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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

IN RE

BLUE CROSS BLUE SHIELD  
ANTITRUST LITIGATION MDL  
2406

\* 2:13-cv-20000  
\* 2-21-13  
\* Birmingham, Alabama  
\* 9:35 a.m.  
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TRANSCRIPT OF STATUS CONFERENCE  
BEFORE THE HONORABLE R. DAVID PROCTOR  
UNITED STATES DISTRICT JUDGE

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14 ALSO PRESENT:           BARRY A. RAGSDALE  
15                               JUDGE MADELINE H. HAIKALA,

16                               ANDREW ALLEN LEMMON, ESQ.  
17                               ROBERT M. FOOTE, ESQ.  
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PROCEEDINGS

1  
2 THE COURT: All right. Good morning everyone. We are  
3 here in the Blue Cross/Blue Shield litigation.

4 What I thought we would do is dispense with having  
5 introductions of counsel but introduce yourselves if you rise  
6 to speak, and then if you wouldn't mind, also please state  
7 your name again if you rise to speak again.

8 That's just going to help Anita keep track of who's  
9 speaking and make her job easier in terms of reporting our  
10 time here today.

11 All right. We have a number of things to attack along  
12 the Agenda. I want to say I appreciate everyone's input and  
13 assistance and cooperation in developing an Agenda for our  
14 first status conference in this case.

15 What I thought we would do is -- does everyone who's  
16 going to be speaking have a copy of the Agenda with you? I  
17 thought we would defer -- obviously we have dealt with 1.  
18 I thought we would defer Item 2 and jump straight into item --  
19 I should say defer Items 2 and 3 and jump straight into Item 5  
20 first, which is the pending appointment of Mr. Ragsdale to  
21 serve as the Plaintiffs' Discovery Liaison, and my  
22 understanding is he's going to have some role, perhaps, today  
23 in terms of keeping us organized.

24 So any objection to the appointment of Barry  
25 Ragsdale to serve as the Discovery Liaison for the Plaintiffs'

1 side? I know the Defendants have not stated a position on  
2 that.

3 MR. WHATLEY: Your Honor, Joe Whatley. I think all  
4 parties have agreed that Mr. Ragsdale should serve --

5 THE COURT: That was my understanding, but I just  
6 wanted to make sure that everyone had notice and an  
7 opportunity to be heard on that because I thought that was  
8 important.

9 All right. So we will enter an Order appointing him.  
10 And I think a job description has been circulated to folks to  
11 make sure that you understand what the parameters of his  
12 position would be.

13 My thought is he has many talents that he can employ  
14 in other areas if you want to utilize him for those, including  
15 keeping everyone in good humor, so -- he's quite good at that.

16 So I would say that we will make that appointment, but  
17 feel free to utilize his services along with Mr. Gentle's, on  
18 the Plaintiffs' side particularly, as needed, and he'll know  
19 kind of where the line is of what he should and should not try  
20 to tackle.

21 All right. Let's backtrack, then, to the  
22 direct-filing of cases. I think Mr. Small wanted to speak to  
23 that. And the question I have is simply this:

24 A number of counsel have contacted us and said would  
25 the Court prefer, rather than designate a case a tag -- file

1 it in a different district and designate it a tag-along, would  
2 there be any concern about directly-filing certain cases here.

3 My sense is that if the parties agree that it ought to  
4 be directly filed, that's fine. If there is a concern --  
5 obviously on the Plaintiffs' side, it won't be direct-filed  
6 here, but I would just ask the Plaintiffs' counsel to check  
7 with the Defendants' counsel -- or in particular the lead  
8 Defendants' counsel -- to make sure there's not a concern  
9 about that particular case being direct-filed. There may be a  
10 couple other issues that we'll have to tackle later.

11 Now, direct-filing here means that it's here for  
12 lexicon purposes. And that's obviously one issue that we're  
13 going the need to address on the front end in terms of where  
14 you might want to try the case, both sides.

15 If you're stipulating to venue here, that's great; but  
16 there may be reasons that you want to make sure of that choice  
17 before you make it.

18 Anything else we need to address on that, Mr. Small?

19 MR. SMALL: No, Your Honor. I mean, I can briefly  
20 address the lexicon issue if you want to get to that now or we  
21 can do that later.

22 THE COURT: Well, other than just indicating that if  
23 it's filed elsewhere, I'm a pretrial judge, not the trial  
24 judge.

25 MR. SMALL: That's correct. But the issue, as I

1 think you have already identified, Your Honor, is what happens  
2 when we complete pretrial proceedings in an MDL court? Will  
3 there be a trial here, or will the cases that were transferred  
4 here get remanded for trial?

5 And I think, in general, the practice is to have the  
6 MDL judge preside at least over the first trial, which is also  
7 usually the last trial if --

8 THE COURT: Yeah, sometimes we can bellwether a  
9 trial, and we can choose one here; or the parties can agree to  
10 try it back home with their jury. And then the decision would  
11 be whether I just accept an inter-circuit transfer, if there's  
12 some reasons the parties would want me, because of familiarity  
13 with the issues, to do that.

14 I would certainly be open to that, but I wouldn't  
15 suggest myself for that role. I think that would have to be  
16 something the parties initiate. So that's my thought on that.

17 MR. SMALL: Okay. The one thing I would note, Your  
18 Honor, is there have been several cases that were filed  
19 originally in this court and not transferred by the MDL Panel.  
20 So the Court would have the opportunity --

21 THE COURT: That's right.

22 MR. SMALL: -- to do a bellwether trial here --

23 THE COURT: Exactly.

24 MR. SMALL: -- because all the claims were filed here  
25 initially.



1 THE COURT: That's right. And the question is which  
2 are the best candidates for bellwether status if we get to  
3 that point.

4 MR. SMALL: That's right. Thank you.

5 THE COURT: All right.

6 MR. WHATLEY: Your Honor, Joe Whatley again. On the  
7 Provider side, this is a non-issue because the original case  
8 was filed here, and all of the other cases that were filed  
9 elsewhere are exact copies of the one that was filed here. So  
10 the resolution of this case will necessarily resolve those  
11 cases, and so at this point, lexicon is a non-issue on the  
12 Provider track.

13 THE COURT: Yeah. I think that's right, if we try a  
14 case that you've filed here. Now, there's a lot of points in  
15 between here and there that we have to get to; certification  
16 and other things like that. But I see your point.

17 And that's more of an issue on the Subscriber side  
18 because we have got multiple filings that are designated for  
19 centralization or tag-along status on the Subscriber side even  
20 more so than the Provider side.

21 MR. WHATLEY: I think Mr. Hoover was about to  
22 suggest that on the Provider side we will be ready to strike a  
23 jury in two weeks.

24 THE COURT: Why so long?

25 MR. HOOVER: It's only been 12 years that Mr.

1 Whatley has been putting words in my mouth. Hopefully not 12  
2 more.

3 MR. WHATLEY: Seems like yesterday.

4 MR. HOOVER: Your Honor, briefly on the lexicon  
5 issue, the Defendants believe it would be premature to try to  
6 answer the question now at this stage before motions to  
7 dismiss, before class certification.

8 THE COURT: Well, that's pretty much what I was  
9 saying. I think there's a lot of water that has to go under  
10 the bridge before we can get there, and that presumes a lot of  
11 things in terms of -- not the least of which I was thinking  
12 would suggest certification and some other pretrial rulings.

13 MR. HOOVER: Correct, Your Honor. And I think on  
14 the direct-filing issue, I think it raises an interesting  
15 esoteric issue about when the case goes back, is it a 1404 if  
16 it's direct-filed here with that higher standard and all the  
17 choice of law issues that come along with 1404 versus a  
18 straight remand under 1407.

19 I guess our position is nobody wants to waive any  
20 choice of law issues, venue issues, personal jurisdiction  
21 issues.

22 I think there was a case filed against the Mississippi  
23 Plan a day or two ago, direct-filed in this court, whereas  
24 most others had been going through the process -- which, by  
25 the way, has been working very, very well, I think.

1 THE COURT: Yeah.

2 MR. HOOVER: And that raises an issue if people are  
3 going to start direct-filing here with no understanding --

4 THE COURT: That's why I said I want consultation.  
5 And I take it if there's issues, that Plaintiffs' counsel will  
6 govern themselves accordingly and you will govern yourself  
7 accordingly.

8 MR. HOOVER: Yes. Thank you.

9 THE COURT: If they choose to direct-file here  
10 without your consent, then we'll have to address some of these  
11 issues that you may be raising on behalf of your clients.

12 MR. HOOVER: Right. And hopefully we're not dealing  
13 with a situation like Vioxx where there are 6,000 or more of  
14 these coming. So it may be that we have seen most of what's  
15 going to be here, and the JPML process has worked smoothly so  
16 far.

17 THE COURT: We can only pray. We are getting a  
18 steady flow still. I don't know if it's a trickle or a flow,  
19 but I think I just consolidated two cases that were filed  
20 before Judge Blackburn. I did that on the same day I asked  
21 her if I could use a magistrate judge for Discovery in this  
22 case. So thinking through that a little bit.

23 MR. HOOVER: Right.

24 THE COURT: But we'll address those issues. I  
25 wanted to say I want there to be some communication on the

1 front end, and I'm not pre-judging anything beyond that.

2 MR. HOOVER: We couldn't agree more.

3 THE COURT: I do think I have the -- I do think I  
4 have the standing to say let's talk about it before we haul  
5 off and do anything and try to identify what the issues are,  
6 let you have a chance to be heard, and inform their choice  
7 about where to file.

8 MR. HOOVER: Thank you, Your Honor.

9 MR. JONES: Your Honor?

10 THE COURT: Yes.

11 MR. JONES: Larry Jones from Jones Ward in  
12 Louisville. I wasn't scheduled to speak.

13 MS. WAUDBY: One second.

14 (Off the record discussion.)

15 THE COURT: Okay. I'm just being informed we have  
16 an issue with our phone call-in, so I predicted that since I  
17 was presiding over this hearing, there would be a  
18 technological issue. Seems like they follow me around.

19 (Brief Pause.)

20 THE COURT: So where do we stand with that? We  
21 don't want to encourage more people to show up next time. I  
22 take it we have a feed downstairs?

23 MS. WAUDBY: I'm not sure anybody is downstairs.

24 THE COURT: Looks like we still have a little bit of  
25 seating available here so... I'm sorry. One minute, Mr.

1 Jones.

2 (Off the record discussion.)

3 THE COURT: Good morning. I'm sorry. We thought we  
4 had you on the line already. We have been proceeding for a  
5 few minutes, and we've resolved the case.

6 I'm kidding. This is Judge Proctor. Is everyone on  
7 the phone now?

8 ATTORNEY BY PHONE: Yes, Your Honor.

9 THE COURT: Okay. Great. Sorry for that. Quite  
10 frankly, all we've addressed so far are the unanimous consent  
11 to appoint Barry Ragsdale as the Plaintiffs' Discovery  
12 Liaison.

13 A,T&T SPECIALIST: This is Brian with A,T&T. You  
14 signaled for a specialist?

15 (Off the record discussion.)

16 THE COURT: All right. Sorry, folks. Mr. Jones,  
17 the floor is yours -- let me just make one more segue.

18 MR. JONES: Sure.

19 THE COURT: Folks, we've addressed the appointment  
20 of Barry Ragsdale, and we have also begun addressing  
21 direct-filing. What I've said about that -- and that's Item 4  
22 on the Agenda.

23 And what we have said about that is I'm not going to  
24 make any ruling about whether direct-filings are permitted or  
25 not. I think that's a case-by-case basis.

1           But what I am going to insist upon is that to the  
2 extent a Plaintiffs' counsel wants to direct-file a case that  
3 would not be properly filed in this district based upon in  
4 personam jurisdiction, venue and other considerations, then I  
5 want you to communicate with the Blue Cross side to make sure  
6 that there's not an objection to that, and if there is, they  
7 are on notice of that potential filing.

8           If you can't work out your differences, give them  
9 notice of potential filing so they can address it as necessary  
10 or appropriate upon the filing. All right?

11           And I know we have got some folks on the phone. If  
12 you're moving around or have background noise, please mute  
13 your phone.

14           All right. Mr. Jones, I think you might want to  
15 address the direct-filing issue. That's where we were before  
16 we experienced our technological difficulties.

