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

<u>IN RE</u>	*	2:13-cv-20000
	*	4-23-13
BLUE CROSS BLUE SHIELD	*	Birmingham, Alabama
ANTITRUST LITIGATION MDL	*	10:53 a.m.
2406	*	
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TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

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ON BEHALF OF CAREFIRST: PATRICK de GRAVELLES, ESQ.
BRIAN K. NORMAN, ESQ.

Anita M. McCorvey, RMR-CRR
Federal Court Reporter
1729 5th Avenue North Ste 204
Birmingham, AL 35203-2101

1 THE COURT: All right. Good morning,
00:00:03 2 everyone. Have a seat. All right. We are here in the
00:00:05 3 In Re: Blue Cross/Blue Shield Antitrust Litigation, MDL
00:00:10 4 No. 2406, which is our master docket number
00:00:13 5 2:13-cv-20000-RDP.

00:00:17 6 We are here on a hearing set previously by the
00:00:20 7 Court to consider the question of the appointment of
00:00:24 8 Interim Class Counsel and a Plaintiffs' Steering
00:00:27 9 Committee for each of the two tracks in this case, the
00:00:30 10 Subscriber and the Provider track.

00:00:35 11 I have been provided a roster of counsel. I
00:00:40 12 guess the first order of business to take up is to
00:00:43 13 indicate that there were two objections that the Court
00:00:46 14 was to take up at the hearing today.

00:00:48 15 The first objection related to the appointment of
00:00:53 16 Dan Small of the Cohen Millstein firm to be a Plaintiff
00:00:58 17 Steering Committee on the Subscriber track. That
00:01:01 18 objection is moot. Mr. Small has withdrawn his name
00:01:04 19 from consideration.

00:01:06 20 The Court contemplates at this point that it will
00:01:11 21 not appoint -- it will only appoint five members to the
00:01:15 22 Plaintiffs' Steering Committee. I do reserve the right
00:01:18 23 to consult with Interim Class Counsel and the other
00:01:22 24 members of the Plaintiffs' Steering Committee to see if
00:01:25 25 they would contend that we ought to do something

00:01:30 1 different than that. All right. So that's the first
00:01:32 2 order of business.

00:01:33 3 On the Provider track, there was an objection to
00:01:35 4 the appointment of Joe Whatley and Edith Kallas to serve
00:01:40 5 as Interim Class Counsel. And to be clear, the Court is
00:01:45 6 contemplating simply that at this point, Interim Class
00:01:48 7 Counsel under Rule 23.

00:01:51 8 The Court will hold off on making any decisions
00:01:55 9 about appointment of Class Counsel to serve the
00:02:00 10 interests of the Class until a future time, most likely,
00:02:03 11 if it becomes necessary, the Class Certification Hearing
00:02:09 12 or some point appropriately designated before that.

00:02:13 13 But today we're dealing simply with Interim Class
00:02:16 14 Counsel. The idea was that we had a Special Master
00:02:20 15 appointed to interview various candidates and make
00:02:24 16 recommendations to the Court about not only Interim
00:02:30 17 Class Counsel appointments but also Plaintiffs' Steering
00:02:33 18 Committee appointments so that we could examine a number
00:02:35 19 of things and get the ball rolling in the litigation.

00:02:39 20 One would be whether to file a consolidated class
00:02:42 21 action complaint for both tracks or a consolidated class
00:02:47 22 action for the separate tracks and then move forward
00:02:51 23 with the filing of a consolidated class action
00:02:54 24 complaint.

00:02:55 25 All right. So I think the next order of business

00:02:57 1 would simply be to take up the objection that exists on
00:03:01 2 the Provider side. Who wishes to speak to that
00:03:05 3 objection? All right. Mr. Whatley?

00:03:12 4 MR. WHATLEY: Yes, sir.

00:03:13 5 THE COURT: You'll be speaking in opposition
00:03:15 6 to the objection?

00:03:17 7 MR. WHATLEY: Yes, sir.

00:03:17 8 THE COURT: And who will be speaking in
00:03:19 9 favor of the objection?

00:03:20 10 MS. WEST: Your Honor, I'm Kimberly West,
00:03:23 11 liaison counsel.

00:03:24 12 THE COURT: And I appreciate very much your
00:03:25 13 efforts.

00:03:26 14 MS. WEST: Thank you, Your Honor. Mr.
00:03:27 15 Norman for CareFirst of Maryland and Mr. Koch will be
00:03:33 16 speaking in support of their objection.

00:03:34 17 THE COURT: Mr. Norman and Mr. Koch.

00:03:41 18 MR. KOCH: Koch, K-O-C-H.

00:03:43 19 THE COURT: Koch, yes. I'm sorry. I've
00:03:44 20 seen your name. All right, I think we take up the
00:03:49 21 persons who are speaking in favor of the objection
00:03:52 22 first. That makes sense. And, Mr. Norman, welcome.
00:03:56 23 You're going to lead us off?

00:03:58 24 MR. NORMAN: I will, Your Honor. Good
00:04:00 25 morning. I appreciate the opportunity to appear here in

00:04:03 1 the Magic City. It is the second time that I have been
00:04:08 2 to Birmingham, and I appreciate the hospitality.

00:04:13 3 CareFirst has --

00:04:13 4 THE COURT: I came very close to practicing
00:04:15 5 in Dallas --

00:04:15 6 MR. NORMAN: Did you really?

00:04:17 7 THE COURT: But for my spouse who didn't see
00:04:19 8 fit to move that far west. But I came real close to
00:04:24 9 going to Dallas after clerking with Judge Widener on the
00:04:28 10 Fourth Circuit.

00:04:29 11 MR. NORMAN: I would say that there are
00:04:30 12 probably advantages and disadvantages to each place.

00:04:32 13 THE COURT: Okay.

00:04:33 14 MR. NORMAN: You know, Your Honor, we have
00:04:35 15 sort of been drawn into making probably a more
00:04:40 16 vociferous objection than that which we intended.

00:04:43 17 CareFirst objected to the appointment of Whatley,
00:04:48 18 Kallas as interim lead counsel through a fairly
00:04:50 19 simplistic document designed to give the Court notice
00:04:54 20 that there was this Maryland lawsuit out there. That
00:04:57 21 is, there was a complaint that had been filed in
00:04:59 22 Maryland and that because of certain issues that
00:05:02 23 presented itself in the Complaint --

00:05:05 24 THE COURT: Now, you yourself were not
00:05:07 25 counsel in filing that Complaint, correct?

00:05:09 1 MR. NORMAN: No, Your Honor. Mr. Patrick de
00:05:13 2 Gravelles with CareFirst was counsel filing that
00:05:16 3 Complaint in Maryland.

00:05:17 4 THE COURT: Okay.

00:05:18 5 MR. NORMAN: And so CareFirst made what was
00:05:21 6 functionally a notice filing by way of this objection to
00:05:25 7 let the Court know that there were -- the Complaint was
00:05:29 8 out there; there were certain issues that presented
00:05:31 9 themselves by the existence of the Complaint in terms of
00:05:34 10 the potential that Mr. Whatley and Miss Kallas might
00:05:39 11 face issues serving in their role as interim lead
00:05:41 12 counsel, and those issues were simply things related to
00:05:44 13 the fact that Miss Kallas and Mr. Whatley may, in fact,
00:05:48 14 be fact witnesses in the Maryland Complaint, and the
00:05:51 15 allegations in Maryland regarding the use and disclosure
00:05:54 16 of information might make the actions that they take as
00:05:58 17 Interim Lead Counsel here in this action be discoverable
00:06:02 18 and get into things like work product privilege,
00:06:05 19 privileged communications --

00:06:06 20 THE COURT: I'm fascinated by the theory
00:06:10 21 that -- and I realize it's not before a state judge
00:06:14 22 right now. It's been removed, and Judge Titus has the
00:06:17 23 case as I understand it.

00:06:18 24 MR. NORMAN: I understand it's been removed,
00:06:19 25 Your Honor.

00:06:19 1 THE COURT: And Judge Titus in the Greenbelt
00:06:22 2 Division, who was in my baby judge's school, has the
00:06:26 3 case.

00:06:27 4 I'm fascinated by the theory that at least upon
00:06:30 5 the filing of that action a state court judge could
00:06:35 6 order discovery of work product in a federal MDL. Is
00:06:39 7 that one of the theories advanced in that litigation?

00:06:42 8 MR. NORMAN: Well, I think one of the
00:06:44 9 theories, Judge, or one of the possibilities is that to
00:06:46 10 the extent that you have a law firm that is actually a
00:06:49 11 party to a confidentiality agreement as opposed to the
00:06:53 12 clients of the law firm, and the law firm itself is then
00:06:56 13 engaging in some use, that use must -- may necessarily
00:07:00 14 involve what they have done with the information, which
00:07:02 15 might be work that has then, in fact, been done in
00:07:06 16 support of, let's say, this MDL.

00:07:09 17 And so I think one way to distinguish this
00:07:12 18 situation from a different situation is that you have
00:07:16 19 counsel who signed the confidentiality agreement as
00:07:18 20 individual parties of the law firm that Whatley Kallas,
00:07:23 21 LLC, did.

00:07:24 22 And you also have a situation where there is the
00:07:28 23 possibility that involved in the very -- at the
00:07:32 24 inception or the creation of the event that might give
00:07:35 25 rise to the claim, you have the actual counsel who later

00:07:38 1 represent the clients bringing the claim who are
00:07:40 2 actually involved in the underlying facts that makes
00:07:46 3 them potentially fact witnesses.

00:07:47 4 And in my Brief, Your Honor -- I know this Court
00:07:51 5 had generously allowed us to file under seal. We had
00:07:54 6 some logistical issues, and I know the Court has ordered
00:07:57 7 us to provide the Court with the information that we
00:08:00 8 sought.

00:08:00 9 THE COURT: And you've offered to provide it
00:08:03 10 in camera.

00:08:04 11 MR. NORMAN: I have, Your Honor

00:08:05 12 THE COURT: I'll be glad to accept it in
00:08:06 13 camera.

00:08:08 14 MR. NORMAN: Okay. Mr. Whatley has also
00:08:09 15 viewed a copy of it.

00:08:10 16 THE COURT: All right. Would you mind
00:08:11 17 handing it up?

00:08:12 18 MR. NORMAN: May I approach?

00:08:14 19 THE COURT: You may. Thank you. All right.
00:08:23 20 So the pregnant question that I was trying to get to the
00:08:27 21 bottom of -- well, there's two or three. First is how
00:08:31 22 could I possibly deal with your objection without at
00:08:35 23 least addressing the merits of whether or not Miss
00:08:42 24 Kallas or Mr. Whatley have improperly used information
00:08:45 25 gained during negotiations that's subject to a

00:08:49 1 confidentiality agreement? I don't understand how I
00:08:52 2 could even deal with your objection without first
00:08:55 3 addressing that question.

00:08:57 4 MR. NORMAN: Yeah, so I think what --

00:08:59 5 THE COURT: That seems to be a threshold
00:09:00 6 question.

00:09:01 7 MR. NORMAN: Yeah, I think what the Court
00:09:02 8 does is take a perspective as follows: Let us first
00:09:07 9 assume that everything that is alleged in the Maryland
00:09:09 10 complaint is true absent some other evidence that there
00:09:11 11 was a bad faith filing or, you know, something like
00:09:16 12 that.

00:09:16 13 If everything alleged is true, what issues does
00:09:19 14 it then present with the Interim Lead Counsel
00:09:22 15 appointment, that is --

00:09:24 16 THE COURT: So I assume that the facts
00:09:26 17 alleged are true or the conclusions alleged are true?

00:09:31 18 MR. NORMAN: I think you start with the
00:09:32 19 facts alleged are true.

00:09:33 20 THE COURT: Well, what facts does the
00:09:37 21 Maryland filing contend were subject to a
00:09:41 22 confidentiality agreement -- what facts or information
00:09:45 23 were subject to a confidentiality agreement but used in
00:09:49 24 the preparation of the lawsuit against CareFirst?

00:09:55 25 MR. NORMAN: There are going to be facts

00:09:57 1 related to the pricing for certain codes, the ability to
00:10:01 2 unbundle certain codes or -- that is, the nascent offer
00:10:05 3 made by CareFirst to do those things -- and the prices
00:10:10 4 and the economics associated therewith.

00:10:14 5 THE COURT: But none of those facts are
00:10:15 6 alleged in the CareFirst -- in the Complaint against
00:10:18 7 CareFirst. There's no information about pricing data,
00:10:23 8 pricing codes, unbundling or pricing information
00:10:27 9 whatsoever, is there?

00:10:30 10 MR. NORMAN: Not with that level of
00:10:32 11 specificity, but that goes --

00:10:32 12 THE COURT: Not with any level of
00:10:34 13 specificity.

00:10:35 14 MR. NORMAN: That goes more to the issue of
00:10:37 15 disclosure as opposed to the issue of use.

00:10:39 16 THE COURT: All right.

00:10:40 17 MR. NORMAN: And there are two bars in the
00:10:42 18 confidentiality agreement.

00:10:43 19 THE COURT: All right. Show me the language
00:10:45 20 in the confidentiality agreement that bars use as
00:10:47 21 opposed to non-disclosure. Let's dissect that a little
00:10:51 22 bit.

00:10:58 23 MR. NORMAN: Section II, Your Honor, and I
00:11:00 24 quote, "non-disclosure obligations."

00:11:03 25 THE COURT: Yes.

00:11:03 1 MR. NORMAN: "The receiving party will
00:11:04 2 utilize confidential information of the disclosing party
00:11:07 3 only for the purpose of evaluating and determining the
00:11:10 4 precise nature of the formation of a more formal
00:11:14 5 business arrangement and for no other purpose."

00:11:16 6 THE COURT: All right. Now, so that's
00:11:18 7 "utilize."

00:11:19 8 MR. NORMAN: Correct.

00:11:20 9 THE COURT: All right. Let me give you an
00:11:22 10 analogy. See what you think of this. Let's say you
00:11:25 11 want to buy my car, and I tell you I'm a pretty private
00:11:31 12 individual, and I don't like my negotiations or my style
00:11:36 13 of negotiation disclosed to others because I want to
00:11:39 14 sell another car to someone else one day.

00:11:41 15 So I, quite surprisingly, at least from your
00:11:44 16 perspective, ask you to sign a confidentiality agreement
00:11:48 17 that says that you will not disclose or use the
00:11:52 18 information that you learn in our negotiations for any
00:11:56 19 purpose other than deciding whether you want to enter
00:11:59 20 into an agreement to buy my car. And I -- after you
00:12:04 21 sign that agreement, I represent to you the following
00:12:08 22 facts:

00:12:08 23 One, my car only has 50,000 miles on it. It's
00:12:15 24 never had a mechanical problem, and it's never been
00:12:17 25 involved in an accident.

