question of Mr. Torzilli about
7 complexities. Any different answer?

8 MR. KASS: I think you hit on the one, which was
9 health records. And so health records do appear throughout the
10 production. During the investigation, we went to the DOJ and
11 we said, Look, if there is -- it's called PII, private --

12 THE COURT: Personal.

13 MR. KASS: So we use the term PII.

14 If there's PII, we will withhold the document
15 entirely. We won't redact it; we will just withhold it. We'll
16 give you a log. We gave them a page of the log and said --
17 because you have to redact the log too often, because it
18 appears in the subject matter sometimes.

19 So we said to them, If you have an issue, let us know.
20 And then the investigation ended before we got to that point.

21 So our view is that the documents that relate to
22 individuals tend not to be as important, because then you're
23 talking about contract enforcement or contract application.
24 But you're not talking about the key provision, the negotiation
25 of these provisions.

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1 THE COURT: And the application is not at least
2 squarely presented -- there might be a relevance, but it's not
3 squarely presented in the complaint.

4 MR. KASS: That's our view. Correct.

5 I think our view is that those are applications. So,
6 for example, if the contract says, You're in network for all
7 services, and in one particular case an insurer says, I'm going
8 to deny the claim, and we say, Well, you already contracted for
9 us, is that relevant? It may be tangentially relevant, but it
10 doesn't go to the heart of the negotiation of these claims. So
11 we believe that they should just be excluded from the
12 production so we don't have to spend a million dollars
13 redacting all these documents.

14 THE COURT: Great.

15 Let me ask you just one other question about fact
16 discovery: Is there a singular provision or, based on your
17 knowledge, are there different striations of the provision at
18 issue?

19 MR. KASS: Each contract differs a little bit, I would
20 say. And what the DOJ is challenging might have slight
21 variations, like they might challenge other provisions as
22 ancillary. The key provision is what's referred to as the all
23 products provision. That is not actually in all of the
24 contracts.

25 For example, one of the contracts basically just has a

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1 90-day termination provision; doesn't have an obligation at
2 all, it just has a 90-day termination provision. And we've
3 been in all of their plans. And if some day we're not in their
4 plan, then we have a right to revisit that because it's a
5 90-day contract.

6 But I think the DOJ would say, Well, that's just a
7 version of the same provision; it's just differently worded.

8 So there might be differences among the contracts and
9 there might be slight different provisions, but it's all part
10 and parcel of the same thing.

11 THE COURT: Okay. Very helpful.

12 Let's then turn just briefly to experts.

13 Same question to you.

14 MR. KASS: I think experts most likely will be
15 predominantly economists. I think it will be one or two
16 economists per side. The parties have already agreed on pretty
17 extensive expert report disclosures; three rounds of
18 simultaneous reports.

19 For other experts, I think you hit the nail on the
20 head, which is, there might be some other experts to talk about
21 the industry or something along those lines. I don't think
22 that will be extensive.

23 THE COURT: But the heart of it is the economists.

24 MR. KASS: Correct.

25 THE COURT: All right. Great.

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1 I'm about to then turn -- you can be seated.

2 Thank you both. Very helpful. Just gives me much
3 more texture about the case.

4 I'm about to turn to the issues that are disputed.
5 And you can take as a premise that where I'm not raising --
6 where you've agreed on things, I'm not reopening that; I have a
7 lot of respect for all the work that went into what you've
8 done, and you are closer to the case, so I want to defer to
9 that.

10 One of the issues that I think was a bit of a
11 stumbling block in the case management plan involved the joint
12 pretrial order. I think I can be clarifying on that.

13 The premise of the deadline in my model plan is that
14 there is not summary judgment motion practice. And in that
15 situation, it makes sense for the case management plan to key
16 the joint pretrial order off of dates marking the end of
17 discovery.

18 A case like this, I may be making an inaccurate
19 assumption, but this sure has the feel of a case in which
20 somebody is going to be thinking about summary judgment. If
21 that is the case, there is literally no point whatsoever in my
22 getting a pretrial order until summary judgment has been
23 resolved, because summary judgment has every possibility to
24 prune at least a case. It may not here, but it has that
25 potential.

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1 So given that, you can put aside the joint pretrial
2 order as a stumbling block in your revisions to the case
3 management plan. What I would have in mind presumptively is
4 that, assuming, as is likely, that a summary judgment motion by
5 somebody is going to be filed, the joint pretrial order would
6 be presumptively due something like 60 days after the
7 resolution of the summary judgment motion, because at that
8 point the parameters of the trial will have been shaped by the
9 summary judgment litigation.

10 So let's put the joint pretrial order out of
11 everyone's mind. I fear that my baseline model was unequal to
12 the challenges of this case in that respect. So just ignore
13 that for those purposes.

14 The first issue on which you part company involves
15 something called newly disclosed witness discovery. And I take
16 it -- we're now talking about fact witnesses. And the issue is
17 right now you've got fact discovery ending on May 14th; and the
18 parties, in effect, want some clarity as to the mechanism of
19 what happens if late in the day relevant people pop up and you
20 need to, depending on what's happened, top up fact discovery.
21 And I think you both are respectful of each's interest in doing
22 that and not playing gotcha, and I am too.

23 What about this as a mechanism -- I'm just trying to
24 come up with something that works: If we were to say that, you
25 know, newly disclosed fact witness discovery can be taken,

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1 whether documentary or deposition, in a, let us say, something
2 like the two months after the end of the current fact discovery
3 deadline, how would that work? Does that give you the latitude
4 you need to adapt?

5 MR. KASS: Your Honor, I think the issue on the newly
6 disclosed fact period is twofold: One, should other deadlines
7 be keyed off of it, in other words, should it be hard-wired
8 into the process? I think our view is that it should not.

