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

(Amended transcript)

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

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

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

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 Small has withdrawn his name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

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

1 different than that. All right. So that's the first
2 order of business.

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

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

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

20 One would be whether to file a consolidated class
21 action complaint for both tracks or a consolidated class
22 action for the separate tracks and then move forward
23 with the filing of a consolidated class action
24 complaint.

25 All right. So I think the next order of business

1 would simply be to take up the objection that exists on
2 the Provider side. Who wishes to speak to that
3 objection? All right. Mr. Whatley?

4 MR. WHATLEY: Yes, sir.

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

7 MR. WHATLEY: Yes, sir.

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

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

12 THE COURT: And I appreciate very much your
13 efforts.

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

17 THE COURT: Mr. Norman and Mr. Koch.

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

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

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

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

3 CareFirst has --

4 THE COURT: I came very close to practicing
5 in Dallas --

6 MR. NORMAN: Did you really?

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

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

13 THE COURT: Okay.

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

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

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

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

4 THE COURT: Okay.

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

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

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

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

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

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

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

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

1 represent the clients bringing the claim who are
2 actually involved in the underlying facts that makes
3 them potentially fact witnesses.

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

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

11 MR. NORMAN: I have, Your Honor

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

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

16 THE COURT: All right. Would you mind
17 handing it up?

18 MR. NORMAN: May I approach?

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

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

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

5 THE COURT: That seems to be a threshold
6 question.

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

13 If everything alleged is true, what issues does
14 it then present with the Interim Lead Counsel
15 appointment, that is --

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

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

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

25 MR. NORMAN: There are going to be facts

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

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

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

12 THE COURT: Not with any level of
13 specificity.

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

16 THE COURT: All right.

17 MR. NORMAN: And there are two bars in the
18 confidentiality agreement.

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

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

25 THE COURT: Yes.

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

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

8 MR. NORMAN: Correct.

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

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

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

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

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

10 Are you out of luck?

11 MR. NORMAN: No, I'm not.

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

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

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

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

1 of liability are barred or void.

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

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

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

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

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

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

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

21 Do you think that violates the confidentiality
22 agreement, that particular allegation?

23 MR. NORMAN: As to disclosure or use, Your
24 Honor?

25 THE COURT: Either.

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

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

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

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

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

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

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

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

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

16 MR. NORMAN: We have a good faith basis to
17 believe.

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

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

23 THE COURT: All right. This is your
24 opportunity.

25 MR. NORMAN: Right.

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

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

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

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

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

24 THE COURT: Well, then who is?

25 MR. NORMAN: Mr. de Gravelles.

1 THE COURT: Where is he?

2 MR. NORMAN: He's here.

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

4 MR. NORMAN: Your Honor, do I return to
5 the --

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

8 MR. NORMAN: Yes, Your Honor.

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

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

13 MR. DE GRAVELLES: Yes, Your Honor.

14 THE COURT: What is your answer?

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

21 THE COURT: I don't understand what that
22 means.

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

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

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

10 Paragraphs 87 through 92 involve allegations
11 regarding healthcare providers who were not parties to
12 the confidentiality agreement.

13 And Paragraph 3 simply says that CareFirst
14 refused to negotiate in any meaningful sense, and it
15 insisted on achieving anti-competitive results in the
16 negotiations.

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

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

25 THE COURT: How?

1 MR. DE GRAVELLES: Through discovery, Your
2 Honor.

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

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

7 THE COURT: So that was going to come out
8 anyway.

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

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

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

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

1 your client did in those negotiations?

2 MR. DE GRAVELLES: No, Your Honor.

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

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

9 THE COURT: Sure.

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

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

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

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

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

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

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

14 MR. DE GRAVELLES: Yes, it can be.

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

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

1 from confidential negotiations and use it to that end.

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

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

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

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

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

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

25 What I'm getting at is do the allegations in the

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

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

10 THE COURT: Well, let me --

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

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

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

17 THE COURT: CareFirst is a Maryland
18 corporation.

19 MR. DE GRAVELLES: Yes, Your Honor.

20 THE COURT: SurgCenter Development
21 Corporation is a California corporation.

22 MR. DE GRAVELLES: Yes, Your Honor.

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

1 MR. DE GRAVELLES: DC.

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

7 MR. DE GRAVELLES: Your Honor, one of the
8 parties to the confidentiality agreement was SurgCenter
9 Development Corp.

10 THE COURT: Uh-huh (affirmative). I got
11 that.

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

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

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

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

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

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

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

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

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

18 MR. DE GRAVELLES: Your Honor --

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

21 MR. DE GRAVELLES: No, I understand.

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

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

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

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

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

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

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

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

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

8 MR. WHATLEY: Correct, Your Honor.

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

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

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

1 and forth about this. It has not been radio silence.

