UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HASSAN CHUNN; NEHEMIAH McBRIDE; AYMAN RABADI, by his Next Friend MIGDALIZ QUINONES; JUSTIN RODRIGUEZ, by his Next Friend JACKLYN ROMANOFF; ELODIA LOPEZ; and JAMES HAIR, individually and on behalf of all others similarly situated, Petitioners, *-against-* WARDEN DEREK EDGE, Respondent.	No. 20 Civ. 1590

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the accompanying Memorandum of Law in Support of Petitioners' Motions in Limine and the Declaration of Katherine Rosenfeld, dated May 9, 2020, with exhibits, Petitioners, by their counsel, move this Court for the following two Orders.

First, an Order remedying Respondent's spoliation of evidence by precluding Respondent from:

(a) offering evidence that Respondent screened for, or identified patient complaints of, COVID-19 symptoms in the Metropolitan Detention Center ("MDC") during the time period March 27 through April 23, 2020,

(b) offering evidence that Respondent adequately responded to sick-call requests reporting COVID-19 symptoms during the time period March 27 through April 23, 2020,

(c) representing that there were few people with COVID-19 symptoms, or in any way quantifying the number of symptomatic people in the MDC, during the time period March 27 through April 23, 2020, and

(d) representing that Respondent has accurate and complete medical records for Petitioners or members of the putative class during the time period March 27 through April 23, 2020.

Second, an Order precluding Respondent's putative expert witness Asma Tekbali from opining on:

(a) standards for medical care,

(b) the policies and procedures at the MDC, and

(c) conclusions about actual practice at the MDC.

Dated: New York, New York
May 9, 2020

EMERY CELLI BRINCKERHOFF
& ABADY LLP

By: /s/ Katherine Rosenfeld
Katherine Rosenfeld
O. Andrew F. Wilson
Samuel Shapiro
Scout Katovich
600 Fifth Avenue, 10th Floor
New York, NY 10020
(212) 763-5000

CARDOZO CIVIL RIGHTS CLINIC
Betsy Ginsberg
Cardozo Civil Rights Clinic
Benjamin N. Cardozo School of Law
55 Fifth Avenue, 11th Floor
New York, NY 1003
(212) 790-0871

ALEXANDER A. REINERT, ESQ.
55 Fifth Avenue, Room 1005
New York, NY 1003
(212) 790-0403

DEBEVOISE & PLIMPTON LLP
Yeugenia Shvets
919 Third Avenue
New York, NY 10022
(212) 909-6000

Attorneys for Petitioners and Putative Class

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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individually and on behalf of all others similarly situated,

Petitioners,

-against-

WARDEN DEREK EDGE,

Respondent.

No. 20 Civ. 1590

MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTIONS IN LIMINE

Emery Celli Brinckerhoff & Abady LLP
600 Fifth Avenue, 10th Floor
New York, New York 10020
(212) 763-5000

Debevoise & Plimpton LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

Cardozo Civil Rights Clinic
Benjamin N. Cardozo School of Law
55 Fifth Avenue, 11th Floor
New York, NY 1003
(212) 790-0871

Alexander A. Reinert
55 Fifth Avenue, Room 1005
New York, NY 1003
(212) 790-0403

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OTHER AUTHORITIES

Petitioners file this motion *in limine* on two grounds. First, Petitioners seek remedies for Respondent's spoliation of evidence, including an order from this Court precluding Respondent from (a) offering evidence that Respondent screened for, or identified patient complaints of, COVID-19 symptoms in the Metropolitan Detention Center ("MDC") during the time period March 27 through April 23, 2020, (b) offering evidence that Respondent adequately responded to sick-call requests reporting COVID-19 symptoms during the time period March 27 through April 23, 2020, (c) representing that there were few people with COVID-19 symptoms, or in any way quantifying the number of symptomatic people in the MDC, during the time period March 27 through April 23, 2020, and (d) representing that Respondent has accurate and complete medical records for Petitioners or members of the putative class during the time period March 27 through April 23, 2020. Second, Petitioners seek to preclude testimony by Respondent's putative expert witness Asma Tekbali, who with a newly-minted Masters in Public Health and less than one year of experience under her belt is presented as an expert on epidemiology and infection prevention. For the reasons articulated herein, she should be precluded from opining on (a) standards for medical care, (b) the policies and procedures at the MDC, and (c) insasmuch as she has never visited the MDC, conclusions about actual practice at the MDC.