9 THE COURT: Well, let me try it this way: Right now
10 you've got fact discovery – and forgive me – ending May 14th,
11 and expert discovery ending about five months later. And so if
12 you were to, in effect, allow a mulligan for fact discovery of
13 a couple of months for newly disclosed witnesses, you're still
14 marching ahead with expert discovery, you're not pushing the
15 time off, but you're assuring that the newly disclosed fact
16 discovery is done in time that there's plenty of time to
17 incorporate it into everyone's expert work.

18 MR. KASS: So our view on that is that I think under
19 the plaintiff's schedule, actually expert discovery is pushed
20 off, and so in our view it is compressed.

21 But the bigger issue or the related issue is that the
22 disclosure of preliminary witness lists in our schedule occurs
23 after all discovery, including expert discovery, as part of
24 getting ready for trial. Theirs occurs during the fact
25 discovery period. And our view is, Well, we already have

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1 initial disclosures that you have to supplement, and so you've
2 already gotten that.

3 THE COURT: I don't understand why we would have trial
4 witnesses identified until after a summary judgment motion.
5 That's part of the joint pretrial order. That's separate from
6 initial disclosures.

7 MR. KASS: So that is the rub of the issue. That is
8 our view as well, that trial witnesses come after summary
9 judgment. But under the plaintiff's schedule, you disclose
10 your trial witnesses during the fact discovery period. And to
11 us that makes no sense. Because you already have initial
12 disclosures that you have to supplement by rule anyway.

13 THE COURT: What is animating the plaintiffs, no
14 doubt, is avoidance of surprise. But there are other apps for
15 that.

16 So let me then engage with you, Mr. Torzilli.

17 Look, I fully respect that particularly the case of
18 this complexity and scale, there's every possibility to need to
19 do a bit of a do-over and to recognize that, given the
20 direction that depositions or fact discovery took, you need to
21 identify somebody else who needs to get deposed. I'm all for
22 that. I don't think the defense is opposing that either. But
23 I don't envision people identifying their trial witnesses until
24 the joint pretrial order, which will postdate summary judgment.

25 What I'm trying to do is find a way to accommodate

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1 everyone's legitimate interest in not being needlessly boxed in
2 by an initial identification.

3 What do you think? What about just simply giving you
4 the first two months of expert discovery to do that topping up?

5 MR. TORZILLI: We're happy to take that time. The
6 predicate issue is understanding who would be a newly disclosed
7 witness. So our idea was to have a preliminary – preliminary –
8 exchange of fact trial witnesses to be able to suss out or
9 identify whether there are people who would then need to be
10 deposed as opposed to only learning that information far, far
11 later in the process.

12 THE COURT: Why don't the initial disclosures cover
13 that? In other words, look, I don't want a situation in which
14 the defense says, Ha, ha, we've got a sixth insurer, and you
15 didn't know about that. But I don't think that's likely to
16 happen here, given initial disclosures and the document
17 discovery in the case.

18 I mean, what's -- look, I'm respectful of your desires
19 here, but I don't want to make this more complicated than is
20 necessary; and the individual rules provide you with
21 considerable -- the rules of civil procedure provide you with
22 considerable protections.

23 MR. TORZILLI: The initial disclosures though are
24 broad, right. I mean, it's like a funnel, right. 26(a)(1)
25 disclosures, and then you take fact discovery, and then you

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1 wind up with people on your witness list and present at trial,
2 and that's a cascading funnel. So there may be -- we haven't
3 seen their initial disclosures, of course, but certainly in my
4 experience with a case with the volume and complexity more than
5 just the bilateral dispute between two parties that will wind
6 up with far more names on initial disclosures than we could
7 ever take, in fact --

8 THE COURT: So let me see if I can help out here.

9 Your concern is that you're going to be surprised here
10 that there are so many people in initial disclosures or
11 something like that, that you might ultimately wind up
12 defensively over-lawyering just given the sheer scale of
13 people.

14 MR. TORZILLI: One more thing to that would be late
15 supplementation, where we don't have an opportunity then to go
16 get that person's documents, and then get the documents and do
17 the deposition.

18 THE COURT: So, look, I mean, isn't there some way to
19 solve this where -- look, we have to be flexible here. This is
20 a complicated case. Nobody is going to completely see around
21 corners.

22 That said, if there's a window of time at the end of
23 fact discovery where right at the end of fact discovery you
24 together, in good faith, meet and confer to share what you can
25 about what you expect the trial to look like so that each other

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1 can then -- you can then do supplemental fact discovery,
2 whether somebody's emails or their depo, why doesn't that work?
3 I mean, look, I'm just trying to be -- I'm trying to idea
4 complicate this. Does something like that work?

5 MR. TORZILLI: It does. And that was the point of us
6 presenting the idea of the preliminary fact witnesses, which I
7 will note, your Honor, is common in cases brought by the
8 antitrust division. So this is not, you know, something that
9 we've just come up with solely for purposes of this case. And
10 it has, in my experience, worked quite well to ensure that
11 issues like this don't occur and that discovery can occur as
12 efficiently as it can.

13 THE COURT: So, Mr. Kass, I'm trying to de-complicate
14 this. What's the problem with, in effect, saying at the end of
15 fact discovery -- I've got professionals in the room and you've
16 got a judge who really doesn't like people surprising each
17 other, and I'm getting that across to each of you, and sure you
18 know it. At the end of fact discovery, can there be some form
19 of meet-and-confer that will then inform what needs to get done
20 in terms of this, say, two-month period to top up the facts?

21 MR. KASS: So I think we would be okay with doing a
22 shorter version of our initial disclosures. I think that's
23 what they're asking for.

24 THE COURT: I think that's exactly what they are
25 asking for.

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1 MR. KASS: We can live with that.

