UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

SOUTHERN DIVISION

St. Alphonsus Medical Center - Nampa, Inc., et al, Plaintiffs, vs. St. Luke's Health System, LTD, et al, Defendants.	Case No. CV12-560-BLW Boise, Idaho April 23, 2013 9:36 a.m.

VOLUME I OF I
TELEPHONIC HEARING
BEFORE THE HONORABLE RONALD E. BUSH
UNITED STATES MAGISTRATE JUDGE

COURT RECORDER:	TRANSCRIPTION BY:
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(Proceedings begin.)

CLERK: Counsel, we have Judge Bush here for the status conference in Civil Case No. 12-560, St. Al's versus St. Luke's.

COURT: Counsel, good morning. I understand that Ms. Ball has already addressed or Ms. Case has with you who will be arguing on each side and I have that information in front of me. Let's begin with having -- Mr. Bierig, would you just identify yourself for our record and identify those from your side of the equation who are also on the line, please?

MR. BIERIG: Yes. Good morning, Your Honor. This is Jack Bierig, B-i-e-r-i-g, with the law firm of Sidley, Austin in Chicago on behalf of St. Luke's. With me in my office is Tacy Flint and also present by phone is Walt Sinclair from the Stoel Rives firm.

COURT: All right. Thank you. And is it Henry Su? Am I pronouncing your last name correctly, sir?

MR. SU: Yes, Your Honor.

COURT: All right. Would you do the same then, please, for the folks who are on the line on behalf of the government plaintiffs?

MR. SU: Yes, Your Honor. This is Henry Su, S-u, from the Federal Trade Commission. With me in my office are Michael Perry and Peter Herrick also with the Commission and also separately on the line for the Commission is Tom Greene, G-r-e-e-n-e. And then also on the phone representing the State

of Idaho are Eric Wilson and Wendy Arends, A-r-e-n-d-s.

COURT: Thank you. I understand we also have on the line Ms. Rauer with the Powers Tolman firm on behalf of Treasure Valley and Mr. Julian on behalf of Saltzer as well. Is that right, Ms. Rauer? Are you there?

MS. RAUER: I am, Your Honor. Thank you.

COURT: Mr. Julian?

MR. JULIAN: Yes, Your Honor. Yes, Your Honor. Thank you.

COURT: Okay. All right. Now, counsel, let me preface this argument this morning with a couple of things. First, just so our record is clear, this particular method of resolving a discovery disagreement was set up by Judge Winmill, the presiding judge in this matter, as part of his original pretrial orders and it calls for a necessarily informal process to some degree.

Then I've had an opportunity to review the submissions, some of which came in the form of e-mail, some of which came in the form of briefing. I'm familiar with the issues in that setting and I think that it's important to note here for the benefit of counsel that because of the unusual nature of the way that this case is going forward on a very fast track basis towards trial, the fact that an expedited discovery process was already underway at the time that the federal government and the state government became parties to the case, the fact that it's

a complicated anti-trust action involving multiple parties and tens of thousands of pages of document and of course enormous amounts of electronically stored information as well, the sort of general rules that might apply both as to the Federal Rules of Civil Procedure and the local rules of this court are not necessarily a very adequate template to resolve this present dispute.

So I say that to simply note that in the Court's view, at least what I've seen to this point, even though the case is not very old, the discovery has progressed substantially already. And so the kind of classic rule that contention interrogatories are generally a disfavored tool early on in the case is not necessarily appropriate here.

Similarly, however, the very nature of contention interrogatories means that there's an enormous burden that goes along with trying to respond to them. So I'm paying attention to those issues as well and in trying to sort through all of this, I've been trying to balance in my mind the needs as opposed to the benefits and I'm also considering the fact that in a setting such as this where it's the government regulatory function that's being met by the FTC and the State that it's not the classic model in terms of who one might turn to to ask questions of in a deposition setting.