17           MR. JONES: Yes, Your Honor. I wasn't scheduled to  
18 speak, but I do have something to offer on this as the chair  
19 of law and briefing for the Via Mat MDL LPSC. I have actually  
20 looked at the direct-filing lexicon issues fairly recently,  
21 and I wanted to alert the Court that there is precedence out  
22 there for an agreement by the parties that should be  
23 memorialized within the direct-filing order that would  
24 properly preserve the lexicon choice of law issues.

25           So, you know, it's been done in Vioxx. Judge Fallon

1 did it. Judge Miller in the Northern District of Indiana just  
2 did it. And I'll be glad to circulate that.

3 THE COURT: Would you please coordinate with Mr.  
4 Small today after the hearing?

5 MR. JONES: Absolutely.

6 THE COURT: Mr. Small, would you, in turn, get with  
7 Mr. Gentle, and we will see where we are on that?

8 MR. SMALL: Absolutely.

9 THE COURT: Folks, you need to mute the phones. We  
10 have a lot of background noise. If you haven't muted, I would  
11 hate to have the phone detectives figure out who you are.

12 All right. Any other points on direct-filing? I  
13 guess we're going to have to hold off on a direct-filing order  
14 until I can take a look at that language that Mr. Jones is  
15 referring to.

16 And, Mr. Small, if you would just get promptly with  
17 Mr. Gentle about that.

18 MR. SMALL: Yes.

19 THE COURT: All right. The next issue I want to  
20 take up is Item 6, the Consolidated Class Action Complaint.  
21 Who wants to address that from the Providers and Subscribers  
22 side?

23 MR. RAGSDALE: Your Honor, Mr. Boies, I think we  
24 decided was going to address that on behalf of the  
25 Subscribers.

1 MS. KALLAS: And Edith Kallas on behalf of the  
2 Providers.

3 THE COURT: All right. Take it in whatever order  
4 you decide.

5 MR. BOIES: Your Honor, David Boies of Boies,  
6 Schiller & Flexner. We believe it should be possible to work  
7 out a consolidated complaint with both possibly the Providers  
8 and the Subscribers working together. We haven't reached a  
9 conclusion on that yet.

10 We believe that if the Court set a deadline of 30 days  
11 after the appointment of lead counsel, we would be in a  
12 position to file either a consolidated complaint for both  
13 providers and subscribers together or two separate  
14 consolidated complaints, one for the Providers and one for the  
15 Subscribers.

16 THE COURT: All right. Miss Kallas?

17 MS. KALLAS: Yes, Your Honor. Edith Kallas. We  
18 always remained open to discussing the possibility of filing  
19 something consolidated.

20 However, I want the Court to understand our position  
21 right now is that we would like to file separate complaints,  
22 and that's based on a lot of experience in doing this in cases  
23 involving Providers and Subscribers as different classes.

24 I would just like to point out two examples so the  
25 Court can appreciate where I'm coming from. The first example



1 is in the UCR litigation, which is -- they are MDLs in New  
2 Jersey and in California. They are required to file a  
3 consolidated complaint.

4 And we spent more time negotiating with our own side.  
5 It's a real tough position to be in to have to feel that you  
6 can't get the language exactly the way you wanted to make that  
7 statement on behalf of your client.

8 And so that was very frustrating, and I don't feel  
9 that it put our best foot forward, and we would like the  
10 opportunity to do that here.

11 In the Managed Care Litigation, by contrast, we filed  
12 two separate complaints; a subscriber complaint and a provider  
13 complaint. And there, like here, we had Mr. Podhurst who  
14 served as liaison, and here you have appointed Mr. Ragsdale.

15 So we think that we can do enough coordinating to make  
16 sure that we're, you know, thinking through the issues and  
17 being cooperative, but we would like the opportunity to  
18 present our own statement of the claims in our own complaint.

19 Having said all that, we're happy to meet and confer  
20 with Mr. Boies and others on this issue.

21 THE COURT: All right. I would like you to sit down  
22 and talk about it. And I understand there's hesitation. I  
23 think the product of those communications would do us some  
24 good.

25 MS. KALLAS: Absolutely.

1 THE COURT: Now, the question I have -- and I'll be  
2 glad to recognize Mr. Hoover in just a moment. I guess the  
3 question I have -- and I'm all for hurrying and getting the  
4 issues joined. Do we need to have some leadership in place?

5 For example, I'm contemplating appointing interim  
6 class counsel, perhaps, for both providers and subscribers.  
7 Should we do that before we have a consolidated complaint?

8 MS. KALLAS: I think we should, and, again, that's  
9 based on a lot of experience. You need somebody leading in  
10 the charge.

11 THE COURT: And someone's got to be responsible for  
12 what's in that complaint on behalf of not only the parties  
13 that sit here and in responding to it but also on absent class  
14 members making sure their interests are plead.

15 MS. KALLAS: Sure.

16 THE COURT: So my thinking is -- and that's what I'm  
17 going to address later in the hearing, how we're going to get  
18 organization in place, but I think we need to address that,  
19 and then within 30 days of appointment have the consolidated  
20 class action complaint. Mr. Hoover.

21 MR. HOOVER: Yes, Your Honor. Craig Hoover for  
22 Defendants. I would just like to briefly address Defendants'  
23 strong preference would be to have a single consolidated  
24 complaint for administrative purposes as is the case on the  
25 two UCR MDLs currently going on; one in New Jersey; one in Los

1 Angeles.

2 We realize that it takes a fair amount of work up  
3 front and took a fair amount of work up front on the  
4 Plaintiffs' side to get the complaint into one document, but  
5 if that work is done on the front end -- and from what I can  
6 see, I think Provider and Subscriber counsel here might work  
7 better together than has happened, let's say, in New Jersey;  
8 but if that happens on the front end, the Court realizes  
9 tremendous efficiencies because you don't then have us having  
10 to bring the same substantive arguments in separate motions to  
11 dismiss and sort of the cross-fire of that. You have things  
12 worked out in a single complaint up front.

13 And I think if you talk to Judge Gutierrez or Judge  
14 Chesler about what their perception of efficiency is, they, I  
15 believe, would strongly feel that one complaint, one motion to  
16 dismiss, one opinion dealing with all the issues that it needs  
17 to deal with in one place is the most efficient approach.

18 THE COURT: All right. Thank you. And I'm sure  
19 counsel will take that into account as they have their  
20 discussions. Obviously I think all of us would prefer one  
21 complaint if it works. I think the question Miss Kallas is  
22 raising is will it work.

23 MS. KALLAS: Yes. And just briefly, Your Honor.  
24 It's not a matter of work. Mr. Hoover indicated there's a lot  
25 of work, and there were parties on the Plaintiffs' side who

1 didn't get along, as he indicated.

2 But it was really a question of not compromising how  
3 you want to present the case, and I think -- you know, I can't  
4 speak for Judge Moreno, but I believe things were pretty  
5 efficient down there as well.

6 But there is also one other matter. A lot of  
7 Subscriber cases right now are really state-specific, and the  
8 Provider cases are national in scope. So there are those  
9 kinds of differences.

10 But we're happy to sit down and talk to everyone about  
11 it.

12 THE COURT: Very well. Thank you. Anything else,  
13 or anyone else want to be heard on that issue? I think what  
14 I'm going to suggest is we go ahead and begin to get  
15 discussions about that now because I want everyone's input.

16 On the other hand, when we get interim counsel in  
17 place -- and that's one question, Mr. Hoover, for you to be  
18 thinking about, too, if we're going to have separate class  
19 counsel for Subscriber and Provider track. I don't think we  
20 have otherwise.

21 MR. HOOVER: No, I think that works fine with one  
22 complaint.

23 THE COURT: So you're thinking subclass then.

24 MR. HOOVER: Well, I'm thinking separate counsel,  
25 separate representations, correct.

1           THE COURT: Right. So that's one thing to take into  
2 account.

3           But I'm going to probably say 30 days from your  
4 appointment, we'll get either a consolidated complaint or two  
5 complaints filed, depending on what we can work out between  
6 now and then, and then an appropriate amount of time for the  
7 "Blues" -- if you don't mind me using that acronym --

8           MR. HOOVER: That's okay.

9           THE COURT: -- short reference, I should say, for the  
10 Defendants to respond, and we will figure out what that  
11 timeframe is. Okay?

12          MS. WEST: Fine, Judge.

13          THE COURT: So the deadline for filing is a little  
14 soft right now. Depends on when we can get appointments made.  
15 And we'll readdress that, I'm sure, at our next conference.

16          And the next item is No. 7, which I think we probably  
17 ought to take up in conjunction with Item 13 -- I think they  
18 are related -- and that is the magistrate judge assignment and  
19 Discovery issues, including the role of the magistrate judge  
20 and the district judge putting in place quickly a protective  
21 order where Discovery ought to take place principally and  
22 document repository issues and also when we ought to have a  
23 Rule 26 Parties' Planning Meeting with any initial  
24 disclosures. So that's the laundry list on these two items.

25          For your information, yesterday I did ask our Clerk of

1 Court to randomly draw from the cards in our Discovery  
2 magistrate judge deck, and Judge Haikala, who sits over here  
3 (indicating), was drawn. She's our newest magistrate judge  
4 and comes straight out of practice, so I think she's well  
5 acquainted with a lot of these issues.

6 Now, the other thing I need to let you know is before  
7 making that draw, I had to consult our Chief Judge about using  
8 a magistrate judge for Discovery in an MDL, and her point was  
9 that is fine, but don't dominate her time.

10 So we're going to have to figure out some things.  
11 Judge Haikala and I have talked this morning. Our sense is  
12 this is going to be a tag-team approach to Discovery. We'll  
13 kind of work out who has principal roles between ourselves on  
14 various things, and that may from time to time vary depending  
15 upon the availability.

16 So the idea is that Judge Haikala and I will both be  
17 very involved in Discovery as kind of partners on that issue.

18 Now, on some major things, I think the parties can  
19 consult with us and say we'd like, you know, Judge, on this  
20 one -- for example, if there's something that's a privilege  
21 issue, confidentiality issue that maybe my eyes don't need to  
22 see, you could certainly bring that to our attention and ask  
23 us to assign Magistrate Judge Haikala to handle that. Make  
24 sense?

25 That's kind of the rough sketch of how we're

1 anticipating using the magistrate judge and the district judge  
2 in this case.

3 Now, there's a couple things we haven't worked out yet  
4 that she and I will work out between ourselves that I just  
5 don't feel the need to go into right now, but that's the rough  
6 outline on that.

7 As far as a protective order, where do we stand on  
8 needing that, timeframe wise? Mr. Whatley.

9 MR. WHATLEY: Your Honor, Joe Whatley. We have had  
10 some initial discussions. We have suggested the Wellpoint UCR  
11 Protective Order and the Electronic Discovery Protocol. I  
12 think the parties have a fundamental difference.

13 The Defendants, I think, want to stay Discovery. I  
14 hate to keep putting words in Mr. Hoover's mouth. But the  
15 Defendants want to stay Discovery.

16 We don't want to stay Discovery on the Plaintiffs'  
17 side. That's the universal view on the Plaintiffs' side.

18 And what I would suggest on that is let's have a  
19 motion and briefing on that, and whether you want to decide it  
20 or whether the Magistrate Judge wants to decide it, that's up  
21 to you from our standpoint.

22 THE COURT: All right.

23 MR. WHATLEY: Your general framework sounded fine,  
24 and however y'all want to make that choice is fine. So I  
25 think it behooves us to move forward on the Discovery Order

1 and the Electronic Protocol. From the standpoint of the  
2 Provider Plaintiffs, we think this is a much more  
3 data-intensive case than it is document-intensive case, and so  
4 the Electronic Discovery Protocol is very important.

5 But we want -- we would like to move forward quickly  
6 to get those orders in place. We think the Rule 26 conference  
7 should take place shortly after the filing of the consolidated  
8 amended complaint.

9 THE COURT: And the Answer.

10 MR. WHATLEY: And the Answer.

11 THE COURT: Or other motion.

12 MR. WHATLEY: Or while that's in the process. I  
13 would be surprised if we didn't see a motion.

14 THE COURT: Right.

15 MR. WHATLEY: Even though the Defendants will be  
16 extraordinarily impressed with the complaint or complaints we  
17 file.

18 But putting all that aside, Your Honor, I think we  
19 have got to tee up the issue of when the Discovery starts, and  
20 it seems to me we ought to come out of here with a schedule  
21 for Defendants filing a motion if they want to continue the  
22 stay in effect and us setting a briefing schedule to get that  
23 done, and we can get that done while we're in the process of  
24 the other things.