2 I will say, I think this is, sort of, a mountain out
3 of a molehill. Because, you know, even if they got a
4 preliminary witness list at the joint pretrial order, which
5 they will, I'd be shocked if there's even one witness that they
6 hadn't previously deposed; but even if there is, there's still
7 plenty of time to take that deposition.

8 THE COURT: So, look, I think we've got the outlines
9 of something that can be worked out here. I think your way of
10 formulating it, which is putting the initial disclosures on a
11 diet after the end of fact discovery so as to give meaningful
12 notice to the front table if there's somebody they neglected to
13 depose, I think that's a very smart way to go.

14 Can I assume with this level of guidance you can now
15 get this piece of the joint pretrial order -- the case
16 management plan across the goal line?

17 MR. TORZILLI: I think so.

18 THE COURT: All right.

19 So issue two is expert discovery. Unless I'm
20 misreading this, you disagree by one week -- October 15th versus
21 22 -- as to the end of expert discovery. Is that really a
22 dispute?

23 MR. KASS: That piece of it is not the dispute. The
24 dispute is that the schedule -- there are different events in
25 the schedule that are disputed, that, in terms of, for example,

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1 do you get 45 days to take expert depositions or just 28 days
2 to take depositions. When do you start with your first expert
3 report? Ours is a little earlier than theirs. So if you adopt
4 our schedule --

5 THE COURT: I see.

6 MR. KASS: -- then that's the date that is governed.
7 If you adopt their schedule, that's the date that's governed.

8 THE COURT: I confess, I didn't dig into those
9 particulars, and the last thing I want to do is pop off and do
10 something uneducated here.

11 When do we need that issue sorted out by? Is that a
12 today issue?

13 MR. KASS: I do think there's two expert issues that
14 will govern most of these issues, which is, number one -- well,
15 actually, as to the timing, it's just one issue, which is, how
16 long after the last report do you have to take the deposition
17 of the other side's expert? Because this is such quantitative
18 analysis that you have to reconstruct and it takes a lot of
19 back-time effort, we want 45 days, they want 28 days. We think
20 you need that extra time.

21 THE COURT: But, from your perspective, it can be
22 accommodated within what amounts to substantially the same
23 expert discovery period.

24 MR. KASS: Yeah. If you start the first expert report
25 a couple of weeks earlier than theirs, and you end, you know,

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1 basically a week later, yes.

2 THE COURT: Mr. Torzilli, look, you all know the case
3 better than I. But in the interest of the truth-seeking
4 function and given the complexity here, it's hard to argue with
5 more time, particularly if it can be tucked into an overall
6 expert discovery period about the same length. Why not?
7 What's the problem with a longer period?

8 MR. TORZILLI: We won't quibble over a week's time.

9 THE COURT: No, no, no, but -- sorry. Mr. Kass is
10 saying it's not the end date of the one week, it's the
11 intermediate time. He wants more time for -- I guess to depose
12 an expert, the last expert after their report, right?

13 MR. KASS: Correct.

14 MR. TORZILLI: Yeah. As I understand that, though,
15 your Honor, on page 18, the third entry on the chart, the
16 difference is 16 days. They've asked for 45 days after the
17 last report to complete expert discovery, and we've said 29
18 days. And I certainly think 29 is reasonable, but we certainly
19 wouldn't lay down in traffic for it.

20 THE COURT: I'm on page 18. And forgive me for
21 missing this. In other words, you're talking about third round
22 of expert reports -- sorry, this is the close of expert
23 discovery.

24 MR. TORZILLI: Yes.

25 THE COURT: And let me ask you, what's your problem --

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1 the defense's overall proposal has expert discovery ending
2 actually earlier than yours, but there happens to be a greater
3 period of time after the last expert report for expert
4 discovery to close. Something therefore has -- there's
5 something offsetting earlier. What is it?

6 MR. TORZILLI: It's the newly disclosed witness
7 discovery period.

8 THE COURT: If we tie that up in the two-month period
9 that I envisioned, is there any problem with the defense's
10 schedule?

11 MR. TORZILLI: We think 29 days between the service of
12 the final report and the close of expert discovery would be
13 adequate, because the other side will already have two-thirds
14 of the reports already, and will only be receiving the third
15 report.

16 THE COURT: What's going to be happening though during
17 that period is predominantly preparing for and doing the
18 depositions of the last reporting experts, right?

19 MR. TORZILLI: The third report is the incremental
20 information. The first two reports will already have been
21 received and deposition preparation can be conducted based on
22 those.

23 THE COURT: Insofar as NYP's proposal though gives
24 both of you more time and brings the expert process in a week
25 earlier, what's wrong with it? I appreciate that you'd like to

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1 hold them to 28 days -- 29 days instead of 45, but, at the end
2 of the day, it's not elongating the overall process here. It's
3 an awfully complicated case. What's the problem with that?

4 MR. TORZILLI: We're fine with going from 29 to 45
5 days. We don't think that it's necessary, but if that's the
6 rules of the road, we will be living with it.

7 THE COURT: Look, it's equally applicable to
8 everybody. And I am very impressed from this conference with
9 just the overall complexity of the case. I'd rather have more
10 time and get this right.

11 So, look, I'm not dictating dates here; this is for
12 all of you to take this back. And I realize my introduction of
13 the joint pretrial order confusion may have made a bit of a
14 hash of things and you'll want to extract that from what you're
15 doing here.

16 But, directionally, can you revise the case management
17 plan to bring in expert discovery in the ballpark of where you
18 both currently have it now, but with 45 days for what I take it
19 will be adapting to -- meaning deposing -- the author of the last
20 report?

21 MR. TORZILLI: Your Honor, yes. These seem to be *de*
22 *minimis* adjustments --

23 THE COURT: Thank you.

24 MR. TORZILLI: -- that should be worked out very, very
25 easily and quickly.

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1 THE COURT: All right. Fine.