So I have all of that in my mind in trying to sort through all of this and I simply tell you that at the outset so

that, counsel, you have the benefit of that as you make your respective arguments to me here.

Mr. Bierig, I'll hear from you first.

MR. BIERIG: Thank you, Your Honor. Thank you for scheduling this so promptly. As Your Honor has just noted, this case is on a very tight schedule with discovery set to close provisionally on June 18, less than two months from now. As Your Honor knows, as we all know, in accordance with the case management order entered by Judge Winmill, we served interrogatories in a timely fashion that were designed to determine the bases for the government plaintiffs' allegations against St. Luke's in this -- in their Complaint.

We did not think that setting forth the bases for their substantive allegations should pose undue burdens for the government plaintiffs because after all, they were the ones that made the allegations. Presumably they had a basis for each one of those allegations and documents and other materials to support those allegations and what we're saying is tell us what those are.

It is extremely critical for us to have this information in order to be able to prepare a defense generally in the short time that we have and to do the depositions in the less than two months that remain.

And rather than talk about this in the abstract, what I thought I would do is just sort of take two or three of the

interrogatories and demonstrate why it's very important for us to have this information, why it should not be all that burdensome for the government which is, as you pointed out, the United States and the State of Idaho who are not typical private litigants.

So, for example, Interrogatory 7, "Identify the health plans that have had limited success resisting price increases in the past and believe their ability to do so will further diminish if the acquisition is allowed to stand." That's a hugely important issue in this case because the theory of the government is that by virtue of this affiliation between Saltzer and St. Luke's, prices are going to increase through the exercise of market power.

If we're going to take discovery and prepare our defense, we need to know exactly which health plans the government is alleging that have had limited success resisting price increases and we want to know who the people are who believe that their ability to do so will further diminish if what they refer to as the acquisition is allowed to stand.

There's one way to get that information and it's pretty easy. It's to ask the government who are these health plans, what's the basis for that allegation and, you know, who should we be talking to. Then we can schedule depositions of those people and determine whether what the government has alleged has any basis.

Or you move to No. 12. I'm just taking these as -- pretty much at random. "Describe in detail the factual basis for the allegation that in the Magic Valley, St. Luke's used its new-found leverage to extract higher payments from health plans that had no choice but to agree to St. Luke's rate demand." We don't think that's true at all but we know that part of the government's case is to say, look, after certain acquisitions in the Magic Valley, prices rose and therefore we expect the same result to occur in the Treasure Valley as a result of the affiliation with Saltzer.

So if we're going to prepare our case properly and take depositions of the right people and ask the right questions to those people, we want to know exactly what the basis is for the government's allegations that we used leverage, that we used market power to extract higher payments from health plans. We want to know who those health plans are, what the basis is for their claim that we used market power to extract higher payments from them and we want to know why they say that whoever these health plans are have, quote, no choice but to agree to St. Luke's rate demands.

We need to know that because we need to be able to show that that in fact didn't occur and that that is not a prediction of what's going to happen as a result of the Saltzer information -- as to the Saltzer affiliation.

No. 16, they claim that there are all these

improvements that St. Alphonsus has achieved by working with independent physicians and it is going to be the government's theory and St. Alphonsus' theory that those same improvements could have been achieved by St. Luke's without the tight integration that is a part of the Saltzer affiliation. It's going to be our defense that the tightness of this integration is necessary to achieve the efficiencies and the benefits that we see resulting from this affiliation.

So therefore, it's critical to the defense of our case to know precisely what improvements they claim St. Alphonsus achieved that they say we could not have -- that we could have achieved fore to the affiliation with Saltzer.

These are just three examples to see that they should not be particularly burdensome on the government. The government actually made the allegations and we want to know exactly what the basis is for these things.

This is true if we had time -- I know Your Honor doesn't want to spend time. I would be happy to do so if you want. We could go through every one of the sub parts of the contention interrogatories in Paragraph 1 or we could go through any of the 17 other interrogatories that we've served and I could explain to Your Honor for each one of those why we need to understand the basis for the claim or the allegation and why by far the most efficient and effective way to proceed is to basically ask the government.

