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N.D. OF ALABAMA


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

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| IN RE | * | 2:13-cv-20000 |
| | * | 8-21-13 |
| BLUE CROSS BLUE SHIELD | * | Birmingham, Alabama |
| ANTITRUST LITIGATION MDL 2406 | * | 10:20 a.m. |
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TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

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THE COURT: All right. Good morning everyone. We are here in the Blue Cross Blue Shield multi-district litigation, MDL No. 2406.

The Court set this as a status hearing on what I think are some fairly pinpoint issues related to the minor disputes -- at least as the Court views them -- that the parties have with respect to formulating a briefing schedule and a motion to dismiss schedule of deadlines.

Having said that, yesterday I think we had a little development that I think we might want to discuss and see how it fits into what we want to decide today.

I'm not going to ask anybody to go into any substance of the merits on any of these issues, but I just wonder how we might want to address them in the context of the schedule that we're going to be discussing today.

And that has to do with Judge Moreno's decision regarding the release -- potential release of certain claims that have been asserted on the Provider's track as I read his Opinion. All right?

So who -- how do we want to start?

JUDGE CLEMON: May it please the Court, I'm UW Clemon.

THE COURT: Welcome. Welcome back.

JUDGE CLEMON: Thank you, sir. I will be

our speaker on behalf of the Provider plaintiffs but only shortly.

THE COURT: Right.

JUDGE CLEMON: We need your help, Judge. We have, I think, in a fairly cooperative spirit, tried to reach agreement on a briefing schedule as recently as a few moments ago.

We also have some very real concerns as to the extent of judicial involvement in the informal production that we will be engaged in.

And so we need the benefit of your thoughts on things, for example, like how much time should we have for briefing.

THE COURT: Okay.

JUDGE CLEMON: How long should the briefs be. During the process of informal discovery, should we have some disputes about what is being produced, should there be some kind of judicial involvement in terms of magistrate judge involvement to give us some direction.

And so we are asking the Court to give us the benefit of your thinking as to how long this briefing period should be and those kinds of things before we try to address them in separate meetings with the Defendants.

THE COURT: All right. Very well. Do the "Blues" want to be heard on that introductory statement?

MR. ZOTT: Sure, Your Honor. My name is David Zott. I'm here on behalf of Blue Cross Blue Shield Association and its co-coordinating counsel.

We agree that what we should address today are fairly targeted, narrow issues, the ones that Your Honor set, and I think that primarily focuses on a briefing schedule and page limits, proposed page limits for the briefs.

In that regard, we have worked hard to try to work this out with our colleagues on the other side of the aisle, including at one point a briefing schedule that we thought we were there on, and we had -- we thought we had it virtually ready to sign on the dotted line. It didn't work out that way, and we understand --

THE COURT: What caused the backup?

MR. ZOTT: I'm not entire -- well, my sense is -- we started out talking briefing schedule, but the Providers and Subscribers -- particularly the Providers -- were concerned, given the briefing schedule that we were talking about, that they wanted to address other issues, how to move the other parts of the case forward.

We did have a long discussion. You saw that in the Status Report where we had competing proposals. We felt we got close.

My best sense is the issue that probably became the sticking point was to what extent during this interim period when we were going to make various accommodations, produce certain limited documents, to what extent could they, then, go to court and actually litigate substantively the scope of discovery.

Our view is we're willing to accommodate, we're willing to even go beyond what -- to some extent, what Chudasama requires; but we don't want to actually litigate the scope of discovery because that's just opening discovery at that point.

My sense is that was the sticking point. They may have a different view. Beyond that, I'm not exactly sure. Honestly, Your Honor, we felt we were just about there. So that's the best I can give you.

THE COURT: Well, let me ask you this. What scope of disputes do you expect might arise based upon the Plaintiffs' proposal to you as reported to me in the Joint Report?

MR. ZOTT: Well, the ones that we think could arise that we're prepared to address with the Court would be preservation. We're willing to work with them on preservation.

THE COURT: It seems like that's something we ought to get on top of right away if there's a

dispute about a document or set of documents.

MR. ZOTT: And categories. And we agree with that. We're going to try to work it out, and we hope that never goes to the court.

THE COURT: But what I'm saying is if there is a disagreement between the parties on document preservation, we don't -- we shouldn't want to wait until a ruling on dispositive motions because then the documents are gone potentially, and maybe even in good faith, but --

MR. ZOTT: Sure. And we have said on that issue, the parties are free to go to the court.

THE COURT: All right.

MR. ZOTT: We obviously we think we're complying already, but that was in our proposal, so that was one area where we think we could go to the court.

The other area would be -- as an accommodation, we even agreed to receive and exchange actual discovery requests and to assert objections to those. And we agreed to confer on the objections in terms of scope. So we would talk to the Providers and Subscribers and try to work that out.

But in the event we couldn't work that out, our view is we should not litigate the scope of discovery in terms of actually going to court on these objections

prior to the motions to dismiss being decided because at that point, we're really just talking about -- well, first of all, it makes little sense --

THE COURT: Well, are these disagreements related to, for example, your production of license agreements, membership standards, guidelines --

MR. ZOTT: No.

THE COURT: -- or are we talking about something further than that?

MR. ZOTT: Something else. As part of our proposal, we agreed, as a compromise, that we would produce those categories that you just described, Your Honor; and we would do that through the Association, which has those documents in its possession. So they would get a set of those documents.

Again, emphasizing we think it goes beyond what we are required to do under Chudasama. And we also believe at the end of the day, Your Honor, this case should be and hopefully will be dismissed. But notwithstanding that, we're going to go ahead and do that.

The point is even beyond that, we've agreed in our proposal to exchange discovery requests, assert objections and confer on the scope of discovery beyond those categories.

Our only point is it makes no sense to go to court

and litigate that issue when we've got dispositive motions to dismiss pending that we believe should be granted; and even if they're not granted, the scope of the case could dramatically alter, in which case we're really talking in a vacuum about what should and shouldn't be produced.

That's really, I think, where the line was drawn; and my understanding is beyond that, I think virtually every other point we had agreement on.

And now we're sort of moving away from the dismissal briefing and scheduling. If we want to get back to that, Your Honor, I'm happy to do that.

THE COURT: Well, let's talk about what would be a suitable schedule assuming we can work the other issues out.

MR. ZOTT: Okay.

THE COURT: It seems to me -- and this is kind of what I've jotted down -- is you file your motion to dismiss and appropriate briefing, the scope of which we'll discuss in a minute --

MR. ZOTT: Okay.

THE COURT: -- by September 30.

MR. ZOTT: Right.

THE COURT: The Plaintiffs respond by January 15. I moved that back a little bit because I

think -- I couldn't remember if you had December 15 or December 30 as a target date, but I'm going to save some associates from working over the holidays, having been one once myself. And then the reply briefs from the Defendants will be due March 6.

Assuming we can work out some of these other issues, any objections to anything along those lines?

MR. ZOTT: From our perspective, that's fine.

THE COURT: All right. The remaining issues, then, come down to -- well, is there any real concern about producing within 90 days of my Order, which presumably would be today or tomorrow, the documents -- within the applicable statute of limitations, the documents that the parties agreed, subject to other agreements, the "Blues" would provide to the Plaintiffs, in particular, license agreements between the Individual Blue Plans and Blue Cross Blue Shield Association, Blue Cross Blue Shield Membership Standards applicable to regular members, Blue Cross Blue Shield Guidelines to Administer Membership Standards applicable to the regular members, list of members of Blue Cross Blue Shield Association's Brand Enhancement Protection Committee, and the last triennial membership compliance letter? Any problem with producing those?

MR. ZOTT: No, Your Honor, with just one caveat. We have discussed this extensively because there's some ambiguity. We said that we would produce the current versions of those documents. As a practical matter, because of the way they're prepared, they will get a cross-section of the entire class period in what we produced and so in that sense, I think it fully satisfies their desires at this time.

THE COURT: I'm going to ask whoever is on hold on the phone to mute your phone. We're getting moving around and feedback.

Unidentified Female Speaker: We can't hear. It seems like somebody --

THE COURT: You can't hear me or you can't hear counsel?