2 I'm giving you directional guidance. If you need to
3 move the dates around here or there collegially, of course
4 that's fine. I'm just resolving the big-picture issues.

5 Anything further on that issue before we move to the
6 next one?

7 MR. KASS: You may want to deal with it later, but the
8 amount of expert deposition time.

9 THE COURT: Going to get to that in a moment.

10 All right. The next issue is the deposition number,
11 the number of people to be deposed. And, forgive me,
12 plaintiffs anticipate 30 depositions; the defendants say each should
13 be limited to ten, with no more than ten of any party or
14 nonparty.

15 Mr. Kass, given the colloquy I had with you, I would
16 have expected those numbers -- you would have been the one
17 urging 30.

18 MR. KASS: So we would propose 20, with ten -- no more
19 than ten from any party. But the key issue here is that most
20 third-party depositions will only count as a half a deposition,
21 because they'll mostly be cross-noticed. So that, in effect,
22 is either between 30 or 40 depositions per side, depending on
23 how many they use of NYP. So that's how it works out.

24 So that's why we believe 20 ought to be sufficient.
25 We want to try to keep it cabined somewhat to make sure we stay

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1 within the time frame that's allowed. But that was our
2 thought.

3 THE COURT: Look, I have a bit of a thumb on the scale
4 in favor of more and thorough here. Mr. Torzilli just --
5 Mr. Kass says that because of the crediting of common
6 depositions, 50 percent each, the 20 each, 40 aggregate, is
7 enough. Just explain to me your reason for 30 each.

8 MR. TORZILLI: Yeah. At equal numbers of depositions
9 per side, which is, I know, common in these cases, we just have
10 fewer opportunities to cross-notice third-party depositions.
11 So without an extra cushion --

12 THE COURT: Why do you have further opportunities --
13 why do you have less opportunities? I don't understand.

14 MR. TORZILLI: Because we need to use one, so a full
15 deposition deposing individuals from --

16 THE COURT: Oh, I see. In other words, they are not
17 deposing anybody from DOJ antitrust, and you're deposing people
18 from them. And so you're going to blow a bunch of your depositions,
19 full 1.0 worth, on parties of theirs.

20 MR. TORZILLI: I'm hoping to minimize. But, as stated
21 earlier, I think a reasonable budget at this moment would be,
22 you know, 12-ish party depositions.

23 THE COURT: Which leaves you less range of motion with
24 all those insurers and others.

25 MR. TORZILLI: And I am concerned about the range of

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1 discovery that the defendants want to pursue outside the --

2 THE COURT: Mr. Kass, I have to say, I get it where
3 Mr. Torzilli is coming from. Unless you want to use your time
4 deposing people from Main Justice, which doesn't sound very
5 fruitful, there isn't a symmetry. I understand why he's more
6 pinched by this than you. Let's go with the plaintiff on that.

7 MR. KASS: Fine, your Honor.

8 THE COURT: Okay. Next up is allocating time for
9 cross-examination, if you will, for a party who has not been
10 cross-noticed. And the difference between you is a half an
11 hour and an hour.

12 MR. KASS: Your Honor, I have to say, this is -- I
13 know it seems like it's a little, but it actually is a lot.
14 Because our experience is these insurers are going to be
15 hostile third parties for us. It's going to be very difficult
16 to depose them. And if we are constrained now -- I mean,
17 normally we would want the full seven hours. I get that we're
18 not going to get that. But to now say we only get six hours,
19 it creates the possibility of effectively stonewalling during
20 the deposition to run out the clock. We want that extra time.

21 If the DOJ says this is an important witness to them
22 too, they'll cross-notice it. Then we'll have to negotiate
23 whether we can get some extra time with a third party or seek
24 an extra day from the Court. So that, to us, is the trigger or
25 the safety valve, is, if the DOJ thinks it's important enough,

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1 then we'll have a conversation. But if the DOJ doesn't think
2 it's important enough to begin with, we don't want our hard
3 limit to be 6.5.

4 THE COURT: Mr. Torzilli?

5 MR. TORZILLI: Our expectation is important
6 depositions are going to be important to both sides, and that
7 will be reflected in noticed and cross-noticed depositions.

8 Just simply the 30 minutes is just not enough. It's
9 not minimum order of magnitude to be able to accomplish very
10 much in a deposition. So it seems the minimum order of
11 magnitude to be able to productively conduct a deposition where
12 you're not cross-noticing would be closer to an hour than
13 closer to 30 minutes.

14 THE COURT: Is there a way to solve this problem that
15 takes -- that authorizes for such situations an extra half hour
16 of the deposition; so plaintiffs get the six and a half you
17 want, and the other side gets the hour it wants, and that way
18 I'm expanding the pie at somebody else's detriment?

19 MR. KASS: I would love that, your Honor. The only
20 issue is whether -- the third parties aren't here, but that's
21 the only issue for me. But, yeah, that would be --

22 THE COURT: Look, again, I mean, I am -- why do you
23 think the insurers are going to be pulling teeth more for you
24 than for DOJ?

25 MR. KASS: I think the issue in this case is that --

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1 as I mentioned earlier, one of the things that insurers do is
2 that they negotiate based on volume. And then after they sign
3 the contract, they say, Well, I don't actually want to honor my
4 side of the deal. And so this case allows them to not honor
5 their side of the deal if the DOJ wins. So I think they'll be
6 hostile to our side on that.

7 THE COURT: Let me ask you a question, Mr. Torzilli:
8 Has there been any suggestion of any investigation of the
9 insurers? Is there any sense in which here their posture
10 towards this case may be informed a little bit by their concern
11 about being more than a witness?