As Your Honor correctly noted in your preparatory remarks, this is not the kind of thing where we can sit down and have a 30(b)(6) deposition and say what is the meaning of all this because this is a Complaint that was written by a number of government officials in their capacity as sort of prosecutor and we can't lay a 30(b)(6) dep on the chair of the FTC or on Mr. Wasden and say what was meant by these allegations.

So by far, the most efficient way is to ask them for each one of these substantive allegations what exactly is the basis for their allegation, what did you mean by it and what do you have to support it. And that's exactly what we've done.

Their response is two-fold. One is I think they make really a response which is very unsatisfactory. They make this highly technical argument that we've exceeded 25 depositions and we should have sought leave from the Court. As Your Honor I think suggested implicitly in the Court's opening remarks, all that would do is delay the very tight schedule we're on. In effect, the government has now forced us to seek leave of court. That's what we're doing so I don't see that we should be bickering about this.

This is not a case where we want to be delaying on technicalities these kinds of things. So let's get to the substance. The only substantive -- the thing -- two substantive things. They say, well, you can get this in depositions of other parties but the fact is we can't.

When we decide who we want to depose, we have to know exactly who these health plans are that they're claiming, what are the facts in the Magic Valley, what these improvements are that they claim St. Alphonsus has achieved that we could have achieved. We need to know that before the depositions and the only way to get that is by asking the government.

And then their other argument is that this is somehow burdensome on the government but it really isn't that burdensome. Sure it will take them time to do it but they made -- they were the ones who chose what allegations they made. They decided how they're going to phrase these allegations and it shouldn't be a burden on them to basically tell us all the things that they're relying on for these very serious allegations that we need to defend ourselves against.

So we think that balancing the need for us to prepare our case and to do the depositions against the burden, we think the balance points sharply towards forging each and every one of these interrogatories.

Now, under Judge Winmill's order, you know, that Judge Winmill put in the case management order, we were supposed to have responses to this tomorrow, April 24, is when we were expecting to get responses. Clearly that's not going to happen because of the interjections they've interposed but we don't think it's inappropriate to ask that within five days after Your Honor issues a ruling, assuming Your Honor does enforce these

interrogatories, that they be required to give us full and complete responses to each and every one of these interrogatories. We need that in order to go forward with the depositions and with further written discovery that we may put on some of these as yet unidentified health insurers, some of these people in the Magic Valley they're talking about and various other things that are brought forth that we hope to learn in the interrogatories.

We got two months to do it which is a very, very slight amount and we need to have these answered and we need to have them basically as soon as possible. So that is in essence my position, Your Honor.

COURT: All right. Thank you, Mr. Bierig. Mr. Su.

MR. SU: Yes, Your Honor. You know, I think based on Your Honor's comments, we're on the same page. The government plaintiffs joined this case understanding that we would be joining a case that -- you know, for which fact discovery was already at least a couple months or so underway and that we would be working under an accelerated schedule. It's for that reason that my colleague Tom Greene wrote a letter to Mr. Bierig on March 14, two days after we had filed our Complaint enclosing our initial disclosures.

Those initial disclosures include the identification of all of the health plans we've talked to and there are probably four or five of them, that's it, that -- you know, that would be

the basis of the allegations that Mr. Bierig has talked about.

Also, Mr. Bierig talked about St. Alphonsus' quality improvements which are the subject of one of our allegations in the Complaint. Well, St. Alphonsus was the original plaintiff in this case and St. Luke's has been taking discovery of St. Alphonsus as well.

So it is not the case that -- you know, that we haven't moved this case along, that we haven't given St. Luke's what it needs to get ready for depositions. In addition to the initial disclosures, we've produced, you know, pretty much everything from our files that we've collected from third parties. And what we're worried about today, Your Honor, are basically the types of discovery requests that create undue burden and really don't add all that much to the discovery process and that -- you know, I respectfully disagree with Mr. Bierig that these interrogatories that they've served are not -- don't impose an undue burden on us.