Unidentified Female Speaker: I can't hear hardly anybody.

THE COURT: All right. Well --

Unidentified Female Speaker: Now we can hear you very well.

THE COURT: All right. That may have been when I was sitting a little far back from the microphone. That might have been my fault. Pull your mike in closer just in case.

MR. ZOTT: Could be me too, so, okay.

THE COURT: Okay. Thank you for letting us know that.

Unidentified Female Speaker: Thank you.

MR. ZOTT: So, Your Honor, with that one caveat, the answer is yes. Obviously we proposed that as part of an overall agreement, but we're willing to do that.

THE COURT: All right. And the other -- just one other -- again, I kind of view this as a minor dispute the parties had was 11 months or 10 months after the Consolidated Complaint in terms of discovery schedule. Did I read that correctly?

MR. ZOTT: That would be with the -- other than producing this information, discovery will be stayed. They could come in in either 10 or 11 months, propose a schedule and ask that the stay be lifted at that point, and I think the disagreement was is it 10 or 11 months.

THE COURT: All right. I'm going to say 11 months.

MR. ZOTT: Okay.

THE COURT: I think the Plaintiffs won't be prejudiced by that because I'm about to make you a little unhappy in terms of --

MR. ZOTT: All right.

THE COURT: -- what limited discovery can be conducted and what issues can be brought to the court in that respect.

So let's talk about -- and that's what it boils down to. That's the last issue we have to resolve before we get to the --

MR. ZOTT: I think so, Your Honor. That's my sense of --

THE COURT: -- Conway issue.

MR. ZOTT: Yeah.

THE COURT: All right.

MR. ZOTT: I don't know if you wanted to talk page numbers -- pages for the --

THE COURT: Yeah, let's go ahead and talk. Were there different proposals along those lines, and did you give my law clerks any input?

MR. ZOTT: That's fair, Your Honor. And the first thing we agreed on is we really want to make sure that we're satisfying the Court in this regard, and that's one thing we all agreed on.

Let me tell you what we're thinking about, Judge, and obviously it's subject to the Court's views. Our goal at the end of the day is to try to persuade Your Honor that we're right and this case should be dismissed. They have the opposite goal, so -- and we're mindful of

that the shorter the better here. We do have, obviously, complicated, very long --

THE COURT: And to be clearer, your position is they need to be dismissed now, not later.

MR. ZOTT: Right.

THE COURT: That's really what your point is on an early motion like this.

MR. ZOTT: Correct, dispositive across the board, dismiss the case. So what we're proposing, Your Honor, given the magnitude of just in terms of sheer length, number of counts, number of parties, et cetera -- and I could walk through that in detail, but Your Honor has seen those complaints.

We would propose to file two principal briefs that would be non-duplicative; that all the plans I think in the main would get behind, and one would address the Section 1 allegations, principally the claims regarding an alleged conspiracy on exclusive service areas. That would be one principal brief.

The second principal brief would address the monopolization and then the various state law claims that have been brought.

We're also going to try as much as possible to make that brief and incorporate all -- you know, as many arguments as we can on behalf of the various many

different plans that we have here.

Our proposal is that for those two briefs, we would have up to a maximum of 150 pages for those two briefs. To put that in perspective in the much narrower Servin case where we had two defendants and 60 pages, those briefs were 90 -- our opener was 90, two briefs that were 90 pages.

So we're really proposing about 60 pages more as a max. We're going to try to get as short as we can consistent with good advocacy.

So my understanding of the Plaintiff's position is they want -- in essence, whatever amount of pages we get, they want the same amount.

So now let me also flag for the Court that in addition to those two --

THE COURT: And you don't disagree with that?

MR. ZOTT: No. And then our replies would be about half of our opening in terms of length, so that would be the other --

THE COURT: Seventy-five?

MR. ZOTT: Right. Right. Now, let me caveat one other issue. As I said, we're going to try to and we will file two principal briefs on those issues; but we do have many plans in this case, 37

plans, that have their own issues, potential issues, where they need to reserve the right to potentially file shorter, non-duplicative briefs on specific issues that relate to them.

I can't give Your Honor that much clarity into exactly what to propose. I can tell you they can be much, much shorter. I can tell you that they're not going to duplicate what we put in our main briefs, but there are issues here, there are specific allegations against plans that those plans may need to address.

And we just don't have the visibility yet at this stage of the game to know exactly how that's going to look. We're obviously going to try to put together as compelling and as non-duplicative and concise a packet for the Court as we can, and the deal there would be whatever pages those take, they would also have the commensurate -- the Plaintiffs would have the commensurate ability to have the same number of pages, and we're fine with that.

THE COURT: Will there be coordination between the different individual "Blues" on addressing these Plan issues if there's overlap?

MR. ZOTT: I think so. I mean I think we're going to end up circulating these briefs and getting coordination on everything before it even gets filed

with the Court.

THE COURT: Let me just hear from the Plaintiffs real quick. Any problems with these page limits or these separate briefs for the different plans?

MR. BOIES: No, Your Honor; whatever is most useful for the Court.

THE COURT: All right.

MR. BOIES: We don't like burdening the Court with too many pages. We want the Court to have full briefing on it, and so we're prepared to do whatever the Court thinks is --

THE COURT: All right. Twenty pages for each, do you think, would be sufficient on the Plans?

MR. ZOTT: Yes, I do.

THE COURT: And then 20 pages on the responsive opposition, and then 10 pages on the reply.

MR. ZOTT: Correct.

THE COURT: All right. So I think we've got the scope of the briefing resolved. I'll probably get second-guessed here in about an hour. We'll find out about that.

All right. So what I would be interested in hearing now is are there discovery topics that are not going to do too great an offense to the "Blues" to engage in with the understanding that I think on an early -- these

early dispositive motions, we have to at least plan for the potentiality that you're not going to be successful on everything, not to say that you won't.

MR. ZOTT: I understand.

THE COURT: But I don't want to have the case at a standstill if it's pretty obvious from the first, second briefs that there's going to be something remaining.

MR. ZOTT: I understand.

THE COURT: And I realize there's different -- at least what the parties -- what the Plaintiffs alleged, there's different market shares involved with respect to some of these plans and states and regions, so the question is is there something that we can do between now and a final ruling on at least these early dispositive motions that sets us up for advancing the ball down the road if that becomes necessary? I take it you have given some thoughts to that.

MR. ZOTT: We have, Your Honor. And we think that the proposal that we -- and you can look at the two proposals and see how close they are on many of these topics. We think that that is exactly what these proposals were designed to address.

So we already talked about preservation. We all

agree that that's something -- we've already started to dialogue. We need to have those dialogues and continue that and if need be, come to the court. I mean that's critical for our own protection and so we agree with that. That's point one.

We have and are working on an E-Discovery Protocol, so how to handle the production of electronic documents, that can be quite complex; but that's another issue that we can and should address, and we're willing to do it in the interim.

Obviously we're going to work out a protective order, and that's another issue we can address.

We've said that with respect to any remaining Rule 26(f) issues, we're willing to have a meeting and discuss those issues as well so we can have a Rule 26(f) conference in the interim.

And as I mentioned, we're already -- as we mentioned, we would produce this set of current documents that I alluded to earlier, Your Honor alluded to, so that's some initial discovery.

And we've been agreeable as part of an overall proposal that continues a stay of discovery. We've agreed that we would even exchange discovery requests and meet and confer on objections.

The one area, as I mentioned, where we felt that it

would be going too far and simply at this point becoming full-on discovery is if we actually litigated the scope of those objections during this interim period.

So everything I have described would advance the case forward, and --

THE COURT: Well, back me up for a second.

MR. ZOTT: Sure.

THE COURT: So you would agree to do some limited requests for production.

MR. ZOTT: The ones we talked about, right.

THE COURT: Right, and but if there's disagreements about whether you've complied with the request for production or what the scope of the request for production should be, you would want to defer that until after a dispositive motion ruling.

MR. ZOTT: Well, to be clear, we agreed on the categories of documents you described earlier -- the license agreement, the membership agreements, et cetera --

THE COURT: Right.