00:12:19 1 After purchase, you've learned that I rolled the
00:12:22 2 odometer back from 150,000 to 50,000; that it's been in
00:12:29 3 and out of the shop for transmission issues and that I
00:12:32 4 have been involved in four accidents with it.

00:12:34 5 And you, not being very happy about this
00:12:37 6 revelation, decide you want to sue me for fraud. And I
00:12:41 7 take the position that you can't use any of my
00:12:43 8 statements against me because you've signed a
00:12:46 9 confidentiality provision.

00:12:49 10 Are you out of luck?

00:12:53 11 MR. NORMAN: No, I'm not.

00:12:53 12 THE COURT: Then why is this case any
00:12:56 13 different from that?

00:12:57 14 MR. NORMAN: Because Your Honor's
00:12:58 15 hypothetical gets into the notion of fraudulent
00:13:02 16 inducement to contract, which typically vitiates private
00:13:06 17 contractual relationships.

00:13:07 18 THE COURT: Well, don't enforcement of the
00:13:11 19 antitrust laws often vitiate pre-dispute agreements
00:13:15 20 about either waiver of claims or use of information to
00:13:19 21 support claims?

00:13:20 22 MR. NORMAN: Only to the extent that
00:13:22 23 generally in our civil law outside of the realm of
00:13:25 24 contract when we're talking about tort-related issues
00:13:27 25 there is a general principle where perspective waivers

00:13:31 1 of liability are barred or void.

00:13:33 2 There's been nothing in the antitrust laws that
00:13:36 3 would vitiate this sort of confidentiality agreement, I
00:13:41 4 think with good reason. I think the reason is --

00:13:43 5 THE COURT: Maybe the reason is that no
00:13:45 6 one's tried this before.

00:13:46 7 MR. NORMAN: No, I don't think so, Your
00:13:47 8 Honor. I think the reason is that, you know, when you
00:13:50 9 start getting into federal laws vitiating agreements
00:13:58 10 that are not, in fact, a restraint on trade; they are,
00:14:00 11 in fact, the, you know, oil for the engine of commerce.
00:14:03 12 That is, there's not probably a significant business
00:14:05 13 transaction in this country that does not kick off with
00:14:07 14 a non-disclosure agreement or a confidentiality
00:14:10 15 agreement.

00:14:11 16 I think when you start down a slippery slope
00:14:13 17 where we say okay, well, confidentiality agreements
00:14:18 18 apply in this situation but not as to this federal
00:14:21 19 statute, then -- you know, common law analogy often
00:14:25 20 works well, hey, you know, they don't apply to Sherman
00:14:27 21 Act so they must not apply in 34 Act, or -- you know,
00:14:30 22 you start down a slippery slope, and before you know it,
00:14:33 23 we've got the entire body of, you know, trading and
00:14:37 24 transactional commerce in this country who have MDAs and
00:14:39 25 we provide information in reliance upon the private

00:14:41 1 contractual benefit who, once they find out those
00:14:44 2 confidentiality agreements are potentially void or
00:14:47 3 avoidable, are not going to be providing the same level
00:14:51 4 of information, and I think we need an even exchange in
00:14:54 5 commerce in order to engage in trade or commerce in this
00:15:04 6 country.

00:15:09 7 THE COURT: Well, I guess I'm looking at the
00:15:12 8 Complaint filed in the District of Maryland that was
00:15:18 9 centralized with me, and I'm looking at your client's
00:15:24 10 state court lawsuit alleging that confidential
00:15:29 11 information was utilized in violation of the
00:15:31 12 confidentiality agreement.

00:15:34 13 And your client, at least in that filing, has
00:15:38 14 pointed to a handful of paragraphs where he alleges that
00:15:42 15 information was utilized as part of the lawsuit filing,
00:15:47 16 Paragraph 3, which simply indicates that negotiations
00:15:53 17 had taken place and that CareFirst, however, had refused
00:16:00 18 to negotiate in a meaningful sense and instead insisted
00:16:04 19 on achieving the anti-competitive, rock-bottom rates it
00:16:07 20 desired.

00:16:08 21 Do you think that violates the confidentiality
00:16:10 22 agreement, that particular allegation?

00:16:13 23 MR. NORMAN: As to disclosure or use, Your
00:16:15 24 Honor?

00:16:15 25 THE COURT: Either.

00:16:17 1 MR. NORMAN: As to use, there is a
00:16:21 2 significant chance that it does. I believe that it
00:16:24 3 does. You know, as to disclosure, I think that there is
00:16:29 4 some room for the notion that mere generalities -- and I
00:16:33 5 think some of Mr. Whatley's case law pointed this out --
00:16:36 6 do not rise to the level sufficient to, you know, be
00:16:40 7 enforceable under confidentiality agreements. One of
00:16:42 8 his cases deals, in fact, with information that is
00:16:46 9 considered to be too general to be constituted trade
00:16:49 10 secret.

00:16:50 11 I think the fact that there was a commencement of
00:16:52 12 negotiations, to me, is too general.

00:16:54 13 THE COURT: Well, let's go back to this
00:16:56 14 issue of use then because that seems to me to be the
00:16:59 15 lynchpin of your argument.

00:17:00 16 If Mr. Whatley from Miss Kallas was just
00:17:05 17 generally aware of facts that would suggest your client
00:17:08 18 was engaging in anti-competitive behavior and using its
00:17:15 19 misophony or monopoly power to do that, but they don't
00:17:20 20 include it in the complaint and they don't intend to use
00:17:23 21 any of that information for purposes of discovery, but
00:17:26 22 it does make them feel better about filing the
00:17:28 23 complaint, is that use?

00:17:31 24 MR. NORMAN: It may be use, Your Honor, and
00:17:34 25 that's one of the disadvantages at which we find

00:17:37 1 ourselves, which is that that's going to be the subject
00:17:38 2 matter of discovery. You know, perhaps -- you know, we
00:17:42 3 have a good faith basis to protect CareFirst's
00:17:46 4 agreements and say it looks to us like there was use.
00:17:48 5 We filed a good faith lawsuit.

00:17:49 6 The level and the extent to which there has been
00:17:53 7 use doesn't have to necessarily be reflected in a public
00:17:57 8 disclosure. It gets into, again, the work product and
00:18:01 9 the processes by which, you know, Mr. Whatley and Miss
00:18:06 10 Kallas move forward with the lawsuit.

00:18:08 11 And we don't know. Maybe they've used it for
00:18:11 12 other things. Those are all things that would be
00:18:14 13 discoverable matters.

00:18:15 14 THE COURT: Well, if you don't know, then
00:18:17 15 why would you make the assertion?

00:18:19 16 MR. NORMAN: We have a good faith basis to
00:18:21 17 believe.

00:18:21 18 THE COURT: But if you don't know, how could
00:18:23 19 you have a good faith basis?

00:18:24 20 MR. NORMAN: You don't have to know all of
00:18:26 21 your facts; you have to believe those facts in order to,
00:18:28 22 I believe, rise to the level of a filing.

00:18:30 23 THE COURT: All right. This is your
00:18:31 24 opportunity.

00:18:32 25 MR. NORMAN: Right.

00:18:33 1 THE COURT: You've made an objection. I'm
00:18:34 2 hearing your objection. What specifically can you point
00:18:36 3 to to suggest that they've used any information gained
00:18:43 4 during these negotiations in the filing of the suit
00:18:46 5 that's before me other than the fact that they contend
00:18:50 6 your client engaged in anti-competitive conduct during
00:18:56 7 the negotiations themselves?

00:19:00 8 MR. NORMAN: Those are the only facts that
00:19:02 9 we have right now, Your Honor, the fact that one would
00:19:05 10 not know as a separate, distinct party to the
00:19:10 11 confidentiality agreement exactly what occurred in the
00:19:14 12 negotiations and been part and parcel with it without,
00:19:17 13 you know, the -- and so maybe I'm not understanding Your
00:19:22 14 Honor's question.

00:19:23 15 THE COURT: No, you've understood it, and
00:19:25 16 you've answered it. That's what I thought the answer
00:19:27 17 would be.

00:19:27 18 What facts have been disclosed in the lawsuit,
00:19:30 19 Complaint against CareFirst that was centralized before
00:19:34 20 me that your client hasn't put into the public medium by
00:19:40 21 the filing of its suit in the state court?

00:19:53 22 MR. NORMAN: I don't know, you know -- and
00:19:55 23 I'm probably not prepared to answer that, Your Honor.

00:19:57 24 THE COURT: Well, then who is?

00:19:59 25 MR. NORMAN: Mr. de Gravelles.

00:20:01 1 THE COURT: Where is he?

00:20:02 2 MR. NORMAN: He's here.

00:20:03 3 THE COURT: Well, let's get him up here.

00:20:11 4 MR. NORMAN: Your Honor, do I return to
00:20:12 5 the --

00:20:12 6 THE COURT: You may surrender the podium
00:20:14 7 until you're ready to return to it.

00:20:16 8 MR. NORMAN: Yes, Your Honor.

00:20:19 9 MR. DE GRAVELLES: Good morning, Your Honor.
00:20:19 10 Patrick de Gravelles.

00:20:20 11 THE COURT: Good morning. You heard the
00:20:22 12 question.

00:20:23 13 MR. DE GRAVELLES: Yes, Your Honor.

00:20:23 14 THE COURT: What is your answer?

00:20:24 15 MR. DE GRAVELLES: My answer is this, Your
00:20:26 16 Honor; that the negotiations between CareFirst and
00:20:30 17 SurgCenter Development Corp and to which Miss Kallas and
00:20:36 18 the law firms were party, those were not disclosed to
00:20:44 19 anyone as far as CareFirst knows other than to those
00:20:47 20 individuals. And --

00:20:50 21 THE COURT: I don't understand what that
00:20:52 22 means.

00:20:52 23 MR. DE GRAVELLES: What it means, Your
00:20:53 24 Honor, is that CareFirst didn't disclose the substance
00:20:57 25 of those negotiations to anyone. They were kept

00:21:02 1 internal. When Whatley Kallas filed the action in the
00:21:07 2 U.S. District Court for the District of Maryland, it
00:21:10 3 referred to things like CareFirst's best and final
00:21:13 4 offer. It referred to the history of negotiations.

00:21:17 5 THE COURT: I see what it's referred to. I
00:21:19 6 have read the Complaint. Paragraphs 93 through 95 of
00:21:23 7 that lawsuit make assertions about CareFirst's use of
00:21:32 8 monopoly power and refusal to negotiate with respect to
00:21:36 9 reimbursement rates.

00:21:38 10 Paragraphs 87 through 92 involve allegations
00:21:42 11 regarding healthcare providers who were not parties to
00:21:45 12 the confidentiality agreement.

00:21:47 13 And Paragraph 3 simply says that CareFirst
00:21:53 14 refused to negotiate in any meaningful sense, and it
00:21:58 15 insisted on achieving anti-competitive results in the
00:22:01 16 negotiations.

00:22:02 17 What I'm getting at is why is any of that a
00:22:05 18 disclosure of confidential information as opposed to
00:22:08 19 simply accusing your client of engaging in Sherman Act
00:22:13 20 violations during the negotiations themselves?

00:22:17 21 MR. DE GRAVELLES: Your Honor, I think the
00:22:20 22 question has to have two parts, which is why was this a
00:22:23 23 use or a disclosure. As to the disclosure issue, it's
00:22:28 24 quite clear that it will inevitably be disclosed.

00:22:33 25 THE COURT: How?

00:22:35 1 MR. DE GRAVELLES: Through discovery, Your
00:22:37 2 Honor.

00:22:37 3 THE COURT: Well, they would be entitled to
00:22:38 4 that -- your confidentiality agreement can't insulate
00:22:42 5 you from discovery in a case, can it?

00:22:44 6 MR. DE GRAVELLES: No, it can't.

00:22:45 7 THE COURT: So that was going to come out
00:22:47 8 anyway.

00:22:47 9 MR. DE GRAVELLES: Not if they didn't even
00:22:49 10 know about the negotiations, Your Honor.

00:22:50 11 THE COURT: Well, if they sent out the right
00:22:52 12 interrogatories and requests for production, they'd find
00:22:54 13 out. You don't think they'd ask about pricing data if
00:22:57 14 they're accusing you of anti-competitive behavior in
00:23:00 15 that area?

00:23:00 16 MR. DE GRAVELLES: Possibly, Your Honor, but
00:23:01 17 I'm not sure they would be entitled to pricing data that
00:23:05 18 had been offered but not accepted. Pricing data and
00:23:08 19 agreed-upon pricing data is different.

00:23:12 20 THE COURT: If they contend that your client
00:23:15 21 violated certain provisions of the Sherman Act in those
00:23:17 22 negotiations themselves, your position is that this
00:23:21 23 confidentiality agreement would insulate them from even
00:23:24 24 being able to do discovery without disclosing that or
00:23:29 25 utilizing that pre-complaint to discover exactly what

00:23:32 1 your client did in those negotiations?

00:23:37 2 MR. DE GRAVELLES: No, Your Honor.

00:23:37 3 THE COURT: Well, then why is this not -- as
00:23:41 4 your Dallas, Texas counsel might tell you -- all hat and
00:23:45 5 no cattle?

00:23:46 6 MR. DE GRAVELLES: Your Honor, CareFirst
00:23:49 7 enters into confidentiality agreements with potential
00:23:55 8 contracting parties as a routine matter.

00:23:58 9 THE COURT: Sure.

00:23:59 10 MR. DE GRAVELLES: And as Mr. Norman
00:24:01 11 explained, these types of agreements are very important
00:24:04 12 because they offer parties, sophisticated commercial
00:24:09 13 parties, the opportunity to have a free flow of
00:24:12 14 information, an exchange of information.

00:24:15 15 One of the conditions -- one of the contractual
00:24:17 16 conditions that the parties agreed to in this situation
00:24:21 17 was no use beyond the attempt to enter into this
00:24:29 18 contractual relationship, which was never consummated.

00:24:34 19 At the end of the day, there were four parties to
00:24:37 20 the confidentiality agreement. One was CareFirst. One
00:24:42 21 was SurgCenter Development Corp. One was what was then
00:24:46 22 known as, I believe, Whatley, Drake & Kallas. And the
00:24:50 23 fourth was the Mooney Law Firm out of Washington, DC.

00:24:55 24 SurgCenter Development Corp is a partner in each
00:24:58 25 of the ASCs who are plaintiffs in the federal antitrust

00:25:02 1 action that's been tagged to this MDL. It is clear that
00:25:06 2 the way they got that information must have been either
00:25:10 3 through their partner, SurgCenter Development Corp, or
00:25:13 4 through the --

00:25:14 5 THE COURT: What information? The fact that
00:25:16 6 your client allegedly used its monopoly power to force
00:25:22 7 feed -- and this is just based on their allegations.
00:25:24 8 I'm not saying this is true.