Although Mr. Bierig gives -- went through the examples of 7, 12 and 16 which relate to the health plans that are at issue in this case and to St. Al's quality improvements, he failed to talk about Interrogatory No. 1 which is really, you know, the major focus of our concern here.

It alone lists 29 sub parts and through the meet and confer process, we formed an understanding that what St. Luke's is looking for here is for us to catalog every piece of evidence

where there is a document or testimony or data, whatever, that might support each and every one of the allegations that they've listed there. And that, according to the case law we've cited, Your Honor, the IBP case from Kansas, the --

COURT: Mr. Su, let me -- Mr. Su, let me interrupt you at that point. I've got a disconnect in my mind here. I presume that your office as well as the Idaho Attorney General's Office made some determination based upon the investigation that you've conducted and the documents you've assembled and the interviews that you've conducted that there was some basis in fact and law to bring the Complaint that you brought. I mean that's sort of self-obvious, right?

MR. SU: Correct, Your Honor.

COURT: So what I'm searching for here is the space between that point and then describing that in a fashion that doesn't call on you to have to disclose your work product or other privileged or protected communications and also isn't just a sort of right back at you St. Luke's response which is to say everything which I think Mr. Bierig is at some risk of given the nature of the discovery that's been propounded.

So I'm really not interested in whether or not you're both playing fair in terms of trying to sort through these issues. I'm satisfied that you know that your responsibilities require that and everybody's trying to do that. But it doesn't seem to me that it's unreasonable at this point in the case to

say to you, all right. You've gone to all this effort. You've put all this together. You've framed your Complaint. We're on a short time frame here. There's not going to be a year and a half of discovery going forward. It's appropriate at some point or at some level to say, all right. Be more specific about who and what.

Now, are you telling me you just don't think that there's any space at all for you to have to do that and if that's the case, then I'll incorporate that into my thinking. But are you telling me that you think there is some space to do that?

MR. SU: Yes, Your Honor. We're telling the Court that there is space. What -- the burden that I'm talking about, Your Honor, relates to our understanding that they're asking for every single shred of evidence that might support each of these allegations. Certainly consistent with the case law, we are prepared to identify the main or principal pieces of evidence that, you know, are relevant to, you know, the allegations. For instance, if it's an allegation that refers to what somebody said, we're perfectly willing and able to identify the testimony, the investigational hearing testimony that that came from or the declaration that that came from.

So it's not that -- you know, that we're not prepared to provide some sort of a response but, you know, I think the kind of response that St. Luke's is demanding here would be an

undue burden in amounts that just -- a make-work exercise when the parties have other things that they need to be doing to get -- you know, to get through fact discovery.

COURT: And you're prepared to do that as to each and every one of the sub parts of Interrogatory 1 which in essence are tied to the allegations of your Complaint?

MR. SU: Yes, we are prepared to do that.

COURT: Okay. All right. Now I interrupted you and I'm sure I kind of interrupted your train of thought but I wanted to make sure you have a chance to make your other points as well. Go ahead, please.

MR. SU: I know, Your Honor. I mean I think the point again is if we take Interrogatory No. 1 as the focus of our concern, I think it is that delta between, you know, produce everything or identify everything that you think might possibly support your allegations a lot of which I must say come from, you know, St. Luke's own production versus a reasonable response to, you know, the sub parts identifying the main or principal pieces of evidence that we were thinking about when we made the allegations.

COURT: Okay. And how would you define the main or principal pieces of evidence?

MR. SU: Well, Your Honor, I mean I think in most instances, I would say that they are there -- well, as Mr. Bierig's own interrogatory puts it in the preamble, he talks --

it requests us to respond to documents that are specifically referenced in the Complaint. Well, obviously if an allegation specifically references a document or testimony, you know, or something of that nature, we're prepared to identify what that is.