MR. ZOTT: -- we would produce a current set of those. I don't anticipate there will be any dispute. Those are objective, defined documents, so that would be produced.

Then with respect to where we agreed is that we would

be willing to exchange other discovery requests on other documents or data.

THE COURT: Like give me some concept of what those requests would look like based on your discussions with the Plaintiffs.

MR. ZOTT: Well, we're hoping they would be narrow, but my sense is they won't be. So I think that, you know, documents relating to, you know -- what will we see? We'll see documents relating to competition among the "Blues," documents relating the exclusive --

THE COURT: Well, here's the tension.

MR. ZOTT: Yeah.

THE COURT: Here's the tension. On the one hand, I understand the "Blues" view that until we get a shot at our dispositive -- early dispositive motions -- on the pleadings, right?

MR. ZOTT: Correct.

THE COURT: You don't expect this will be converted to a Rule 56 motion.

MR. ZOTT: No.

THE COURT: This is going to be straight 12(b)(6) on the pleadings.

MR. ZOTT: On the pleadings and on the documents referenced and incorporated into the pleadings.

THE COURT: Sure. I understand your view that we don't need to get into full-blown discovery until we find out whether the Plaintiffs' allegations pass muster.

MR. ZOTT: Right.

THE COURT: All right. Now, this is not the PLSRA. We're not dealing with some stay on discovery that generally takes place, but the question is whether in the Court's discretion it should permit this to go forward, right?

MR. ZOTT: I understand, and under the law that exists in this circuit, right.

THE COURT: Let me just finish. Do you agree with that so far --

MR. ZOTT: Consistent with Chudasama. I'm going to refer to that.

THE COURT: Yeah, sure, which I think gives me some discretion. On the other hand, it seems that why kick a can down the curb if you've agreed to conduct some discovery but the Plaintiffs believe the responses are off the mark? That's the tension we're dealing with, right?

MR. ZOTT: Uh-huh. I mean, I think you've put your finger on the one area which is -- and let me just back up. Part of the reason why I think it's

difficult, Your Honor, to -- we can negotiate scope, but for the Court to actually have that brought to the Court and rule on it before you issue rulings on dispositive motions, I think it's going to be hard to address those issues until you know is there a case at all, and if so, what does that case look like.

So just as a practical matter, I wouldn't think that it would be sensible to even address those issues because our first point would be, Your Honor, A, we think there should be no case; but, B, if there's any case, we don't even know the scope. How can we talk about the scope of discovery when we don't know the scope of the case?

And the last point is we're going to have a lot to do here with what we've already talked about that I think will fully occupy this group and probably the Court as well.

THE COURT: Well, aren't there some foundational issues that if they get past dispositive motions you're going to have to do some production on, even if you win -- even if you get the ball inside the 10 yard line, just don't score, right? There's going to be some foundational issues that discovery is going to be necessary on that we know of right now, isn't there?

MR. ZOTT: That's probably the case.

THE COURT: All right. Why not limit it to that then? Why not have the parties go back to the drawing board to a degree, figure out what those are, and the backstop would be we'll let the magistrate judge at the appropriate time, if there is a dispute, determine whether it's fish or foul, and if so, make a recommendation to me on how to deal with it.

MR. ZOTT: Well, the -- in part the categories we've agreed to produce were an effort to address that issue already, Your Honor.

THE COURT: Right.

MR. ZOTT: To put those in, and then beyond that -- understanding obviously the Court's administrative authority and discretion, we do feel that the Chudasama case and related cases do have a fairly strong pronouncement in this circuit that generally based on dispositive motions that rely on the pleadings that that discovery should be stayed.

THE COURT: What about this. What about if we were to say that discovery does not take place until the Plaintiffs respond to the motion for -- to the motion to dismiss? That way you don't have any fear of that being used against you, and we have an agreement that it's not used -- it can't be targeted to any allegation they've made.

MR. ZOTT: I've got, sort of, two thoughts. The one on that is at that point -- because we had already -- at least had agreed subject to this overall agreement that they would defer on serving their -- you know, when we would have to serve our objections, so that doesn't interfere with the briefing.

But the point is if they serve discovery, we serve objections, we then sit down and talk to them, all of which we've said we're going to do. That is all fine, Your Honor.

You're talking the next step of then actually producing additional material beyond what we talked about before the Court's ruling. I think that's where we would have the bigger issue and -- because, again, for all the reasons really that underlie Chudasama, I think we're going to have plenty to do.

We don't think there should be a case, but if there is -- you're right. If there is, certain things will certainly have to be produced if there is a case, but why don't we just --

THE COURT: Well, I'm just looking around the courtroom. I know there's plenty to do, but it seems like there's plenty to do it too.

MR. ZOTT: That's fair.

MR. HOOVER: Your Honor, could I be heard --

THE COURT: Yes, Mr. Hoover.

MR. HOOVER: -- just on behalf of the Plans. Your Honor, we were very close, as you could see, to an agreement.

THE COURT: Right.

MR. HOOVER: That agreement did not call for the actual -- other than the license agreement and the things that the Association would be producing, current versions, that agreement with the Plaintiffs did not call for the actual production of documents.

We got all of our clients to agree to -- and we got very close, as you could see from the two documents, to a process where each side would serve, if you will, discovery requests; the other side would look at them, file -- not file but serve objections, and then there would be a discussion so that we were moving in the process that we would normally move on, and so --

THE COURT: So -- and maybe I misunderstood the Parties' Report. What you're telling me is the agreement that was on the table but not nailed down completely was that you would just have the lawyering take place in terms of what the scope of discovery was but no documents would be produced ultimately until after the ruling on the dispositive motions?

MR. HOOVER: No, no, it was in the 11-month

period.

MR. ZOTT: Right.

MR. HOOVER: We didn't know how long a briefing would take or how long the Court would take, and so the Plaintiffs said we don't want it to be completely open-ended and wait for the ruling; we want 11 months.

So at that 11-month period, the agreement was we would have all our meet and conferring done, objections, requests, everything done --

THE COURT: Okay. I got you.

MR. HOOVER: -- they could then come in to you, Your Honor. But we couldn't have gotten agreement from all of our clients, some of whom think they have rifle shots, you know, of various kinds that could mean they shouldn't be producing a single document.

We couldn't have gotten where we got if it wasn't really a stay. It was go out, find documents, produce documents, get discovery going.

So I think the sticking point that we ended up with wasn't -- Plaintiffs weren't insisting that we throw broad documents over-the-transom. The sticking point was the Plaintiffs said if we disagree in our meet and confer, we would like to be able to go to the Judge and say, you know, we're having a disagreement at our meet

and confer.

And our feeling was how do you, then, adjudicate that, sort of, voluntary consulting process when we don't know when we have a stay, number one, in place; and number two, we don't know where the complaint's going to land.

And so we were that close --

THE COURT: That's why I was asking questions along the lines of we know there are certain core subjects that are going to --

MR. HOOVER: Right.

THE COURT: -- require discovery if you do not get the TKO early.

MR. HOOVER: But not necessarily of every Plan, and again, if there are some plans that -- the other thing, Judge, is this briefing that will be going on will take up most of this -- I mean, when you look at July 1 to March when the final brief is filed, if we're briefing and we're meeting and conferring and we're going through a serious effort at this whole process, there isn't that much more time left before the 11-month mark hits, so there is going to be both briefing and meeting and conferring going on.

And from the Defendants standpoint, it wouldn't be consistent to put on top of that actual discovery where

people are going out and getting documents, collecting things before our motions have even been looked at by the Court.

THE COURT: All right. I think I've got a better understanding of where you were.

MR. ZOTT: In fact, I'm looking at the last -- our reply briefs under the Court's schedule would be filed on March 6 under this sort of 11-month notion I think we're really talking about by May they could come in and ask that discovery be opened. We obviously -- full discovery.

We obviously could oppose that and we could have a discussion to litigate that, but in the meantime everything that I've tried to describe and Mr. Hoover's described would happen including talking to him about scope and trying to work those issues out.