25 THE COURT: All right. Makes sense. Now, here's my



1 question, I guess. And, Mr. Hoover, I'm going to let you  
2 speak -- or whomever you designate to speak on this issue --  
3 but wouldn't it make sense, regardless of when we are going to  
4 start Discovery, to get some protocols in place in terms of  
5 these orders --

6 MR. HOOVER: Absolutely.

7 THE COURT: -- so we're not giving you a green light  
8 to start Discovery and then having to work on some of these  
9 threshold questions?

10 MR. HOOVER: Right. Your Honor, actually we came  
11 out of a meeting of all the Plaintiffs in Dallas before the  
12 MDL hearing, and that's when we went and asked the Defendants  
13 what do you think about these orders that have been used in  
14 the Wellpoint UCR case, and so we would like to move those  
15 discussions along as quickly as the Defendants will have them  
16 with us.

17 THE COURT: All right. Very well. Yes.

18 MR. ZOTT: Your Honor, David Zott with Kirkland &  
19 Ellis representing the Association. A couple points.

20 First, Your Honor, we certainly don't have any  
21 problem with briefing the issue of a Discovery stay. Counsel  
22 correctly characterizes our view. We do think there should be  
23 a stay.

24 I should just point out there is an existing stay  
25 right now. As you know, Your Honor has already entered a stay

1 with Case Management No. 1 pending further order of the Court,  
2 and we believe that should remain in place.

3 As the Court knows --

4 THE COURT: What do you think we need to tackle  
5 before we can start any Discovery?

6 MR. ZOTT: Well, obviously I think we first need to  
7 first have the leadership of the Plaintiffs worked out so we  
8 know who we're dealing with when we start to negotiate some of  
9 these issues.

10 THE COURT: Certainly.

11 MR. ZOTT: Then I think they need to file,  
12 hopefully, a single consolidated complaint, and then we can  
13 there see the allegations.

14 Now, at the same time, I agree with Mr. Whatley.  
15 We're perfectly fine. I think there's a lot for us to get  
16 done before we actually start Discovery, and we can work on  
17 some of those issues.

18 The two that come immediately mind is we're fine  
19 working out a protective order. We think that's something  
20 that needs to be done. I have already reviewed the one that  
21 Mr. Whatley sent over, and we certainly have thoughts about  
22 that.

23 We also -- I think, Item 7, Your Honor, which is  
24 related, is the preservation issue. And we think that's also  
25 an issue that we can deal with in the interim.

1           And that can be quite complicated because we have  
2 many, many plans here that have different systems, and to sit  
3 down and just start talking about what preservation ought to  
4 look like, I think that's going to take some time.

5           THE COURT: Wouldn't that be a plan-by-plan  
6 implementation, though, in terms of --

7           MR. ZOTT: It could be. It could be. And that's  
8 why I think it would take time. I mean, I -- and on that  
9 score, Your Honor, I just want to point out -- because this is  
10 an important issue for our side -- Your Honor does have some  
11 proposed language in the Agenda, but -- and that, I think,  
12 would be problematic for some of the plans.

13           You also have already entered an Interim Preservation  
14 Order, though, that's in that Case Management Order No. 1, and  
15 that actually has language which says that "the parties will  
16 take reasonable steps to preserve."

17           That has already been in place for a month and a half,  
18 no objection on anybody, and I think as a group, we can live  
19 with that for right now and then work and confer with the  
20 Plaintiffs on what a more detailed and appropriate  
21 preservation order would look like.

22           And so I think --

23           THE COURT: Normally wouldn't all these issues be  
24 taken up at the Rule 26 meeting, at least the dialogue  
25 beginning at the Rule 26 meeting?

1           MR. ZOTT: I think so. Honestly I think the issue  
2 with the Rule 26 is some of these will definitely be taken up.

3           On the other hand, you know, in terms of ultimate  
4 scope of Discovery and when to begin Discovery, it's our view  
5 that that's not something we can talk about just yet until we  
6 have more clarity on their side in terms of a complaint and in  
7 terms of who's going to lead the charge.

8           And we do intend to bring a motion to dismiss, Your  
9 Honor, absolutely, and we do honestly believe that that's a  
10 motion that should be granted. I'm not going to argue it here  
11 today. But even if it's not --

12           THE COURT: Since we don't have a complaint.

13           MR. ZOTT: Yeah. I have a decent sense of what it  
14 might say. So that's where we stand, Your Honor. And we're  
15 happy to brief.

16           And I should point out that is sort of the presumption  
17 in this circuit under the Chudasama case that Discovery should  
18 not proceed if a dispositive motion is planned, and here it  
19 certainly is planned.

20           But there's a lot of work we can get done between now  
21 and then so we don't delay the case.

22           THE COURT: All right.

23           MR. BOIES: Your Honor, let me speak --

24           THE COURT: And this is Mr. Boies.

25           MR. BOIES: David Boies from Schiller & Flexner.

1 Let me speak, if I could, to the preservation issue. We don't  
2 think that the language that has been proposed is terribly  
3 burdensome, and if there are documents and data that are  
4 covered by the Court's suggested language that are not  
5 currently being preserved, I think we need to address that.

6 I don't think we can wait until the Rule 26 conference  
7 and then find out -- and that may be quite a while -- and then  
8 find out that some material that they knew were going to be  
9 requested no longer exists.

10 There is an interim order, but given counsel's  
11 comments, I would like to know with more specificity what it  
12 is he thinks is covered here by the Court's language that's  
13 not covered by an interim order because if there are things  
14 that we are losing right now in terms of documents and data  
15 that are relevant to this case, I think that's a serious  
16 problem and needs to be addressed promptly.

17 THE COURT: All right. You think that's the kind of  
18 issue we would work out before leadership's firmly in place?

19 MR. BOIES: I think we should, Your Honor, at least  
20 on an interim basis because I think that none of us wants to  
21 be in the position of finding out that something was lost  
22 after the fact.

23 THE COURT: All right. Mr. Zott, what's your take  
24 on that? I mean, why wouldn't we freeze the status quo  
25 regardless of when Discovery is going to start and make sure

1 that status quo will continue?

2 MR. ZOTT: A couple things. First, Your Honor, I  
3 mean, I'm not suggesting that anyone is destroying any  
4 documents. We have got legal obligations independent of any  
5 court order. We're aware of that. Legal holds have gone out.  
6 The Order does say that we need to "take all reasonable steps  
7 to preserve evidence." That's an appropriate order.

8 The difficulty with the language as currently proposed  
9 in the just new Agenda, among other things, is no time limit.  
10 It doesn't limit in any way to which documents that are  
11 reasonably accessible, and there's a lot of law that covers  
12 that there should be such a limitation.

13 It's unclear how it would impact routine corporate  
14 operations as currently phrased. It doesn't address the  
15 issues of backup tapes, all of which are well-litigated in the  
16 case law.

17 Our point is we'll sit down whenever they want to  
18 start --

19 THE COURT: I was going to say let's sit down after  
20 this hearing and start talking about that issue.

21 MR. ZOTT: That's fine.

22 THE COURT: And what I'm going to do is pick the  
23 people as the focus group. I'm going to ask you and Mr. Boies  
24 and Mr. Whatley to sit down -- and that's no presumption on  
25 the Plaintiffs' side in terms of anything, but that is just

1 who I want to start dealing with these issues. And you can  
2 bring along to the table anyone you would like, as may they.  
3 All right?

4 MR. ZOTT: And we will do that.

5 THE COURT: I think your points are well-taken. I  
6 think this was a starting point on this language that was  
7 placed in the Agenda. Let's tweak it to your satisfaction and  
8 their satisfaction. And I would like to have that in place  
9 because I think Plaintiffs' counsel is right and you're right  
10 at the same time.

11 No one expects that any Defendant is intentionally  
12 destroying any documents. On the other hand, I think they  
13 want to make sure there's not some inadvertent loss of  
14 information.

15 MR. ZOTT: Fair enough.

16 THE COURT: Okay? And that makes sense actually.

17 MR. SMALL: Your Honor, can I address one other  
18 aspect of document preservation?

19 THE COURT: Sure.

20 MR. SMALL: So we have been talking about the  
21 parties' obligation to preserve documents, and as Mr. Zott  
22 already pointed out, that obligation arose upon the filing of  
23 the complaints in this case. And then there's the Court's  
24 initial Order that added that obligation.

25 But where I believe there may not be any obligation

1 to preserve right now is as to third parties, you know, in  
2 part because we don't know yet or they don't know yet whether  
3 they are going to be subpoenaed even for documents in this  
4 case.

5 And I'm wondering whether it would make since, Your  
6 Honor, to serve third-party document subpoenas promptly in the  
7 case, putting aside whether Discovery is going to be stayed or  
8 not -- that would go to the question of when those subpoenas  
9 would be enforced -- but to get them served would then create  
10 the obligation on behalf of the third parties to preserve  
11 their documents.

12 THE COURT: I'm sure someone on the other side would  
13 like to speak to that. Mr. Zott.

14 MR. ZOTT: Your Honor, we don't think that's a very  
15 good idea for a number of reasons. But first of all, I mean,  
16 again, before Discovery even can be issued, there should be a  
17 complaint so those third parties can assess --

18 THE COURT: I agree. I think we can't very well  
19 send subpoenas out in the case that we don't have an active  
20 complaint in and that we need to develop a complaint in.

21 And I understand Mr. Small's point that we want to  
22 take whatever steps we can as early as we can to preserve some  
23 of these issues. So that's why I'm kind of assembling a  
24 committee to start tackling some of those issues. Okay?

25 MR. SMALL: All right.



1           THE COURT: And that will be something we can take  
2 up and see if there's something that can be agreed upon with  
3 respect to third-party preservation.

4           But I think Mr. Zott is exactly right. I think we're  
5 going to have to have the issues joined before we even know  
6 what proper Discovery is from a party, much less a  
7 third-party.

8           MR. SMALL: Okay.

9           THE COURT: All right. Everyone tend to agree that  
10 we would like to do as much -- and this is not favoring my  
11 hometown. It's just this is where our resources are to police  
12 Discovery efforts. There's no ironclad rule here. But I want  
13 as much Discovery as possible taking place here because  
14 that's -- if we're going to have a magistrate judge kind of on  
15 call, a Discovery Liaison available to help out who are both  
16 based in Birmingham, that makes sense.

17           What I would say is I understand there's going to be  
18 Discovery that's conducted; that it doesn't make sense to  
19 bring everyone who's participating on the receiving end of  
20 that Discovery, if you will, into Birmingham; but in those  
21 situations, I want you to make advance arrangements with  
22 either the Magistrate Judge, Mr. Ragsdale, and anyone else who  
23 needs to be involved, that the deposition is going to be  
24 taking place elsewhere and make sure that they are in a  
25 position to assist and fulfill their responsibilities. Fair

1 enough?

2 MR. BOIES: Yes, Your Honor, absolutely. We believe  
3 from the Plaintiffs' side, certainly the Subscriber side, and  
4 I think all the Plaintiffs' are in agreement on this, that we  
5 can, through the use of technology, have at least most of it,  
6 if not all the depositions -- certainly most of the  
7 depositions here, and it will be much more efficient for all  
8 the parties to do that.

9 There are available technologies that will allow  
10 people to participate in those depositions remotely with a  
11 screen that will show the witness and a screen that can put up  
12 the documents that are being examined at the deposition.

13 And that will mean that we will have not only the  
14 people who are going to have to rule on Discovery disputes  
15 available, but in addition we will have -- because we'll have  
16 the documents both in physical form and electronic form  
17 here -- we will have all of that material accessible.

18 THE COURT: All right.

19 MR. BOIES: So I think that we believe that we can  
20 construct, with available technology, a centralized system  
21 that will allow us to go forward very efficiently and will  
22 make it a benefit to everybody to have the depositions for the  
23 most part here.

24 THE COURT: Fair enough. Anyone else? Yes, sir.

25 MR. LEMMON: Yes, Your Honor. Andrew Lemmon. In

1 circling back, I guess, to Item No. 7, in deciding or  
2 coordinating with the Magistrate or with the Court as far as  
3 where the depositions might be taken, in some cases recently  
4 the magistrates have had regular -- whether it's weekly or  
5 monthly -- conversations with a liaison in Discovery from both  
6 sides, and the depositions that are coming up in the next  
7 month, they have decided specifically where they will be and  
8 how they will take place.

9           So if it's a 30(b)(6), you know what the issues are  
10 that might be taken up during that deposition. And that has  
11 seemed to work pretty well, with the presumption being that  
12 everything would be done here, but if somebody showed good  
13 cause for it to be somewhere else, then it could be somewhere  
14 else.