12 MR. TORZILLI: I don't think so. I will also say
13 that, as we talked about earlier, there was a case similar to
14 this that was filed in Charlotte challenging similar
15 restrictions that was litigated, including through fact
16 discovery. The insurers were deposed in that case. And the
17 sorts of stonewalling and other recalcitrant things just did
18 not emerge in that case. So my expectation is they won't
19 emerge here. And they had any similar incentives that they
20 would have here. So I think this is a solution in search of a
21 problem, frankly.

22 And also my expectation is we will be cross-noticing
23 important depositions. And if this conference has done nothing
24 else, it's underscored the importance of depositions to this
25 litigation.

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1 THE COURT: All right. Then, look, how about this: I
2 will side with the defendants in the sense that for a
3 seven-hour deposition, a noncross-noticing party with respect
4 to a third-party deposition gets a half hour. But please know
5 that on a timely application in advance of the deposition by
6 the nonnoticing party for an extra 30 minutes, I get it. And
7 you can expect, without committing in any individual case, the
8 Court, on a reasonable explanation, likely to be receptive to
9 the extra half hour. And I would expect that opposing counsel
10 is not going to play hardball on that; that's an issue for the
11 third party, not for the other -- for the noticing party.

12 Understood?

13 MR. TORZILLI: Correct.

14 THE COURT: I think that's a good way to deal with
15 this. So the onus, then, in Mr. Kass's scenario under which
16 it's a party that he notices, you are the one who gets the half
17 hour, then Mr. Torzilli. And it's on you in advance of the
18 deposition to seek leave from this Court. And please do so
19 enough in advance so that I'm not dealing with a brush fire the
20 night before the deposition.

21 My individual rules provide for rocket resolution of
22 discovery disputes through the exchange three days apart of
23 three single-spaced page letters. I'll leave it to you to
24 figure out the mechanics. But in the revised case management
25 plan, figure out a way to make sure that that request and

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1 notice to the third party is done early enough that I've got
2 those letters in time to rule with a little bit of time to
3 think, okay? I think this is a rational solution.

4 MR. TORZILLI: We'll make that work, your Honor.

5 THE COURT: Good. Okay.

6 Next up is pre-deposition document production.

7 Mr. Kass, Mr. Torzilli, I'm all in favor of finding
8 some way not to have surprise during depositions, but I'm also
9 trying not to construct too big a mousetrap here. What is it
10 that's different about this case? What fundamentally do you
11 need here?

12 MR. TORZILLI: We want to ensure there are clear rules
13 of the road for late-produced documents, late-produced relative
14 to a deposition. And this is a provision that's not common in
15 antitrust division cases, but we think is warranted here,
16 because late-produced documents was a significant --

17 THE COURT: You're worried that a document is going to
18 be produced a week or two before the deposition?

19 MR. TORZILLI: Days before. And not worried. It's a
20 reality. It was experienced in pre-complaint depositions that
21 were conducted in this case.

22 So we simply just want a clear rule of the road that
23 we understand things happen and we understand documents get
24 found and produced, but we do want clear rules of the road as
25 far as what is prescribed when these scenarios emerge.

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1 Hopefully, they won't emerge.

2 THE COURT: This is not a rule for disclosure of
3 documents that were produced a while back. Your concern is you
4 don't want things popping up in the few days before the depo.

5 MR. TORZILLI: We would like for those situations to
6 stop occurring. And if they do occur, your Honor, to have just
7 a clear rule about what is to occur thereafter, which is hold
8 the deposition open and let's get the completed deposition
9 wrapped up.

10 THE COURT: So, Mr. Kass, I'm disinclined to create a
11 bunch of new rules for this case, but I am inclined to impress
12 upon everybody that I really value people playing fair, and
13 stuff not popping up at the last minute.

14 What is the right way to deal with this?

15 MR. KASS: So our view is the federal rules already
16 provide a good framework. I don't really even know exactly
17 what counsel is talking about, about surprise depositions -- or
18 surprise documents.

19 We've produced a lot of documents. We're going to
20 continue to produce lots of documents. I don't see this being
21 a real issue. But I do see the provision that's being proposed
22 to be a real issue, which is, that gives them the ability to
23 issue a deposition notice and short-circuit a meet-and-confer
24 on a document production issue that's independent of that.

25 So we're negotiating documents. They issue a

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1 deposition notice. And now we have a 60-day clock. And if we
2 don't meet their deadlines on whatever issue happens to come up
3 during that meet-and-confer, then the penalty is that our
4 witness has to then sit for a second deposition. That's how
5 that provision reads. That's how it works. That's not how the
6 federal rules work.

7 I think if there's a dispute about what the production
8 is that they've asked for, and whether our objections or
9 whatever we've done to comply is not adequate, the Court has
10 procedures for that, and that's what should be followed.

11 THE COURT: Mr. Torzilli, look, I'm respectful of your
12 interests here, but I'm not persuaded that there's some need to
13 revise the federal rules. Just know that I really value fair
14 play. And so I think it won't sit well with me if there's a
15 stunt and somebody says, Oh, we just found this yesterday, and
16 here it is. That's not good.

17 But I have no reason to expect that in this case.
18 You're all starting off with a significant reservoir of
19 credibility given the way you've handled the initial
20 conference; and I expect the same level of professionalism
21 among you. So for the time being, nothing new here in the case
22 management plan.

23 MR. TORZILLI: Understood, your Honor.

24 I assume there would be the -- we would have the right
25 to revisit this issue if circumstances require.

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1 THE COURT: Of course. Of course.

2 Okay. Next issue is contention interrogatories.

3 It feels awfully early for there to be contention
4 interrogatories, early in the discovery process in this case,
5 particularly given the one-sided aspect of the case presented
6 by an investigative discovery which only one side could do.

7 Whatever the date is, it seems to me it ought to be
8 sufficiently down the road that people can make sense of this
9 hot mess that is before all of us. The defense says,
10 essentially, six months as the starting gun is reasonable.
11 Intuitively, that doesn't sound wrong. What's wrong with it?