So we're really only talking about, at most, one to two months depending upon the 10 or 11 months -- you mentioned 11 months -- after the reply briefs are due; and, Your Honor, we would probably, it seems -- that, to me, in light of everything else we have to do, seems quite reasonable and moves the ball forward.

THE COURT: All right. Let me hear from the Plaintiffs on that. And I'm taking it the tracks are going to be coordinating their responses to some of

these points.

MR. WHATLEY: Yes, sir, Your Honor. I'm going to address some general things and background and then Mr. Boies will have some more specifics in terms of what we think some of the process ought to be.

First of all, it's our desire to get started with discovery. We've tried to work things out with the Defendants. Where they broke apart was on more issues related to judicial involvement than what has been discussed so far.

For example, the initial documents to be produced, we have one of the -- we have the Blue Cross of Illinois licensing agreement. The version we have was signed, I think, in 2006, but it has pages substituted up through 2012.

What we want to make sure that we're getting is the actual copies of the licensing agreements as they were signed, not to have substituted pages as the one we have now.

THE COURT: How would your effort fall short if they were required to provide the license agreements between each of the plans and the Association during the statute of limitations?

MR. WHATLEY: That is what we requested.

THE COURT: All right.

MR. WHATLEY: That is what we requested, and we couldn't get exact clarity on exactly what the "current version" means, which is the terminology they've just given us, and we said okay. Then let's -- if there's an issue about that, let's let the magistrate resolve it.

And that was where they said no, we don't want to involve the magistrate; we want to be able to have judicial supervision to make sure we get the meaningful documents. But what you've just recited is exactly what we had asked for.

Number two, we will be going forward in working out -- part of this is working out the protective order and the electronic protocol. And we said as in the case of preservation, we want -- if we are not -- if you're not -- you know, if we don't think you're proceeding in the way that we believe you should, or if they don't think we're proceeding in the way they think we should, let's have the magistrate as a backstop to be able to go to the magistrate and resolve that.

THE COURT: Let me ask you this. Were you planning on having judicial involvement on discovery disputes outside of the five categories of documents that I referenced earlier in the hearing?

MR. WHATLEY: We were, and if it became

necessary on the development of an Electronic Discovery Protocol -- and that's something Mr. Boies will address and some ideas on how we can do that efficiently in this interim period.

And, by the way, we've got plenty of people that won't be working on the briefing that are available to work on this in the meanwhile, but --

THE COURT: I suspected that was the case on your side.

MR. WHATLEY: Yes, sir. And if we can't succeed in getting things worked out on the protective order -- and understand, we first tried to start discussions on this last November, and that's the reason we think we need the backstop of judicial involvement to be able to have those -- if those discussions aren't proceeding within a reasonable time -- and Barry sent to them a proposal on August the 15th of a schedule for getting all these issues addressed. We don't have a substantive response yet.

But if they're not proceeding in a reasonable manner, then we want to be able to go to the magistrate. If we run into road blocks on working out what the protective order will be, let's go get it resolved while we've got this period of time.

And those are additional areas of judicial

involvement that we wanted to have available in this period of time so that we're making progress, and we want to make as much progress as possible and that it is all of those areas of judicial involvement where the real issue broke down, not just the ones that were identified.

In terms of the specific idea of -- and that's what we would ask the Court to include.

On the specific area of how the electronic protocol discussions would work and what we think would include in that, I think David has some ideas to suggest on that if I could turn it over to him.

THE COURT: All right.

MR. WHATLEY: And then I think whenever you're ready to address Judge Moreno's Order, Edith will be ready to address that.

THE COURT: Well, why don't you stand there with him for a moment because I've got a couple questions. I'm trying to get my hands around this.

What subject areas outside of these five categories do you expect early discovery would be advisable and fruitful on while accommodating the "Blues" concerns that we don't even know what the scope -- we don't even know what issues are going to be joined at the conclusion of this briefing and the Court's ruling on

the dispositive motions? You undoubtedly think there will be something. We don't know what something is yet though.

MR. BOIES: Right. And, Your Honor, if I could spend maybe a few moments just talking about what was referred to as "Electronic Discovery" --

THE COURT: Right.

MR. BOIES: -- which, as the Court knows, the vast majority of documents that are going to be produced today are going to be electronic documents. And those documents have an advantage and a curse.

The advantage is that they are actually quite easy to produce because all you have to do is, in effect, press a button.

The problem is that they are so voluminous that things like privilege reviews and substantive reviews take an inordinate amount of time.

So what increasingly I think everybody -- both Plaintiffs and Defendants are doing is they are trying to come up with protocols and procedures by which they can narrow down the documents to the documents that are going to be important.

That's in the Defendant's interest because it reduces their burden and expense; it's very much in the Plaintiffs' interest because otherwise we'll get an

infinite number of documents and never be able to get through those in an appropriate time.

THE COURT: Let me ask you this. Am I correct in understanding what the "Blues" counsel just told me a moment ago that a lot of this is in the "what if" category -- in other words, what if the motion is either substantially or partially overruled, what's the quickest way to hit the ground running with a discovery period after that?

So a lot of the -- we're not talking about actual production of documents; we're talking about everyone getting on the same page with the magistrate judge's input, you would contend, if that's necessary, in terms of what the scope of discovery will be when that time comes.

MR. BOIES: I think that's true with a qualification, Your Honor. There are certain foundational issues that the Court indicated that are going to be involved here regardless of the scope --

THE COURT: Those five categories that --

MR. BOIES: Those five categories but also things like market definition, market share. Those issues are going to be present in the case -- and there are a few other issues like that -- that are going to be present in the case no matter what the scope is that the

Court ultimately decides, if there's any case at all.

So there are certain foundational issues which we know that we're going to want to take discovery on.

Now, what we want to do is we want to be in a position to hit the ground running if the Court permits some of this case to go forward.

And the way you would do that -- and that's why this electronic protocol, the so-called "ESI," is so important because the way that those protocols are designed is not by sort of sitting back in the abstract and saying these are the search terms that we will do; what you do is you get a sample document produced -- not a lot. It can be -- we're going to have tens of millions of pages of documents ultimately here, but you get a small sample set -- it can be 10, 20,000 pages -- and you run through various protocols, and you test what kind of protocols pull up in this particular case the kind of documents that are going to be relevant.

And you do that two or three times, and by the time you've gone through that, each side has the protocols, if they want to do it. We want to do it.

The Plaintiffs, at least, will have the protocols that will narrow the case and allow us to hit the ground running because now we'll have the protocols that we can give them and say okay, run it now on the files that the

Court ordered you to search.

Now, that process of testing and refining your protocols inevitably takes time. It doesn't take a lot of time and burden to produce the documents, but it takes time to construct the protocols, test them and refine them, and that is the time that we want to have expended during this significant period when we are having the motion to dismiss.

Now, we believe that the law is clear that some discovery is within the discretion of the Court. It needs to be limited. It needs not to be burdensome on the Defendant. And we believe that it ought to be materials that are readily available.

And we think that staying within the guidelines of limited, non-burdensome, readily-available documents, we can come up in negotiation with the Defendants and if necessary with the intervention of the magistrate, a way to easily produce a -- some sample sets that we can then use to define what the protocols ought to be.

And we think that work -- there's no reason not to do that work. It's not burdensome, it's not costly, and it moves this case along in a very efficient way so that if the Court permits us to go forward, we will have an ability to hit the ground running.

THE COURT: I understand your argument on

the electronic documents and why those testing of protocols would not be burdensome, be limited and would be readily available. What about market share and market definition, though?

MR. BOIES: Your Honor, with respect to market share and market definition, what we would hope is that we could work with the Defendants to find what is readily available. If the Court were to give a guidance that says for foundational issues, if there are materials that are readily available, not burdensome to produce, that those kinds of materials ought to be produced, we believe that within that guideline, we can cooperatively work with them and work that out.

I think right now the issue is what is the guideline, what's the standard. Is it a standard of zero discovery or is it a standard of some limited discovery, and if it's limited discovery, how do you define it.