00:25:27 9 Your client used its monopoly power to force feed
00:25:32 10 below-market reimbursement rates down their throat and
00:25:35 11 said take it or leave it. If that's true, can an
00:25:40 12 antitrust case be constructed from those facts, yes or
00:25:44 13 no? If it's true.

00:25:45 14 MR. DE GRAVELLES: Yes, it can be.

00:25:47 15 THE COURT: All right. If your client used
00:25:49 16 its monopoly power to insist upon reimbursement rates
00:25:56 17 that did not reflect a true competition in the market,
00:26:02 18 then that could be liability-creating. There would
00:26:06 19 obviously be much more to the quotient than that, but
00:26:11 20 that's at least a skeleton of a Sherman Act allegation,
00:26:14 21 correct?

00:26:16 22 MR. DE GRAVELLES: Your Honor, I have to be
00:26:17 23 honest. I'm not an expert on the Sherman Act, but I
00:26:20 24 understand where the Court's going. I think that the
00:26:22 25 issue is can they take the information that they've got

00:26:26 1 from confidential negotiations and use it to that end.

00:26:30 2 No one's disputing that they can't make
00:26:36 3 allegations that will stand up at least to a facial
00:26:44 4 test. They can create allegations. Whether they stand
00:26:46 5 up even to a 12(b)(6) analysis --

00:26:48 6 THE COURT: Why wouldn't all this be
00:26:50 7 resolved by a protective order that just simply says any
00:26:55 8 information other than an alleged Sherman Act violation
00:27:00 9 that comes out of those negotiations isn't going to be
00:27:03 10 used by them in this case, which Mr. Whatley has
00:27:09 11 essentially volunteered to the Court?

00:27:11 12 And by the way, he says he's not done it but
00:27:13 13 won't do it is his position.

00:27:15 14 MR. DE GRAVELLES: My response to that would
00:27:16 15 be we had a binding contract with them at one point,
00:27:19 16 what we thought was a binding contract, and they
00:27:22 17 violated it.

00:27:23 18 THE COURT: Well, that remains to be seen.
00:27:25 19 You haven't shown me how they violated it at this point.
00:27:29 20 I'm giving you this chance.

00:27:31 21 And I know you have been very crafty in your
00:27:34 22 approach to this that you don't want me to make that
00:27:37 23 decision for whatever reason even though you've squarely
00:27:40 24 put the issue before me with your objection.

00:27:44 25 What I'm getting at is do the allegations in the

00:27:47 1 Complaint concern anything other than the Plaintiff
00:27:51 2 assertion that your client used monopoly power to insist
00:27:55 3 upon below-market reimbursement rights? That's the way
00:27:58 4 I read the Complaint. But there may be more to it than
00:28:02 5 meets my eye because I'm not privy to all these things
00:28:04 6 that you claim occurred.

00:28:06 7 MR. DE GRAVELLES: Your Honor, first of all,
00:28:08 8 let me say if the Court's impression is that I have been
00:28:10 9 crafty, I apologize --

00:28:12 10 THE COURT: Well, let me --

00:28:13 11 MR. DE GRAVELLES: -- because that certainly
00:28:15 12 wasn't my intent.

00:28:16 13 THE COURT: -- ask you while we are on that
00:28:18 14 subject. You've just told me there were four parties to
00:28:20 15 the confidentiality agreement.

00:28:21 16 MR. DE GRAVELLES: I believe that's correct.

00:28:22 17 THE COURT: CareFirst is a Maryland
00:28:24 18 corporation.

00:28:25 19 MR. DE GRAVELLES: Yes, Your Honor.

00:28:25 20 THE COURT: SurgCenter Development
00:28:27 21 Corporation is a California corporation.

00:28:28 22 MR. DE GRAVELLES: Yes, Your Honor.

00:28:29 23 THE COURT: Whatley, Drake is a
00:28:31 24 non-Maryland -- I don't know if they are in New York or
00:28:34 25 what have you. Where is Mooney?

00:28:38 1 MR. DE GRAVELLES: DC.

00:28:39 2 THE COURT: But you, in your state court
00:28:41 3 complaint, made allegations against a number of Maryland
00:28:45 4 defendants that weren't a party to the confidentiality
00:28:47 5 agreement saying that they breached the confidentiality
00:28:50 6 agreement. Why is that not crafty?

00:28:55 7 MR. DE GRAVELLES: Your Honor, one of the
00:28:57 8 parties to the confidentiality agreement was SurgCenter
00:29:03 9 Development Corp.

00:29:04 10 THE COURT: Uh-huh (affirmative). I got
00:29:05 11 that.

00:29:06 12 MR. DE GRAVELLES: SurgCenter Development
00:29:08 13 Corp is a partner in each of the ASCs. So in order to
00:29:12 14 craft -- and I hate to use that word considering the
00:29:15 15 Court has deemed my --

00:29:16 16 THE COURT: I think it might be a Freudian
00:29:19 17 slip.

00:29:20 18 MR. DE GRAVELLES: Well, Your Honor, I
00:29:22 19 honestly take my obligations to the court seriously, and
00:29:24 20 I do apologize --

00:29:26 21 THE COURT: Well, if I hadn't made that very
00:29:29 22 clear, that's a good thing that you're aware of your
00:29:31 23 obligations to this court right now.

00:29:33 24 MR. DE GRAVELLES: Your Honor, the issue is
00:29:34 25 if we had -- imagine, okay, if you think about an

00:29:41 1 injunction that binds three parties -- the two law firms
00:29:47 2 and a California corporation, okay, and it binds only
00:29:52 3 those parties. Well, we know that the Maryland entities
00:29:59 4 have the information through their partner SurgCenter
00:30:06 5 Development Corp.

00:30:07 6 So if we got an injunction against just those
00:30:13 7 three parties, the remedy would be incomplete. It would
00:30:21 8 be almost meaningless.

00:30:22 9 THE COURT: Well, couldn't you have resolved
00:30:24 10 that on the first instance by asking anyone connected
00:30:27 11 with these entities to sign your confidentiality
00:30:30 12 agreement if they were ultimately beneficiaries of the
00:30:33 13 negotiations that you were undertaking?

00:30:36 14 And I don't know that they were direct
00:30:39 15 beneficiaries of these negotiations, but to the extent
00:30:42 16 they might have been, that would have been an easy fix
00:30:45 17 to your issue, wouldn't it?

00:30:49 18 MR. DE GRAVELLES: Your Honor --

00:30:50 19 THE COURT: You know, this isn't the
00:30:52 20 presidential debates.

00:30:53 21 MR. DE GRAVELLES: No, I understand.

00:30:54 22 THE COURT: When I ask a question, I don't
00:30:56 23 want a political response by ignoring it. What I want
00:30:58 24 is an answer.

00:31:00 25 MR. DE GRAVELLES: I'm going to give the

00:31:01 1 Court an answer, but I have to be careful because there
00:31:06 2 are documents that we submitted for an in-camera review,
00:31:10 3 and the answer, I'm going to say, lies in there; but I
00:31:13 4 don't want to disclose the documents in open court.

00:31:16 5 THE COURT: Fair enough. But the answer was
00:31:19 6 you could have easily fixed that problem by having
00:31:23 7 everyone who you wanted to keep this information
00:31:25 8 confidential to agree to keep it confidential, correct?

00:31:30 9 MR. DE GRAVELLES: Your Honor, yes, but we
00:31:32 10 thought -- perhaps we were mistaken, but we believed
00:31:37 11 that the confidentiality agreement was broad enough to
00:31:46 12 restrict access to those other entities.

00:32:00 13 THE COURT: Explain this one to me. If
00:32:04 14 Interim Class Counsel -- and if Mr. Whatley and Miss
00:32:07 15 Kallas are appointed to be that, they would fulfill this
00:32:12 16 role.

00:32:12 17 The idea from day one in this case from when I
00:32:15 18 first met with the defense counsel and the respective
00:32:19 19 Plaintiffs' counsel is that we would work toward
00:32:21 20 drafting a consolidated complaint which would displace,
00:32:27 21 for purposes of my proceeding with the MDL, the other
00:32:32 22 complaints that had been filed in in the 30 some-odd
00:32:35 23 other actions.

00:32:37 24 On top of that, Mr. Whatley has told me in his
00:32:40 25 filings that he does not -- and, Mr. Whatley, correct me

00:32:43 1 if this is a misreading on my part. He does not plan on
00:32:47 2 pursuing class claims with respect to these negotiations
00:32:51 3 anyway. He thinks they are straight-up, individual
00:32:53 4 monopolization claims, not any type of conspiracy claims
00:32:58 5 that he plans to make part of the class action
00:33:01 6 complaint, whether he is drafting it or giving input
00:33:03 7 about it? Am I right?

00:33:05 8 MR. WHATLEY: Correct, Your Honor.

00:33:06 9 THE COURT: So in light of all that, how
00:33:09 10 could the information you're concerned about possibly be
00:33:13 11 utilized in the drafting of the class allegation
00:33:20 12 consolidated complaint if Mr. Whatley and Miss Kallas
00:33:23 13 are appointed Interim Counsel?

00:33:34 14 MR. DE GRAVELLES: To be honest, Your Honor,
00:33:37 15 I -- I have not had the opportunity to digest Mr.
00:33:40 16 Whatley's Brief. It was -- I was traveling yesterday to
00:33:46 17 come here -- or this morning, rather, getting ready to
00:33:50 18 go. He filed it, I think, when the Court required.

00:33:53 19 It may be -- if the Court's asking if there is a
00:33:57 20 way that this issue can be avoided through an
00:34:02 21 understanding with the parties, I do not foreclose that
00:34:09 22 possibility. I think given the briefing schedule, it
00:34:13 23 was -- we have been in touch with Mr. Whatley. The day
00:34:17 24 I filed the Complaint I was in touch with him. And I
00:34:22 25 think he will -- he can confirm that. We've had back

00:34:25 1 and forth about this. It has not been radio silence.

00:34:31 2 Mr. Norman was speaking with Mr. Whatley this
00:34:34 3 morning about it. Is there a way? Probably.

00:34:38 4 THE COURT: Well, I'm trying to figure out
00:34:40 5 if there's a valid objection. What I'm trying to figure
00:34:43 6 out is if you're correct in your assertion that he's
00:34:48 7 utilized confidential information in the filing of the
00:34:53 8 Complaint against your client. I've looked at the
00:34:55 9 Complaint. I don't see any information in the Complaint
00:35:00 10 about pricing codes, pricing data, the ability to
00:35:05 11 unbundle.

00:35:06 12 What I do see is the allegation that during
00:35:09 13 negotiations your client engaged in anti-competitive
00:35:13 14 conduct, and I -- at least from the top-of-the-head
00:35:17 15 response to that -- do not believe that a pre-dispute
00:35:21 16 confidentiality agreement can operate to bar a client's
00:35:27 17 ability to prosecute an antitrust action based upon the
00:35:31 18 very conduct that exists during those negotiations, if,
00:35:38 19 in fact, it is anti-competitive.

00:35:41 20 So far as I can tell, that's all we're dealing
00:35:43 21 with at this point. Now, I'm going to look carefully at
00:35:46 22 your in camera submission. I've glanced through it.
00:35:49 23 I'm not sure how it fits within what I'm dealing with in
00:35:52 24 my case on my first pass through it, but I'm giving you
00:35:57 25 an opportunity to explain this to me.

00:36:03 1 I don't have a judgment, but there are two things
00:36:07 2 that are very strong possibilities at this point. One
00:36:10 3 is that you have some legitimate concern about the use
00:36:14 4 of a confidentiality agreement that you're just not
00:36:15 5 articulating to me very well.

00:36:18 6 The other is that you're not concerned about the
00:36:21 7 disclosure of a confidentiality agreement; you're
00:36:23 8 concerned about trying to keep your client out of
00:36:26 9 antitrust hot water, and this is a game to accomplish
00:36:31 10 that goal.

00:36:34 11 I assure you if we're dealing with the latter,
00:36:37 12 you will be my object lesson in this case that I do not
00:36:39 13 tolerate that type of lawyering in this court, and we
00:36:44 14 have a whole host of witnesses that will get a chance to
00:36:48 15 learn don't touch the hot stove; see what happens. You
00:36:52 16 got that?

00:36:54 17 MR. DE GRAVELLES: Your Honor, may I be
00:36:55 18 heard on that?

00:36:56 19 THE COURT: You may.

00:36:56 20 MR. DE GRAVELLES: The very first agreement
00:37:03 21 that I offered Mr. Whatley was keep the Section I claim.
00:37:07 22 We agree there's no problem there. CareFirst is a
00:37:13 23 defendant in many, many lawsuits here.

00:37:16 24 THE COURT: And all those other lawsuits
00:37:18 25 have made very similar allegations that your client uses

00:37:21 1 its monopoly power to drive home unreasonable,
00:37:25 2 non-competitive reimbursement rates, right?

00:37:29 3 MR. DE GRAVELLES: And that's exactly our
00:37:30 4 point.

00:37:31 5 THE COURT: So he could have got all that
00:37:32 6 information in this Complaint just by reading other
00:37:35 7 complaints and talking to other lawyers.

00:37:36 8 MR. DE GRAVELLES: Exactly, Your Honor.
00:37:37 9 That's precisely our point.

00:37:40 10 THE COURT: So are you taking the position
00:37:43 11 he's used confidential information in the drafting of
00:37:45 12 this Complaint?

00:37:45 13 MR. DE GRAVELLES: Because this particular
00:37:46 14 Complaint -- and I appreciate all the work the Court did
00:37:49 15 prior to this. I've been made aware of that. I
00:37:52 16 understand it.

00:37:53 17 What is somewhat of a mystery to me is why on the
00:37:58 18 eve of this particular proceeding appointing Interim
00:38:05 19 Class Counsel, why this information -- they knew the
00:38:10 20 confidentiality agreement was there. And when he filed
00:38:13 21 his initial opposition to our response, Mr. Whatley
00:38:18 22 actually acknowledged the problem with the confidential
00:38:22 23 information because he said we ran up to the line, but
00:38:24 24 we didn't cross it. He knew it was there.

00:38:27 25 So given that there are all these other

00:38:29 1 allegations that they could have relied on, all these
00:38:31 2 other things Mr. Whatley could have done, be appointed
00:38:34 3 Interim Class Counsel. Your Honor, I assure you, we
00:38:37 4 don't want to have this fight, and I told Mr. Whatley
00:38:43 5 you can bring your lawsuit without this. This is what I
00:38:47 6 don't understand.

00:38:47 7 THE COURT: What's "this"? That's what I'm
00:38:48 8 getting at. Take me to the paragraph --

00:38:50 9 MR. DE GRAVELLES: Okay.