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

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

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

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

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

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

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

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

19 THE COURT: You may.

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

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

1 its monopoly power to drive home unreasonable,
2 non-competitive reimbursement rates, right?

3 MR. DE GRAVELLES: And that's exactly our
4 point.

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

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

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

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

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

25 So given that there are all these other

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

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

9 MR. DE GRAVELLES: Okay.

10 THE COURT -- of the Complaint and tell me
11 what "this" is.

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

18 THE COURT: Do you understand the concept of
19 antitrust standing?

20 MR. DE GRAVELLES: Yes, Your Honor.

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

23 MR. DE GRAVELLES: Yes, Your Honor.

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

1 the atmosphere somewhere affecting others.

2 MR. DE GRAVELLES: Yes.

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

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

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

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

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

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

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

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

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

17 MR. DE GRAVELLES: Yes.

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

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

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

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

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

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

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

24 What I'm trying to also figure out is,
25 understanding that there are limitations to federalism

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

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

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

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

1 before that next filing.

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

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

9 MR. DE GRAVELLES: CareFirst is a party,
10 yes, sir.

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

13 MR. DE GRAVELLES: No, no, absolutely, yes.

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

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

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

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

5 All right. Do you understand my concern?

6 MR. DE GRAVELLES: Absolutely.

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

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

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

20 If they will concede to that, we'll drop them
21 now.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 MR. DE GRAVELLES: Yes, and which makes, to
2 me --

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

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

9 THE COURT: I guess it begs the question of
10 who brought it up.

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

13 THE COURT: Yes, you did.

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

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

24 MR. DE GRAVELLES: Yeah.

25 THE COURT: But the same claims are made.

1 The same conduct is alleged in other contexts. So you
2 would be facing this lawsuit and these allegations
3 regardless.

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

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

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

15 MR. DE GRAVELLES: May I sit down, Your
16 Honor?

17 THE COURT: You may.

18 MR. DE GRAVELLES: Thank you.

19 THE COURT: Subject to re-call.

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

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

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

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

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

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

1 contracting departments are going to recognize any
2 distinction between the development entity and the
3 individual ASCs.

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

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

12 MR. NORMAN: Yes, Your Honor.

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

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

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

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

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

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

7 MR. NORMAN: Well, Paragraph 3 is --

8 THE COURT: You agree that that simply
9 establishes anti-

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

12 THE COURT: It says that "we've been
13 injured."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 THE COURT: Well, let's give them an
10 opportunity.

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

13 THE COURT: Right. Mr. Whatley?

14 MR. WHATLEY: Yes, sir.

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

17 MR. WHATLEY: Yes, sir.

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

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

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

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

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

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

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

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

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

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

10 THE COURT: Probably wouldn't want to at
11 this point.

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

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

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

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

9 And so all of that could be handled very easily
10 through the normal discovery process.

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

15 THE COURT: Feel free.

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

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

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

1 next day.

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

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

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

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

23 THE COURT: The former Fifth Circuit.

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

1 defendant can't do is required by this confidentiality
2 agreement.

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

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

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

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

1 That's alleged in the Complaint.

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

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

21 And then he goes forward -- with full knowledge
22 of the law on that point, and he goes forward and he did
23 what he did.

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

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

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

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

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

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

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

1 the antitrust laws.

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

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

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

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

1 addressed by the former Fifth Circuit in Riddells.

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

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

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

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

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

25 THE COURT: Outside the Consolidated Class

1 Action Complaint.

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

6 MR. HOOVER: LifeWatch.

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

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

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

25 What I would suggest we do is let's go forward

1 with the class complaint, either as a Consolidated Class
2 Complaint or as two consolidated class complaints.

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

10 THE COURT: How do we capture the other
11 issues.

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

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

16 MR. BOIES: Yes, it is, Your Honor.

17 THE COURT: All right.

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

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

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

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

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

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

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

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

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

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

5 THE COURT: All right. All right. Mr.
6 Norman?

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

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

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

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

25 THE COURT: Not much at this point.

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

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

11 THE COURT: All right. Mr. Whatley?

12 MR. WHATLEY: We will be, Your Honor.

13 THE COURT: That's of great help to the
14 Court.

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

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

23 (Recess.)

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

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

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

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

17 MR. GENTLE: It is, Your Honor.

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

1 hearing.