And I think that the two ways that we would urge that the Court think about it is one, the sample sets that are necessary to define the electronic protocols and then second, certain basic foundational documents that -- and we'll rely on the Defendants here to tell us what's readily available and what is non-burdensome to produce because --

THE COURT: If that's the case, where do you

see the magistrate judge being required in these early stages, if you're at least for purposes of the first act of the play relying upon them?

MR. BOIES: Your Honor, it is sometimes difficult to actually get closure on these issues unless there is a time when you can actually go to somebody with a black robe. And we've worked very cooperatively, but as the Court can see from the back and forth, we've had lots of e-mails, lots of discussions, everybody worked very hard, but we never get to closure until just before we're going to be in front of the court, and I think that if we don't have a capacity to go to the magistrate, the practical matter is that we're not going to get this resolved.

THE COURT: So you think that's more of a motivation/deterrent --

MR. BOIES: I think it is, Your Honor, and also --

THE COURT: What do you think about my idea, though, of saying the magistrate judge will view first whether the Court should be involved and then maybe in some judicial protocol, we determine -- maybe with my input, maybe without it --

MR. BOIES: Yeah.

THE COURT: And then only then if we

believe, okay, this does involve non-burdensome, limited materials that are readily available, and there's just -- this makes sense to go ahead and tackle now, only then would magistrates get involved with the merits of the discovery dispute?

MR. BOIES: I think that would be entirely consistent with what we're proposing, Your Honor, because we do think that the first threshold question is this something that is appropriate for judicial intervention, and that's something that is easier, we think, to decide in the concrete than it is in the abstract, and the advantage of proceeding the way the Court suggests is that this goes to the magistrate with a concrete issue.

THE COURT: Well, how do we avoid -- if that's the case, how do we avoid a congressional solution of just kicking the can down the curb and saying we're not going to deal with it today; we're going to deal with it if a dispute arises?

MR. BOIES: Well, I think that's probably -- that's probably up to us, Your Honor, in the sense that if we sit on our hands and we don't push it, that may be what happens because it will come as no surprise to the Court that generally the plaintiffs want to move faster than the defendants want to move.

So it's really our burden to bring these matters to a head sufficiently so they can be presented to the magistrate judge for the magistrate judge to do the two-step analysis. Is the something that is appropriate to have a judicial intervention on and if so, what should that judicial intervention be.

THE COURT: All right. Be glad to hear back from the "Blues."

MR. WHATLEY: Judge --

THE COURT: Yes.

MR. WHATLEY -- could I add one or two additional things?

THE COURT: Sure.

MR. WHATLEY: You asked what categories of documents would make sense. One category of documents would be organizational charts, which must be readily available for most, if not all of the Defendants. And if they are, they can be very useful planning tools in the process of starting to decide what custodians will need to be searched when we really get involved in the process.

There's prior litigation -- for example, the Drummond litigation against Blue Cross of Alabama in this court -- I'm reminded of it because we saw Judge Acker walking in this morning. But there's prior litigation

that most likely would be readily available and easily produced without any significant burden.

And there are some other things we could talk about with the Defendants to try to work that process out if it was included in the --

THE COURT: Well, I would like to, when we leave here -- and I know this may be a little unfair to make you look too distantly into the crystal ball, but I'd like, when we leave here, to know what topics, if I allow this discovery, they're going to be conducted within and not having any catch 22 categories.

So is there anything else you can think of?

MR. WHATLEY: Well, if we could start having discussions about their data architecture, what their systems are -- not data production. We know that's expensive, but start having discussions about what they are or to update discussions based on prior discussions we've had with many defendants.

I think that would be helpful. Documents produced in the process of regulatory investigations quite likely are already gathered, already privilege reviewed, probably available electronically. Those are things -- examples of what we're talking about in addition to the market definition and concentration that Mr. Boies mentioned.

THE COURT: All right.

MR. BOIES: Judge, just to refine one of those categories, Your Honor. Almost every large institution has a MIS or a management information system, in effect, catalog, that lists the different data bases, the computer programs and the like. Those are all readily available because they have to have them in order to operate. They can be readily produced.

And, again, what it does is it allows us to plan. It actually doesn't -- the MIS stuff does not provide -- like the organizational charts -- don't provide substantive evidence but allows us to plan so that we can hit the ground running, and there's no real burden in producing them.

THE COURT: All right. I think I've got your points there.

MR. BOIES: Thank you.

THE COURT: All right. Who wants to respond for the "Blues". Mr. Zott?

MR. ZOTT: Let me start, Your Honor.

THE COURT: What about these seven categories: Electronic documents, market share, market definition, organizational charts, prior litigation, data architecture, for example the MIS catalog, and documents produced as part of regulatory oversight or

investigations? Why wouldn't those be readily available, and why would that be burdensome for you to have to undertake those limited things in the appropriate discovery schedule that the parties have gotten close to reaching?

MR. ZOTT: Well, a couple points there. First, several of those categories we think as a practical matter can and should be discussed as part of the preservation discussion such as our system's architecture and what data systems are in place and types of custodians. We're fully -- in terms of this organizational structure types of concerns. We're fully intending to discuss those issues with the Plaintiff. We think that probably is necessary for preservation.

Now, when you go beyond that, though, Your Honor, and you talk about, for example, documents relating to market definition or market share, that is full-blown, full-on discovery that is, I think, far beyond the scope that we're talking about right now.

And one issue I want to just come back to is -- that we shouldn't lose sight of is we spent -- the senior lawyers on both sides spent weeks negotiating the deal that we had, and we were to the point where we thought literally that it was nothing more than signing on the dotted line when all of a sudden there was this huge

step back.

That was done, you know, with all of our Plans to try to get all the Plans onboard. It was a laborious process, and we think that that proposal is extremely reasonable and fair, and I have to come back to the point that --

THE COURT: I thought there was a sticking point all along on what requests for production could be made and what involvement of the judiciary would be involved with that.

MR. ZOTT: Yes. The sticking point was on what they would bring -- and Mr. Whatley provided more clarity on that, which is fine, because we honestly didn't know exactly why the issue terminated -- but what issues they could bring to the Court.

And I should address that. We've never had an issue. If they want to come to the court on need discovery when we try to work out a need discovery protocol, I've mentioned preservation, I've mentioned protective order, but they didn't do that.

THE COURT: Well, let's move the market issues to the side.

MR. ZOTT: Okay.

THE COURT: And let's just say I agree with you that those really are -- it's going to be hard to

draw the line of what's readily available and non-burdensome, what's preparatory to do the work. But electronic documents. You're going to have to discuss these protocols, I would think, just to understand document preservation issues.

The same with the data architecture. Question, what about an org chart, prior litigation and regulatory production.

MR. ZOTT: Well, prior litigation and the regulatory discovery, I'm not exactly sure what that means, but --

THE COURT: I think anything you've produced in prior litigation that's readily available to you still, you would -- is within the scope of these claims that you provide them.

Anything -- for example, I take it you have to respond to various administrative bodies such as the Federal Trade Commission, whether they're investigating or just doing regulatory oversight.

And then organizational chart seems like a no-brainer. I don't think you should have much concern about producing those.

MR. ZOTT: Right. And I felt as a practical matter, that would be discussed in connection with the preservation, but I understand that.

THE COURT: Sure.

MR. ZOTT: Your Honor, in terms of, you know, there's certainly been a lot of litigation -- not necessarily directly on these points, but there's tremendous amount of litigation that's gone on for years that some plans have been involved in, and I think that's a large, large category of material if we're talking about all documents produced to prior agencies and regulatory proceedings.

It's also very suspect how much of that would even be relevant to the issues that we're dealing with today, and, you know, so to me that is going well beyond, you know, the scope of what we're talking about and what would be reasonable to do.

THE COURT: Seems to me three issues; what's readily available --

MR. ZOTT: Right.

THE COURT: -- what is non-burdensome, and what is predictably within the scope of what we would expect discovery to be if some of these claims survive, right?

MR. ZOTT: Right.

THE COURT: All right. So why couldn't the parties use that three-step template applied to these five categories, putting the market issues to the side,

and have a magistrate judge available if they have a disagreement about really what's appropriate scope of discovery right now?