15           THE COURT: All right. Judge Haikala, do you want  
16 to second that motion?

17           JUDGE HAIKALA: That sounds like a good idea.

18           THE COURT: That's probably something we'll be able  
19 to work out just as you've suggested through communication in  
20 those regularly-scheduled Discovery conferences with Mr.  
21 Ragsdale and whomever the Defendants wish to have  
22 participating, and the Magistrate Judge and counsel that are  
23 on what I perceive will be a Discovery committee on the  
24 Plaintiffs' side.

25           Yes. Mr. Zott.

1           MR. ZOTT: Your Honor, just -- we did have a chance  
2 to speak about this among ourselves, understanding that we've  
3 got 30 some-odd Plans in the case so far, far flung, some as  
4 far as Alaska and Hawaii. Some of them are very --

5           THE COURT: I'm participating in any Discovery in  
6 Hawaii.

7           MR. ZOTT: Okay. Well, we have -- we thought that  
8 should be --

9           THE COURT: Sorry, Judge Haikala.

10          MR. ZOTT: Fair enough, Your Honor. And some of  
11 them are very small. They have two-person legal departments  
12 and 350 total employees for the Vermont Plan, for example.

13          So we are supportive and sensitive to trying to do as  
14 much here as possible, but I just want to say that I think  
15 some of these Plans, for burden-related issues, may certainly  
16 be requesting that depositions proceed in some other  
17 locations.

18          THE COURT: Or using the technology that Mr. Boies  
19 has suggested where they can be deposed from afar with counsel  
20 assembled here.

21          MR. ZOTT: Right. That's conceivable as well. And  
22 I don't know if Your Honor has any interest in having this as  
23 the primary location but designating certain other central  
24 cities as well.

25          THE COURT: Well, I hadn't really thought that

1 through. I guess my thought was the default will be here  
2 unless there's a good reason not to do it. I think your  
3 comments highlight a couple of those good reasons not to do it  
4 here or where we might have to accommodate interests.

5 And I really like the suggestion Mr. Lemmon made that  
6 that's just something we need to deal with in these  
7 regularly-scheduled conferences on Discovery with the  
8 Magistrate Judge in terms of what's coming up and how the  
9 parties wish to proceed, and if there's a dispute, resolve it  
10 there so everyone knows how to govern themselves.

11 MR. ZOTT: Fair enough. Thank you, Your Honor.

12 THE COURT: Okay? This is obviously not unique to  
13 MDL litigation but unique to the usual litigation that we all  
14 participate in; interesting in that we're all gathering  
15 together before we have the complaint that will be operative.

16 So that's part of what I'm struggling with is trying  
17 to make sure that we accommodate you but keep the train  
18 heading north on the tracks.

19 That's why in a lot of these situations, I'm not  
20 making a firm ruling today. I'm saying let's communicate  
21 because I'm not sure we're going to have the best idea spring  
22 forth from my mind on a lot of these issues without taking  
23 into account a lot of these other factors.

24 I think when we are able to get leadership in place,  
25 get it consolidated, or two separate complaints, an Answer and

1 kind of more of a Discovery plan, then we're going to be in a  
2 position to give you more quick rulings on some of these  
3 disputes or questions. Make sense?

4 But right now I've got to -- you know, I was just  
5 telling Ed Gentle this morning and Barry Ragsdale that, you  
6 know, walking around in that reception last night, I realized  
7 we had some great lawyers in this case, and my philosophy at  
8 least early on is to allow you to ply your trade.

9 Now, I won't hesitate to jump in and resolve things  
10 when they need to be resolved, and Judge Haikala will not  
11 either, but early on, I'm going to give you a little bit of  
12 rope to see how many of these things you can work out  
13 yourselves because I think that's going to help down the road.  
14 It will help you build a little bit of collegiality and  
15 consensus about the approaches to the case.

16 But please don't misunderstand that to mean that I  
17 won't be serving as an umpire on balls and strikes when the  
18 time comes. I will. All right?

19 I think it's probably appropriate now just to finish  
20 up with the Rule 26 meeting but also talk about some of these  
21 bifurcation issues the parties have started discussing because  
22 that could have some effect on Discovery.

23 I would expect that a lot of these issues that I'm not  
24 making a call on today we're going to try to work out as many  
25 of those as possible in the Rule 26 meeting. And that's going

1 to be some Rule 26 meeting. I don't think it's going to be  
2 ten minutes on the phone like some of our other cases.

3 But what I would expect is that we would have  
4 leadership in place by then, and I would want that to be a  
5 face-to-face meeting.

6 I probably will require that meeting to occur here in  
7 the courthouse, perhaps in my jury room, which seats enough  
8 people where we don't have too many cooks in the kitchen but  
9 enough people to accommodate everyone. And I probably will  
10 ask Judge Haikala to attend that and be a participant in that.  
11 Now, that doesn't preclude a lot of shuttle diplomacy before  
12 that meeting.

13 So that's kind of what I have in mind about the Rule  
14 26 meeting. Anyone uncomfortable with that approach?

15 I just think, you know, we'll give you some time to  
16 kind of get your act together and decide what you want, try to  
17 convince the other side to agree to that, but that will be an  
18 important meeting where we start really laying the framework  
19 on a lot of these issues. Okay?

20 Bifurcation issues. Probably a threshold question.  
21 First, I guess my question is this. Let's presume for  
22 purposes of this discussion -- and I'm not presuming it -- but  
23 just for purposes of this discussion -- that we are going to  
24 initiate Discovery at some point, notwithstanding any  
25 dispositive motion filed by the Defendants, and the question

1 becomes what does that Discovery look like.

2 My perception is the Defendants think there should be  
3 some threshold issues that are the subject of that early  
4 Discovery, at least one of which is factual or legal issues  
5 surrounding the question of whether these are horizontal or  
6 vertical agreements, which would implicate a different  
7 standard of review. There may be some other ones that you  
8 want to highlight for me now.

9 So let's start with the Defendants' side. Assuming  
10 I'm right that you would like to bifurcate some of these  
11 Discovery issues; and presuming and assuming that we are going  
12 to reach Discovery in this case at some point, what are your  
13 thoughts there? What are the issues that ought to be  
14 bifurcated, and give me your best rationale for why that ought  
15 to be done.

16 MR. ZOTT: Your Honor, David Zott again on behalf of  
17 the Association. Again, in the world where we're going  
18 forward with Discovery -- and we've thought about that a lot  
19 and met with our group and considered it.

20 In the normal case, Defendants are in favor of  
21 bifurcation and taking a case in pieces, but in this case,  
22 candidly, we don't think that bifurcation makes sense and will  
23 result in any efficiencies.

24 THE COURT: You don't think that?

25 MR. ZOTT: Do not, no.



1 THE COURT: Okay.

2 MR. ZOTT: And the one issue that has been brought  
3 to the fore is --

4 THE COURT: So you don't think we ought to, for  
5 example, focus Discovery early on on structure and function of  
6 the different Blue Cross/Blue Shield organizations and whether  
7 or not these are horizontal or vertical agreements just as a  
8 threshold issue?

9 MR. ZOTT: Well, the way -- in our view, it's less  
10 an issue of horizontal and vertical -- although we think it's  
11 vertical. But it's more an issue of are the restraints here,  
12 which is the Exclusive Service Areas, you know, going to be  
13 judged under Per se as being, you know, anti-competitive with  
14 no possible justification or under the Rule of Reason which is  
15 left to the justifications.

16 And our problem is that's a threshold issue that will  
17 probably get briefed through the motion to dismiss. It's  
18 certainly an issue the Court will have to decide.

19 But to the extent the Plaintiffs' survive a motion to  
20 dismiss on that count and on a Per se and that continues to be  
21 in the case, our defense to a Per se case will be all the same  
22 issues that come up in a Rule of Reason.

23 So, you know, in other words, the very reasons why we  
24 don't think the Per se Rule could ever apply here are the  
25 reasons why these Exclusive Service Areas are completely --

1           THE COURT:  If we're proceeding under a Rule of  
2 Reason, it seems like there would be a vast amount of  
3 Discovery that wouldn't apply if it's Per se.  I mean, it may  
4 be you're going to provide some justification, but if it's a  
5 Per se analysis under Section 1, that's a completely different  
6 case than a Rule of Reason analysis, isn't it?

7           MR. ZOTT:  Well, it would be a different analysis.  
8 The problem is --

9           THE COURT:  And a different case.  That's what I'm  
10 saying.

11          MR. ZOTT:  I think it would be a different case;  
12 maybe not as different as Your Honor is suggesting.

13           But the point is, for the Court to reach that  
14 result -- and assuming the Court gets through motions to  
15 dismiss and still thinks there's an issue of Per se versus  
16 Rule of Reason, when we defend a Per se claim, we're going to  
17 bring to it all of the justifications before the -- all the  
18 pro-competitive justifications for these Exclusive Service  
19 Areas that have been in place for decades and been reviewed by  
20 numerous courts and the DOJ, et cetera.

21           And I'm not going to argue it today, but we're going  
22 to bring everything to you, including the economic effect.  We  
23 think these are pro-competitive; we think they result in lower  
24 provider prices, lower subscriber prices.

25           So I think for us to actually even defend an argument

1 on Per se, assuming they get that far -- and I think honestly  
2 when you look at the law and you look at the briefing --

3 THE COURT: So are you saying, then, that you think  
4 the Discovery -- let's say it's a Per se analysis for purposes  
5 of discussion, and we find there is a restraint -- an  
6 agreement regarding restraint; it is at a horizontal level of  
7 distribution of the service.

8 Are you saying, then, that you think that evidence  
9 regarding whether there was antitrust injury is going to be  
10 very similar to the evidence that would have to be developed  
11 to determine if the agreement, if it were a Rule of Reason  
12 analysis, unreasonably restrained competition in the relevant  
13 antitrust market.

14 MR. ZOTT: That's not exactly what I'm saying, Your  
15 Honor. What I'm saying is the Per se category is reserved for  
16 a very narrow set of conduct that is anti-competitive on its  
17 face without the need for any --

18 THE COURT: There's only two or three categories  
19 left where you get a Per se analysis.

20 MR. ZOTT: At best.

21 THE COURT: But one of them is a horizontal market  
22 allocation, right?

23 MR. ZOTT: I don't think so. Even a horizontal  
24 market allocation -- and that's true of cases such as the  
25 American Needle case, which is the most recent Supreme Court

1 pronouncement. Even horizontal allocations such as horizontal  
2 agreements to jointly license a product, somewhat similar to  
3 what's being alleged here, the Court had no problem saying  
4 that would be judged under the Rule of Reason so long as there  
5 is any pro-competitive justification, and here we think  
6 there's many, many that have existed for decades. And I can  
7 go through them all.

8 So even for Your Honor --

9 THE COURT: All right. I understand what you're  
10 saying now.

11 MR. ZOTT: Yeah. We're going to need to put all  
12 that evidence in. Assume that -- and I don't think that by  
13 the time you get ripe on a motion to dismiss, I honestly don't  
14 believe Your Honor will conclude that this is in that narrow  
15 category because even if it's purely horizontal, it can still  
16 be a Rule of Reason case, and that's the current state of the  
17 law.

18 And so we're going to need to bring all of that  
19 evidence to bear, and we're not going to leave any of it out,  
20 because we're talking about an allegation that cuts to the  
21 heart of what this system is and what this system has done for  
22 the last 60 or 70 years.

23 So we're going to have to bring all of that to the  
24 fore.

25 THE COURT: All right. This may be music to your

1 ears, Mr. Boies, that you don't necessarily want to bifurcate.

2 MR. BOIES: Well, I think it is useful that we're  
3 not going to be facing a number of arguments trying to stage  
4 Discovery.

5 THE COURT: We don't have to figure out what's wheat  
6 and chaff, right?

7 MR. BOIES: Right. We're going to have to do that  
8 in the Discovery process itself, and I think that's a  
9 positive.

10 On the other hand, without arguing the motion today, I  
11 think the Court knows that our view --

12 THE COURT: For some reason, I've already heard your  
13 argument in my mind.

14 MR. BOIES: I thought you probably had, Your Honor.

15 THE COURT: But, you know, I'll confess, I'm not  
16 pre-judging your argument. I'm very interested in seeing what  
17 everyone has to say when we get to that point.