12 MR. TORZILLI: Your Honor, I think we can have
13 contention interrogatories. We'd set it at January 8th. In
14 their papers they talk about the bulk of discovery being
15 completed. I'm just not as confident that that's the case. So
16 we would just urge that contention interrogatories be served no
17 sooner than January 8th. And we agree with the other side that
18 we can provide --

19 THE COURT: Sorry. But NYP says the date should be
20 about six months into the fact discovery period, which is not
21 far from January 8th. What's the difference here?

22 MR. TORZILLI: They are proposing -- on page 17 of ECF
23 29-1, they are proposing -- it's the second row in the chart.
24 They are proposing November 8th, 2026, and we're proposing
25 Friday, January 8th, 2027.

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1 THE COURT: I see. That's treating fact discovery as
2 having begun when?

3 MR. TORZILLI: Essentially, in March.

4 THE COURT: Oh, right. In other words, the premise
5 being that fact discovery began before the case management
6 plan.

7 MR. TORZILLI: Yes. Yes.

8 So we take the position that that seems -- January 8th
9 seems a reasonable date. We agree with the 45-day turnaround
10 on those responses; so our response would be February 22nd. We
11 disagree with the defendants that the answers would be useless.
12 We think they would be quite useful.

13 And then we'd have supplementation, but not their
14 required --

15 THE COURT: Sorry. The dispute here is fundamentally
16 between NYP saying November 8, and the U.S. saying January 8.

17 MR. TORZILLI: There are two disputes bound up in
18 here. One is the first date upon which contention
19 interrogatories can be served.

20 THE COURT: Right.

21 MR. TORZILLI: And then the second is mandated
22 supplementation of answers.

23 So we're talking about the first date upon which
24 contention interrogatories can be served. We have a
25 difference. Like I said, we think Friday, January 8th is the

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1 right realm, with 45 days.

2 And then, your Honor, on the back end of what should
3 be required for supplementation, our position is the only --
4 there should be supplementation under the rules that are
5 already written by the Federal Rules of Civil Procedure. But
6 if there is going to be a required supplementation, it occur
7 after the close of fact discovery.

8 THE COURT: I'm missing something in the parties'
9 proposed schedules. I see the difference in the second box on
10 page 17 as to the first issue. Forgive me, I'm just missing
11 where the other issue is presented here, the supplementation.

12 MR. TORZILLI: It's in the argument. And I'll find
13 the page for you. It is page 10 of ECF 29-1.

14 THE COURT: Right.

15 MR. TORZILLI: So our position is in the first
16 paragraph --

17 THE COURT: I see.

18 MR. TORZILLI: -- of the plaintiff's position. This
19 is our, frankly, proposed case management plan, paragraph that
20 can be --

21 THE COURT: I get it.

22 MR. TORZILLI: -- cut and pasted into a CMO, if you
23 will.

24 THE COURT: I get it.

25 Let's focus on the initial date.

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1 Mr. Kass, what difference does it make between
2 November 8th and January 8th?

3 MR. KASS: In our view, it makes quite a bit of
4 difference. Our experience is when you issue these
5 interrogatories, you spend some time, and you end up getting a
6 lot of objections. You have to actually move to compel in
7 order to get the actual -- something that you can then use at
8 trial. And it may be that you have to engage in supplemental
9 fact discovery or you may have to take a deposition to address
10 what's said. And so you need to start that process in the
11 middle of fact discovery, understanding that one side or the
12 other might not have all of the information that they need in
13 order to fully answer.

14 So you answer with what you have in the middle of fact
15 discovery. And then you supplement it a month before the close
16 of fact discovery; that still gives you a little bit of a tail
17 period where you're not foreclosed like, Okay, you got a final
18 answer, but you can't do anything with it. And so that's how
19 our proposal works.

20 THE COURT: And I take it by having a supplementation
21 30 days before the end of fact discovery, it avoids a situation
22 in which somebody is running to me saying, We need, based on a
23 response, the last day of fact discovery to open up -- reopen
24 fact discovery.

25 MR. KASS: Correct.

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1 THE COURT: Although there is always the new witness
2 component that is inherently reopened.

3 MR. TORZILLI: May I explain the problem --

4 THE COURT: Sure.

5 MR. TORZILLI: -- with that?

6 As I suspect this case will be, it certainly has been
7 in others of this type, a significant amount of fact discovery
8 does not occur until the very end of fact discovery. So there
9 will still need to be supplementation of the answers at the end
10 of fact discovery, because important -- maybe the most
11 important -- depositions won't occur until the last few days of
12 fact discovery. Certainly the last 30 days.

13 THE COURT: What system incents the parties to avoid
14 that? What set of rules here avoids everybody saving their
15 homework till the last day before the paper is due, which is
16 what you're describing? I mean, in other words, is there some
17 incentive structure that's created by moving the due date for
18 supplementation to 30 days before as opposed to the end, which
19 is a more rational way to build this?

20 MR. TORZILLI: Completion of document discovery.

21 THE COURT: I mean, if we assume that document
22 discovery is complete well before, before 30 days, before the
23 30-day proposal, makes good sense. It's only if one assumes
24 that somebody is providing document discovery in particular,
25 because this is predominantly a documents case. I appreciate

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1 all the testimony. But it seems to me that if we can be
2 confident that the document discovery is done beforehand, the
3 30 days beforehand makes sense; it's only on the premise that
4 it's going to be rolling in at the last minute that it doesn't.

5 MR. TORZILLI: The documents might not roll in at the
6 very end, but the documents need to be completed in order for
7 depositions to occur. Like the discussion a moment ago, we
8 don't want to be in a situation where documents are being
9 produced in the last days before someone's deposition.

10 THE COURT: Mr. Kass, supposing I went with you on
11 this, but that there was a further need to revise the
12 supplemented contention interrogatory response because of
13 something that actually happened afterwards, that's
14 permissible, right?