And, again, I don't see it as doing a lot of violence to you. I realize you don't want to give up documents that relate to prior litigation or regulatory oversight. If we limited that temporally to the statute of limitations period, and that way you're not having to go back and dig into archives for older cases or older administrative investigations, maybe even if we limit it a little bit more than that temporally, but the question is why wouldn't that be readily available and non-burdensome?

MR. ZOTT: Well, the answer is I thought we would need --

THE COURT: And I see the team is assembling so feel free to confer.

MR. ZOTT: I have one client, Your Honor, and there's 37 other ones back there, but --

THE COURT: Well, I'm not going to let 37 people join you, but I will let these two.

MR. HOOVER: Your Honor, Craig Hoover. I think the whole can of worms of all documents relating to regulatory investigation -- you're talking FTC, DOJ -- going back how long. That's a very sensitive

issue to -- in any case where it comes up.

But you've had cases before you where you have a civil case and somebody says well, I want every document relating to an investigation by a related agency. You know, there are different rules in those productions.

This is something that I can assure you the Plans would want to brief and give you legal authority on before we could possibly agree to open that can of worms.

And, you know, to me, the part of this that -- I mean, I expected we would come in here, and the one issue that was a sticking point was if we have a disagreement when we're meeting and conferring about the request for production and objections, can the magistrate judge weigh in on that as part of this whole voluntary process. That's what the sticking point was.

If we get into what are we actually going to ask our clients to go find and get out of the regulatory files and everything else, then I think we would be in a situation where some of them, if not all of them, would want to submit a Chudasama brief if before we have even briefed anything, regulatory files are coming out. I think that's a danger point from the Defendants' standpoint.

MS. YINGER: Just to add one more point to

that, you know, Your Honor, these health plans are very highly regulated, so we're talking about state agencies, we're talking about federal agencies, we're talking about all kinds of routine filings that they may --

THE COURT: What if we're limiting it to not state agencies but particular issues that are regulated by the federal agencies? I see your point. It's hard to draw the line.

MS. YINGER: It really is especially in the era of healthcare reform where they are undergoing dramatic change and applying for all kinds of approvals and subject to all kinds of new scrutiny.

I mean, as Mr. Hoover said, this really is a can of worms. And when you get into prior litigation, as Mr. Zott said, most of that is completely irrelevant to the Sherman Act claims asserted here and for some are ongoing right now and actually have a tremendous burden associated with them.

THE COURT: All right. I'm semi-convinced. Let me just ask Mr. Boise and Mr. Whatley, why wouldn't we just carve that out and say, you know, that is getting closer and closer to merits discovery as opposed to preparation to do merits discovery?

MR. BOIES: Your Honor, I think it is getting closer and closer to merits discovery. On the

other hand, it's the kind of discovery that I think if anything does survive would be clearly discovery that we would do.

THE COURT: And that would be fairly easy to produce once we get to that point if your point now is that it's readily available and it's non-burdensome, but the problem is drawing a line is going to be pretty burdensome.

MR. BOIES: Your Honor, here is the proposal that I would make. I would ask the Defendants to make a good faith representation as to which of these cases and which of these regulatory proceedings they believe go to the issues that are involved in this case.

And for current purposes, for this limited time, I would accept that good faith representation because we know we're going to have a chance to check it during real discovery if the Court allows us to go forward, and they are going to want to be credible with the Court, so I think we can trust that representation.

That's something that they can -- in other words, we're not even saying with respect to this narrow category of documents that we're going to re-examine them during this 11-month period.

But I can see no reason why documents that they know now do overlap with this case and are readily available,

not burdensome to produce, why they shouldn't just be produced.

MR. HOOVER: Your Honor, we're getting back into -- what we're seeing here is a prediction of what's going to happen when we start down this road of them doing interrogatories to -- even though we have agreed to a stay of 11 months as part of this agreement subject to the voluntary discussions and protocols and everything else --

THE COURT: I don't mind you repeating that because I apparently missed it on the front end.

MR. HOOVER -- once we start talking about interrogatories, about regulatory investigations, documents about regulatory investigations, we are down a road where I can assure you there are not going to be agreements on exactly what is within the scope and what is not.

All the while, you haven't seen a brief yet from the Defendants, which is going to be 100 percent dispositive on these issues. And so we're in sort of a no man's land here, if you will.

I think there are a ton of things that we can do that we had agreed to as part of this agreement in addition to briefing at the same time, Your Honor, and I think that there will be good faith on both sides.

I would urge us to try to close the agreement that we were within an hour of closing and then move on.

MR. ZOTT: Just the final point on that, Your Honor, is remember we've already said that we're willing to discuss and we will discuss in good faith what categories of documents should be produced.

So on this regulatory issue, we can have a discussion on what is relevant, what is within the scope of discovery, what we could produce, et cetera, during this interim period, and then they can come back to Your Honor under this proposal a month after our briefing is done and say --

THE COURT: Okay. Let me ask this. Was the parties' agreement geared toward requests for production on these areas as opposed to interrogatories and requests for admission obviously --

MR. ZOTT: Yes.

MR. HOOVER: Yes.

THE COURT: So I'm going to say there will be three areas that I'm going to allow the parties to do early discovery in with magistrate judge involvement if that becomes necessary: The electronic documents and protocols, as Mr. Boise has described previously on the record; the organizational charts and the data architecture.

I just think it's going to be too difficult for the Court to draw the line in terms of prior litigation and regulatory investigations or oversight in terms of what's fish or foul without joining the issues.

I'm also going to say the same thing about the market definition and the market shares. It's difficult to know what plans are still going to be in play once these dispositive motions are ruled upon, what theories may still be in play.

So I'm going to carve those out and say electronic documents, organizational charts and data architecture, and I think that's really the spirit of what I was wanting the parties to accomplish, and that is, you know, sometimes when we work, we have to prepare to do the work. We have to do some preparatory things that enable us to do the work.

That's really what I'm after here to get the parties focused on some of those preparation -- some of that preparation to do the work, and I think that, quite frankly, these market issues and previous document productions in either litigation or administrative regulatory oversight were doing the work.

So I'm going to allow -- request the parties to exchange requests for production while the discovery stay remains in place. I take it that's what we're

dealing with, right?

MR. ZOTT: Yes, Your Honor.

MR. HOOVER: Yes, Your Honor.

THE COURT: Related to those three categories. Objections will be due not earlier than 45 days after the date on which the Defendants file their motion to dismiss. And I don't know that that's really in play as much anymore. Well, your motions to dismiss are due September 30?

MR. ZOTT: Right.

MR. HOOVER: Right.

MS. YINGER: Right.

THE COURT: So we'll give you 45 days beyond that realizing there may be a little recovery.

If the parties agree that a party receiving a request for production may need more than 45 days to provide the information. So I'm going to let the parties kind of work that out. Just be reasonable with each other. I obviously don't want that to turn into an opportunity for delay, unnecessary delay.

And a party -- if the parties don't object or if there's objections that are at issue, then the party who has the question may raise the issue with the magistrate judge. Okay?

What I might do is circulate the Order before I

publish it to let both sides see and make sure that this captures what my ruling is and what everybody understands the ruling to be. I've already given 11 months as opposed to 10 months on the other issue.

Anything else we need to take up with respect to the briefing schedule and the related litigation issues that carried along with that briefing schedule?

MS. YINGER: Just one quick point of clarification, Your Honor. When you were discussing the ESI and the E-Discovery Protocol, we completely agree that we are going to be discussing the E-Discovery Protocol. We've even started talking and exchanging model E-Discovery Protocols. The Plaintiffs have sent us some.

But none of those discussions have included the requirement, as I sort of interpreted Mr. Boies' discussion, of sampling data. So I just want to be clear that that's something that we need to meet and confer about.

It's not usually required, certainly not set forth in any of the E-Discovery Protocols that they've given us or that we're familiar with. And when you're talking about 37 different companies, each of whom have several different types of platforms and archives and all kinds of electronically-stored information, once you get into

the weeds on a sampling issue, you could be into something very burdensome.

So I just didn't want that to be out there without some sort of clarifying comment.

THE COURT: All right. That's fair enough.