18 MR. BOIES: And if we do get to the point --

19 THE COURT: And, of course, their motion to dismiss.  
20 And I understand the Iqbal analysis. And their motion to  
21 dismiss, though, is going to be somewhat determined by what  
22 you allege in your complaint --

23 MR. BOIES: Yes, it is --

24 THE COURT: -- as long as what you're alleging in  
25 your complaint passes Iqbal muster.

1           MR. BOIES: It will, Your Honor. And I think they  
2 basically are probably preparing the motion to dismiss now  
3 because I think they understand basically what's going to be  
4 in the complaint, but I agree that they need the complaint  
5 itself before they make the motion.

6           THE COURT: Right.

7           MR. BOIES: If the Court were to conclude -- based  
8 on the argument that you heard in your head that I'm going to  
9 make that this is Per se, I do think that would significantly  
10 simplify the case and narrow Discovery.

11          THE COURT: Well, and that's the question I also  
12 have in my mind is just because it looks like Per se on the  
13 face of the complaint, we would still have to do some  
14 Discovery to see if, in fact, after Discovery, based upon  
15 either a trial record or a Rule 56 record, these were  
16 horizontal and fit in a category other than what the  
17 Defendants are believing they will be able to convince me they  
18 fit in now.

19          MR. BOIES: I think that's right, Your Honor. I  
20 think that if our Per se allegations survive a motion to  
21 dismiss, there will be probably, depending on what the Court  
22 decides, some Discovery.

23          That Discovery to determine whether it's Per se or not  
24 is going to be quite limited, and I think that if the Court  
25 were to conclude that this were a Per se case after that kind

1 of Discovery, the remaining Discovery would be very much  
2 affected by that ruling.

3 Now, the Court may not want to make that motion early  
4 on; may want to see a complete record. So I'm not pre-judging  
5 when the Court makes that decision.

6 But if the Court were to make a decision that this was  
7 a Per se case, I believe that would greatly simplify Discovery.

8 MR. WHATLEY: Your Honor, Joe Whatley for the  
9 providers. We agree with that. It could also affect how our  
10 claims go forward in the case.

11 THE COURT: Right.

12 MR. WHATLEY: We think you will conclude this is a  
13 Per se case, and our complaint and our amended complaint will  
14 be structured in a way that does present a Per se case.

15 But if you were to conclude that it's not, then, quite  
16 likely, even on the Provider side, you would see a very  
17 differently-structured case --

18 THE COURT: Right.

19 MR. WHATLEY: -- for all the reasons you were raising  
20 in your comments.

21 THE COURT: All right. Well, it seems to me, then,  
22 that we will see where we are in terms of the filing of the  
23 complaint, and that will be an issue you need to take up at  
24 the Rule 26 meeting.

25 No one is frozen. I'm just raising the issue because

1 it was on the Agenda. But no one is frozen on a position.  
2 The Defendants are willing to reconsider that if things don't  
3 look like you think they are going to look after you receive  
4 that complaint.

5 MR. WHATLEY: Fair enough.

6 THE COURT: All right. Let's backtrack on the  
7 Agenda to a couple other things that we haven't covered yet.  
8 Let's pick up at Item 8, the Common Benefit Fund.

9 I don't want to say a whole lot about this because I  
10 think the Plaintiffs' have to make some decisions, with Court  
11 input obviously, and particularly Ed Gentle's input, but I  
12 think we need to have leadership in place before those  
13 decisions can really be made.

14 I do think -- and tell me if you disagree with this.  
15 I think this is a fair question to ask at this point. It does  
16 look to me like there's going to be more resources required on  
17 the Subscriber side than the provider side when it comes to a  
18 lot of these litigation issues. Is that a fair assumption I'm  
19 making?

20 MR. BOIES: I think that is a fair assumption, Your  
21 Honor. I think there will probably be a lot of resources on  
22 both sides, but I do think there's probably going to be more  
23 resources on the Subscriber side than on the Provider side,  
24 and I think that's something that we need to work out  
25 cooperatively how we finance that, and how we --



1           THE COURT: And what I would say is -- you're going  
2 to do this already, I'm sure; but keep Ed tucked in on those  
3 discussions. He has done a wonderful job in breast implant; a  
4 superb job in my Total Body case. He's handled other cases  
5 that I wasn't the judge in. I think he can give you some  
6 pretty creative, sound thoughts about how that ought to get  
7 structured.

8           You may not agree with everything he says, but it will  
9 be worth taking into account what he says.

10           MR. BOIES: Absolutely, Your Honor.

11           MR. WHATLEY: It shouldn't surprise Your Honor that  
12 we have already begun those discussions.

13           THE COURT: That's what I understand. He hasn't  
14 shared any details, but he says you are talking. Okay?

15           I think that's all we need to say about Common Benefit  
16 Fund today. The Defendants really have no position on this at  
17 this point, correct?

18           MS. WEST: Yes.

19           THE COURT: All right. There is an issue about  
20 whether there is a release that may affect some of the  
21 Plaintiffs in this case. I don't know a whole lot about it.  
22 I've not tried to dig into it too much.

23           My understanding is that Judge Greenham has a case  
24 down in Florida where there was a settlement and some release  
25 language that could or could not affect claims in this case.

1           Anybody want to -- Mr. Whatley is standing. I'm going  
2 to let you pick up the discussion from there.

3           MR. WHATLEY: Yes, sir. And I expect Mr. Hoover  
4 will respond without me putting words in his mouth this time.

5           But, Your Honor, there are prior settlements in front  
6 of Judge Moreno that the Defendants believe impact the claims  
7 of the physician members of the class, of the provider class,  
8 up to a certain point at least, in this case.

9           We disagree with them. And I should note that when we  
10 do file an amended consolidated complaint, it will not just be  
11 on behalf of the physicians; it will include ancillary  
12 providers. It will include hospitals, and it will include  
13 ambulatory surgery centers.

14           And so, I mean, there will be a very broad class that  
15 still goes forward before you regardless of the outcome of  
16 that question.

17           THE COURT: So this is just affecting contours of  
18 this class, not the existence of the class.

19           MR. WHATLEY: Exactly. Exactly, Your Honor. And  
20 the question there -- and we're not going to try to argue it  
21 here. I mean, we had made the suggestion that you and Judge  
22 Moreno talk and you decide and that the two of you decide it  
23 here or decide it there. We're fine either way.

24           We filed a Declaratory Judgment Action in front of  
25 Judge Moreno on behalf of the medical doctors that are covered

1 by those settlements, and it includes prior class  
2 representatives in addition to a class representative who  
3 would add into this case.

4 Now, I should stop there and say for a second there  
5 are "Blues" that are not Defendant parties to that, and the  
6 doctors can bring the claims against those "Blues" that didn't  
7 settle in Miami regardless of this issue.

8 And also the class does cut off so there are doctors  
9 that were admitted to practice after that settlement that have  
10 claims here that are not at issue.

11 But in any event, we filed a Declaratory Judgment  
12 Action. Mr. Tropin and Mr. Podhurst and Mr. Prieto are all  
13 here who were involved in that complaint, involved in that  
14 prior proceeding.

15 The issue -- or a major issue in all that is that this  
16 market allocation question was not involved in any way, shape  
17 or fashion in the prior litigation, and so does the release  
18 there reach this issue, which was not in any way related to  
19 what was in the complaint.

20 I don't expect Mr. Hoover to agree with me on that  
21 representation, but that's a question that's going to have to  
22 be decided, and it's going to have to be decided by looking at  
23 the claims in this case and analyzing the claims in this case.  
24 And that's something -- an issue that --

25 THE COURT: So we'd really need complaints in place

1 before we're in a position to do that, won't we?

2 MR. WHATLEY: Sure. Sure. You would have to.

3 THE COURT: Yeah.

4 MR. WHATLEY: But we also don't want to delay. And  
5 we want these folks to be able to move forward. And we didn't  
6 want the contempt issues that we have had in the past in other  
7 matters. And that's why we went down there and we filed a  
8 Declaratory Judgment Action.

9 We weren't trying to run away from you in deciding  
10 that question; and by saying it's fine with us for you to  
11 decide it, we're not trying to run away from Judge Moreno.

12 We're saying we're happy with either one of you to  
13 decide it. We believe that regardless of who decides it, we  
14 will prevail ultimately on the issue. But at the appropriate  
15 time, as soon as practicable, we would like it to be decided  
16 by one of them.

17 THE COURT: All right. Fair enough. Mr. Hoover?

18 MR. HOOVER: Your Honor, this is a very  
19 straightforward issue, and I don't think -- we're not trying  
20 to run away from this Court either, but there is an exclusive  
21 jurisdiction provision of the settlement -- Mr. Whatley knows  
22 that -- exclusive jurisdiction provided to the Southern  
23 District to interpret those settlement agreements.

24 And there was good reason for that. Because by the  
25 time those cases settled, Your Honor, Judge Moreno had seen

1 six, seven, eight complaints. He knew what all the claims  
2 that had been brought were. He knew the settlements. He's  
3 issued 40 rulings since those settlements in cases where --

4 THE COURT: He's got the template of what is in and  
5 what's out.

6 MR. HOOVER: He does. And he's made rulings as  
7 recently as six weeks ago on the key issue that the Muscle Man  
8 Complaint raises, which is if you have an allegation of  
9 post-effective date conduct but a conspiracy going back 20  
10 years or more, is that a claim that's barred.

11 Judge Moreno has ruled on that eight times, and each  
12 time he has ruled that you can bar those claims because the  
13 alleged conspiracy is going back 20 years.

14 And the notion that in the face of that -- and that  
15 issue is in the 11th Circuit as Mr. Whatley's filing pointed  
16 out.

17 In the face of that and the exclusive jurisdiction  
18 provision, the notion that this is a coin-flip situation in  
19 terms of who should decide it, we think is not faithful to the  
20 agreements that the Plaintiffs' in Musclemen had.

21 THE COURT: My sense -- just to cut to the chase, my  
22 sense is that at some point -- and I just haven't thought it's  
23 ripe yet -- I will call Judge Moreno and offer him the  
24 opportunity to resolve it unless he would prefer that I  
25 resolve it. Any problem with doing it that way?

1           MR. HOOVER: I don't have any problem with Your  
2 Honor calling him. I think he's planning on resolving it.  
3 It's in his court.

4           THE COURT: Right.

5           MR. HOOVER: The JPML rejected connecting it to this  
6 case.

7           THE COURT: Right.

8           MR. HOOVER: And rightly so. And he knows about the  
9 exclusive jurisdiction provision. We are going to be filing  
10 our response in Muscle Man on March 8, and that will be --

11          THE COURT: Just as far as collegiality, I probably  
12 still would like to reach out to him just to let him know that  
13 I'm deferring to him unless he is pushing it to me.

14          MR. HOOVER: I would have no issue with that, and my  
15 guess is he will probably tell you that you would be crazy to  
16 offer to take it.

17          THE COURT: He may know me better than you.

18          MR. WHATLEY: Your Honor, there's one thing Mr.  
19 Hoover said that I need to respond to.

20          THE COURT: Yes.

21          MR. WHATLEY: And that is there are two crucial  
22 issues in the Muscle Man Declaratory Judgment Action. One is  
23 the temporal one that Mr. Hoover addressed, and the other is  
24 the subject matter issue.

25                 And the subject matter issue was not one, obviously,

1 because this issue of this claim hadn't come up before Judge  
2 Moreno. That's not one that he's addressed.

3 And we want to make it very clear that that is an  
4 important issue that we want to present either to him or to  
5 you.

6 MR. HOOVER: Your Honor, just to respond to that,  
7 it's correct that he hasn't addressed that specific issue, but  
8 he has five times held that antitrust claims -- even though  
9 the Thomas-Love case was a RICO conspiracy, he's held that  
10 antitrust conspiracy claims are barred by that relief.

11 So he has gotten in the neighborhood on that issue,  
12 and it's another reason why we think it should stay in his  
13 court.

14 THE COURT: All right. Well, I think we have got a  
15 plan to proceed. I'm going to defer to him unless he, for  
16 some reason, thinks I'm more equipped to deal with these  
17 specific issues in my case.

18 So that's where we'll go. I'll probably place a call  
19 to him in the near future. I don't think it's going to be  
20 this week, but I'll place a call in the near future and  
21 discuss that with him.