00:38:51 10 THE COURT -- of the Complaint and tell me
00:38:52 11 what "this" is.

00:38:53 12 MR. DE GRAVELLES: Well, Your Honor, I think
00:38:54 13 that when they talk about -- Your Honor noted in
00:38:59 14 Paragraph 3 they talk about rock -- they characterize
00:39:02 15 CareFirst's pricing as "rock-bottom pricing." They talk
00:39:09 16 about "our best and final offer." They say "we refused
00:39:13 17 to negotiate."

00:39:13 18 THE COURT: Do you understand the concept of
00:39:15 19 antitrust standing?

00:39:16 20 MR. DE GRAVELLES: Yes, Your Honor.

00:39:17 21 THE COURT: They have to show that they are
00:39:19 22 actually injured by the anti-competitive conduct.

00:39:21 23 MR. DE GRAVELLES: Yes, Your Honor.

00:39:22 24 THE COURT: It's not enough to show that
00:39:23 25 anti-competitive conduct is unmoored, floating around in

00:39:27 1 the atmosphere somewhere affecting others.

00:39:29 2 MR. DE GRAVELLES: Yes.

00:39:30 3 THE COURT: They've got to show that it
00:39:31 4 affected them. Why is this anything other than showing
00:39:35 5 they have standing to assert the Sherman Act claims that
00:39:39 6 they're asserting?

00:39:40 7 MR. DE GRAVELLES: The reason it's something
00:39:42 8 more is because they had an agreement that they wouldn't
00:39:45 9 use the information, and I think the very fact that they
00:39:51 10 discussed the negotiation shows they used it.

00:39:54 11 And, again, my -- the question, I think, is, as
00:39:58 12 the Court noted, there's all these other plaintiffs, all
00:40:02 13 these other allegations. There apparently was no
00:40:05 14 problem with confidentiality agreements in any of these
00:40:07 15 other situations. I don't know why it came up at this
00:40:10 16 point.

00:40:11 17 I wish it hadn't come up at this point. We're
00:40:13 18 not happy with it coming up at this point. And if
00:40:15 19 there's a way we can work with Mr. Whatley to pin that
00:40:21 20 information in to where it is and no more, look, we
00:40:25 21 acknowledge what's out in the public sphere is out in
00:40:28 22 the public sphere now. Okay. The idea of moving to
00:40:31 23 seal something once it's been filed in federal court --

00:40:35 24 THE COURT: What would you possibly say that
00:40:37 25 you have to seal in this Complaint? Paragraph 3?

00:40:42 1 MR. DE GRAVELLES: No, no. That's one of my
00:40:44 2 points is that sealing this wasn't the effective --

00:40:48 3 THE COURT: No, what do you claim they've
00:40:50 4 utilized as evidenced by this Complaint? Paragraph 3.

00:40:54 5 MR. DE GRAVELLES: That's one of the
00:40:55 6 paragraphs, yes, Your Honor; the fact that they were
00:40:57 7 able to describe and characterize our pricing
00:41:02 8 information or our pricing offer indicates that they
00:41:06 9 utilized -- the only place they could have gotten that
00:41:10 10 information was through the negotiation.

00:41:13 11 THE COURT: Well, but do you understand --
00:41:16 12 and, again, I don't know that this is really -- either
00:41:18 13 you're not acknowledging it or I'm not sure you're
00:41:22 14 understanding it. Their obligation unrelated to the
00:41:27 15 class claims is that you, your client, violated the
00:41:31 16 antitrust laws in those negotiations.

00:41:34 17 MR. DE GRAVELLES: Yes.

00:41:35 18 THE COURT: Okay. So how can they possibly
00:41:38 19 -- how could they possibly, then, do anything other than
00:41:41 20 what they've done by drafting a complaint which does not
00:41:45 21 specify any particular information disclosed but which
00:41:49 22 makes assertions about what your client's conduct was?
00:41:54 23 Offering below-market rates, using monopoly power,
00:41:58 24 insisting that those be taken or no deal.

00:42:01 25 MR. DE GRAVELLES: I think the response is,

00:42:05 1 Your Honor, that this activity, if they find it was some
00:42:14 2 other provider -- if they got and they interview other
00:42:18 3 providers, and they found out that this happened, they
00:42:21 4 can take that information and draft a complaint.

00:42:24 5 Our belief is -- and I don't think there's been
00:42:27 6 any case law that proves the theory wrong. Our belief
00:42:33 7 is you can't take confidential negotiations, what you
00:42:36 8 learned in there, and then go off to court with it.

00:42:40 9 And I fully accept the fact that the Court may
00:42:43 10 rule differently, and we simply move beyond it then.
00:42:46 11 But we definitely have --

00:42:48 12 THE COURT: Well, I have another issue
00:42:50 13 separate and apart from the objection that you have
00:42:52 14 asserted. I know how to deal with the objection. I
00:42:55 15 hear both sides, and I make a decision about what I
00:42:59 16 think is the correct application of the law.

00:43:05 17 The structure that you're attempting to set up
00:43:08 18 with your state court filing is that we will now have
00:43:13 19 three judges involved in policing discovery disputes in
00:43:17 20 this court, whether it's the judge in Maryland who had
00:43:21 21 the case at the state level, Judge Titus who has the
00:43:26 22 case now on the one hand, and my magistrate judge and
00:43:31 23 myself on the other.

00:43:34 24 What I'm trying to also figure out is,
00:43:38 25 understanding that there are limitations to federalism

00:43:41 1 and understanding I'm a court of limited jurisdiction,
00:43:44 2 how can I possibly conduct this litigation fairly and
00:43:47 3 efficiently if you are behind the scenes working in
00:43:54 4 Maryland to do discovery about any lawyer's work product
00:44:02 5 in this case? And that's why I have concerns about your
00:44:08 6 filing.

00:44:08 7 You didn't simply sue for breach of a contract.
00:44:12 8 You're seeking a preliminary injunction to prevent them
00:44:15 9 from going forward with information utilized, but on the
00:44:19 10 other hand, you tell me that that's not an immediate
00:44:23 11 concern because then you realized that they have to
00:44:25 12 draft a consolidated class action complaint, and they're
00:44:28 13 not going forward with litigation based on those
00:44:30 14 allegations.

00:44:31 15 It seems to me you're wanting to have it both
00:44:34 16 ways on several issues in this case, and that's a
00:44:36 17 concern.

00:44:39 18 MR. DE GRAVELLES: To be honest, Your Honor,
00:44:41 19 I think on the issue of the preliminary injunction, the
00:44:45 20 problem there is -- and I've worked with Mr. Whatley on
00:44:48 21 this, and he was very kind in responding to me to my
00:44:52 22 inquiries saying -- I asked him, I said -- and there are
00:44:58 23 several e-mails back and forth about the timing of the
00:45:01 24 filing of that consolidated complaint, and I didn't want
00:45:04 25 to take any action that would in any way create problems

00:45:09 1 before that next filing.

00:45:12 2 But I think if there's any merit to CareFirst's
00:45:16 3 complaint, it must be recognized that any claim we have
00:45:24 4 goes away if we don't have any protection and he were to
00:45:28 5 file another complaint that disclosed more information.

00:45:32 6 THE COURT: But couldn't you resolve that
00:45:35 7 through the auspices of this court? You're a party in
00:45:38 8 this case, right?

00:45:39 9 MR. DE GRAVELLES: CareFirst is a party,
00:45:40 10 yes, sir.

00:45:40 11 THE COURT: Yeah, your client. Well, when I
00:45:42 12 say you, I mean your client.

00:45:44 13 MR. DE GRAVELLES: No, no, absolutely, yes.

00:45:45 14 THE COURT: Your client is a party in this
00:45:47 15 case. If your client believes that information that's
00:45:50 16 subject to a confidentiality agreement is being utilized
00:45:52 17 in this case, you can seek a protective order. You can
00:45:55 18 even seek sanctions.

00:45:57 19 My question is, though, you've not chosen to go
00:46:02 20 that route. You've chosen to go to state court in
00:46:06 21 Maryland against diverse parties adding in some
00:46:10 22 non-diverse parties who weren't party to the
00:46:13 23 confidentiality agreement, which tells me you're trying
00:46:16 24 to engineer a state court non-removal of complaint, and
00:46:21 25 you're asking a state judge to step in as an interloper

00:46:25 1 into my case and tell me and counsel what you get to
00:46:29 2 discover of their work product in my case.

00:46:33 3 There are French words for that in terms of how I
00:46:36 4 feel about that, but I won't use them on the record.

00:46:39 5 All right. Do you understand my concern?

00:46:41 6 MR. DE GRAVELLES: Absolutely.

00:46:42 7 THE COURT: Do you understand why I would be
00:46:43 8 very troubled by that?

00:46:45 9 MR. DE GRAVELLES: I do, Your Honor. And if
00:46:46 10 it would assist this Court, I think CareFirst would not
00:46:51 11 have a problem dropping the non-diverse defendants if we
00:46:56 12 can get an assurance from Whatley Kallas and SurgCenter
00:47:03 13 that they will be bound by whatever decision is made in
00:47:08 14 a federal action that can be tagged here with regard to
00:47:12 15 that confidentiality agreement.

00:47:13 16 The Court has to understand. Our only concern
00:47:15 17 was if we had a remedy against only three of the parties
00:47:19 18 that had the information, it was a remedy without any
00:47:23 19 worth. It was a remedy without any value.

00:47:24 20 If they will concede to that, we'll drop them
00:47:28 21 now.

00:47:28 22 THE COURT: Well, let me ask you this. How
00:47:30 23 would you feel about me talking with Judge Titus and
00:47:33 24 letting us figure out how to resolve this?

00:47:36 25 MR. DE GRAVELLES: I wouldn't have a problem

00:47:37 1 with that, Your Honor. I would still submit that offer
00:47:41 2 to drop the non-diverse parties just so we would make
00:47:44 3 sure. Then we'll re-file in federal court. That's not
00:47:47 4 the issue. That's fine, as long as we're assured that
00:47:50 5 those 18 ASCs who are getting information from --

00:47:54 6 THE COURT: Let me ask you. Are you
00:47:55 7 concerned about use of this confidential information in
00:47:58 8 any corner other than this particular corner, or this
00:48:03 9 particular court?

00:48:08 10 MR. DE GRAVELLES: There were concessions
00:48:10 11 made to these ASCs that we don't typically make.

00:48:14 12 THE COURT: I'm asking you if you're
00:48:16 13 concerned, presently concerned, that the confidentiality
00:48:20 14 agreement is being violated in any manner other than the
00:48:24 15 prosecution of this action?

00:48:26 16 MR. DE GRAVELLES: Oh, I see. Immediately,
00:48:35 17 no. My concern would be that at some point pricing
00:48:38 18 information -- I think there's a bunch of attorneys here
00:48:42 19 who are better in economics than I am, but at some
00:48:44 20 point, pricing information becomes stale, and so, for
00:48:47 21 example, what you offered a prospective contracting
00:48:50 22 party two years ago, not much value because things have
00:48:53 23 moved on.

00:48:53 24 And it may very well be that as far as a
00:48:57 25 disclosure issue goes, I'm just talking about the

00:49:00 1 disclosure issue, then we'll get to the point where it's
00:49:04 2 stale and it's not -- and then if it's released, we
00:49:07 3 wouldn't be happy with it, but there's probably not a
00:49:10 4 lot of economic value to it.

00:49:11 5 But as far as the use goes, no, that's the area
00:49:13 6 where we're concerned about. And like I said, I would
00:49:17 7 have no problem dropping the non-diverse parties so we
00:49:20 8 can make sure this is in federal court.

00:49:24 9 That's not a problem, as long as I get some
00:49:29 10 assurance that this ASC out in Bowie, Maryland or this
00:49:32 11 ASC out in Bethesda, Maryland isn't going to turn around
00:49:36 12 and have the information from SurgCenter, its partner,
00:49:40 13 and uses it for something else.

00:49:41 14 THE COURT: What other things could they use
00:49:42 15 it for? I'm just curious. I'm trying to imagine what
00:49:45 16 that would be. I guess bragging at the country club
00:49:49 17 about what you know.

00:49:50 18 MR. DE GRAVELLES: I didn't think we would
00:49:51 19 face a federal lawsuit based on that either, but we did.

00:49:54 20 THE COURT: Well, you were facing this
00:49:55 21 federal lawsuit separate and apart -- you would have
00:49:57 22 faced this federal lawsuit regardless of whether there
00:50:00 23 was a confidentiality agreement signed, whether
00:50:02 24 negotiations occurred, and whether you thought
00:50:04 25 information was used. That was coming.

00:50:07 1 MR. DE GRAVELLES: Yes, and which makes, to
00:50:08 2 me --

00:50:08 3 THE COURT: In fact, this isn't the only one
00:50:10 4 you're facing. You're facing a number of them.

00:50:12 5 MR. DE GRAVELLES: Right. And to me that
00:50:13 6 makes the use -- the bringing up of this problem all
00:50:18 7 that more curious. In other words, they could have done
00:50:19 8 what they did --

00:50:19 9 THE COURT: I guess it begs the question of
00:50:21 10 whose brought it up.

00:50:22 11 MR. DE GRAVELLES: Well, we didn't file the
00:50:24 12 lawsuit.

00:50:24 13 THE COURT: Yes, you did.

00:50:25 14 MR. DE GRAVELLES: Well, we filed a lawsuit
00:50:27 15 in Maryland once they filed a lawsuit, so...

00:50:30 16 THE COURT: Yeah. Well, you've just
00:50:32 17 conceded that they filed a lawsuit that is no different
00:50:36 18 in its allegations from any number of lawsuits you're
00:50:39 19 challenged with filed by other lawyers who have no
00:50:43 20 access to that information. The substance of the
00:50:45 21 allegations are no different other than perhaps with
00:50:49 22 respect to the specific conduct alleged during the
00:50:52 23 negotiations, right?

00:50:55 24 MR. DE GRAVELLES: Yeah.

00:50:56 25 THE COURT: But the same claims are made.

00:50:58 1 The same conduct is alleged in other contexts. So you
00:51:03 2 would be facing this lawsuit and these allegations
00:51:05 3 regardless.

00:51:06 4 MR. DE GRAVELLES: I think, Your Honor, that
00:51:08 5 I'm not sure that CareFirst faces a Provider Section II
00:51:15 6 claim in any other case. There's been a lot of cases
00:51:18 7 filed. And I apologize if I'm mistaken on that, but I
00:51:21 8 don't believe we do.

00:51:23 9 So to some degree the Court's right in a general
00:51:26 10 sense, but when you drill down a little bit further, it
00:51:29 11 is possibly different.

00:51:30 12 THE COURT: I see what you're saying. All
00:51:32 13 right. Your counsel has stood and may want to come back
00:51:35 14 and relieve you. I don't know.