COURT: Well, that strikes me as being a whole -- removed from the main or principal evidence.

MR. SU: Well, and I would say, Your Honor, we can give examples of the type of evidence that we would be looking for for other allegations. But again, to try to catalog every type of evidence that might support an allegation, we don't think -- you know, is it a productive exercise, particularly when we too are also taking fact discovery and developing our case and there are other ways that, you know, St. Luke's will learn of the documents or evidence that support our case, for instance, through the disclosure of trial exhibit lists and our expert reports which are to come.

COURT: Well, but that's quite a ways downstream I mean relatively speaking given the sequence of events.

MR. SU: Your Honor -- I'm sorry.

COURT: Given the sequence of discovery. I guess my point, Mr. Su, is I thought maybe you were telling me something that would make good sense but now you seem to be putting a rather tighter loop around it and I'm not so sure. What I'm getting at is what is it that you're willing to do that won't

require St. Luke's to guess at what your supporting evidence would be so that they can make decisions about how to best explore that more fully in deposition setting without making it such that I'm going to have a further argument -- a further hearing between all of you about some kind of generic, well, anything and everything that we've given you might support that allegation? What's the space in between? Is there more that you can provide? Because it seems to me you were just telling me, well, we'll point to the specific items that we referred to in the Complaint. Well, that's not enough.

MR. SU: Well, for those, I mean for the allegations that specifically refer to testimony, we would point to that. For other allegations, again, the case law talks about giving, you know, an example of what the principal evidence would be or the main evidence would be and that we're prepared to do that as well.

Plus, Your Honor, I would mention that the parties have agreed by tomorrow to exchange provisional witness lists which will include descriptions of what -- the witnesses who are likely to testify at trial and the areas of their testimony and that will also provide St. Luke's with disclosure regarding who said what or, you know, in support of our contentions.

COURT: Well, let me just take an example from what's in front of me here. Paragraph 50 of your Complaint alleges that the typical increase in income provided to an acquired

physician group is 20 percent. St. Luke's says, all right. Identify the quantitative evidence in the form of testimony, witness statements, documents and other evidence that would relate to that paragraph. Assuming that -- and it would be appropriate for you to assume here that I'm not going to make a decision based upon some number of interrogatories that's greater than what would otherwise be allowed. Assuming that you are required to answer that, what would be your understanding about how you would answer that today based upon our discussion here this morning?

MR. SU: Well, so, Your Honor, taking Paragraph 50 as an example, we would point to the study provided -- produced to us by St. Luke's of its third party consultant where they analyzed the compensation scheme and concluded that it was a certain percentage above typical market norms.

COURT: And that's all -- that's all kind of stuff -- that's all kind of stuff I assume that you've done as a basis for preparing the Complaint.

MR. SU: Yes, Your Honor.

COURT: So describe to me where it becomes -- other than it's a task in a complex case that's got a lot of work to do for a lot of lawyers, describe to me where the unfair burden is in sitting down and responding in that fashion to this interrogatory.

MR. SU: Well, the (inaudible), Your Honor, if we are

expected to comb through other documents that have been produced to us for other support for this allegation. I mean that's obviously a work in progress. We too are preparing for depositions of St. Luke's witnesses and so while -- again, while it's one thing to identify documents that certainly were before us when we drafted the Complaint, it's another thing to go through, you know, St. Luke's production which is hundreds of thousands of pages to try to catalog anything else that might be supportive of Paragraph 50.

COURT: Okay. All right. That's fair. Anything else, Mr. Su?

MR. SU: No, Your Honor. I understand, you know, the Court's interest in trying to see how this can be done and then balancing the nature of this case, the need for, you know, the parties to proceed on an accelerated schedule with the burdens that, you know, may be attended with responding to these interrogatories. And we're thinking about it in the same way and really the issue for us is, again, that this task of responding to these interrogatories not turn into a make-work exercise where we're spending additional time looking through St. Luke's production or St. Al's production for every support -- every possible piece of support for our case.