22 MR. WHATLEY: You might want to start by mentioning  
23 that you're a Georgia fan, not an Alabama fan.

24 THE COURT: Yes.

25 MR. WHATLEY: Because he --

1 THE COURT: I think he's Notre Dame, right?

2 MR. WHATLEY: He's a Notre Dame fan, and he was  
3 avoiding Judge Pryor down there on --

4 THE COURT: He was around in 1980.

5 MR. WHATLEY: He was Rudy's roommate.

6 THE COURT: That's right. I remember that. But I  
7 was trying to talk about our last National Championship. We  
8 beat Notre Dame in 1980.

9 MR. WHATLEY: It was so long ago, I couldn't  
10 remember it.

11 THE COURT: That's a standard -- I hear that a lot  
12 among my colleagues. "Four and a half yards short, Joe; four  
13 and a half yards short." We lost the National Championship  
14 game on December 10th.

15 MR. WHATLEY: I think that is a correct statement.

16 THE COURT: My apologies to any Notre Dame fans in  
17 the audience.

18 All right. As far as periodic status calls and  
19 conferences, Item 10, we have already discussed the fact that  
20 we will have a regularly-scheduled Magistrate Judge  
21 conference, whether that is monthly or bi-weekly, or just --  
22 you know, that can vary -- to head off any Discovery issues,  
23 to try to discuss and resolve Discovery issues on the front  
24 end.

25 I do think it makes sense for us to come together. I



1 would be glad to hear from anyone because I do not have any  
2 sense of this, whether that needs to be monthly in person,  
3 quarterly in person, monthly phone calls; whether there ought  
4 to be a meeting with the Magistrate Judge and perhaps Ed  
5 Gentle.

6 And we can agree in advance of that to continue the  
7 regularly-scheduled meeting with me or pass it that month  
8 because there's not enough to deal with, any of those options  
9 in combinations are on the table. Anyone want to be heard on  
10 that?

11 MR. BOIES: Your Honor, from the Subscribers'  
12 standpoint, we think that in order to move it along, it would  
13 be useful to have regularly-scheduled conferences, and it may  
14 be that occasionally we will have nothing to do, and we can  
15 then tell the Court that we don't need the Court's time.

16 But with as many people as we have, if we have a set  
17 time, then we can all plan for it so that we know that if we  
18 need to have a conference, we've got a scheduled time to do  
19 that.

20 THE COURT: I think that makes sense. Anyone else  
21 want to be heard on that issue?

22 MS. KALLAS: Your Honor, I mean, just to say the  
23 Providers agree. And we find that when there's conferences  
24 that are set up like that, we get things done in a timely  
25 fashion, and everybody's more efficient. So we appreciate

1 that.

2 THE COURT: It does help with the to-do list,  
3 doesn't it --

4 MS. KALLAS: Yes, it does.

5 THE COURT: -- when you know you've got that monthly  
6 responsibility. "Blues" agree?

7 MR. ZOTT: Yes. Well, certainly we're in favor of a  
8 structure like that, Your Honor, whether it's in person or  
9 maybe monthly conference calls given, you know, the scope on  
10 the travel.

11 Maybe we can talk to the Plaintiffs about that among  
12 other issues we need to talk with them about and get back with  
13 a recommendation.

14 THE COURT: All right. Fair enough. All right.  
15 Coordination with state courts. I think this is more of a  
16 Subscriber than a Provider issue. Am I right there?

17 MS. KALLAS: That's correct.

18 THE COURT: All right. And my understanding is we  
19 do have a few developments on the front, at least in Illinois.

20 MR. FOOTE: Yes, Your Honor. Robert Foote.

21 THE COURT: Welcome.

22 MR. FOOTE: First off, I think I heard Trish Murphy,  
23 lead counsel in the Illinois case, on the phone if it would be  
24 okay if she could unmute.

25 THE COURT: Absolutely. Miss Murphy, if you're

1 hearing me, would you unmute and participate in this aspect of  
2 the hearing?

3 MS. MURPHY: I think I just "unmuted" myself.

4 THE COURT: Great. Thank you.

5 MR. FOOTE: Judge, if I might talk a little bit, and  
6 then, Trish, if you could add in anything that you think is  
7 important.

8 This hearing is timely with respect to Illinois, Your  
9 Honor, because there is an important issue about coordination.

10 First of all, the status in Illinois, it's moved  
11 pretty fast. There is a Motion to Dismiss pending. Our  
12 response to that is due March 1st.

13 Mr. Clobes, Mr. Davis, Mr. Lemmon and I have all  
14 worked with the Illinois folks on that response. I talked  
15 last night to Mr. Boies, and he's also going to make sure he  
16 puts his two cents worth in. That is due March 1st. There is  
17 also Discovery pending in Illinois.

18 The issue really is how you want us to coordinate that  
19 and whether you want the Illinois case to proceed as it is or  
20 whether you want -- the judge there is Judge Boie, Your Honor,  
21 in Union County. I think we have provided contact information  
22 to you.

23 Trish Murphy and I are fine with whatever you,  
24 obviously, and Judge Boie work out. If you two decide that  
25 that case should proceed as it's proceeding, that's fine. If

1 you decide that there ought to be a hold on it, that's fine.

2 I just think the timing is important, and this is a  
3 good time, if you could, Your Honor, to talk to Judge Boie.

4 THE COURT: Yes. What are the claims that are being  
5 advanced in that case? I'm familiar with the case generally,  
6 but I don't know the specificity of the state law theories in  
7 that case.

8 MR. FOOTE: The reason -- first of all, there is an  
9 Illinois antitrust action, Your Honor. And the reason that  
10 the case is still in Illinois is that there isn't a diversity  
11 between the Plaintiffs and the Defendants. So I've been  
12 dealing with Mr. Laytin, who has agreed, at least to this  
13 point, that there will be no attempt to remove it.

14 So the claims are similar to federal claims under the  
15 Illinois Antitrust Act, and --

16 THE COURT: How does that Act compare to the Sherman  
17 Act?

18 MR. FOOTE: It's similar, Your Honor; basically  
19 parallel --

20 THE COURT: All right. The Defendants agree with  
21 that?

22 MR. FOOTE -- so the concepts are the same.

23 MR. ZOTT: Yes, Your Honor. And I don't know if  
24 counsel is done, but we can address our position whenever you  
25 want to hear from us.

1           THE COURT: All right. Let me hear from Miss  
2 Murphy.

3           MR. FOOTE: So, Trish, did you want to add anything  
4 to that in terms of how the state court views this and where  
5 you see it going?

6           MS. MURPHY: Well, basically I agree that the state  
7 antitrust statute in Illinois has no significant differences  
8 from the federal claims that are made in the other cases from  
9 what I can tell.

10           We do have outstanding motions that Mr. Foote  
11 mentioned, and our responses are due March 1st, and those are  
12 dispositive motions. There's a Motion to Stay, a Motion to  
13 Transfer, a Motion to Dismiss.

14           And then I have one lone request to produce the  
15 document that's at issue at the very heart of this case, which  
16 is the licensing agreement between the Association and the  
17 Defendant.

18           It's not true Discovery in that there's not a copy for  
19 production or anything of that nature. It is simply the  
20 request for a copy of the licensing agreement.

21           And we have briefed to that, and it is pending in  
22 front of the judge right now, so I don't know when we might  
23 get a ruling on that.

24           THE COURT: What would be appropriate from the  
25 discussion I'd have with Judge Boie, the Illinois judge, to

1 decide about coordination? What are some of the topics that  
2 you think, Mr. Foote, we ought to tackle there?

3 MR. FOOTE: Well, I think that, first of all, that  
4 judge understands that there is an MDL; understands the tasks  
5 that you have, and from my conversations with Trish, wants to  
6 make sure there is coordination of some type.

7 So I think that the discussion should include the pace  
8 at which the Illinois case proceeds. It should include  
9 whether or not there's going to be coordination with counsel  
10 between the Illinois case and here, which obviously we think  
11 there should be, as in terms of Discovery, in terms of how the  
12 motions proceed.

13 If it proceeds in its logical path without any  
14 intervention from you, Your Honor, we will file our Response;  
15 there will be a Reply, there will be oral argument.

16 There probably would be a decision in Illinois on the  
17 Motion to Dismiss -- and, Trish, correct me if I'm wrong -- in  
18 probably six months. That would probably be the earliest  
19 there would be a decision.

20 So it's those type things, Your Honor.

21 THE COURT: All right. And what would be your  
22 position on those as far as pace, that we would see if we  
23 can't agree to keep our cases on similar tracks as far as the  
24 case?

25 MR. FOOTE: We think that's important for you to

1 think about, Your Honor. From our perspective, I think from  
2 Trish's perspective, we would like to proceed, but we're going  
3 to do whatever you --

4 THE COURT: You'd like to proceed in Illinois.

5 MR. FOOTE: Yes.

6 THE COURT: Yes.

7 MR. FOOTE: And there is that one issue that Trish  
8 mentioned about the agreement itself. That's the only thing  
9 that Trish has requested, and we certainly would like to  
10 proceed on that one document Discovery issue.

11 THE COURT: Right. There?

12 MR. FOOTE: Yes.

13 THE COURT: All right. And would your suggestion be  
14 that if these cases do get somewhat coordinated on similar  
15 tracks, that I should offer to Judge Boie party access, you  
16 know, in whatever parameters that the parties can agree to in  
17 this case, that they would have access to our documents here?

18 MR. FOOTE: Yes, Judge.

19 THE COURT: Now, I don't know to what extent all our  
20 documents are going to be relevant. It may not be  
21 particularly relevant in that case what they are doing in  
22 Vermont, Hawaii or Alaska --

23 MR. FOOTE: Correct, the Association documents and  
24 the documents for the Illinois "Blues."

25 THE COURT: -- but I could see there would be some

1 efficiencies in coordination there.

2 MR. FOOTE: We agree, Judge.

3 THE COURT: All right. Let me hear from the  
4 Defendants.

5 MR. ZOTT: A couple things on this, Your Honor.  
6 First of all, we think that this Court ought to be consistent  
7 with the whole point of an MDL, which is to have a  
8 coordinated, single, efficient approach to a case.

9 We think this Court needs to lead the charge on  
10 whatever we do going forward in this case and not a single --  
11 and, therefore, a single Illinois state court, which for  
12 reasons that are just unique to the diversity statutes we  
13 couldn't remove, shouldn't be getting out in front of this  
14 case.

15 That's point number one. So we strongly encourage the  
16 Court to contact Judge Boie --

17 THE COURT: It sounds like Mr. Foote is reasonable  
18 there. He would obviously love to move his case forward, but  
19 he's deferential to the group here as well.

20 MR. ZOTT: Yeah. And it's the same exact  
21 allegations. So we shouldn't start having -- you know,  
22 briefing motions to dismiss rulings in that case that are  
23 going to affront everything that happens here. That doesn't,  
24 respectfully, make much sense.

25 THE COURT: You want to volunteer to be his law



1 clerk --

2 MR. LAYTIN: Exactly.

3 THE COURT: -- is that what you're saying?

4 MR. ZOTT: Yes, we would, Your Honor.

5 The third point is in connection with the motion  
6 that's pending in Illinois, there's a specific statute in  
7 Illinois, Section 2619, which provides for exactly this  
8 situation where that Court can either stay or dismiss that  
9 case in favor of parallel proceedings.

10 That's actually pending right now in Illinois, and we  
11 think -- we strongly support Your Honor, you know, contacting  
12 Judge Boie.

13 And one of the issues is -- in our mind, what makes  
14 the most sense is to stay that case but then allow whatever  
15 Discovery, whatever happens here, that case to participate.

16 I mean, it's ironic in the sense that we have exactly  
17 the same lawyers that are prosecuting that case that are here  
18 today prosecuting other cases, and there's no reason in the  
19 world why we should allow that to happen in that context.

20 THE COURT: Let me ask this -- this may be a  
21 sensitive question that I might want you to address with Mr.  
22 Gentle later, but I want you to get with Mr. Gentle after the  
23 hearing and give me a sense before I call him of how receptive  
24 you think Judge Boie would be to a call.

25 My approach always in dealing with -- and I have dealt

1 with Judge Wong over in Atlanta, Georgia on this Total Body --  
2 is that we were colleagues working together toward trying to  
3 resolve all cases we could as efficiently as we could. I  
4 don't want to overstep my bounds.

5 I think I do have a responsibility to the parties in  
6 my case, as you've suggested, to make sure that the MDL  
7 proceeding means something and accomplishes the goals that  
8 Congress intended when it created this statute, but -- or  
9 passed the statute.

10 But on the other hand, I don't want to -- I'll tell  
11 this story. Judge Lynne, who was a judge on our court for  
12 many years -- and many of you practiced before him.