00:51:38 15 MR. DE GRAVELLES: May I sit down, Your
00:51:40 16 Honor?

00:51:40 17 THE COURT: You may.

00:51:41 18 MR. DE GRAVELLES: Thank you.

00:51:41 19 THE COURT: Subject to re-call.

00:51:43 20 MR. NORMAN: Your Honor, and, Judge, I
00:51:45 21 mostly stood just because the concern as to confidential
00:51:50 22 pricing information as to the other ASCs is as follows:
00:51:54 23 Typically these are going to be partnerships or limited
00:51:58 24 liability companies in which SurgCenter is going to be a
00:52:02 25 managing member or the general partner, and the

00:52:04 1 information is going to reside in the individual
00:52:07 2 partnerships or LLCs that represent the ASCs, and the
00:52:11 3 other members or partners are going to be physicians,
00:52:13 4 and those physicians often go out and start their own
00:52:16 5 ASCs, at which time -- and they have access to books and
00:52:20 6 records of the ASCs, at which time they've got
00:52:22 7 information on rock-bottom pricing or other special
00:52:24 8 concessions that were made.

00:52:25 9 THE COURT: Well, in this case, they haven't
00:52:27 10 said what the rock-bottom pricing was; they just
00:52:29 11 characterized it as a rock-bottom price below market
00:52:32 12 with the use of monopoly power to require that it be
00:52:37 13 taken.

00:52:38 14 MR. NORMAN: And I was narrowly addressing
00:52:40 15 the issue about whether there's concerns as to the other
00:52:44 16 ASCs having information.

00:52:46 17 THE COURT: I understand. But you would
00:52:48 18 agree with me that if you wanted to tie the bow up tidy,
00:52:51 19 you would just ask them to sign the agreement if you
00:52:51 20 thought they were the potential beneficiaries of any
00:52:54 21 illicit use of the information in any event, right?

00:52:57 22 MR. NORMAN: Your Honor, my experience has
00:52:58 23 been -- and just by way of background, I represent ASC
00:53:03 24 Development companies; that's what I do -- is that
00:53:05 25 there's no way that payor contract departments or

00:53:07 1 contracting departments are going to recognize any
00:53:10 2 distinction between the development entity and the
00:53:13 3 individual ASCs.

00:53:15 4 The development entity is negotiating on behalf
00:53:17 5 of all of those different entities. They all get the
00:53:19 6 same rate structures, and so it's sort of seen as one
00:53:23 7 and the same.

00:53:24 8 THE COURT: Well, going back to my original
00:53:26 9 question, and I'll ask you -- you have heard my
00:53:29 10 discourse with your colleague who's in house at your
00:53:33 11 client.

00:53:34 12 MR. NORMAN: Yes, Your Honor.

00:53:34 13 THE COURT: What confidential information,
00:53:37 14 other than this allegation: "They used their monopoly
00:53:43 15 power to require us to accept rock-bottom, below-market
00:53:49 16 reimbursement rates in these negotiations, and that
00:53:53 17 violates Section II of the Sherman Act" is made in its
00:53:57 18 Complaint?

00:54:30 19 MR. NORMAN: I don't have a good answer for
00:54:32 20 you, Your Honor, without giving an answer that works in
00:54:34 21 a way that would not make you happy, which is anything
00:54:37 22 that --

00:54:37 23 THE COURT: I'm not trying to be happy; I'm
00:54:38 24 trying to be informed.

00:54:39 25 MR. NORMAN: Yeah. It's anything that's not

00:54:41 1 generally publicly available. I mean some of the stuff
00:54:44 2 is going to be publicly available. You know, to the
00:54:48 3 extent that -- and I'm flipping through it if the Court
00:54:58 4 doesn't mind.

00:54:58 5 THE COURT: Yeah, I would focus in on
00:55:00 6 Paragraphs 3 and 93 through 95.

00:55:03 7 MR. NORMAN: Well, Paragraph 3 is --

00:55:07 8 THE COURT: You agree that that simply
00:55:09 9 establishes anti-

00:55:11 10 MR. NORMAN: I think it's more conclusory or
00:55:14 11 introductory.

00:55:15 12 THE COURT: It says that "we've been
00:55:17 13 injured."

00:55:17 14 MR. NORMAN: Right. I think it would be
00:55:26 15 difficult to say that the allegations are not very
00:55:29 16 general in the Complaint.

00:55:30 17 THE COURT: All right. So what we're really
00:55:32 18 dealing with, then, in fairness, is whether they have
00:55:34 19 some information that they've either used in mental
00:55:38 20 operations to satisfy themselves about the strength of
00:55:41 21 the claim or that they may use in the future in order to
00:55:47 22 know what discovery to pursue, what questions to ask in
00:55:51 23 depositions, those types of things?

00:55:54 24 MR. NORMAN: I think that's a very fair way
00:55:56 25 to characterize it.

00:55:57 1 THE COURT: Why can't we just deal with
00:55:59 2 that, then, going forward by letting the parties
00:56:02 3 negotiate a protective order, and if they can't achieve
00:56:08 4 that, letting Judge Putnam step in and work together on
00:56:12 5 a protective order to make sure that whatever pricing
00:56:16 6 data, bundling information, pricing codes, anything of
00:56:26 7 that nature, is not utilized by Interim Class Counsel in
00:56:32 8 prosecuting the case?

00:56:34 9 MR. NORMAN: You know, I think that that is
00:56:36 10 a very workable solution. I am not sure, Your Honor,
00:56:40 11 that it addresses some of the ultimate issues. And I'm
00:56:43 12 taking a look at this with some broad commercial
00:56:46 13 implications. I know that you have to deal with the
00:56:49 14 administration of this case. I'm looking at it just in
00:56:52 15 my practice, for example.

00:56:54 16 THE COURT: Well, what I'd like -- I
00:56:56 17 wouldn't be at all concerned if that state court suit
00:57:01 18 were moved to federal court if it didn't have a
00:57:05 19 preliminary request that would include doing discovery
00:57:11 20 with respect to work product in my case.

00:57:13 21 As far as I'm concerned -- and, Joe, I hope
00:57:15 22 you're not offended by this. You're on your own in the
00:57:18 23 state court action about whether you breached some
00:57:20 24 confidentiality agreement. That's not my concern. I'm
00:57:23 25 not protecting anyone. What I am doing is trying to

00:57:27 1 protect my process, and it's not going to work when you
00:57:32 2 have cooks in the kitchen who aren't even in the same
00:57:35 3 state, the same court, and we have telltale going back
00:57:41 4 and forth between two different courts on some of these
00:57:44 5 matters that I have to administratively manage as part
00:57:49 6 of this MDL.

00:57:50 7 MR. NORMAN: And I think CareFirst can
00:57:52 8 appreciate that, Your Honor. What I was going to say --
00:57:54 9 I mean, there is some concern here. It is very
00:57:57 10 difficult for me to express these things because I am
00:58:00 11 very much about not impugning other counsel.

00:58:04 12 From a business perspective, when I see a
00:58:06 13 confidentiality agreement that related to the
00:58:08 14 negotiation of payor contracts and I see the law firms
00:58:12 15 that have joined the MDA, and I don't have a good reason
00:58:14 16 why -- they are a law firm that I know that they do
00:58:17 17 certain kinds of work, and I say to myself well, what
00:58:20 18 are they doing involved in this. Then I have to ask
00:58:23 19 well, did the law firm set up the other party. Did
00:58:25 20 they, in fact, have a role in sort of creating the
00:58:30 21 facts.

00:58:31 22 In a negotiation, sometimes what I say to one
00:58:33 23 party may, in fact, change the answer or the offer
00:58:36 24 received back, you know, from that party, and those end
00:58:40 25 up being issues that become discoverable and perhaps

00:58:43 1 give rise to defenses, and then I'm back to the same
00:58:46 2 place I was, which is I've got fact-witness lawyers who
00:58:51 3 may really -- and most fairly, even though it doesn't
00:58:55 4 make administration of the case easy -- should be
00:58:58 5 sitting in a deponent's chair some day.

00:59:00 6 And that's the thing I'm struggling with. I
00:59:03 7 understand what His Honor is saying about linking the
00:59:06 8 preliminary injunction back over to a protective order
00:59:09 9 to sort of achieve the same results.

00:59:12 10 I just don't know that it fixes the other issues
00:59:16 11 that's hard to express without making accusations that I
00:59:17 12 don't want to make, and it's a struggle for me, Your
00:59:21 13 Honor.

00:59:21 14 THE COURT: All right. Well, where do you
00:59:23 15 think I am with respect to your client's objection in
00:59:29 16 this case?

00:59:29 17 MR. NORMAN: Where do I think you are?

00:59:32 18 THE COURT: Yes. As an officer of the
00:59:34 19 court, do you think anything has been raised in this
00:59:36 20 case that suggests to me that Mr. Whatley and Miss
00:59:42 21 Kallas could not perform well as Interim Class Counsel
00:59:44 22 in this case?

00:59:47 23 MR. NORMAN: I think it's subject to hearing
00:59:49 24 a statement that we never got in a Reply or a Brief from
00:59:52 25 Mr. Whatley or Miss Kallas yet; no matter what goes on

00:59:56 1 with these allegations -- because to me, Your Honor,
00:59:58 2 we're not having a fully-litigated matter as to whether
01:00:01 3 the confidentiality agreement was breached. His Honor
01:00:07 4 may be able to give some rulings on the law affecting
01:00:09 5 it, but, you know, notwithstanding anything else that
01:00:12 6 we've heard, I can be Interim Lead Counsel. And they
01:00:17 7 didn't say it in the Reply. They didn't say it in the
01:00:20 8 Brief.

01:00:20 9 THE COURT: Well, let's give them an
01:00:22 10 opportunity.

01:00:22 11 MR. NORMAN: Well, right. So I think that's
01:00:24 12 where His Honor is.

01:00:27 13 THE COURT: Right. Mr. Whatley?

01:00:29 14 MR. WHATLEY: Yes, sir.

01:00:29 15 THE COURT: I've spent enough time on the
01:00:31 16 other side. It's your turn.

01:00:34 17 MR. WHATLEY: Yes, sir.

01:00:35 18 THE COURT: First, what do you say about his
01:00:37 19 concern that when a lawyer gets involved, there may be
01:00:40 20 some opportunity that's being presented rather than an
01:00:45 21 attempt to negotiate?

01:00:47 22 MR. WHATLEY: Well, Your Honor, I say this.
01:00:54 23 It's not what happened here, but his entire premise
01:01:04 24 doesn't get to the objection he's making in terms of if
01:01:12 25 one of us were a fact witness -- which we dispute very

01:01:18 1 much. The negotiations here were handled almost
01:01:22 2 entirely by our client. And Miss Kallas and Mr. Brown
01:01:27 3 are on some e-mails in there largely because our firm
01:01:34 4 represents the company.

01:01:36 5 I'm not on any e-mail that he's given to you.
01:01:40 6 But that is really a non-issue because even if there
01:01:47 7 were a witness issue in Alabama -- and we can have Mark
01:01:51 8 White, the former president of the State Bar come up and
01:01:54 9 address this and other ethical issues if you'd like.

01:01:57 10 In Alabama the witness disqualification is solely
01:02:01 11 for trial and is person specific, and anybody, I assume,
01:02:06 12 that would come here and make the kind of allegations
01:02:08 13 they have made would have known that.

01:02:11 14 So it would not be a disqualifying event even if
01:02:15 15 they were correct in everything they said.

01:02:18 16 THE COURT: Well, in Mr. Small's situation
01:02:21 17 the difficulty -- and I give him a lot of credit for
01:02:24 18 recognizing the difficulty -- is that it may not have
01:02:30 19 been disqualifying, but it could reflect on one's
01:02:35 20 ability to fairly and adequately represent a class of
01:02:37 21 absent people. So I guess I would like you to address
01:02:41 22 that head-on.

01:02:42 23 MR. WHATLEY: Well, Your Honor -- and I
01:02:44 24 agree wholeheartedly with what you said about Mr. Small.
01:02:49 25 Let me start there.

01:02:51 1 THE COURT: And I'm glad that's on the
01:02:52 2 record because I would like him to know that I did
01:02:54 3 commend him on the record for that.

01:02:56 4 MR. WHATLEY: And what you've got there is
01:03:02 5 Blue Cross of Louisiana was represented -- or the
01:03:04 6 allegation is that Blue Cross of Louisiana was
01:03:06 7 represented by Mr. Small. Nobody says we ever
01:03:10 8 represented CareFirst. And just so it's totally clear
01:03:13 9 on the record, we have never represented CareFirst.

01:03:17 10 THE COURT: Probably wouldn't want to at
01:03:18 11 this point.

01:03:19 12 MR. WHATLEY: And I assure you we will never
01:03:21 13 ever represent CareFirst. And so it's a very different
01:03:27 14 situation.

01:03:28 15 They are here claiming -- it's what Mr. Boies
01:03:31 16 said to us before we came in. They are here saying you
01:03:35 17 shouldn't be Interim Class Counsel because you know too
01:03:39 18 much. They're claiming we know information about them
01:03:42 19 that they don't -- they don't want anybody to know. And
01:03:47 20 I don't blame them for that, but that's what they're
01:03:49 21 claiming.

01:03:50 22 And the problem they've got here is that every
01:03:53 23 bit of that information is easily discoverable through
01:03:57 24 one document request, which obviously would be made
01:04:00 25 every time in this case.

01:04:02 1 And in terms of what could be or couldn't be
01:04:05 2 under a protective order, Your Honor, in November we
01:04:08 3 proposed to the Defendants a protective order that would
01:04:11 4 include the level of highly-confidential material.
01:04:14 5 We're still waiting on the response. And we offered all
01:04:20 6 of these documents that they've given to you that we
01:04:23 7 would treat -- pending the entry of a protective order
01:04:26 8 by you or Judge Putnam, treat as "attorneys eyes only."

01:04:31 9 And so all of that could be handled very easily
01:04:34 10 through the normal discovery process.

01:04:38 11 But they've said, especially Mr. De Gravelles --
01:04:42 12 and I apologize if I mispronounced his name -- a number
01:04:46 13 of things he said, I think, I need to respond to very
01:04:48 14 briefly if you don't mind.

01:04:49 15 THE COURT: Feel free.

01:04:51 16 MR. WHATLEY: Number one, Your Honor, we
01:04:54 17 have filed this morning while we've been in court a
01:04:55 18 Notice of Related Action with the MDL panel.

01:04:58 19 Number two, since he got into settlement
01:05:02 20 discussions between us, let me give you the rest of the
01:05:05 21 story:

01:05:06 22 Number one, he said he communicated with us the
01:05:09 23 day he filed the action. What he did on April 3rd was
01:05:12 24 send us a letter with a demand that we respond by the
01:05:15 25 end of the day and didn't even give it to us until the

01:05:19 1 next day.