15 MR. KASS: Right. So we weren't trying to negate Rule
16 26(e) that has an ongoing, forever obligation to supplement.
17 We just wanted a firm supplementation 30 days before, not to
18 say that you couldn't then supplement thereafter a third time
19 if you wanted to. That's okay. But we wanted initial answers
20 six months before, supplemented answers 30 days before, and
21 then Rule 26(e) governs any further supplementation.

22 THE COURT: Look, on the back-end issue, I'm inclined
23 to go with the defense; I'm inclined to say that 30 days before
24 makes more sense with the expectation, of course, that there
25 will be further supplementation if new documents come in that

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1 change the answer. But that would have been implicit from the
2 federal rules to begin with. I think that does make more
3 sense.

4 And it minimizes – not increases – the risk of
5 somebody seeking an extension of the fact discovery deadline.

6 Anything that I said for the end of fact discovery is
7 cat nip for an application to extend fact discovery because of
8 the surprise that happened in the last minute.

9 So I feel pretty strongly about that one. I feel less
10 strongly about the November 8th versus January 8.

11 But, Mr. Torzilli, since my job is to rule, I think
12 the earlier one makes sense. I think, as a general rule,
13 anything I can do to promote clarity earlier is better. So I'm
14 going to go with the defense on both parts.

15 MR. TORZILLI: I appreciate that, your Honor.

16 And to be clear on the back-end issue, it's not just
17 discovery, of course, it's also depositions.

18 THE COURT: I understand. I understand.

19 But, look, because there is a continuing obligation to
20 correct initial disclosures that have been overtaken by newly
21 acquired information, you will not be harmed, I think, by that.

22 Look, at the end of the day, I may be adding, in
23 effect, an extra layer here; but I think it's better to do it
24 that way. Look, I appreciate it, you're both arguing in good
25 faith. I'm doing my best to give you a rational answer.

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1 Okay. The nonparty written discovery.

2 Look, the Bates stamp proposals are, of course, fine.
3 I don't think anyone is fighting about that. The prompt
4 production to the other party of the subpoena and the returns,
5 is anybody objecting to that?

6 MR. KASS: No, we've already given them notice.

7 THE COURT: I may have read too fast. What's the
8 heart of the controversy here?

9 MR. KASS: The heart of the controversy is if we
10 subpoena an insurer – and so far we're the only ones to do
11 that – we want to have the ability to have our own
12 conversations with that third party without having to copy the
13 DOJ on every single email and discussion.

14 THE COURT: Oh, sure.

15 MR. KASS: Well, their proposal wouldn't allow us to
16 do that.

17 THE COURT: Under the federal rules, you don't have to
18 do that.

19 MR. KASS: Correct.

20 THE COURT: Mr. Kass, what's -- Mr. Torzilli, what's
21 different here?

22 MR. TORZILLI: Our proposal is not about every single
23 email being copied, but we should get information exchanged
24 when modifications to the subpoena are agreed to so that we
25 have information.

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1 THE COURT: Look, the important thing is that you
2 understand promptly what, in fact, is the document demand
3 that's operative on the third party. In particular, because
4 you might want to add a search term or modify a date range or
5 add a date or add a name, and it's just unfair to the third
6 party to then have to redo the search because you didn't have
7 enough notice to add or modify. That's different from your
8 being party to an iterative conversation that Mr. Kass is
9 having with a third party.

10 Mr. Kass, as long as the operative language, whether a
11 subpoena or a revision of it, is promptly disclosed to the
12 other side, I take it you don't have a problem with that.

13 MR. KASS: No, your Honor.

14 THE COURT: I think, counsel, is there any remaining
15 difference?

16 Mr. Torzilli, I don't think you have a right to be at
17 the table or on the phone call or party to the iterative
18 emails. It's the outcome that I want you to be promptly on
19 notice of in case you would want to, out of fairness to the
20 third party, tweak what they're obligated to search for and
21 produce. Does that make sense?

22 MR. TORZILLI: Yes. We want prompt communication of
23 modifications to scope and timing.

24 THE COURT: That's it. That's it.

25 MR. TORZILLI: Yeah, as stated here in our proposed

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1 provision.

2 THE COURT: Mr. Kass, is there any -- what's the
3 dispute here?

4 MR. KASS: So I think the practical reality is we
5 issue a subpoena, we engage in letters and meet-and-confers
6 back and forth. And they say, We'll produce this, we won't
7 produce that, and then we move on. And that generates a record
8 that's going to be like this big. And I think the DOJ says,
9 Well, within one day of whenever you -- I don't even know what
10 the trigger is, but when in that process am I supposed to go to
11 them, especially if it's a third party that they haven't even
12 cross-noticed, they haven't even sent a deposition -- a
13 subpoena to. Why are they involved in my negotiations with a
14 third party that's really live?

15 THE COURT: Look, it's a bit of an issue of, in
16 effect, when the game of musical chairs stops with you and the
17 third party, right. And so I can't referee in the abstract
18 when an email exchange is iterative and when it's done.

19 But the understanding here ought to be once you've
20 gotten DS, once you've gotten to an outcome as opposed to a
21 conversation the other side -- the front table -- ought to know,
22 even if he hasn't noticed the deposition, your interest in that
23 makes the person, that entity, relevant, and he may want to
24 change a date range or a search term.

25 MR. KASS: As long as it's sort of at towards the end

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1 of the meet-and-confer process instead of in the middle of the
2 meet-and-confer process, then I'm okay with that.

3 THE COURT: Right. I expect you in good faith to –
4 and I'm glad we have a transcript here. I expect you in good
5 faith not to be cute about it. I have no reason to think you
6 would. But what that means is once you've reached a conclusion
7 with a third party, very promptly I expect that to be
8 communicated with clarity to the plaintiff. You can work out
9 the language here. I think I'm as clear as I can be.