PRELIMINARY STATEMENT

As set forth in the pleadings filed on March 27, 2020, Petitioners allege that Respondent has failed to adequately respond when people in the MDC request medical care for symptoms of COVID-19, including by failing to screen, test, and provide treatment to these individuals, leaving them dangerously exposed to untreated serious illness.[1] Notwithstanding that this case

[1] All date references are to the year 2020.

explicitly challenges the quality and timeliness of the MDC's response to medical care requests during the COVID-19 pandemic, Respondent took no steps after it was sued on March 27 to preserve the critical relevant evidence on this issue: the sick-call requests themselves. Instead, Respondent continued to shred all requests submitted on paper forms by people in the facility seeking medical care.

After Petitioners filed this case, they requested on April 10 that Respondent provide copies of all sick-call requests for medical care submitted by incarcerated people in the MDC from March 13, 2020 to April 13, 2020. Again, notwithstanding an explicit discovery request, Respondent continued to shred all paper requests for medical care submitted by people in the facility. It was not until almost a month after Respondent was sued, on April 24, when Petitioners learned that Respondent had failed to retain the paper sick-call requests and explicitly requested that they be preserved, that Respondent stopping shredding these critical documents.

Setting aside whether it is sound medical practice in the midst of a pandemic to destroy medical records documenting symptoms of the virus and related requests for care, Respondent's conduct constitutes spoliation of evidence. First, for weeks after its obligation arose to preserve evidence regarding the medical care provided to people in the MDC exhibiting COVID-19 symptoms, Respondent continued to destroy documents. Second, Respondent failed to institute a litigation hold or take any steps to interrupt whatever routine shredding practices were in place, even as Respondent vigorously asserted to this Court that the COVID-19 pandemic was under control in the MDC, as purportedly evidenced by the low numbers of people testing positive for the virus. Third, Respondent destroyed evidence that was relevant to Petitioners' claims, as this Court already found in granting Petitioners' initial request for the sick-call records. Dkt. 43 (holding that evidence of the number of incarcerated people submitting sick-call requests based

on COVID-19 symptoms was relevant "to assessing the likely prevalence of COVID-19 within a facility where few tests have occurred," and potentially relevant to whether the MDC's medical staff is prepared to provide appropriate care to incarcerated people if they contract COVID-19).

Respondent will no doubt seek to excuse its conduct by blaming the difficulties of operating a large jail in New York City during a global pandemic. Whatever challenges that all parties face in this litigation, Respondent's obligations to preserve evidence remain intact. If the COVID-19 crisis means that Respondent can ignore its duties to retain evidence, incarcerated people—who are already isolated under a nationwide lockdown—are made even more vulnerable to serious harm, because no oversight of their medical care is possible.

Respondent's spoliation of evidence is particularly troubling because Respondent's central defense in this litigation is that it has policies in place to contain the spread of COVID-19, while incarcerated people consistently report that Respondent is not following those policies. Without complete sick-call records, Petitioners are left with fewer ways to prove what they have consistently experienced—that Respondent is not providing them with timely, thorough medical care and is routinely ignoring people who report symptoms consistent with COVID-19.

As an appropriate and commensurate sanction for Respondent's spoliation of evidence, Petitioners seek an order precluding Respondent from offering certain evidence relating to the destroyed records at the preliminary injunction hearing on May 12.

Respondent's purported epidemiology and infections prevention expert, Asma Tekbali, is a 2019 graduate of a Public Health Masters program with less than a year of relevant experience under her belt. Ms. Tekbali's extremely limited experience in the field in which she now presents herself as an expert is disqualifying. Ms. Tekbali is certainly unqualified to sustain the broad scope of opinions she purports to submit on the MDC's response to the COVID-19

pandemic. The Court should exercise its gatekeeping role under Fed. R. Evid. 702 to preclude Ms. Tekbali from testifying on topics outside her expertise and on which she has no adequate factual basis to opine. First, Ms. Tekbali has no background or training in medicine and should be precluded from opining on standards for medical care. Second, Ms. Tekbali's opinions about policies and procedures at the MDC should be precluded because she has zero experience or expertise in correctional settings. Finally, because Ms. Tekbali has not visited the MDC or spoken to people housed there, she lacks a sufficient factual basis for reaching conclusions about actual practice at the MDC and should be precluded on opining on this topic. To the extent the Court permits Ms. Tekbali to testify as an expert in this case, her testimony should be limited to the few topics in her report that are grounded in her actual experience.