01:05:19 2 I responded immediately. I agreed in writing to
01:05:22 3 accept service for all our clients, which is going to
01:05:25 4 become very relevant in a minute.

01:05:28 5 And he then said that day that oh, this can be
01:05:33 6 easily handled by deleting a few paragraphs in the
01:05:40 7 Complaint. Our response, of course, was we don't want
01:05:42 8 to create extra trouble with the Court. This is
01:05:45 9 something you could have resolved if you had given us a
01:05:48 10 phone call before suing us. You didn't, which is pretty
01:05:52 11 extraordinary especially given the fact we've had prior
01:05:55 12 litigation -- or I guess it's not very extraordinary,
01:05:58 13 frankly, given our prior litigation with them.

01:06:02 14 Moving forward, the next day he comes back and
01:06:07 15 says what he cleverly failed to say to you and that is
01:06:13 16 that he believed that the confidentiality agreement
01:06:16 17 prohibited us from ever bringing a Section II claim and
01:06:20 18 that we were required to dismiss our client's Section II
01:06:26 19 claim in order to get out of the lawsuit he had filed.

01:06:31 20 In other words, he said specifically what the
01:06:34 21 11th Circuit said -- the Fifth Circuit, I'm sorry -- in
01:06:40 22 binding law --

01:06:41 23 THE COURT: The former Fifth Circuit.

01:06:43 24 MR. WHATLEY: The former Fifth Circuit in
01:06:45 25 binding law in this court has said exactly what a

01:06:49 1 defendant can't do is required by this confidentiality
01:06:51 2 agreement.

01:06:52 3 Of course, that caused us to research the issue.
01:06:54 4 He's demanding that we dismiss an important claim for
01:06:57 5 our client based on saying this confidentiality
01:07:03 6 agreement requires it. We research it and fast forward
01:07:06 7 there, Your Honor, after he files -- they file the
01:07:09 8 objection to our appointment at the very last minute on
01:07:13 9 Wednesday.

01:07:14 10 Thursday, in less than 24 hours, we file a
01:07:18 11 response, and we give Mr. de Gravelles the cases that he
01:07:23 12 can look at and see that his conduct is illegal. And
01:07:27 13 what does he do? The next day after he has notice, Your
01:07:36 14 Honor, of the cases, including the Riddells case, he
01:07:40 15 then sends us a Motion For Preliminary Injunction that
01:07:42 16 you've been discussing.

01:07:44 17 And what else does he do? He has a letter that
01:07:47 18 tells him we are accepting service for our clients, but
01:07:51 19 he ignores that, and he serves our clients with this
01:07:55 20 100-page legal document, Motion For Preliminary
01:08:00 21 Injunction, serves our clients directly.

01:08:02 22 Why in the world would he do that? We know why
01:08:05 23 he would do it. He wants to intimidate these people.
01:08:08 24 That's what CareFirst does. That's what he does. They
01:08:12 25 had threatened people to kick them out of the network.

01:08:15 1 That's alleged in the Complaint.

01:08:17 2 Your Honor, we have lots of Class
01:08:18 3 representatives, not only with CareFirst, that are very
01:08:22 4 worried about retaliation. I had a phone call this
01:08:27 5 morning from a potential Class representative expressing
01:08:30 6 concern about possible retaliation if the Class
01:08:34 7 representative goes forward as a plaintiff in this case.
01:08:38 8 They are worried about it.

01:08:39 9 Not all of the Blues are as bold in their
01:08:43 10 retaliation as CareFirst. Some of the Blues are more
01:08:48 11 responsible. But many of them have such an enormous
01:08:52 12 market power that Providers out there are very
01:08:56 13 concerned. They have to do business with them or
01:08:59 14 they're out of business. Mr. de Gravelles knows that.
01:09:03 15 That's why he served that preliminary injunction on our
01:09:07 16 clients after he got notice that the Fifth Circuit had
01:09:12 17 said that if he construed the agreement the way he has,
01:09:17 18 not only would the agreement be void but the agreement
01:09:20 19 would then also be an agreement in restraint of trade,
01:09:23 20 another antitrust violation.

01:09:27 21 And then he goes forward -- with full knowledge
01:09:30 22 of the law on that point, and he goes forward and he did
01:09:34 23 what he did.

01:09:36 24 Your Honor, if I seem outraged, I am. It's just
01:09:41 25 inexcusable. It is obvious that the -- one of the two

01:09:45 1 conclusions you could draw about his conduct, it is the
01:09:47 2 second one that is totally apparent that's what's going
01:09:51 3 on here. And Your Honor really needs to put a stop to
01:09:56 4 it.

01:09:56 5 THE COURT: Well, let me ask you this. What
01:09:57 6 are your obligations, in your view, in light of the
01:10:00 7 confidentiality agreement?

01:10:01 8 MR. WHATLEY: Your Honor, our obligations
01:10:03 9 under the confidentiality agreement were, you know, not
01:10:07 10 to disclose confidential information, the kind of
01:10:12 11 information that their own negotiator said was at the
01:10:18 12 heart of this and the affidavit that she submitted in
01:10:23 13 support of the preliminary injunction. It was the
01:10:24 14 sensitive pricing information, the things like the
01:10:31 15 exemptions to the group.

01:10:32 16 THE COURT: Well, would it be not to
01:10:33 17 disclose or utilize?

01:10:35 18 MR. WHATLEY: Well, it says not to disclose
01:10:36 19 or utilize, but you can't interpret the utilization
01:10:40 20 issue to prevent our clients from enforcing a civil
01:10:43 21 action that is, in fact, the enforcement of what is also
01:10:47 22 a criminal act.

01:10:49 23 And so, Your Honor, it does not prohibit and
01:10:54 24 cannot prohibit -- and the cases clearly say that --
01:10:56 25 prohibit our client from bringing an action to enforce

01:10:59 1 the antitrust laws.

01:11:01 2 Now, in that out of respect, we didn't put any of
01:11:05 3 the specific sensitive pricing information. We kept
01:11:09 4 those allegations general, knowing that those things can
01:11:13 5 be discovered later, knowing that they can be put under
01:11:16 6 protective orders like the ones we have already
01:11:19 7 proposed.

01:11:20 8 And pending the time until the information
01:11:23 9 becomes stale -- it's an issue that's addressed in the
01:11:27 10 DOJ FTC healthcare policies about the time when
01:11:32 11 healthcare pricing information would become stale --
01:11:36 12 pending that kind of timeframe, it would remain
01:11:38 13 confidential from anybody unless they specifically
01:11:40 14 created the issue through something like a Twombly
01:11:43 15 motion.

01:11:43 16 So, yes, we can use the information to enforce
01:11:46 17 the laws, and if the contract were interpreted any other
01:11:49 18 way, it would be an illegal and void contract. And,
01:11:55 19 Your Honor, we I think very clearly have acted
01:11:58 20 responsibly in the entire process while we're doing so.

01:12:06 21 I think, Your Honor, that's the basic information
01:12:09 22 that I wanted to respond to and what they have had to
01:12:13 23 say. I think it is the key thing in the Order you
01:12:17 24 entered on Friday. The issue you asked the parties to
01:12:20 25 address most specifically was this question that's

01:12:23 1 addressed by the former Fifth Circuit in Riddells.

01:12:29 2 I'll point out that CareFirst has not cited any
01:12:33 3 new case on that point. It has attempted to distinguish
01:12:36 4 our cases, and basically its position is that the Fifth
01:12:40 5 Circuit didn't mean what it said in Riddells when it
01:12:44 6 said any contractual provision that had this effect
01:12:47 7 would be void and a separate violation. That's the only
01:12:51 8 way you can interpret their legal position.

01:12:55 9 THE COURT: I guess I'm getting at this,
01:12:57 10 though. Is there any circumstance that you could
01:13:00 11 utilize some of this pricing data or pricing codes
01:13:05 12 improperly in terms of mental operation or other
01:13:11 13 litigation, work product in this case?

01:13:15 14 MR. WHATLEY: No, Your Honor, there is not.
01:13:20 15 I mean, frankly, as you pointed out, this is not part of
01:13:24 16 the Class case that's about to proceed, but we will
01:13:29 17 address that.

01:13:29 18 THE COURT: How is this going -- and I know
01:13:31 19 -- let's say you are appointed, and let's say -- and you
01:13:34 20 must have given some thought to this. How do you see
01:13:40 21 the Section II claims fitting into the MDL litigation?

01:13:44 22 MR. WHATLEY: Your Honor, there are several
01:13:46 23 cases here, including the Section II claims, that are
01:13:48 24 going to have to be addressed separately by this Court.

01:13:53 25 THE COURT: Outside the Consolidated Class

01:13:56 1 Action Complaint.

01:13:57 2 MR. WHATLEY: Outside the Consolidated Class
01:13:59 3 Action Complaint. I apologize. Craig, what's the name
01:14:01 4 of the case that was recently transferred here from
01:14:06 5 Pennsylvania?

01:14:07 6 MR. HOOVER: LifeWatch.

01:14:09 7 MR. WHATLEY: LifeWatch. There is the
01:14:10 8 LifeWatch case that was transferred here. There are
01:14:13 9 some allegations in the LifeWatch complaint that are the
01:14:16 10 market allocation allegations. There are other
01:14:22 11 allegations that are not the same, and we've got to
01:14:23 12 figure out --

01:14:23 13 THE COURT: At this point do you perceive
01:14:26 14 those are going forward as individual non-class claims
01:14:32 15 challenging anti-competitive conduct of various of the
01:14:35 16 Blues, or is that going to be part of a subclass of some
01:14:39 17 type? I'm just curious how you're seeing that in the
01:14:43 18 framework of the litigation here.

01:14:46 19 MR. WHATLEY: We have reached out to those
01:14:48 20 lawyers and haven't heard back. I would assume in the
01:14:50 21 LifeWatch instance, there's going to have to be some way
01:14:54 22 to deal with that separately. And a Section II claim in
01:14:59 23 a specific location, there's going to have to be some
01:15:02 24 way to deal with that specifically.

01:15:03 25 What I would suggest we do is let's go forward

01:15:07 1 with the class complaint, either as a Consolidated Class
01:15:13 2 Complaint or as two consolidated class complaints.

01:15:17 3 We've had discussions as late as this morning
01:15:22 4 with our proposed Subscriber track co-lead counsel, and
01:15:28 5 I think we would all suggest a 45-day period for the
01:15:31 6 filing of that complaint or those complaints, and once
01:15:36 7 those complaints are on file and once the process is
01:15:40 8 going with respect to that, I think we can circle back
01:15:42 9 and have a discussion with you of how do we deal with --

01:15:45 10 THE COURT: How do we capture the other
01:15:47 11 issues.

01:15:47 12 MR. WHATLEY -- how do we capture the other
01:15:49 13 issues and address them in an efficient manner.

01:15:52 14 THE COURT: Mr. Boies, is that what you're
01:15:54 15 thinking?

01:15:54 16 MR. BOIES: Yes, it is, Your Honor.

01:15:56 17 THE COURT: All right.

01:15:57 18 MR. WHATLEY: Your Honor, if you have other
01:15:59 19 questions, I'll be glad to --

01:16:00 20 THE COURT: I don't. I'm going to give your
01:16:02 21 opponents an opportunity to respond to anything you've
01:16:04 22 said if they care to. Well, I do have one question for
01:16:17 23 Mr. Whatley.

01:16:18 24 What do you think about my call to Judge Titus
01:16:22 25 and seeing if he and I can come to some arrangement

01:16:25 1 about how to facilitate -- whether it's a resolution or
01:16:31 2 at least a resolution of my concerns with respect to, as
01:16:38 3 I've analogously said, a cook in Maryland being in my
01:16:42 4 kitchen?

01:16:43 5 MR. WHATLEY: We have no problem at all,
01:16:44 6 Your Honor. I think an MDL judge should always do that
01:16:50 7 sort of thing in terms of reaching out to judges who
01:16:53 8 have related cases. I mean, that's part of what you're
01:16:57 9 supposed to do. You will never have a problem from us
01:17:00 10 about reaching out to another judge in a situation like
01:17:02 11 that.

01:17:02 12 THE COURT: He may have a wiser approach to
01:17:05 13 this than I've been able to come up with, so we'll see.

01:17:08 14 MR. WHATLEY: I don't know. The one
01:17:09 15 issue -- as I understand it, there is a third judge in
01:17:14 16 the mix, Judge Mott in the Greenbelt division, gets --
01:17:19 17 every fourth case or sixth case or something like that
01:17:23 18 goes to a Baltimore judge, which Judge Mott is in that
01:17:26 19 group. And I don't know if ultimately they would
01:17:29 20 transfer this back to Judge Mott because --

01:17:32 21 THE COURT: I'm sure Judge Titus would vote
01:17:35 22 for that.

01:17:35 23 MR. WHATLEY -- because he has the related
01:17:39 24 case or whether it would stay with Judge Titus. We
01:17:42 25 don't really care, but obviously when you talk about

01:17:45 1 Judge Mott, you're talking about a judge with enormous
01:17:49 2 experience and expertise in MDL proceedings, and so he's
01:17:53 3 a third judge to throw into the mix in terms of what his
01:17:57 4 ideas are.

01:17:57 5 THE COURT: All right. All right. Mr.
01:18:03 6 Norman?

01:18:05 7 MR. NORMAN: Just wanted to address a couple
01:18:07 8 of things that Mr. Whatley said, Your Honor.

01:18:12 9 THE COURT: I'm not going to allow silence
01:18:14 10 to be acquiescence in any of that, so --

01:18:19 11 MR. NORMAN: No. A wise person -- and I was
01:18:20 12 trying to think of who the person was -- told me that if
01:18:25 13 you have some factual issues, then let's talk about the
01:18:30 14 lawyers. And so I thought Mr. Whatley spent an
01:18:33 15 inordinate amount of time in the briefing and in
01:18:37 16 argument making allegations against Mr. de Gravelles. I
01:18:41 17 sort of watched what was going on.

01:18:43 18 I don't agree with Mr. Whatley's
01:18:44 19 characterization, and I'm taking up for Mr. de
01:18:48 20 Gravelles. Some of these things like hey, he went ahead
01:18:51 21 and served my clients anyway. Well, the ASCs were never
01:18:56 22 noticed as his clients by anybody. Some of those
01:18:59 23 things, I don't know to what extent His Honor is going
01:19:01 24 to take any of that into account.

01:19:03 25 THE COURT: Not much at this point.

01:19:05 1 MR. NORMAN: Right. I felt like I had to at
01:19:07 2 least take that point up.