13 I went to a cocktail party one night where some state  
14 judges were present, and apparently one of the state judges  
15 had had a lawsuit filed in a TRO filed that morning a half an  
16 hour before a competing lawsuit and a TRO was filed before  
17 Judge Lynne.

18 And as it would occur, apparently, the two judges  
19 entered diametrically-opposed orders within a few minutes of  
20 each other, and they met up at the cocktail party.

21 And the state judge said Seybourn, I notice that we've  
22 had cases that relate to each other filed today. And Judge  
23 Lynne purportedly said yes, I saw that. And the state judge  
24 said well, I noticed that we entered orders that really can't  
25 be reconciled with each other. Judge Lynne said yes, I

1 noticed that.

2           Finally the state judge just broke the ice and said  
3 look, I know what you're thinking. You're the federal judge;  
4 I'm just the state judge. You're forgetting something.  
5 There's a lot more police power in this state in place to back  
6 up my order than your order.

7           And Judge Lynne said you're forgetting something. And  
8 he said what's that? He said we have something at the federal  
9 level that the states don't have. What is that, Judge Lynne?  
10 The bomb.

11           So supposedly they worked it out after that. Now,  
12 that's not my approach.

13           MR. ZOTT: We're hoping that won't be necessary,  
14 Judge.

15           THE COURT: Yeah, but it was a good segue for that.

16           MS. MURPHY: Judge, I would like to speak to the  
17 propriety of you contacting Judge Boie.

18           THE COURT: Yes. Miss Murphy.

19           MS. MURPHY: Since I'm more or less local counsel  
20 down here in Southern Illinois. First of all, you need to  
21 know he's an Ole Miss Rebel.

22           THE COURT: My niece just signed with Ole Miss to  
23 run track there.

24           MS. MURPHY: Yeah, he would more than appreciate a  
25 phone call from you. He's not familiar with the MDL process

1 in any fashion.

2 THE COURT: All right. That's helpful information.

3 MS. MURPHY: And that's what I was told by Judge  
4 Boie.

5 THE COURT: Got it.

6 MS. MURPHY: And I told him to expect a call from  
7 you.

8 THE COURT: That's super. Well, good. That helps  
9 me. I just didn't want to be the stranger calling on the line  
10 asking favors.

11 MS. MURPHY: I don't think that would be the case at  
12 all.

13 THE COURT: All right. And I've got his contact  
14 information. Ed, I know you handed it to me, but I'll get  
15 that again from you.

16 MS. MURPHY: Yes. And I do have a unique  
17 understanding of how touchy federal judges can be.

18 THE COURT: Yes. All right. Yes, Mr. Zott.

19 MR. ZOTT: One related issue, Your Honor, that I'm  
20 hoping won't be an issue, but I think it's prudent to raise it  
21 here today, which is there were also in addition to that case,  
22 the same plaintiff group filed four other cases in state  
23 court. They did not name the Association and instead just  
24 named the local plan, which would have prevented its removal.

25 We, in each of those cases, had to move to intervene

1 to add the Association since, after all, the complaint is  
2 challenging the licensing of the Association's marks. And we  
3 were able, and every court to consider it has allowed the  
4 Association to intervene.

5 We then removed those cases to federal court under the  
6 Minimal Diversity Rules of CAFA, and a couple other motions to  
7 remand have now been filed. Others have not been filed.  
8 Those cases are stayed.

9 And what we're hoping in light of what we've heard  
10 here today -- and antitrust is the case. But we ought to flag  
11 it as that, at least as to those cases going forward, since we  
12 have all the lawyers here, and we're going to have  
13 consolidated complaints here, that they are going to proceed  
14 in this court and bring the Association in --

15 THE COURT: Are those tagged-along yet? Are they  
16 still in Illinois?

17 MR. ZOTT: Yeah, they are all here.

18 THE COURT: They are all here. Okay.

19 MR. ZOTT: Yes. But that we're not going to go  
20 through that drill again.

21 And I don't know what their intention is, but I'm  
22 assuming they are here; we're going to file a federal  
23 complaint; those cases belong in federal court.

24 THE COURT: Where do we stand on the Motion to  
25 Remand in those cases? Is that Ms. Murphy, Mr. Foote, or

1 somebody else?

2 MS. MURPHY: I'm not involved in those, Judge.

3 MR. FOOTE: First off, I think because of the way  
4 it's come here, it's obviously your decision on the remand  
5 issue. I think they're Mr. Pendley's cases.

6 THE COURT: Mr. Pendley. Thank you.

7 MR. PENDLEY: May it please the Court, Patrick  
8 Pendley, Your Honor. The Motions to Remand in those state  
9 cases are effectively stayed because of the tag-along notice  
10 to the clerk, the MDL clerk, and to my knowledge, no judge has  
11 ruled on any of the Motions to Remand that were filed.

12 THE COURT: Are you still wanting to prosecute the  
13 motions? That's one question, I guess.

14 MR. PENDLEY: Well, Judge, let me hedge my bet and  
15 say they are out there and they are pending, and I think we  
16 should address those with the leadership on the Plaintiffs'  
17 side at some point.

18 THE COURT: All right. So you wanted to see what I  
19 looked like before you decided.

20 MR. PENDLEY: Yes, sir.

21 THE COURT: All right.

22 MR. PENDLEY: I cannot lie to a federal judge.

23 THE COURT: All right. Fair enough. I would think  
24 that's something we'll need to address, but I want the parties  
25 to address that and see if we can agree to it. If not, I get

1 paid to make decisions.

2 MR. ZOTT: We're hoping it just gets mooted out with  
3 the filing of the complaints, but we'll have to see.

4 THE COURT: All right. And that's obviously one  
5 thing with -- if there's some agreement Mr. Pendley reaches  
6 with respect to a consolidated complaint, whether it's -- or  
7 Subscriber/Provider complaints -- that may cure a lot of that  
8 because obviously we have a number of overlapping actions, and  
9 that would be one question we'd have to tackle. Yes.

10 MR. FOOTE: And the only other issue -- Robert Foote  
11 again. That's all we know of on the Plaintiffs' side. The  
12 Defendants will obviously know if there are any other cases  
13 filed that are currently in state court, but from our  
14 perspective, Judge, that's all we know.

15 THE COURT: Right.

16 MR. PENDLEY: Judge, Patrick Pendley again. There  
17 is one other state case pending, and it is in Oklahoma. And I  
18 believe service is being perfected upon Blue Cross probably  
19 this week, if not next week.

20 THE COURT: All right. Very well. One of the  
21 things I would plan to tell Judge Boie is we're contemplating  
22 a State Coordination Committee that will be there to assist  
23 him and his staff, and we would want to be a good resource for  
24 him. I take it everyone agrees.

25 I'm about to get to organizational leadership in a

1 moment, but while we're on that topic, I thought I would  
2 address that. I think that's one of the things we're going to  
3 need, at least on the Subscriber side.

4 MR. FOOTE: We agree, Judge.

5 THE COURT: Okay. Okay. We're about to circle back  
6 to Items 2 and 3, but any other contents of additional Case  
7 Management Orders that we haven't addressed in the laundry  
8 list today that we need to think about?

9 I've tried to cover the waterfront, and I've tried to  
10 get those smarter than me to put together the Agenda to cover  
11 the waterfront, but I just want to make sure there's nothing  
12 else out there that we think we need to be concerned with at  
13 this point. Okay.

14 MR. BOIES: Not from us, Your Honor.

15 THE COURT: All right. Thank you. All right.  
16 Let's go to organizational structure. What I'm thinking about  
17 doing is this:

18 I think that it's probably time to have a last call  
19 for those who want to apply for leadership positions, whether  
20 they are interim class counsel or other leadership positions.

21 And what I'm expecting to do is put an order out  
22 saying -- it may go out, if not today or tomorrow, Monday --  
23 telling everyone they have got basically four weeks to get  
24 applications in if they want to be considered for a leadership  
25 position. All right?



1 I'm not pre-judging any of those issues. I think that  
2 one question, though, I have is I think I have the  
3 responsibility, and I alone have the responsibility, to  
4 appoint interim class counsel for whatever putative classes  
5 would be brought forth, whether it's subscriber and provider  
6 or what have you.

7 I think we have some more flexibility when it comes to  
8 perhaps a Plaintiffs' Steering Committee. I want to have some  
9 input. I'm not sure I need to be the one alone making those  
10 decisions.

11 And I think when we get interim class counsel in  
12 place, to a degree, I think they ought to have a lot of input  
13 about who's going to be supporting them on these various  
14 committee assignments.

15 Anyone disagree with anything I've said so far? Okay.  
16 The nitty-gritty is, though, how does that work.

17 I think I would have exclusive authority on interim  
18 class counsel appointment under Rule 23.

19 I think I would have a lot of input on anyone who  
20 would be sitting on the Plaintiffs' Steering Committee.

21 And I think I would want to have maybe -- for want of  
22 a better term -- veto power on any committee assignments.

23 Anyone disagree with that structure? And, believe me,  
24 I'm open. You will not offend me at all if you say, Judge,  
25 I'm not sure you need to do that.

1 I just presented down in Palm Springs in October on  
2 plaintiff selection issues to the MDL Judge's Conference, and  
3 I'm well aware of Silver's article, the Texas professor, and  
4 Judge Fallon's response, and we addressed that and fleshed  
5 that out a good bit at the conference in October.

6 So I'm very sensitive to both leadership counsel  
7 wanting to be able to make their calls but also those who are  
8 not in leadership positions but have an interest as counsel in  
9 the case wanting to make sure that there's a fair process.

10 Okay?

11 So having said that, I want to hear from you now if  
12 there's concerns about that approach.

13 MR. BOIES: From the Subscribers, Your Honor, David  
14 Boies. We completely agree with that.

15 THE COURT: All right.

16 MS. KALLAS: And we do as well, Your Honor, on  
17 behalf of the Providers.

18 THE COURT: All right. Very well. And I take it  
19 you have met with your groups and speaking for everyone you're  
20 aware of has a voice on that issue.

21 MS. KALLAS: Yes, well -- Edith Kallas. We speak  
22 for the group that we have been working on a structure for  
23 with Mr. Gentle. We met with some of the additional Provider  
24 counsel last evening, and we've offered a way for them to work  
25 within the group. Nothing is solid yet. I mean, I agree --

1 THE COURT: I'm going to let Mr. Gentle keep working  
2 with you on that issue.

3 MS. KALLAS: Okay. All right.

4 THE COURT: Is that fair?

5 MS. KALLAS: Absolutely. Thank you.

6 THE COURT: Okay.

7 MR. SMALL: And just to be clear, Your Honor, on the  
8 group that I'm a party of, the supporter group, we agree.

9 THE COURT: All right. Great. Thank you, Mr.  
10 Small.

11 MR. DAVIS: Same here, Your Honor.

12 THE COURT: All right. Thank you, Mr. Davis. I  
13 thought that makes sense and thought it was a fair balance.  
14 It's kind of the hybrid approach. I don't think there's  
15 anything that suggests I abandon Rule 23 responsibilities. In  
16 fact, I think it would be error to do that.

17 But on the other things, I think we can kind of have a  
18 collective approach to that.

19 Now, let me find a note I made here. I think roughly  
20 -- and I must have left my -- either I've got my note buried  
21 here and I can't find it -- but I think I've got some other  
22 resources to list these.

23 I think roughly we're talking about a Discovery  
24 Committee, some type of Briefing/Written Submission Committee,  
25 a Class Certification Committee, a Damages Committee, which

1 may obviously include some experts. This is on the  
2 Plaintiffs' side.

3 And I would think this may very well be staffed by  
4 people from Provider and Subscriber. And there may be some  
5 different approaches that are necessary in light of the  
6 context of those claims.

7 Hopefully, we'll engage, one day, a Settlement  
8 Committee. I speak from my own perspective in saying that.

9 Ed, do you have that list? I'm sorry. You gave that  
10 to me earlier and I misplaced it somehow.

11 MR. GENTLE: Yes, sir.

12 THE COURT: Thank you. A State Liaison Committee.  
13 I think I've already said Damages Committee. If I didn't,  
14 I'll restate that. And a Committee on Experts, to the extent  
15 that may be a subset of the Discovery Committee, coordinating  
16 with also -- and all these need to coordinate with kind of a  
17 Litigation Committee.

18 We're going to have a group that -- I take it you  
19 would like to have a group that's in charge of just litigation  
20 issues and coordinating with the other committees.