FACTS

A. Petitioners Filed this Action on March 27, 2020 Alleging Deficient Medical Care

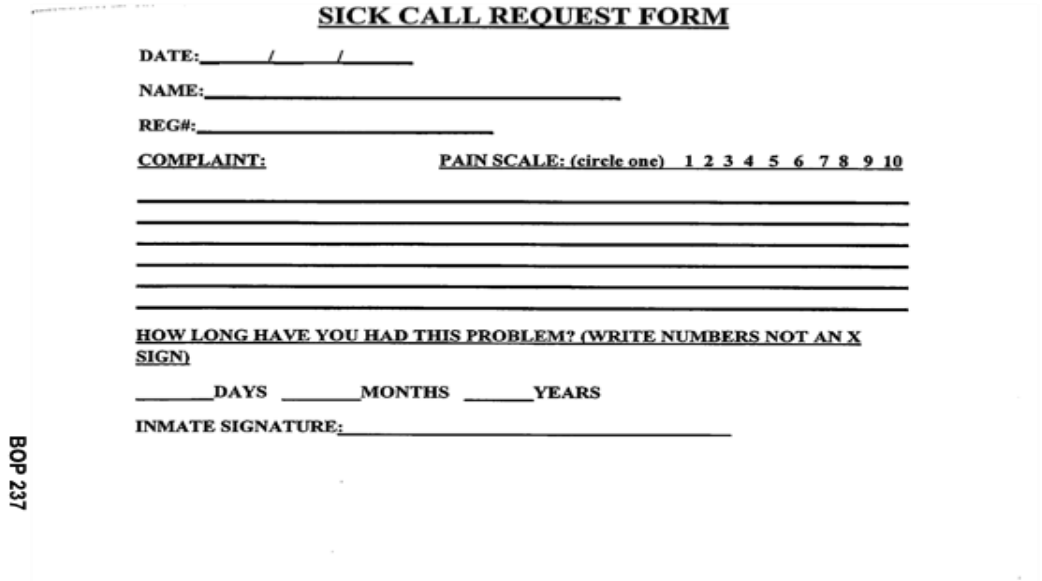
Petitioners filed this case on March 27, 2020, alleging that: "The MDC lacks adequate medical infrastructure to address the spread of infectious disease and treat the people most vulnerable to COVID-19." Pet. ¶ 58 (Dkt. 1). On March 30, Petitioners filed a motion for a Temporary Restraining Order, alleging that MDC was ignoring incarcerated people's requests for medical care and otherwise providing insufficient medical care during the COVID-19 pandemic. *See e.g.* Supp. von Dornum Decl. ¶ 7(b) (Dkt. 12-12), Nevarez Decl. ¶ 5 (Dkt. 12-3).

Opposing the TRO, Respondent argued that Petitioners' claims of "scant medical care resources . . . lack merit." Resp. Opp. at 18 (Dkt. 18). Respondent also claimed that "MDC medical staff is prioritizing immediate medical care for anyone who claims symptoms indicative of COVID-19 infection." King Decl., ¶ 22 (Dkt. 18-1); *see also* Dkt. 29 at 2 (BOP taking "many

steps" to mitigate COVID-19 spread, including that "[a]ny inmate currently in BOP custody who presents with COVID-19 like symptoms is assessed by the institution health services staff.").

B. Overview of How Incarcerated People in the MDC Request Medical Care

It is undisputed that incarcerated people in the MDC can request medical care in three ways: (1) they can submit an electronic request on a facility computer; (2) they can fill out and submit a paper "sick-call request" form that is provided by the facility; and (3) they can verbally request medical care from an MDC staff member. With respect to paper sick-call requests, the BOP form requires the person completing it to provide narrative information about their medical complaint, fill out a pain scale, and identify the duration of their medical problem. A copy of the paper sick-call request form used by the BOP is below:



SICK CALL REQUEST FORM

DATE:_____/_____/_____

NAME:_____

REG#:_____

COMPLAINT: PAIN SCALE: (circle one) 1 2 3 4 5 6 7 8 9 10

HOW LONG HAVE YOU HAD THIS PROBLEM? (WRITE NUMBERS NOT AN X SIGN)

_____DAYS _____MONTHS _____YEARS

INMATE SIGNATURE:_____

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C. Petitioners Demand Sick-Call Requests on April 10, 2020

On April 10, the parties filed a Proposed Case Management Plan, in which Petitioners requested "[a]ll sick call requests for medical care made by people incarcerated at [the] MDC from March 13, 2020, in redacted form to omit the person's name and DIN number." Case

Management Plan 2 (Dkt. 37-1). Respondent opposed the request for all discovery, including these documents. Dkt. 37.