10 MR. KASS: You are, your Honor.

11 THE COURT: Okay.

12 MR. TORZILLI: Thank you, your Honor.

13 THE COURT: All right. We've got about seven or eight
14 more minutes.

15 The next issue involves expert depositions.

16 And the issue here is 14 hours for the economists,
17 that's the defense's position.

18 Mr. Torzilli, even without reading the exposition
19 beyond that, the defense had me at yes on that one. This case
20 is all about the experts. And reading the back-and-forth
21 narratives here, both of which were very well-done, I remember
22 thinking, Boy, I'm going to be interested in hearing from the
23 experts here. I'm in the truth-seeking business. I would much
24 rather for those people expand the time available.

25 MR. TORZILLI: It would be atypical for a case like

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1 this to have expert depositions be more than seven hours. And
2 certainly in a CMO, without knowing who the experts are, what
3 the reports are, what their content --

4 THE COURT: We're talking about economists. We're not
5 talking about descriptive experts, about exposing for me how
6 the healthcare industry works. We're talking about economists,
7 right? We're talking probably a couple people per side, seven
8 hours extra per person, for people whose meters are running,
9 right?

10 MR. TORZILLI: They are paid experts.

11 THE COURT: Who's getting hurt by this? Who's getting
12 hurt by my getting more information?

13 MR. TORZILLI: It seems unnecessary. And also counsel
14 in these cases can run very focused, very effective
15 depositions, including in cases more voluminous and complex
16 than this case.

17 THE COURT: I may be wrong, but I'm not uncertain
18 about this. I really do have a strong feeling that the heart
19 of this case is going to be the experts. And I'd rather take
20 the extra time. They are not doing this for free, nor are --
21 nobody is getting hurt economically, let me put it at that.
22 And more information on the heart of the matter is better.

23 Okay. Nationwide service of trial subpoenas.

24 I'd rather deal with this on a one-off basis. I'm not
25 even sure which one of you wanted a categorical rule --

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1 MR. TORZILLI: We proposed that.

2 THE COURT: Look, I'm receptive to on a showing on a
3 for-cause basis for the individual witness. I completely get
4 why it may well make sense.

5 I'm reluctant to do that on -- particularly given the
6 scale that I've heard about of the number of people here, it
7 feels a bit impetuous to make a categorical ruling like that.
8 But please know that I get where you're coming from, but let's
9 make the showing on an individual basis. And if events play
10 out such that you have a reason to ask me to reconsider, you're
11 welcome to do that.

12 MR. TORZILLI: It may be helpful for planning
13 discovery purposes. So, your Honor, I would expect potentially
14 to see if we can have this taken up again once we have a better
15 sense of fact discovery. It may be appropriate --

16 THE COURT: Meet and confer as always. But I am
17 acutely aware that you know the case 1,000 times better than I.
18 I'm happy for you to reassess it.

19 But given the scale of the student body we're talking
20 about getting deposed here, I'm really reluctant to make a
21 categorical ruling to that effect. But it's not that heavy a
22 burden on an individual basis. And if you conclude that
23 there's some reason to treat a cluster of people together, I'm
24 happy for you to make that showing. But as of now, we'll stick
25 with the rules. Okay.

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1 We may actually have gotten through everything? Have
2 we gotten through all of the disputed issues?

3 MR. KASS: I believe so, your Honor.

4 THE COURT: Okay. So, counsel, may I ask you, within
5 a week, can you revise the case management plan to incorporate
6 what's been agreed to here?

7 MR. KASS: Yes, your Honor.

8 THE COURT: Look, the other thing I will say is I very
9 much value collegiality among lawyers. Whatever has happened
10 here may have some ramification in a way that's been
11 unanticipated that runs afoul of somebody's vacation, partner
12 or associate, or does some damage to something. If you need to
13 work around that, I want you to work around that. This is an
14 important case. It shouldn't ruin working people's lives. So
15 please be always respectful of each other's needs in that
16 respect.

17 Okay. Anything further that I can usefully take up
18 today?

19 MR. TORZILLI: Just by way of update, your Honor.

20 We are working on revising our protective order in
21 response to your Honor's rulings that you issued on Monday. We
22 sent a revised protective order yesterday evening over to the
23 defendants for their review. We've conferred with Mr. Kass
24 prior to the hearing, and it sounds like they need a couple of
25 days to review, so we'll look forward to getting their comments

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1 back and presenting that as promptly as we can to get that
2 entered to ensure that at least that facet of discovery will be
3 in place.

4 THE COURT: Terrific.

5 Anything further from the defense?

6 MR. KASS: No, your Honor. Thank you very much.

7 THE COURT: All right.

8 Look, thank you, both of you, as well as the rest of
9 your teams. I really value the engagement today. This has
10 really been a helpful conversation.

11 I'm going to say one other thing which I would say in
12 pretty much any case, so this is not key to this case.

13 But in any case where you're about to embark on a very
14 expensive, time-consuming process, I would be a bad neutral
15 here not to encourage you to explore settlement. I imagine
16 that's already happened. I don't want to know about it. But,
17 in strong terms, please convey to your clients just what the
18 cost of this is likely to be and just the inherent nature –
19 uncertain nature – of litigation.

20 I don't know whether there are intermediate stops here
21 or places that people can live with, but please have those
22 discussions.

23 All right. Have a very good summer -- did you want
24 to --

25 MR. WESTLING: Your Honor, I just wanted to completely

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1 point a personal issue here.

2 Judge Higginson wanted me to tell you say hello.

3 THE COURT: Say hello back to him.

4 MR. WESTLING: I will.

5 THE COURT: Okay. Very good. Thank you.

6 We stand adjourned.

7 Have a good summer, everybody.

8 * * *