COURT: I assume there's some overlap in all of this in terms of the information. You may have information that you obtained in your investigation that neither St. Al's or

St. Luke's has but now is in the course of being produced or maybe already has been produced but otherwise, much of it -- I shouldn't say much of it. I assume that some of it is information that would either already be in the hands of St. Luke's because it's information you obtained from St. Luke's are in the hands of St. Al's because it's information you obtained from St. Al's. Is that an accurate statement?

MR. SU: That's accurate, Your Honor. I should mention also that while we certainly have collected documents from third parties such as health plans, that St. Luke's and St. Al's have served a number of third party subpoenas as well and so we're actually getting production of third party information that we didn't have before as part of our investigation. So it's not as if we -- you know, everything we have, you know, the parties didn't have before.

COURT: All right. Very good. Mr. Bierig.

MR. BIERIG: Yes. Let me just respond. First of all, I want to assure Your Honor that we have made it very clear to the Federal Trade Commission and the State of Idaho that we are not seeking their work product or any privileged information. We've made that 100 percent clear so that shouldn't even be at issue in this case.

I think that what Your Honor said is exactly what we've asked for and we've made it clear, by the way, that we've asked for this and I'm a little surprised to be hearing what Mr. Su is

saying as if he's learning this for the first time.

We've said that you on March 12 when you filed this Complaint, you made very serious allegations against St. Luke's. You said, for example, in Paragraph 1 that there's quantitative evidence, statements and documents from commercial health plans and local employers that the acquisition likely will lead to higher health care costs and lost available non-price competition. So we said, okay, identify that quantitative evidence. Identify those statements and documents and tell us what they are so we can follow up on them.

Paragraph 4 where they say the evidence -- this is what they said. The evidence that St. Luke's facilities almost invariably charge substantially higher fees, often more than double those of independent facilities even when the patient is receiving the same services in the same location she did before her PCP, that's primary care physician, was acquired by St. Luke's. We're saying, okay. Tell us -- tell us what evidence you had in mind on March 12 when you filed this Complaint that supports it. And the same thing with every one of these things.

As you pointed out, Paragraph 50, the evidence of the typical increase in income provided to an acquired physician group of 20 percent. All right. You made that allegation on March 12. What is the basis for that allegation?

We're not asking them to go through and get each and

every document that might exist somewhere in the millions of documents that -- you know, that was -- that have been produced in this case. We want to know what the basis was -- what the evidence was that they were relying upon in making each and every one of these allegations.

Certainly, as Your Honor had pointed out, there was such evidence. We want to know what it is so we can follow up on it and either, you know, try to say it's wrong or they misunderstood or we have an explanation or whatever it is. And that's all we're asking and, you know, it is going to be somewhat of a task for them but that's, you know, what happens when you make serious allegations in a case that's on a very tight schedule.

So that's our point. I think Your Honor understands exactly what we're asking for and, frankly, I think Mr. Su understands what we're asking for and I think it should be ordered that they produce each and every piece of evidence that they were thinking about to support the allegations in this Complaint that we've asked about. It's at simple as that.

COURT: All right. Mr. Su.

MR. SU: Just quickly. I was on the meet and confer call with Mr. Bierig as was my colleague Peter Herrick and also Wendy Arends and we did not come away with that understanding that we were -- we would be allowed to identify only the main or principal pieces of evidence that we were thinking about when we

drafted the Complaint but I will accept Mr. Bierig's representations to the Court today and proceed on that basis.

COURT: All right, folks. Everybody take a deep breath. You're all kind of wound up about all of this and I think we can work through it.

I'm going to give you an oral ruling today because I'm satisfied I think I know where I want to go with this and it's not going to help me to sit down and try to put it in any kind of writing.