On April 11, Petitioners wrote to the Court, explaining that the sick-call requests were "necessary to show that incarcerated people are requesting medical care from Respondent for COVID-19 symptoms but Respondent fails to test these individuals for the disease, as well as the changing volume of sick call requests over time." Dkt. 39 at 6-7. On April 12, Petitioners served and filed a 30(b)(6) deposition notice for testimony about "the procedures for people incarcerated at the MDC to request and receive medical care for suspected COVID-19 exposure or diagnosis." Dkt. 41 at ¶4(h).

On April 13, the Court heard arguments regarding the sick-call requests. Respondent stated at this hearing that inmates "can get a staff member a hard copy piece of paper requesting sick call or they can also submit a request electronically using the Trulincs system." Ex. 1 (Transcript of Telephonic proceedings of April 13, 2020) at 23:21-23.[2] At the hearing, the Court pressed Respondent for more specific information about how the paper sick-call requests were maintained:

> THE COURT: Just to make sure I understand this, just to go one by one, let's just set aside the oral requests for a moment. If somebody submits a hard copy request, is that request maintained anywhere after that aside from the individual person's file?
>
> MR. CHO: It could be or may not be. I know those requests are then sent to the medical unit to schedule but what happens beyond that it may be maintained or it may not be maintained. The important thing is that the inmate gets seen by a medical professional. I think that's what the BOP's primary concern is.
>
> THE COURT: I understand that, but I am trying to figure out what kinds of records exist and how they might be compiled. So I'm wondering if you know whether once somebody submits a hard

[2] All references to "Ex. ___are to exhibits attached to the accompanying Declaration of Katherine Rosenfeld dated May 9, 2020.

> copy request if there is a folder used to hold the sick call requests - - whether there's a centralized compilation of it or not.
>
> MR. CHO: There may be, but I'm not sure.

Id. at 25:2-19.

At the same hearing, and in response to the government's representations that it would need to review 1,700 people's individual medical records to find non-electronic sick-call requests, and therefore that Petitioner's request was unduly burdensome, Petitioners agreed to limit their request to electronic sick-call requests. As stated on the record, Petitioners believed at that time that all medical care needed to be requested electronically.[3]

On April 14, the Court ordered Respondent to produce all electronic sick-call requests for medical care submitted by persons incarcerated at the MDC from March 13, 2020 to April 13, 2020. Dkt. 43. Respondents produced these records on April 20, which revealed almost 150 electronic sick-call requests with COVID-19 symptoms from that one-month time period. Dkt. 72.1 ¶ 24 (Dr. Venters Report).

D. Petitioners Confirm that Incarcerated People at the MDC Are Actively Submitting Paper Sick-Call Requests, Particularly During the Lockdown

On April 23, Dr. Homer Venters inspected the facility. Approximately two hours after the inspection, Petitioners requested that Respondent produce the paper sick-call requests, stating that it was important for Dr. Venters to be able to review the full universe of requests.

[3] *See* Ex. 1 at 27:3-16 ("If there happens to be hard copy requests that somehow don't get logged electronically, we're not asking that the respondent go through individual medical records to look for those although my understanding is that also medical records are maintained electronically. Our request here is to be able to look at how medical care is being delivered during this epidemic to understand whether people who need care are able to get care including the petitioners. So, we have said that they are at heightened risk for infection and have said that the facility is unable to care for them should they become infected and, so, the ability for the medical system to handle these requests and to address them in a timely way is critical to our claim.")