01:19:08 3 And, you know, I'm still not hearing statements
01:19:11 4 from Miss Kallas and Mr. Whatley that, Judge, no matter
01:19:15 5 what happens as a result of what has been in Maryland
01:19:17 6 State Court and has since been removed, we will be able
01:19:22 7 to, in an unfettered manner, be the most efficient
01:19:27 8 Interim Lead Counsel for this case instead of somebody
01:19:30 9 else. I didn't hear the statement. Maybe I missed it.
01:19:33 10 But that's all I wanted to address.

01:19:34 11 THE COURT: All right. Mr. Whatley?

01:19:39 12 MR. WHATLEY: We will be, Your Honor.

01:19:40 13 THE COURT: That's of great help to the
01:19:42 14 Court.

01:19:42 15 MR. WHATLEY: It's the reason I didn't think
01:19:44 16 you wanted me to spend time talking about that.

01:19:49 17 THE COURT: All right. Here is what we're
01:19:51 18 going to do. I'm going to take a short recess, step in
01:19:54 19 the back, think about where I think things are, and I'll
01:19:58 20 be right back out. If you want to take about a
01:20:01 21 ten-minute break, let's do that now. I don't think we
01:20:04 22 will be much longer when we resume. All right?

01:20:08 23 (Recess.)

01:36:16 24 THE COURT: Let's come to order. All right.
01:36:42 25 Very well. I'm going to go ahead and rule on the

01:36:44 1 objection. I'm going to overrule the objection for at
01:36:48 2 least the following reasons -- I may write to this; I
01:36:51 3 may not. I think I'm going to give a sufficient
01:36:53 4 explanation for my rationale in denying the objection.

01:36:58 5 At this point the Court's task is to determine
01:37:02 6 whether Mr. Whatley and Miss Kallas in particular -- not
01:37:08 7 their firm. The Court's been very clear about that from
01:37:11 8 the beginning that I'm appointing lawyers, not firms, to
01:37:15 9 these positions.

01:37:16 10 The question is whether they should go forward as
01:37:19 11 Interim Class Counsel. I've consulted with the Special
01:37:24 12 Master, Mr. Gentle. I've asked him to review everything
01:37:28 13 that's been filed and to sit in on the hearing today. I
01:37:30 14 asked him if anything he read or heard changes his
01:37:33 15 recommendation, and his answer was no. Is that correct,
01:37:36 16 Mr. Gentle?

01:37:37 17 MR. GENTLE: It is, Your Honor.

01:37:38 18 THE COURT: All right. Furthermore, I found
01:37:41 19 there's been no disclosure of the information at issue
01:37:44 20 in this proceeding. No allegations in the Complaint
01:37:48 21 state anything other than general assertions about
01:37:51 22 anti-competitive conduct that occurred during the
01:37:55 23 negotiations. It doesn't include any information about
01:37:59 24 price -specific data, price points, price codes or any
01:38:06 25 of that information that we've discussed during the

01:38:09 1 hearing.

01:38:09 2 As to use, I don't have enough information for me
01:38:13 3 to conclude there's been any use of the information. I
01:38:16 4 don't think there has, in any improper way. But the
01:38:20 5 point on that is simply this.

01:38:23 6 What we're doing is selecting Interim Class
01:38:26 7 Counsel to pursue the conspiracy claims in this case and
01:38:31 8 the allegations that aren't related to the Section II
01:38:36 9 claim against CareFirst that's at the bottom of the
01:38:42 10 assertions made in the objection.

01:38:47 11 I just don't think there's anything in the
01:38:50 12 negotiations that would affect prosecution of the Class
01:38:56 13 claims.

01:38:57 14 And fourth, the agreement cannot be -- I find the
01:39:04 15 agreement -- that the confidentiality agreement at issue
01:39:06 16 in this case cannot be used to avoid liability with
01:39:12 17 respect to allegations of conduct that itself is
01:39:15 18 anti-competitive that occurred during the negotiations.

01:39:18 19 I think the former Fifth Circuit case, although
01:39:21 20 not on all four's factually is right on point legally in
01:39:25 21 terms of the fact that a pre-dispute agreement cannot be
01:39:29 22 used to avoid the prosecution of a Sherman Act claim.

01:39:36 23 I'm going to stop there. I'm not going to go further,
01:39:39 24 despite Mr. Whatley's invitation for me to find that the
01:39:43 25 agreement itself is an independent violation or reliance

01:39:46 1 upon the agreement constitutes a violation of the
01:39:48 2 Sherman Act. That may be an issue for another day; it
01:39:51 3 may not be.

01:39:52 4 Fifth, the issue really involves a Section II
01:39:57 5 claim that's a separate carveout of what I'm dealing
01:39:59 6 with in terms of appointment of interim counsel. It's
01:40:04 7 simply not part of the Class allegations that Mr.
01:40:06 8 Whatley and Miss Kallas would be essentially appointed
01:40:10 9 by the Court to prosecute.

01:40:14 10 Sixth, nothing that has come before the Court, in
01:40:18 11 my view, affects my conclusion that Mr. Whatley and Miss
01:40:25 12 Kallas are able to fairly and adequately represent the
01:40:28 13 interests of the Class. And nothing that I've heard
01:40:31 14 undermines my view of their integrity as counsel.

01:40:37 15 Seventh, if they become witnesses -- and I will
01:40:40 16 make no comment on whether I think that's a likelihood
01:40:43 17 or not or should occur or not. But if that day comes,
01:40:47 18 the Court can reach out to the Maryland court. I think
01:40:50 19 I've got both sides' permission to do that. And we can
01:40:54 20 deal with that in a way that is, perhaps, least invasive
01:41:01 21 of their duties as Class Counsel.

01:41:04 22 And, quite frankly, I don't think there would be
01:41:07 23 any discovery of any work product permitted with respect
01:41:10 24 to Class pursuits even if there were some theory that I
01:41:18 25 can't grasp right now that would allow discovery of work

01:41:22 1 product with respect to preparation of a Section II
01:41:26 2 complaint or Section II count against CareFirst.

01:41:31 3 The final thing I would say is anything we're
01:41:38 4 going to do to address this Section II claim in the
01:41:41 5 CareFirst case, which is one of, by my count, of about
01:41:46 6 37 actions that have been centralized here is way down
01:41:49 7 the road. I've gotten Mr. Whatley and Mr. Boies' -- two
01:41:53 8 of the four proposed interim counsel to agree that that
01:41:57 9 would have to be put in essentially a separate pot and
01:42:00 10 dealt with later.

01:42:04 11 Gentlemen, don't let me speak for you, but I
01:42:06 12 think that's well down the road. We have to concentrate
01:42:09 13 on getting the Class allegations out of the gate. I
01:42:12 14 think that's only fair to all the other Blues who are
01:42:15 15 very interested in attacking those head-on, and I know
01:42:19 16 that Plaintiffs' counsel have a desire to prosecute
01:42:23 17 those head-on. Fair?

01:42:25 18 MR. BOIES: Yes, Your Honor

01:42:26 19 THE COURT: So for all those reasons, I
01:42:29 20 believe the objection's due to be overruled. I'll just
01:42:33 21 say this as a part of the record. If anyone attempts to
01:42:40 22 do discovery with respect to work product in a case that
01:42:48 23 I have, every party who's aware of that, every counsel
01:42:51 24 who's aware of that has a duty to disclose that to me,
01:42:55 25 whether that's a discovery request, a request for -- on

01:43:01 1 a motion to compel or any related action. I want to
01:43:06 2 know about it. Everyone understand that?

01:43:06 3 MR. WHATLEY: Yes, Your Honor.

01:43:06 4 MS. WEST: Yes, sir.

01:43:06 5 MR. HOOVER: Yes, sir.

01:43:13 6 THE COURT: All right. If you don't
01:43:13 7 understand that, please stand up and address me right
01:43:15 8 now. All right. That's one way I think we can deal
01:43:22 9 with too many cooks in the kitchen.

01:43:26 10 Now, any questions about the Court's ruling? All
01:43:33 11 right. I think we're at the point now where I'm going
01:43:40 12 to ask Mr. Hellums and Mr. Wood to introduce the
01:43:46 13 proposed slate that the Special Master has recommended
01:43:50 14 to the Court

01:43:52 15 MR. HELLUMS: Who would you prefer go first?

01:43:55 16 THE COURT: Alphabetically.

01:43:59 17 MR. WOOD: That's you.

01:44:01 18 THE COURT: I'm worried about my Interim
01:44:05 19 Steering Committee counsel who had to think about that
01:44:07 20 for a moment.

01:44:12 21 MR. HELLUMS: Good morning, Your Honor.

01:44:13 22 THE COURT: Maybe you were thinking about
01:44:14 23 nicknames, I don't know.

01:44:16 24 MR. HELLUMS: Well, I was going to do the
01:44:18 25 football thing, but I think I guess I'll leave that for

01:44:21 1 Barry. As you know, Your Honor, on I guess it's April
01:44:25 2 10th, Special Master Gentle made some recommendations
01:44:29 3 for spots in this case, and I guess what I'll do is just
01:44:33 4 introduce them and have them stand up. For co-leads,
01:44:37 5 David Boies --

01:44:39 6 THE COURT: And to be clear, we're talking
01:44:41 7 about Subscriber track at this point.

01:44:43 8 MR. HELLUMS: I'm sorry, Your Honor, yes.
01:44:47 9 Michael Hausfeld of Hausfeld, LLP.

01:44:51 10 MR. HAUSFELD: Good morning, Your Honor.

01:44:52 11 THE COURT: Good morning.

01:44:53 12 MR. HELLUMS: On the Plaintiffs' Steering
01:44:55 13 Committee, Kathleen Chavez of Foote, Mielke, Chavez &
01:45:01 14 O'Neil.

01:45:01 15 MS. CHAVEZ: Good morning.

01:45:01 16 THE COURT: Good morning.

01:45:02 17 MR. HELLUMS: Greg Davis of Davis &
01:45:02 18 Tolliver.

01:45:02 19 MR. DAVIS: Good morning.

01:45:05 20 THE COURT: Good morning.

01:45:05 21 MR. HELLUMS: Bill Isaacson of Boies,
01:45:11 22 Schiller & Flexner. Megan Jones of Hausfeld, LLC.

01:45:14 23 MS. JONES: Good morning.

01:45:16 24 THE COURT: Good morning.

01:45:16 25 MR. HELLUMS: And Cy Smith from Zuckerman

01:45:20 1 Spaeder.

01:45:20 2 THE COURT: All right. Welcome all of you.
01:45:22 3 Y'all may be seated. Thank you. I've asked for --
01:45:25 4 there was an objection to Mr. Small's service. He has
01:45:29 5 withdrawn his name in light of that. I think I've
01:45:32 6 already noted that for the record and commended him for
01:45:36 7 that what I view as probably a very difficult decision
01:45:39 8 for him but one that I much respect.

01:45:43 9 Any objections to the slate as proposed absent
01:45:48 10 Mr. Small? I've not received any in writing. I just
01:45:52 11 want to give everyone your last and final chance to make
01:45:56 12 those.

01:45:58 13 All right. Hearing no objections, I'll address
01:46:01 14 my findings in a moment. Thank you, Mr. Hellums. Mr.
01:46:05 15 Wood?

01:46:05 16 MR. WOOD: Yes, Your Honor.

01:46:07 17 THE COURT: You can do it from there if you
01:46:07 18 care to.

01:46:13 19 MR. WOOD: I appreciate that. In an effort
01:46:13 20 to save some toes, I will do it from here. For the
01:46:14 21 Providers, interim co-lead is Edith Kallas and Joe
01:46:18 22 Whatley from Whatley Kallas from Birmingham, Aspen and
01:46:23 23 New York City. I am the Interim Local Facilitator
01:46:27 24 Counsel as identified by Ed from here in Birmingham.
01:46:31 25 The Interim Plaintiff Steering Committee, Debra Hayes of

01:46:31 1 the Hayes Law Firm.

01:46:37 2 MS. HAYES: Good afternoon, Your Honor.

01:46:37 3 THE COURT: Good afternoon.

01:46:39 4 MR. WOOD: Judge UW Clemon from White,
01:46:42 5 Arnold & Dowd here in Birmingham.

01:46:42 6 THE COURT: Well aware of him.

01:46:42 7 MR. WOOD: I think you may know Judge
01:46:42 8 Clemon.

01:46:44 9 THE COURT: Welcome, sir.

01:46:45 10 JUDGE CLEMON: Thank you, sir.

01:46:46 11 MR. WOOD: Not with us today is Aaron
01:46:50 12 Podhurst of Podhurst & Orseck in Miami, Florida. He
01:46:51 13 will be back next time. And Dennis Pantazis of Wiggins,
01:46:54 14 Childs, Quinn & Pantazis.

01:46:56 15 THE COURT: All right. Welcome. Y'all may
01:46:58 16 be seated. Thank you.

01:46:58 17 MR. WOOD: Thank you, Your Honor.

01:47:00 18 THE COURT: And we also have already
01:47:02 19 appointed Mr. Ragsdale to serve as Plaintiffs' Liaison
01:47:07 20 Counsel. He's also been volunteered for some other
01:47:10 21 duties, as I understand it.

01:47:13 22 MR. RAGSDALE: Yes, sir.

01:47:14 23 THE COURT: Any objections to that?

01:47:17 24 MR. RAGSDALE: From me?

01:47:18 25 THE COURT: Or you. I'm quite surprised

01:47:22 1 that we don't have a number of people standing. I'm
01:47:25 2 just kidding. All right. Thank you, Mr. Ragsdale.

01:47:28 3 And any objections to the Provider plaintiffs'
01:47:31 4 track other than what the Court specifically dealt with
01:47:34 5 in this hearing? All right. Very well.

01:47:36 6 The appointment of these positions is indeed
01:47:39 7 personal in nature. It is the attorneys who are being
01:47:43 8 appointed, not the attorneys' law firms. I understand
01:47:48 9 there may be occasions -- I understand that my case is
01:47:53 10 not the only case these lawyers are dealing with, and I
01:47:57 11 understand they also have family and other obligations.

01:47:59 12 I am going to expect them to participate or make
01:48:03 13 arrangements in their absence if that is necessary, but
01:48:07 14 I expect counsel to be fully functioning and
01:48:15 15 facilitating in terms of their respective roles.

01:48:19 16 As I indicated, the Plaintiffs' Steering
01:48:21 17 Committee positions are for one-year terms. That does
01:48:24 18 not mean that I expect to have any changeover. I just
01:48:26 19 think that's an appropriate way to make sure that
01:48:29 20 everyone stays on task for the entire year. I fully
01:48:34 21 expect there would be reappointment unless there's a
01:48:36 22 good reason not to have reappointment of each of those
01:48:39 23 positions.