21 Now, I'm very sensitive. I don't want to overstaff.  
22 I don't want to have the Common Benefit Fund increased  
23 unnecessarily. I think you're going to have to decide about  
24 funding and some other things that aren't my business to start  
25 making suggestions about right now. I think I've got to make

1 sure they are fair and reasonable.

2 But those are kind of the list of some of the  
3 committees, and I would think that we would have a Plaintiffs'  
4 Steering Committee with a certain number of members which  
5 would include Barry Ragsdale sitting on that committee kind of  
6 as a non-voting member.

7 I take it you don't want to vote, do you, Barry?

8 MR. RAGSDALE: No.

9 THE COURT: And Ed Gentle being a resource of that  
10 committee. That's kind of the structure I've thought through.  
11 Anybody think of a committee that I've failed to mention?

12 MR. CLOBES: Not that -- Your Honor, Brian Clobes  
13 from Cafferty Clobes. Not that you failed to mention, but  
14 oftentimes in these antitrust MDL cases, experts are sort of  
15 treated separately --

16 THE COURT: Yeah.

17 MR. CLOBES -- by creating a committee separately,  
18 and also class certification, damages, if they are two  
19 separate committees, those committees are going to be also  
20 very heavily involved and invested in working with experts and  
21 expert reports and developing all that material.

22 So there's a lot of interplay between not just  
23 Discovery but class certification and damages with respect to  
24 experts.

25 THE COURT: What I'm going to suggest. Ed's got

1 kind of a list of the committees -- not an organizational  
2 chart. And maybe what you're talking about is almost an  
3 organizational chart, like who coordinates for who and which  
4 way the arrows go.

5 I would think that we could probably have a few of you  
6 get together and review with Ed this so we could put this into  
7 an order so everybody will know what they are actually  
8 applying for.

9 MR. CLOBES: I think that makes sense.

10 THE COURT: Now, I also think, quite frankly, that  
11 Interim Class Counsel and Plaintiffs' Steering Committee need  
12 to be the ones deciding organizational structure in some ways.  
13 I just thought in fairness we ought to list out what positions  
14 are going to be available, not necessarily where they fit on  
15 the page, so that everyone can make a decision about whether  
16 they want to seek appointment to one of these positions.

17 MR. CLOBES: Thank you, Your Honor.

18 THE COURT: And I have not really given that much  
19 thought to how many people ought to serve. It may be the  
20 Settlement Committee is something we don't have to appoint  
21 right now, and we might want to let some time pass before we  
22 decide who's on the Settlement Committee and see how the  
23 nature of the case goes along.

24 But all that to say I think we ought to list out these  
25 eight or so committees. I understand there's a Plaintiffs'

1 Steering Committee, and it may be that we're just taking on  
2 the Plaintiffs' Steering Committee the key people who head up  
3 these other committees. And I would like to get some input  
4 from y'all about both that issue but also the constitution of  
5 membership in terms of number of members.

6 I do think we ought to pay close attention to make  
7 sure that there's diversity on the committees. I do think we  
8 ought to pay close attention to make sure that we're putting  
9 skill sets in place on the committees that have the right  
10 people.

11 For example, the Written Submissions Committee, that's  
12 not going to be the person who was the most popular one at the  
13 party last night. That may be the person who stood in the  
14 corner and really is thinking about the case full time.

15 So those are the kind of things I think we're going to  
16 have to look at.

17 I think on a State Liaison Committee, though, that's  
18 probably Subscribers only at this point, am I right there,  
19 Joe? You don't think you need a State Liaison Committee.

20 MR. WHATLEY: We do not.

21 THE COURT: And I take it anybody else who has a  
22 Provider case is in that same boat.

23 All right. Anything else we need to say on the  
24 Plaintiffs' case?

25 MR. LEMMON: Andrew Lemmon. One thing that may be

1 helpful is either an Executive or Administrative Committee to  
2 sort of coordinate among all of the committees.

3 THE COURT: Do you think the Plaintiffs' Steering  
4 Committee and the Interim Class Counsel, that would be beyond  
5 their role? I'm trying to keep things as lean as possible,  
6 and I thought, quite frankly, I'm going to rely heavily upon  
7 Interim Class Counsel and the Plaintiffs' Steering Committee  
8 to really make sure that there are efficiencies and --  
9 administrative and otherwise -- on these committees.

10 MR. LEMMON: It probably depends somewhat on how  
11 many people that you choose to be on the PSC because if there  
12 are 15 people, that's probably not manageable for an Executive  
13 Committee or an Administrative Committee --

14 THE COURT: Right.

15 MR. LEMMON -- but, you know, if it's four people who  
16 were designated as part of that from the PSC, that probably  
17 works.

18 THE COURT: And, again, I told you I wasn't going to  
19 throw out numbers, but I will on this. We were roughly  
20 thinking four subscribers, four providers, and Barry on the  
21 Executive Committee or Plaintiffs' Steering Committee.

22 But, you know, they are going to earn their common  
23 benefit claim pay and position by trying to cut out some of  
24 those layers. But I'm very open to discussion about that.

25 MR. LEMMON: That sounds like it will take care of



1 that problem.

2 THE COURT: All right.

3 MR. CLOBES: Briefly. Brian Clobes again. So based  
4 on experience in cases like this case, one approach that  
5 works -- and I think you were getting to this earlier on.

6 You have a Steering Committee or an Executive  
7 Committee, whatever you decide to call it. To the extent that  
8 you want specific firms and lawyers to be responsible for  
9 specific tasks and areas of litigating a case like Discovery,  
10 experts, and class certification, one way you can do it and  
11 still be lean is have each member of the Executive Committee  
12 also serve as chair, if you will -- you don't have to call it  
13 this, but their responsibility mainly could be in those  
14 substantive areas like Discovery, and what they then can do  
15 with the approval of lead counsel is tap the resources of  
16 other firms that are not on the Executive Committee to assist.

17 THE COURT: Right.

18 MR. CLOBES: So you would have a captain essentially  
19 that's also an Executive Committee member perform those  
20 various functions.

21 THE COURT: I tend to agree with that.

22 MR. CLOBES: Okay.

23 THE COURT: What else do we need to take up on this  
24 issue on the Plaintiffs' side, Item 2?

25 I guess what I would like to do is have y'all get with

1 Ed fairly quickly, say no later than the end of the day  
2 tomorrow, and express your view about whether we need some  
3 administrative oversight committee, or however you described  
4 it, Mr. Lemmon, and we'll include that if we think it's  
5 necessary.

6 If not, we'll just go with these eight in terms of the  
7 Plaintiffs' Steering Committee.

8 One thing I am going to do -- and I think this is the  
9 sound advice I gave my colleagues in October, and I'm going to  
10 follow my own advice. I'm appointing lawyers, not firms, to  
11 these positions.

12 I understand that there are circumstances where a  
13 lawyer will not be able to attend every single one of these,  
14 but if I put a lawyer in charge of something, that lawyer's  
15 responsible, not as junior partner, not as best right-hand  
16 associate, for getting the work done. All right? Everybody  
17 understand that?

18 Okay. How about -- do I need to do anything on the  
19 Defendants' side as far as organization? Is the Association  
20 going to take the lead on kind of being the point person on  
21 this?

22 MS. WEST: Judge, Kimberly West for the Defendants.  
23 Yes, Your Honor, the Defendants have managed to organize  
24 themselves, and what we've decided to do is I will serve as  
25 liaison counsel in -- more of the traditional liaison counsel,

1 similar to Mr. Ragsdale's communicative roles with the Court.

2 As far as lead counsel or "co-coordinating" counsel,  
3 as the term the Defendants are using, our co-coordinating  
4 counsel will be Mr. Zott -- who you have heard speak -- Mr.  
5 Laytin, and Mr. Hoover.

6 THE COURT: All right.

7 MS. WEST: Now, the Association is represented by  
8 Mr. Zott and Mr. Laytin, and they will be taking the lead on  
9 the issues that involve the entire system, the SA allegations,  
10 and pretty much primarily what you've heard Mr. Zott address  
11 today.

12 Mr. Hoover, on the other hand, represents a large  
13 number of the individual plans, and he will be taking the lead  
14 on the plan-specific issues.

15 Now, the co-coordinating counsel role as we perceive  
16 it, Your Honor, is that they will coordinate with the other  
17 plans and with counsel, and this will be primarily through the  
18 Association's auspices.

19 We will reach consensus positions, where possible,  
20 among all Defendants, all the Plans, and present to the Court.  
21 So that's the structure that we have come up with.

22 Now, there are other issues that may be reached in  
23 this case where other Plans through their counsel may wish to  
24 address the Court directly, and we will certainly make the  
25 Court and court personnel aware of that before it occurs.

1           THE COURT: All right. Is there going to be a  
2 particular person designated, though, to be a liaison to the  
3 Plaintiffs' side -- one point person that if Barry Ragsdale  
4 has a question on Discovery, he's worked out something and  
5 wants to propose it to the defense side, who should he call?

6           MS. WEST: He should call me, Your Honor, and I will  
7 convey it the other counsel.

8           THE COURT: Very well. I think that makes sense.  
9 Okay. Notice I saved organization last. I've worn you down  
10 by now. Less energy in the room to take up this issue. I'm  
11 just kidding.

12           What else do we need to take up? Everybody wanted to  
13 know about restaurants in Birmingham last night. We have got  
14 several good ones. I'm sure you'll get to know them well over  
15 the course of time. But Ed Gentle and Barry Ragsdale are  
16 connoisseurs of our local restaurants. I have to eat at the  
17 restaurants that federal judges can afford to eat at, so I'm  
18 not a good resource there. Subway. Judge Clemon? Arby's?

19           JUDGE CLEMON: Yeah.

20           THE COURT: Inside joke there. I did a film, a  
21 documentary for our court when Judge Clemon left us that  
22 preserves for posterity some of his experiences on the bench  
23 and the Civil Rights Movement as a lawyer, and it took me  
24 about a month to schedule the video because I knew he knew  
25 something was up.

1           So I finally got him interviewed and, of course, we  
2           taped all the questions and answers, and then he left my  
3           office, and we re-taped all the questions and edited them in.

4           So I asked him in the first interview what his  
5           favorite fast food restaurant was. He said Arby's. And the  
6           second one was if you were going to take your wife on a nice,  
7           romantic dinner for her anniversary or birthday, what's your  
8           first choice. And I got "Arby's." So he's on a better budget  
9           now than he was then.

10           All right. Anything else we need to take up? All  
11           right. Very well. I appreciate everyone being here. We did  
12           finish in under two hours as my hope was, and I think that was  
13           great work on everyone's part going in. Thank you all.

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C E R T I F I C A T E

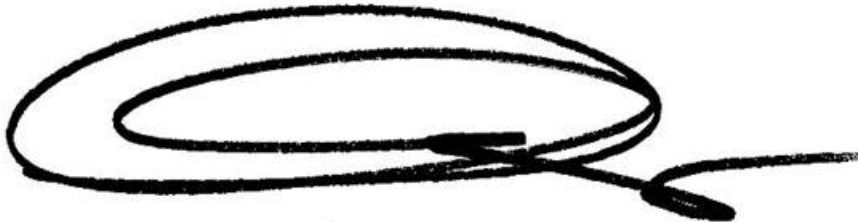
STATE OF ALABAMA  
COUNTY OF JEFFERSON:

I HEREBY CERTIFY THAT THE ABOVE PROCEEDINGS WERE TAKEN  
DOWN BY ME AND TRANSCRIBED BY ME USING COMPUTER-AIDED  
TRANSCRIPTION AND THAT THE ABOVE IS A TRUE AND CORRECT  
TRANSCRIPT OF SAID PROCEEDINGS TAKEN DOWN BY ME AND  
TRANSCRIBED BY ME.

I FURTHER CERTIFY THAT I AM NEITHER KIN OF COUNSEL NOR  
TO ANY OF THE PARTIES NOR IN ANYWISE FINANCIALLY INTERESTED IN  
THE OUTCOME OF THIS CASE.

I FURTHER CERTIFY THAT I AM DULY LICENSED BY THE  
ALABAMA BOARD OF COURT REPORTING AS A CERTIFIED COURT REPORTER  
AS EVIDENCED BY THE ACCR NUMBER FOLLOWING MY NAME FOUND BELOW.

SO CERTIFIED, THE 4TH DAY OF MARCH, 2013 IN THE  
ABOVE-REFERENCED CAUSE.



ANITA MCCORVEY, COURT REPORTER CCR #599