MR. ZOTT: And, Your Honor, I think it's a good idea to circulate, perhaps, this Order. I think that would be very sensible, so -- and we have nothing further from our end, Your Honor.

THE COURT: All right.

MR. ZOTT: So thank you very much for your time.

THE COURT: Mr. Whatley?

MR. WHATLEY: Your Honor, will the Order also include the categories of documents they have agreed to produce that we talked about earlier?

THE COURT: Yes. In fact, I was reading from the draft order earlier when I gave you those categories.

MR. WHATLEY: Thank you, Your Honor.

THE COURT: All right. So briefly let's talk about Judge Moreno's ruling and my take on that.

I don't know that there's anything to do today other than maybe my suggestion to the parties and counsel would be that's a dispositive motion issue in my case,

and we follow the briefing schedule that we're going to have in place to deal with it.

MR. HOOVER: Your Honor, could I ask for clarification on that? It's Craig Hoover.

THE COURT: Yeah. I take it you're going to take Judge Moreno's ruling and come to me and say Judge, you defer to Judge Moreno on these issues, and we're going to have a more tailored motion that the Defendants would file saying here are the claims and the parties that we believe are precluded based upon the Settlement in the Southern District of Florida from pursuing their claims here.

All right. And, for example, that may be all healthcare practitioners who were members of the class in 2007 when the case was settled. Right?

I take it you wouldn't contend that this binds non-class members or non-released defendants.

MR. HOOVER: Well, Your Honor, I think -- no, we would not contend that it binds non-released defendants. There are some non-released defendants -- Miss Kallas and I would agree on that -- who did not settle any of the cases, and it wouldn't impact those.

But I think in terms of -- the way the Plaintiffs have set this up, they have four persons that they agreed they would bring in against all defendants if

Judge Moreno ruled their way.

And Judge Moreno didn't rule their way, and so those persons are there as name Plaintiffs but not against the released defendants. I think Miss Kallas and I would agree on that point.

I think that the -- there are -- we do need to look at the Judge's Order, and we are investigating whether there are any other name Plaintiffs representing categories of Providers such as, for example, ambulatory surgical centers, who would be affected by the release. We are in the process of doing that, and we will be letting Miss Kallas know if, in fact, the conclusion is that beyond the four that Plaintiffs backed out with the caveat, there are others.

But if that were determined, that would be a cease and desist letter just like the others ones we have sent to the plaintiff, and if they disagreed, that would be an issue -- if they said no, those people aren't covered by the release, that would be an issue we would need to take up with Judge Moreno. It wouldn't be an issue that we would be putting in front of this Court.

I think the impact of this ruling, Your Honor, if that's sort of what you're going to is there were about 900,000 class members in the Thomas Love Settlement, and those people won't be part of this case under Judge

Moreno's ruling, neither will, at a minimum, the four name plaintiffs.

THE COURT: Well, I prevailed upon Judge Moreno to take the lead on this because he had the experience --

MR. HOOVER: Right.

THE COURT: -- in dealing with these settlement issues. I guess in my mind, though, in terms of application of his ruling to the parties before me, I had envisioned that we would address that here. What's the harm of that?

MR. HOOVER: In terms of application, I think it's self-effectuating in terms of there never was a bar as to the non-settling defendants, right, so those --

THE COURT: Well, what about Dr. Martin Welby who started practicing medicine in 2008?

MR. HOOVER: Well, you can only take what the name plaintiff situation is, and Judge Moreno could only take what the name plaintiff situation is in front of him. The Plaintiffs have defined their class as "all Providers," period. "All Providers." And so it's overbroad even before Judge Moreno's ruling.

THE COURT: On the Provider side.

MR. HOOVER: Yeah, on the Provider side.

And so, you know, that issue is certainly out there.

What -- I don't know what Miss Kallas would be asking Your Honor to deal with, but to me, the issue is are they going to appeal. If they do appeal, they're appealing; but certainly for right now, Judge Moreno's word is those are released claims. They could have been brought, as he said, long before the settlement of those claims in Conway. And that's where we are.

THE COURT: All right. Miss Kallas, we'll find out what you have to say.

MS. KALLAS: I'm dying to talk here. Okay. So if I could just give a brief background on what we did in the Amended Complaint because -- and who is at issue in terms of now who's enjoined because of the settlement in Florida.

The injunction affects a subset of the Providers, as I know the Court understands. That subset is a subset of medical doctors only, and the Providers that we are litigating on behalf of here is obviously a lot broader and --

THE COURT: What about chiropractors like Dr. Conway?

MS. KALLAS: It does not include Dr. Conway. I think Craig would agree.

MR. HOOVER: Chiropractor would not be

included.

THE COURT: All right.

MS. KALLAS: So we're talking about medical doctors; we're not talking about what we refer to as ancillary providers like chiropractors, physical therapists, dentists; we're not talking about hospitals; we're not talking about ambulatory surgical centers or pharmacies.

MR. HOOVER: Well --

MS. KALLAS: I know where he was going, so I was just going to say it for him. I know that Mr. Hoover was implying that there could be an issue, for example, with an ASC, an ambulatory surgical center, to the extent that it bills medical codes for doctors as opposed to the facility fee. I suspect that we can work that out to make sure we're understanding one another if that's what you were referring to.

MR. HOOVER: We'll confer.

MS. KALLAS: Okay. But -- so we're talking about the world of medical doctors up until a certain point. Obviously, if somebody had not yet graduated from medical school at the time of the end of that release, there would still be doctors, as Your Honor just referred to, that would not be part of the injunction.

What we did in this Complaint, though, was we specifically --

THE COURT: By the way, I want to pat myself on the back for requiring two complaints.

MS. KALLAS: We're glad you did.

THE COURT: I think that simplifies things at this point.

MS. KALLAS: It does. We specifically accounted for this. I don't know if you have a copy of the Complaint, but in paragraph 33 of the Complaint, we made clear that for purposes of the Complaint, these Providers, meaning three, we have three of our Provider Plaintiffs, Drs. Musselman, Clark and Cain. Those were the MD parties who would be enjoined under Judge Moreno's Order; that those Providers do not bring claims against any of their released parties in those settlements. That's in paragraph 33.

However, I just want to be clear that those three MD Plaintiffs continue to pursue their claims against the parties we call non-released "Blues." Not all of the "Blues" that are parties here were part of the Settlement that we're talking about down in Florida.

And in paragraph 108 of our Amended Complaint, we set forth who those non-released "Blues" are.

So I would just -- I just want to make clear that

yes, we're not going to be proceeding with respect to the MDs at this point in time in light of the injunction except --

THE COURT: The question is this. Who decides how the rubber hits the road? Is it Judge Moreno in kind of policing his injunction, or is it this Court in terms of deciding what claims can go forward and what the class definition would be?

MS. KALLAS: Right. I think to the extent that there are issues -- and like I say, I think that we have tried to plead around them. It would be -- our view is that it would be this Court because, like I said, we did plead around them; we're not intending to proceed at this point unless we are successful on the appeal on behalf of those MDs against the released "Blues."

THE COURT: It wouldn't be a collateral attack; it's just a question of how that applies to the unique allegations of the Complaint.

MS. KALLAS: Right.

THE COURT: All right. Mr. Hoover, you have a different view obviously.

MR. HOOVER: Well, Your Honor, I think our threshold view is anything having to do with the interpretation of the release, the Plaintiffs agree is

part of the Settlement. Judge Moreno would have sole and exclusive jurisdiction. I think that we start from that.

I don't right now see a dispute that you would have to resolve. Miss Kallas is saying they are not going to proceed with the enjoined parties against the released defendants. I don't see a dispute that you have to resolve.

I do think that the class definition in paragraph 215 which says "all healthcare Providers who provided covered services," et cetera, and then ends on "by a Defendant in this case," that's obviously overbroad because there are going to be some healthcare providers who have barred claims against a Defendant, but, you know, I assume that that's something that Miss Kallas will focus on, and I don't think we should have a dispute over that. So --

THE COURT: All right. So what you're saying is maybe there's nothing for me to do yet.