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

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

11 I just don't think there's anything in the
12 negotiations that would affect prosecution of the Class
13 claims.

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

19 I think the former Fifth Circuit case, although
20 not on all four's factually is right on point legally in
21 terms of the fact that a pre-dispute agreement cannot be
22 used to avoid the prosecution of a Sherman Act claim.
23 I'm going to stop there. I'm not going to go further,
24 despite Mr. Whatley's invitation for me to find that the
25 agreement itself is an independent violation or reliance

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

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

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

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

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

1 product with respect to preparation of a Section II
2 complaint or Section II count against CareFirst.

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

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

18 MR. BOIES: Yes, Your Honor

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

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

3 MR. WHATLEY: Yes, Your Honor.

4 MS. WEST: Yes, sir.

5 MR. HOOVER: Yes, sir.

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

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

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

16 THE COURT: Alphabetically.

17 MR. WOOD: That's you.

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

21 MR. HELLUMS: Good morning, Your Honor.

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

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

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

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

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

10 MR. HAUSFELD: Good morning, Your Honor.

11 THE COURT: Good morning.

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

15 MS. CHAVEZ: Good morning.

16 THE COURT: Good morning.

17 MR. HELLUMS: Greg Davis of Davis &
18 Tolliver.

19 MR. DAVIS: Good morning.

20 THE COURT: Good morning.

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

23 MS. JONES: Good morning.

24 THE COURT: Good morning.

25 MR. HELLUMS: And Cy Smith from Zuckerman

1 Spaeder.

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

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

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

16 MR. WOOD: Yes, Your Honor.

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

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

1 the Hayes Law Firm.

2 MS. HAYES: Good afternoon, Your Honor.

3 THE COURT: Good afternoon.

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

6 THE COURT: Well aware of him.

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

9 THE COURT: Welcome, sir.

10 JUDGE CLEMON: Thank you, sir.

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

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

17 MR. WOOD: Thank you, Your Honor.

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

22 MR. RAGSDALE: Yes, sir.

23 THE COURT: Any objections to that?

24 MR. RAGSDALE: From me?

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

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

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

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

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

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

24 I'm going to address the responsibilities of
25 Plaintiffs' lead counsel and the Plaintiffs' Steering

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

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

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

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

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

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

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

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

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

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

25 Again, when it comes to that, it will be

1 efficiency, economy and completion of necessary work
2 that's going to be our polestar.

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

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

11 THE COURT: All right.

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

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

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

1 complaints? A couple weeks?

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

4 MS. KALLAS: Yeah, we agree.

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

8 (Off the record discussion between Miss Kallas
9 and Mr. Boise.)

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

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

17 MR. BOIES: Yeah.

18 MS. KALLAS: That's right.

19 THE COURT: Defendants comfortable with
20 that?

21 MR. HOOVER: Yes, Your Honor.

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

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

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

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

11 THE COURT: You may.

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

15 THE COURT: Right.

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

1 at issue here are related. The Provider market and
2 Subscriber markets are not completely unrelated.

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

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

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

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

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

4 MR. HOOVER: Yes.

5 THE COURT: Would you mind giving him a
6 call --

7 MS. KALLAS: Of course.

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

10 MS. KALLAS: Yes.

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

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

15 MR. WHATLEY: That's true.

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

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

21 MR. HOOVER: Thank you.

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

25 MR. HOOVER: We appreciate that. That would

1 be our view as well.

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

7 MR. HOOVER: That's correct.

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

10 MR. HOOVER: We will indeed.

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

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

17 THE COURT: That will inform you how much
18 time you need.

19 MR. HOOVER: Thank you.

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

23 MR. HOOVER: Yes, Your Honor.

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

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

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

8 THE COURT: All right. So --

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

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

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

25 MR. BOIES: Nothing from us, Your Honor.

1 THE COURT: All right.

2 MS. WEST: Nothing from us, Your Honor.

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

14 (Proceedings concluded.)

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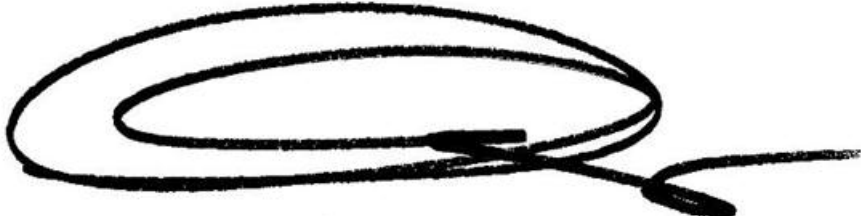
STATE OF ALABAMA
COUNTY OF JEFFERSON:

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 3rd DAY OF MAY, 2013 IN THE
ABOVE-REFERENCED CAUSE.



ANITA McCORVEY, COURT REPORTER CCR #599