In a sense, where all of you are at in this case is, to use an Idaho analogy I guess, you're all in the same river coming down from the mountain and there are streams coming in from either side that are bringing more flow into the stream and you're trying to integrate and absorb all of that and everybody be in the same channel while you're doing that. So it's unquestionably a moving target as you're going along and it's difficult to manage that. I think Judge Winmill's put a structure in place that's given you good assistance in that. I know you're all trying to meet that.

But in that regard, as I said at the outset, it makes this issue the nature of these contention interrogatories at this particular stage of the case a little bit different than it might be in some cases.

I'm satisfied that contention interrogatories of this nature can appropriately be pursued by St. Luke's at this stage

of the litigation but, similarly, I think that it's appropriate that the government -- I'm trying to think how best to fashion this so there's no confusion going down the road. That the government's response is based upon what it has in its hands right now that it's had a chance to process.

So obviously primarily, that's going to be the documents and the information that it's had from the nature of its investigation leading up to the Complaint being filed and to the extent that it's then aware from reviewing anything else that's come into its possession that there's additional information that it would rely upon and that would need to be part of the mix as well.

And so within that particular universe of information, I'm going to require that the government plaintiffs respond to all the interrogatories but it will be with the explicit understanding that that is information that may very well be supplemented in terms of the responses based upon additional information that comes into the possession of the government in the course of the case going forward and the review of that information.

Now, the acid test for that later on if there's a dispute about it will be, well, what was it? When was it? What did you do to review to get that because if you then get in an argument later on about whether there ought to be something that comes up, then obviously counsel had better be prepared to

explain why it isn't something that could have been disclosed earlier. That's not a very exact line that I can draw but that's the best that I can do in this setting.

Now as to the number of interrogatories, I appreciate the government plaintiffs' position that ordinarily, this would not be something the Court would take up. That this is something that to the extent that there is a set of interrogatories that arguably exceed the permitted number that the parties' usual burden is to ask for permission first, I think an argument could be made that the number's not exceeded but an argument could be made that it is. I'm satisfied that even if the number's exceeded that if a request had been made to allow for an additional number that there would be good cause for that and so I don't find that issue to be of any consequence here. I'm not going to prohibit it based on that.

I will require that the interrogatories be answered in the fashion I just described and based upon the conversation we've had here this morning between counsel about what the government's aware of at this point in time that would be supportive and that that -- those responses or those answers be served no later than the end of business on Tuesday, April 30.

Just a moment. All right. I think that that answers the specific issue that's been put in front of me. Ms. Ball, am I forgetting anything? All right. But I do want to hear from counsel about whether there's some particular nuance of all of

this that you'd like some direction from me upon. Mr. Su, you're the (inaudible) here I suppose. Maybe I'll hear from you first.

MR. SU: Your Honor, thank you. My question for clarification would be using Your Honor's analogy about, you know, being in Idaho and paddling downstream is that as the other streams feed into the river, the river gets larger and larger and larger and so, you know, the items that would be responsive to the interrogatories get bigger and bigger.

For instance, depositions are going on right now of witnesses that, you know, may give testimony that supports our allegations. Is it Your Honor's expectation that we would have an obligation to go through those deposition transcripts and identify statements that support our allegations to the Complaint?

COURT: Well, my intention right now, Mr. Su, is that you answer right now based upon what you know as of today. All right? And going forward, I can't give you a precise test as to that. I think you have to make an assessment as to whether you need to supplement in some fashion going forward and when to do it.

I think the flip side of that is that Mr. Bierig and his client need to be aware that if they're going to try to press that issue to the nth degree in terms of trying to preclude the government's use of evidence going forward, then

obviously the nature in which it's come together in this case and the timing would go into a weighing of the equities of all of that. So you know, I think the attorneys need to work closely and in good faith with each other on such matters. I just can't give you a precise answer about that. I know you'd like to have it but I don't think I can do that on this record.

MR. SU: If I may supplement my question, Your Honor.

COURT: All right.