MR. HOOVER: I guess what I'm saying is if there is a disagreement on a release-related issue, we would have to -- I would like to be able to give you our position at that point as to whether it should go to Judge Moreno.

I don't see a dispute right now. Miss Kallas, I

don't know if you see a dispute right now.

MS. KALLAS: I don't see a dispute. The only issue that Mr. Hoover raised that I just want to make sure that the Court is aware of is we do have an MD group that opted out of the settlement down in Florida, so -- and that's not one of the -- obviously it's not one of the enjoined parties, so -- and I don't think we get to this point until we're at the class certification stage, but to the extent -- there is a class representative who can represent the interests of those MDs who are not subject to the injunction in Florida.

MR. HOOVER: Well, who is the MD?

MS. KALLAS: San Antonio Orthopedic Group.

MR. HOOVER: Out of all settlements or out of one settlement?

MS. KALLAS: Out of one settlement.

MR. HOOVER: Okay. Well, I think we should discuss that --

THE COURT: It sounds like you have -- and I was just trying to come up with a protocol for dealing with the issue --

MR. HOOVER: Yeah.

THE COURT: -- and I think it's too early to do that.

MR. HOOVER: I think that's right, Your

Honor.

MS. KALLAS: I agree, Judge. Thank you.

THE COURT: All right. But something tells me that's what detracted half the audience. All right. What else do we need to take up for right now?

MR. WHATLEY: Your Honor, there's one procedural issue. We viewed our Amended Complaint as an amendment to the Conway Complaint. We filed it in the MDL docket as we thought we were supposed to do, and reading the orders I still think we're supposed to do, but do we need to file anything in the Conway separate docket to confirm that the Amended Complaint is an amendment to the Conway Complaint, something you have an original action over?

THE COURT: Mr. Hoover, do you want to be heard on that?

MR. HOOVER: Yes, Your Honor. Our position is -- and I think this is consistent with MDL practice -- that the Consolidated Amended Complaint, the Subscriber and the Provider, are master complaints for administrative purposes. They are not meant to extinguish all underlying complaints, and I didn't read your Court's Order otherwise, and I know this Court has had previous MDLs.

I think the case law tells us that if you don't deal

with the underlying complaints and make whatever amendments you think are appropriate to the underlying complaints, whether they be Conway, which was filed here or whether they be Servin, which was filed in North Carolina and sent here. If you take this approach that you file a consolidated master complaint, and that is deemed amendment of everything under it consistent with that, that creates a nightmare scenario for the court come Lexecon time, and so our view would be -- and one of the issues that we raised on Wednesday with the Plaintiffs, raised it with Mr. Whatley and on the Subscriber side, was you've got new defendants in this complaint that were not named in any previous complaint. What's their home? You've got new plaintiffs. What's their home for Lexecon purposes, and the Defendants -- you know, in order to determine things like Lexecon protection, personal jurisdiction, subject matter jurisdiction --

THE COURT: They've got to be tagged into a complaint that's here and so we know where the complaint originated.

MR. HOOVER: Yes. You have to know where you're being sued and by whom. So I think that process has been --

THE COURT: So you're agreeing with Mr.

Whatley he may need to do that.

MR. HOOVER: I think the underlying -- whether it's Conway or whether it's, on the Subscriber side, a little bit more complicated, I think that that housekeeping needs to be done now because otherwise, there's going to be a question later, okay, is this claim in Richards or is it in Servin, and so I think the underlying -- whatever their decision is as to where they want to put claims and plaintiffs, it needs to be done consistently on the underlying complaints so that when we get to the end of pretrial proceedings, it's clear where the case goes to be tried if we ever get there.

MR. WHATLEY: Well, let me see if -- unless you were about to say something, Judge --

THE COURT: And just to clarify, this is your footnote, this is Footnote 1 in the Joint Report. That's the issue you raised I believe.

MS. YINGER: Right.

THE COURT: Right.

MR. HOOVER: Yes, that's correct.

MR. WHATLEY: The sole issue I was raising is that we need to file -- it had been our intent -- we've told the Special Master, we've told the Defendants we're intending to amend the Conway Complaint.

THE COURT: Well, then let's clarify that and the --

MR. WHATLEY: Do we need to file a copy of the Complaint; do we need to file a notice in the Conway docket? And it may be --

THE COURT: I think you file a copy of the complaint, the Amended Complaint on the Conway docket, indicate -- and the Plaintiffs are the master of their complaint allegations, so if that's where you want it to land, you amend the Conway Complaint.

Now, the question becomes there may be other issues raised by that; there may not be, but that's why we have a briefing schedule.

MR. WHATLEY: And we will confer well in advance of the briefing schedule.

THE COURT: And that makes sense to confer.

MR. WHATLEY: We will do that. It may well result in the dismissal of some of the other Provider claims, but we will -- of some of the other Provider complaints, but we will confer with the Defendants and file --

MR. HOOVER: You could dismiss your claims too, Joe, if you wanted.

MR. WHATLEY: Well, you can wish for lot.

THE COURT: Mr. Boise, are you going to do

the same thing on the Subscriber side?

MR. BOIES: Yes, we will, Your Honor.

THE COURT: All right. All right. What else?

MR. BOIES: Nothing from our side I think, Your Honor.

THE COURT: Okay. So what I'm going to suggest, then, Mr. Hoover, is that the parties confer on the proper home for these claims. If there's a good faith disagreement, then the Plaintiffs can assert them in whatever underlying complaint, whether it's directly filed in this court or centralized by the Panel, and that just becomes an issue that we'll deal with through the appropriate litigation procedures that are before us.

MR. HOOVER: Your Honor --

THE COURT: But what I would say is, you know, quite frankly, conferring makes sense because if there are Defendants and/or Plaintiffs that are more appropriately tagged in a different underlying case, you need to consider that on the Plaintiffs' side too.

MR. HOOVER: Your Honor, I would agree, and I would raise one other procedural point in terms of how this fits into the briefing schedule that the Court's just ordered.

THE COURT: All right.

MR. HOOVER: The sooner the better.

THE COURT: Sure.

MR. HOOVER: Because clearly if it's a personal jurisdiction issue, it could make a big difference.

THE COURT: Could we meet and confer today since everybody is here?

MR. HOOVER: Sure.

THE COURT: And then we'll require the Plaintiffs to amend any pleadings in the underlying cases, one of the 47 -- well, 46 underlying cases by the end of the month? That work?

MR. WHATLEY: Yes, Your Honor.

MR. BOIES: Yes, Your Honor.

THE COURT: We'll say by August 30. I won't make you work on Saturday when they're kicking off the college football season on a real day. South Carolina plays on Thursday's; the rest of the conference doesn't.

MR. WHATLEY: We may need you to provide some judicial immunity so Alabama has enough players.

THE COURT: Well, what I was thinking is Alabama and Georgia both have a defensive back suspended for the opener. We just trade players and give them a different number. We'll take Geno Smith; you guys can

have Harvey Clemons, and we're all even.

All right. If there's nothing further, I think we're going to adjourn, and I will circulate the Order hopefully by the end of the day tomorrow, if not sooner, and then what I'll ask you to do is just take a look at it. If there's a concern -- raise your hand if you want to be on a conference call with me just to address any issues as far as wordsmything. I take it Mr. Whatley and Mr. Boise at some point on this side?

MR. BOIES: Yes, Your Honor

THE COURT: Judge Clemon, you want to be on?

JUDGE CLEMON: Yes, sir.

THE COURT: All right. And our three folks from the -- Mr. Zott and those who joined him at the podium. All right. If you wouldn't mind, just make sure that Ed has good contact information for you on tomorrow and Friday and Monday just in case we need to hurry and have a quick conference call on that, whether that's cell phones or whatever offices you might be inhabiting at that point, okay? If there's nothing else, we'll be adjourned.

(Proceedings adjourned.)

C E R T I F I C A T E

STATE OF ALABAMA

COUNTY OF JEFFERSON:

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

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

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

SO CERTIFIED, THE 22ND DAY OF AUGUST, 2013 IN THE ABOVE-REFERENCED CAUSE.

ANITA McCORVEY, COURT REPORTER CCR #599