On April 24, having received no response, Petitioners sought an order from the Court requiring Respondent to provide the paper sick-call requests submitted at the MDC from March 13 to April 13, as a supplement to Respondent's prior production of electronic sick-call requests for the same time period. Dkt. 63. Petitioners explained that during the inspection at the MDC with Dr. Venters, several people reported that they had requested medical care using the paper sick-call request forms. It also became clear that because the entire population of incarcerated people at the MDC is locked in their cells almost 24 hours a day, incarcerated people have limited access to computers, and must use the paper forms for sick-call requests more often than when they have normal access to computers. Finally, Petitioners noted that the paper requests were important because they likely reflected the needs of a different patient population than those who requested care via email: "If the current sick-call documents represent only a fraction of the total requests, or are skewed to only include electronic requests made by individuals well enough to leave their cells and access email, this data is important for Dr. Venters' evaluation." Dkt. 63 at 3.

Respondent again vehemently objected to producing paper sick-call requests, arguing that Petitioners had previously only asked for electronic ones, that Petitioners had already known that requests were made via paper (which they had not), and that "[p]roduction of paper sick call requests would largely be duplicative of sick call requests submitted electronically." Dkt. 64 at 2. Finally, Respondent revealed that the BOP did not have the documents because it had not retained them. *Id*.

Petitioners subsequently learned on April 27, 2020 during the deposition of Health Services Administrator Stacey Vasquez that the MDC had been shredding sick call requests until April 24, 2020. Vasquez Dep. at 194 ("Q: What happens to that form after the information has

been included into the scheduler? A: Currently we are putting it in the box. Previously because what was our normal practice was we were getting rid of it. Q: When did you start putting them in a box? A: Friday I believe. Q: The previous practice was to get rid of it how? A: Shred it.").

E. Respondent's Shifting Explanations for Destroying the Paper Sick-Call Requests

Respondent has provided several different explanations for why it shredded the paper sick-call requests after this lawsuit was filed.

During a colloquy with the Court on April 24th, Respondent described the paper sick-call requests as "living documents" and stated the MDC does not "retain them because once they either see the inmate, or input the inmate's name into the scheduling system, they are then discarded as is their normal protocol because they've either – they've acted on it in some way." Ex. 2 (Transcript of Telephonic proceedings of April 25, 2020) at 39:21-40:3.

It remains unclear whether Respondent's practice is to discard the sick-call request before or after a medical provider sees the patient. *Compare* Dkt. 64 (Resp.'s Letter to the Court dated April 24, 2020) ("The provider, however, does not retain the hard copy sick call request after seeing the inmate.") with Ex. 3 (Email from Respondent's Counsel dated April 28, 2020) ("the paper sick call requests are not retained once inmate names are added to the scheduling system.").

Beginning on April 24, Respondent started to claim that its destruction of the paper sick-call requests was in response to the COVID-19 pandemic: "The provider does not retain the hard copy sick call request once the inmate has been entered into the schedule *for infection control reasons to the extent the document may be contaminated in any way*." Ex. 4 (Respondent's Letter dated April 24, 2020 to Petitioners) (emphasis supplied). Respondent's suggestion that the sick-call requests were discarded because they were potentially "contaminated" or for

"infection control reasons" was new. At her deposition on April 27, Ms. Vasquez asserted both rationales for the practice: that on the one hand, the destruction of records was justified for "infection control" reasons, and at the same time, that it was the MDC's routine practice that had preceded the COVID-19 epidemic. Vasquez Dep. at 194, 196. But these explanations are contradictory; either the MDC started shredding sick-call requests because it believes that COVID-19 could be transmitted via a piece of paper, or it has always shredded these requests, which is further evidence of the broken medical system that Dr. Venters identified.

On April 28, 2020, Respondent again repeated this far-fetched claim that "it is not the practice for MDC to retain paper sick call requests as they are akin to appointment requests, not medical records, and for infection control purposes to the extent the documents may be contaminated." Ex. 3. In his report, Dr. Venters generously characterized this rationale as "confusing," rejecting the claim that scanning of sick-call requests would pose a threat to staff. Dkt. 72.1 ¶ 30.

On April 29, Respondent agreed to provide copies of the only surviving paper sick-call requests, those submitted after April 24, for the time period of April 24 through May 9. Despite repeated requests, Respondent refused to advise Petitioners when it requested that the MDC place a litigation hold on the documents.

Also on April 29, Respondent produced paper sick-call requests submitted from April 24 to April 28 bearing Bates Stamp numbers BOP_SCR 889-922. For the four days of paper records received, which fell over the weekend, there were 32 requests for medical care, seven of which (or 20%) reported COVID-19 symptoms including fever, chest pains and tightness, and difficulty breathing. Ex. 5 (seven paper sick-call requests for medical care for COVID-19 symptoms).