01:48:43 24 I'm going to address the responsibilities of
01:48:49 25 Plaintiffs' lead counsel and the Plaintiffs' Steering

01:48:52 1 Committee in a separate order. But what I expect is
01:48:56 2 that the Plaintiffs' Steering Committee will certainly
01:49:00 3 be a resource to the Plaintiffs' Lead Counsel position,
01:49:05 4 or positions, I should say, and be essentially -- I'm
01:49:15 5 not sure of the military rank -- maybe colonels -- in
01:49:19 6 terms of ordering the troops.

01:49:22 7 But the main thing I want to do is make sure that
01:49:26 8 our participation as Plaintiffs' counsel is fair,
01:49:32 9 efficient and economical. That is part of the reason
01:49:37 10 why when Mr. Small tendered his resignation from
01:49:43 11 consideration, that I decided we didn't need to appoint
01:49:46 12 someone else in his place. I just think I want to make
01:49:50 13 sure that we are lean and mean as necessary.

01:49:54 14 On the other hand, I understand there's a lot of
01:49:57 15 work that has to be accomplished by Plaintiffs' counsel
01:50:00 16 in this case and that there is going to be work for the
01:50:03 17 good of the Class.

01:50:08 18 I certainly understand that Interim Counsel will
01:50:12 19 be the generals and will certainly listen to the
01:50:16 20 Steering Committee, but ultimately it will be their job
01:50:21 21 to act as spokespersons for all the Plaintiffs to submit
01:50:26 22 verbal and written motions with the support of the
01:50:30 23 Plaintiffs' Steering Committee and to handle the
01:50:32 24 day-to-day tasks and the long-range planning needed for
01:50:37 25 tackling this case.

01:50:41 1 Again, I'll spell out those details in more
01:50:46 2 specificity at the time I enter the order.

01:50:51 3 I am going to approve the slate recommended by
01:50:53 4 the Special Master, again, absent -- with the exception,
01:50:58 5 I should say, of Mr. Small.

01:51:05 6 Now, we've had a -- what I plan to do -- and I
01:51:09 7 want to get the Defendants' permission on this. I would
01:51:13 8 like to meet very briefly at the conclusion of this
01:51:15 9 hearing with the Plaintiffs' Steering Committee and
01:51:18 10 Interim Counsel just to explain what I expect in terms
01:51:21 11 of their filling of committee responsibilities.

01:51:25 12 And essentially what I'm going to tell y'all --
01:51:27 13 and I want to give a little more detail to them in an
01:51:31 14 appropriate manner, but I'm going to treat this as a
01:51:34 15 confirmation process.

01:51:35 16 And this time I get to be the Senate. You'll
01:51:38 17 nominate -- I'm not going to be involved in telling you
01:51:42 18 who you ought to use. I am going to withhold my own
01:51:51 19 authority to approve your nominations, but I'll give my
01:51:56 20 advice and consent unless there's a good reason not to.
01:52:00 21 All right? Everyone understand that?

01:52:02 22 So you will be forming your teams. I just want
01:52:05 23 to make sure that I think the teams make sense both in
01:52:10 24 composition and in the persons that you are nominating.

01:52:17 25 Again, when it comes to that, it will be

01:52:20 1 efficiency, economy and completion of necessary work
01:52:28 2 that's going to be our polestar.

01:52:33 3 Now, what date can we expect -- and I think the
01:52:38 4 Blues would be interested in knowing this. What date
01:52:40 5 can we expect you to propose to me a roster of your
01:52:45 6 organizational structure and who you see serving on
01:52:49 7 those various committees?

01:52:54 8 MS. KALLAS: Your Honor, Edith Kallas on
01:52:56 9 behalf of the Provider attorneys. We believe that we
01:52:59 10 would be able to present something to the Court today.

01:53:01 11 THE COURT: All right.

01:53:03 12 MR. BOIES: Your Honor, I think we can
01:53:04 13 probably do that at the end of the day as well.

01:53:06 14 THE COURT: All right. Very well. I'll
01:53:08 15 expect something by the end of the day, and what I would
01:53:10 16 ask you to do is pass it through Ed Gentle as Special
01:53:15 17 Master, who I -- and I should have made clear on this.
01:53:19 18 I will continue to consult him. I think he obviously
01:53:24 19 has a wealth of information I'm not privy to and have
01:53:30 20 chosen not to make myself privy to in terms of a lot of
01:53:35 21 these decisions.

01:53:35 22 So I'm going to trust him to continue to advise
01:53:38 23 me on a lot of those issues. All right. So the next
01:53:40 24 question is when do you think we can have a consolidated
01:53:44 25 class action complaint decision about one or two

01:53:49 1 complaints? A couple weeks?

01:53:50 2 MR. BOIES: I think two weeks would be fine,
01:53:53 3 Your Honor.

01:53:54 4 MS. KALLAS: Yeah, we agree.

01:53:55 5 THE COURT: All right. And if it's one or
01:53:57 6 two complaints, when can we expect filing of
01:54:01 7 consolidated complaint or complaints?

01:54:04 8 (Off the record discussion between Miss Kallas
01:54:06 9 and Mr. Boise.)

01:54:06 10 MR. BOIES: I think, Your Honor, about four
01:54:08 11 to five days from now or about 30 days from the time
01:54:11 12 that we make that decision.

01:54:12 13 THE COURT: All right. All right. So yeah,
01:54:15 14 we're talking about 45 days out. If it's two weeks to
01:54:19 15 decide how you're going to proceed and then another 30
01:54:22 16 days beyond that to do the actual drafting and filing.

01:54:25 17 MR. BOIES: Yeah.

01:54:27 18 MS. KALLAS: That's right.

01:54:27 19 THE COURT: Defendants comfortable with
01:54:30 20 that?

01:54:31 21 MR. HOOVER: Yes, Your Honor.

01:54:32 22 THE COURT: All right. I think that keeps
01:54:34 23 things moving, and that's been our interest.

01:54:37 24 Now, let me say I do appreciate the Defendants'
01:54:40 25 patience as we have worked through a lot of these

01:54:42 1 issues. This is one of the necessary organizational
01:54:44 2 features of these cases. I want to commend Mr. Gentle
01:54:47 3 and his group of attorneys that have participated with
01:54:50 4 him and some of my staff in being very efficient and I
01:54:54 5 think very detailed in terms of their work in this area,
01:55:01 6 and I think that's -- their extra time they have spent
01:55:04 7 putting this together, I think, is going to save us time
01:55:07 8 down the road.

01:55:08 9 MR. HOOVER: We agree, Your Honor. May I
01:55:09 10 just be heard on the --

01:55:10 11 THE COURT: You may.

01:55:11 12 MR. HOOVER -- one complaint versus two
01:55:14 13 complaint question. We had a brief discussion of that
01:55:15 14 at the last hearing.

01:55:16 15 THE COURT: Right.

01:55:17 16 MR. HOOVER: And it's the Defendants'
01:55:18 17 viewpoint -- and it's a fairly strong viewpoint -- that
01:55:21 18 the one complaint -- and I know Your Honor said in an
01:55:23 19 ideal world, we would all prefer one complaint. We
01:55:27 20 would -- we don't know what the decision is going to be
01:55:30 21 on one versus two, but we do think that from a point of
01:55:34 22 view of judicial economy and what's been done in other
01:55:36 23 MDLs efficiently and having a motion -- having a
01:55:40 24 complaint to frame a motion to dismiss on, that a single
01:55:45 25 complaint makes sense, specifically because the markets

01:55:47 1 at issue here are related. The Provider market and
01:55:50 2 Subscriber markets are not completely unrelated.

01:55:54 3 The same core pro competitive defense for the
01:55:58 4 ESAs will apply to both, and we would submit that when
01:56:00 5 the Court's looking at a motion to dismiss, it's much
01:56:04 6 more efficient for the Court to be addressing a motion
01:56:08 7 attacking the ESA allegations in one complaint where the
01:56:13 8 plaintiffs have done the work in advance to get one
01:56:16 9 complaint together as opposed to having, in a vacuum,
01:56:20 10 okay, I've got to look at what the Provider complaint is
01:56:23 11 and the motion to dismiss that with all the overlap,
01:56:27 12 then look separately at the Subscriber complaint.

01:56:30 13 So we view it as an issue of efficiency for the
01:56:35 14 Court and also what makes sense from the point of view
01:56:37 15 of the attack that Your Honor properly characterized
01:56:40 16 that we will be making on the ESA obligations.

01:56:43 17 THE COURT: All right. And I think what
01:56:44 18 I've heard is that both sides are very interested in
01:56:46 19 seeing if they can't work something out along those
01:56:49 20 lines, but until we've got people actually appointed to
01:56:52 21 these positions with the authority to negotiate, discuss
01:56:57 22 and decide on those discussions, we couldn't really rein
01:57:02 23 them in on that question.

01:57:03 24 So what I'll say, then, is when we reach the
01:57:07 25 decision within two weeks about one versus two

01:57:10 1 complaints, who will volunteer -- I would like you to
01:57:15 2 have a discussion with the Defendant's lead counsel on
01:57:19 3 this issue. And will that be you, sir?

01:57:21 4 MR. HOOVER: Yes.

01:57:22 5 THE COURT: Would you mind giving him a
01:57:24 6 call --

01:57:24 7 MS. KALLAS: Of course.

01:57:25 8 THE COURT: -- and discussing it even before
01:57:29 9 you share that with Mr. Gentle and/or the Court?

01:57:31 10 MS. KALLAS: Yes.

01:57:32 11 MR. WHATLEY: Your Honor, we discussed it
01:57:34 12 over a drink last night and he was very persuasive.

01:57:37 13 THE COURT: That was when you had a few
01:57:37 14 drinks.

01:57:39 15 MR. WHATLEY: That's true.

01:57:39 16 MR. HOOVER: And, Your Honor, in terms of a
01:57:41 17 response time to the Complaint, does the Court want to
01:57:44 18 have views on that now or leave that for a later time?

01:57:46 19 THE COURT: I'm going to leave that -- I'm
01:57:48 20 going to let you have that discussion with them.

01:57:50 21 MR. HOOVER: Thank you.

01:57:51 22 THE COURT: And, quite frankly, I'm a little
01:57:53 23 hesitant to tie you down to a response time until we
01:57:56 24 know what we're dealing with.

01:57:58 25 MR. HOOVER: We appreciate that. That would

01:57:59 1 be our view as well.

01:58:00 2 THE COURT: And I know -- look, I have
01:58:02 3 gotten -- Mr. Gentle has delivered the message loud and
01:58:05 4 clear that your side wants to get things moving, so I
01:58:08 5 don't expect there to be undue delay in your request to
01:58:14 6 have response time.

01:58:14 7 MR. HOOVER: That's correct.

01:58:16 8 THE COURT: I think we will be lean and mean
01:58:17 9 with that also.

01:58:18 10 MR. HOOVER: We will indeed.

01:58:20 11 THE COURT: All right. So I'm going to --
01:58:23 12 I'll leave that to you to discuss and maybe present a
01:58:28 13 joint proposed order on those issues.

01:58:30 14 MR. HOOVER: Very well, Your Honor. Once we
01:58:32 15 see the actual complaint and who the defendants are in
01:58:34 16 the Complaint and so forth, that will inform our view.

01:58:36 17 THE COURT: That will inform you how much
01:58:37 18 time you need.

01:58:38 19 MR. HOOVER: Thank you.

01:58:38 20 THE COURT: And I mean what I said. I very
01:58:40 21 much trust you to use your time wisely, and I know you
01:58:43 22 won't take more time than you need.

01:58:45 23 MR. HOOVER: Yes, Your Honor.

01:58:46 24 THE COURT: All right. What else do we need
01:58:49 25 to address for right now? Now, as far as the

01:58:58 1 appointment order, I'm -- in about two weeks, I think,
01:59:03 2 I'm asked -- and some of you may be there. I've been
01:59:05 3 asked to address appointment orders at an MDL conference
01:59:10 4 for Duke Law School. Anybody going to that?

01:59:14 5 MR. HOOVER: Yes, Your Honor. I'm an
01:59:15 6 alumnus and was persuaded that it would be a good
01:59:18 7 seminar to go to.

01:59:20 8 THE COURT: All right. So --

01:59:25 9 MR. WOOD: Your Honor, on behalf of the
01:59:28 10 Providers, I'm organizing a bus trip.

01:59:29 11 THE COURT: It's in DC. Okay. So don't go
01:59:33 12 to Duke. Well, it's interesting I've been asked to
01:59:37 13 stress the context of these appointment orders, so why
01:59:40 14 don't everybody take few minutes this afternoon and do
01:59:44 15 two pages for me on that issue and pass that along to my
01:59:47 16 law clerk.

01:59:49 17 In all seriousness, I do think at least in this
01:59:51 18 case it makes sense to generally outline the
01:59:56 19 responsibilities of various Subscriber and Provider
02:00:01 20 track lead counsel but not to get overly detailed and
02:00:04 21 bog you down with respect to that. Anybody have a
02:00:08 22 disagreement about that before I venture along on that
02:00:12 23 approach? Okay. All right. What else do we need to
02:00:19 24 take up now?

02:00:26 25 MR. BOIES: Nothing from us, Your Honor.

02:00:27 1 THE COURT: All right.

02:00:30 2 MS. WEST: Nothing from us, Your Honor.

02:00:31 3 THE COURT: All right. I think we've
02:00:33 4 accomplished what we need to accomplish. But I would
02:00:35 5 ask if you are one of the counsel that was introduced to
02:00:39 6 Court and I have appointed to Interim Lead Counsel or to
02:00:42 7 the Plaintiffs' Steering Committee on either track, I
02:00:45 8 would ask you to go down to the 7th floor shortly and
02:00:49 9 let me meet with you in chambers, and I'm only going to
02:00:52 10 spend a few minutes with you, and then I'm going to --
02:00:55 11 again, with the Defendants' permission, and then I'm
02:00:57 12 going to dispatch you to go to lunch and begin your
02:01:01 13 work. All right? Thank everyone.

02:01:05 14 (Proceedings concluded.)

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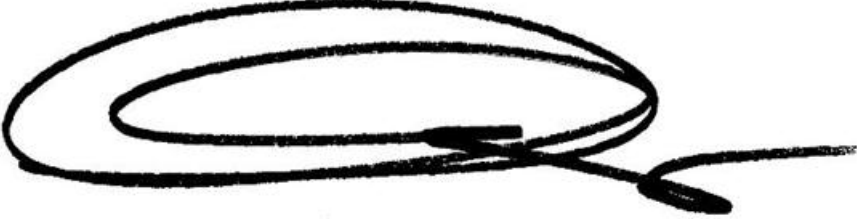
STATE OF ALABAMA
COUNTY OF JEFFERSON:

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 24th DAY OF APRIL, 2013 IN THE
ABOVE-REFERENCED CAUSE.



ANITA McCORVEY, COURT REPORTER CCR #599