MR. SU: You know, the discovery rules contemplate that there are many ways that a party can learn about something. Not just through, you know, one type of disclosure but it can be through a deposition or through some other means and it seems to us, Your Honor, that if the parties are learning about something through a deposition they have taken, then they know about that. They know that that's, you know, potentially in the case and can be used for trial and it does seem to us that it would be burdensome for us to continue to supplement these interrogatory answers with additional evidence that is coming through other discovery.

COURT: Well, then I would suggest, Mr. Su and Mr. Bierig, if there are concerns about all of that and if they're shared concerns, then you come to some sort of understanding between yourselves about what constitutes a safe harbor for those purposes. I simply can't describe a safe harbor for you from the bench right now on this record about this case that I

think would make any sense.

And so if you have concerns about that, then put all the kind of protective boilerplate in your responses that you think you need to do and go forward in whatever way that you have to. That's the best I can do for you.

All right. Anything else, Mr. Su, that you'd have a question about or want some further clarification? Otherwise of course the rules are simply going to govern, the Court's pretrial orders that governs the case and the rules of discovery, the rules of procedure.

MR. SU: Understood, Your Honor.

COURT: Okay. Mr. Bierig?

MR. BIERIG: Thank you very much, Your Honor. I have nothing to add on what Your Honor has ruled on. I noted that Your Honor has said in an e-mail I think from Ms. Ball that you wanted to be apprised of the status of the meet and confer on other issues. Is that correct?

COURT: I'm sorry. Just a moment. What Ms. Ball was referring to was how it related to this particular dispute.

MR. BIERIG: Oh, okay. I think this dispute has been fully aired.

COURT: All right.

MR. BIERIG: We do still have a couple of issues that the parties are trying to work through but they're not before the Court at this time.

COURT: Yeah.

MR. BIERIG: And I would want to note for Your Honor that we also have an issue with Blue Cross of Idaho that we may be bringing to the Court's attention but that again is not before Your Honor now.

COURT: All right. Well, I think everybody's clearly understood that these things really need to be worked out between counsel if at all possible and I think that everybody's been working hard towards that. I've been I guess impressed with the work of counsel in that regard and appreciative of it as well just in a selfish respect given all the other work that we have on our desks over here.

But, you know, that's why we're here for these purposes and I think you understand that the reason I said let's do it once a week was so that I can reasonably process that with Ms. Ball's request and we're not just waiting every day for a discovery dispute to land on the desk but we can try to structure our other things around that as well.

All right. If there's nothing else then, counsel, I'll get out of your way. I hope that helps solve at least this present dispute and we'll be here to assist you with anything that comes forward.

MR. BIERIG: Your Honor, excuse me. I did have one question. I'm sorry to bring this up at the last second.

COURT: All right.

MR. BIERIG: I want to be clear about when the government is ordered to file the responses. I know you said it's next Tuesday but I think you said close of business which I take it to be 5:00 Boise time; is that correct?

COURT: Yes. Mountain time. Mountain Daylight Time.

MR. BIERIG: Yes, because if we're going to have issues, then we're going to have to present those issues to you the following day on Wednesday. We would really like to get them as soon on Tuesday as possible.

COURT: Well, here's my thinking in that regard. There's a whole lot of information that's going to take a lot of work from Mr. Su and his colleagues to do what you've asked them to do. I assume that they're going to be having one of those thank God it's Friday like two more working days till Monday weekends and then they would like to have Monday to finalize things and look through everything carefully.

So hopefully, there won't be any further dispute but then after you've had a chance to read it Monday night or Tuesday night and Wednesday morning, if you think there is, then you can let us know.

All right. 5:00 p.m., Mountain Daylight Time, Tuesday the 30th. All right, counsel. Thank you. We'll be in recess.

MR. BIERIG: Thank you.

(Proceedings concluded.)

I, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/ Tamara A. Weber — 4/24/13

Signature of Approved Transcriber — Date

Tamara A. Weber

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