On April 30, Dr. Venters submitted his report and evaluated the MDC's routine practice of discarding the original sick-call requests rather than scanning them into the electronic medical record of patients:

> This represents a gross deviation from basic health care standards because the sick-call requests form part of the patient's medical record. Without this practice, the health service does not know how many requests were made, and how many were responded to. It also renders impossible any evaluation of whether the assessment and care provided was appropriate to the patient's original concerns.

Dkt. 72.1 ¶ 29 (Dr. Venters Report).

ARGUMENT RE: SPOLIATION

A. Legal Standard

"Spoliation is 'the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.'" *Orbit One Commc'ns, Inc. v. Numerex Corp*., 271 F.R.D. 429, 435 (S.D.N.Y. 2010) (quoting *Byrnie v. Town of Cromwell, Bd. of Educ*., 243 F.3d 93, 107 (2d Cir. 2001)). "The party seeking discovery sanctions on the basis of spoliation must show by a preponderance of the evidence: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." *Klipsch Grp., Inc. v. ePRO E-Commerce Ltd*., 880 F.3d 620, 628 (2d Cir. 2018) (internal quotation marks omitted).

"The determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of the trial judge, and is assessed on a case-by-case basis." *Fujitsu Ltd. v. Fed. Express Corp*., 247 F.3d 423, 436 (2d Cir. 2001). Where the spoliator acted only negligently, the

party seeking sanctions "must demonstrate prejudice in order for the Court to consider imposing an extreme sanction such as an adverse inference instruction." *Distefano v. Law Offices of Barbara H. Katsos, PC*, No. 11 Civ. 2893, 2017 WL 1968278, at *26 (E.D.N.Y. May 11, 2017); *Scalera v. Electrograph Sys., Inc*., 262 F.R.D. 162, 178 (E.D.N.Y. 2009) ("'[W]here more severe sanctions are at issue, ... the moving party must show that the lost information would have been favorable to it.'") (quoting *Chan v. Triple 8 Palace, Inc*., No. 03-CV-6048 (GEL) (JCF), 2005 WL 1925579, *7 (S.D.N.Y. Aug. 11, 2005)).

An expert witness may testify only if "(a) the expert's scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. The proponent of expert testimony carries the burden of establishing its admissibility by a preponderance of the evidence. *United States v. Williams*, 506 F.3d 151, 160 (2d Cir. 2007). The Court must determine that expert testimony is relevant and rests on a reliable foundation. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). The Court's role is to make certain that an expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire v. Carmichael*, 526 U.S. 137, 152 (1999). The Court should "undertake a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand." *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002).

To testify as an expert witness, an individual must be "qualified as an expert by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. "To determine whether a

witness qualifies as an expert, courts compare the area in which the witness has superior knowledge, education, experience, or skill with the subject matter of the proffered testimony." *United States v. Tin Yat Chin*, 371 F.3d 31, 40 (2d Cir. 2004). "In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony." Fed. R. Evid. 702 advisory cmte. note (2000). "[C]ourts have found an expert unqualified to render an opinion where that expert did not have direct experience with the particular product, machine or specific field at issue in the litigation." *Lara v. Delta Int'l Mach. Corp.*, 174 F. Supp. 3d 719, 732 (E.D.N.Y. 2016).

B. Respondent Spoliated Evidence by Shredding the MDC's Sick-Call Requests

1. *Respondent Had an Obligation to Preserve the Sick-Call Requests at the Time It Destroyed the Records*

Petitioners easily satisfy the first prong of the test for spoliation, that Respondent had an obligation to preserve the sick-call requests at the time they were destroyed. "The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." *Fujitsu Ltd. v. Fed. Exp. Corp.*, 247 F.3d 423, 436 (2d Cir. 2001). Here, Respondent indisputably knew or should have known that the sick-call request records were relevant to this litigation when the action was filed, on March 27, 2020. At the latest, Respondent knew that the sick-call requests were relevant to the litigation on April 10, 2020, when Petitioners requested these documents.

When "triggered, the preservation obligation requires a litigant to do more than refrain from intentionally destroying relevant evidence; the litigant must also 'take affirmative steps to prevent inadvertent spoliation.'" *Skyline Steel, LLC v. PilePro*, LLC, 101 F. Supp. 3d 394, 407-08 (S.D.N.Y. 2015) (citation omitted). Respondent took no affirmative steps to ensure that the MDC was maintaining these documents, even as its counsel aggressively litigated to block their

production to Petitioners. Respondent knew that paper sick-call requests existed, and even knew that it was an open question whether they were being retained—yet it did nothing. At minimum, Respondent should have ceased the destruction of any records related to patient reports of COVID-19 symptoms.

2. *Respondent Failed to Preserve the Records with a Culpable State of Mind*

Petitioners also satisfy the second prong—that Respondent failed to preserve the sick-call requests with a "culpable state of mind." In this Circuit, "a 'culpable state of mind' for purposes of a spoliation inference includes ordinary negligence." *Richard Green (Fine Paintings) v. McClendon,* 262 F.R.D. 284, 290 (S.D.N.Y. 2009). "[T]he culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to breach a duty to preserve it, or negligently." *Residential Funding Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) (internal quotation marks, citations & alterations omitted); *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec*., 685 F. Supp. 2d 456, 464, 471 (S.D.N.Y. 2010) ("[T]he following failures support a finding of gross negligence, when the duty to preserve has attached: to issue a written litigation hold; to identify all of the key players and to ensure that their electronic and paper records are preserved . . .."), *abrogated on other grounds by Chin v. Port Auth. of NY & NJ*, 685 F.3d 135 (2d Cir. 2012).

Respondent and his counsel failed to take any steps to ensure that the sick-call requests would be preserved even though they knew that: Petitioners had filed a lawsuit alleging Respondent's failure to respond to sick-call requests (on March 27, 2020); Petitioners had specifically requested these documents (on April 10, 2020); the Court had inquired as to how

those documents were maintained (on April 14, 2020); and the Court had ruled that the documents were "relevant" to the case (on April 14, 2020).

Respondent was surely aware, and at the very least should have been aware, that when he instituted a facility-wide lockdown it would severely limit access to the computers that facilitated electronic requests for sick call. From that point forward, Respondent knew that more incarcerated people would need to use non-electronic means to request sick call and that more paper sick call requests would be generated.

Respondent acted at least negligently in failing to preserve the sick-call requests, satisfying the second prong.

3. *The Destroyed Evidence Was Relevant*

Petitioners meet the third prong of the test— whether the destroyed evidence was "relevant." To obtain sanctions for evidence spoliation, the movant must show "that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." *Residential Funding Corp*., 306 F.3d at 107. In the context of spoliation, relevance "means something more than sufficiently probative to satisfy Rule 401 of the Federal Rules of Evidence." *Id*. at 108–09. "Instead, to establish relevance, the party seeking sanctions 'must adduce sufficient evidence from which a reasonable trier of fact could infer that the destroyed . . . evidence would have been' favorable to its case." *In re: Gen. Motors LLC Ignition Switch Litig*., No. 14-MD-2543 (JMF), 2015 WL 9480315, at *3 (S.D.N.Y. Dec. 29, 2015). "Thus, for sanctions to be warranted, 'there must be extrinsic evidence to demonstrate that the destroyed evidence ... would have been unfavorable to the destroying party.'" *Id.* (quoting *Great N. Ins. Co. v. Power Cooling, Inc.*, No. 06-CV-874, 2007 WL 2687666, at *11 (E.D.N.Y. Sept. 10, 2007) (internal quotation marks omitted)).

This Court has already found on April 14, 2020 that the sick-call requests are relevant evidence in this case when it ordered Respondent to produce them:

> Sick-call requests by other inmates are relevant to petitioners' Eighth Amendment claims. As noted above, while respondent has sought to rebut petitioners' arguments by pointing to the limited number of positive tests thus far, very few inmates have been tested. *Evidence of the number of inmates submitting sick-call requests based on symptoms consistent with COVID-19 is relevant to assessing the likely prevalence of COVID-19 within a facility where few tests have occurred*. In addition, were the evidence to establish that the MDC has received many sick-call requests reporting COVID-19 symptoms, but that it has performed very few tests in response, *that evidence would be relevant to petitioners' argument that the MDC's medical staff is not prepared to provide appropriate care to them (including diagnostic care) if they contract COVID-19*.

Dkt. 43 (emphasis supplied)

Other courts in this Circuit have held that prison officials' disregard of sick-call requests may be evidence of deliberate indifference. *Aikens v. Rao*, 13-CV-1088S, 2015 WL 5919950, at *2 (W.D.N.Y. Oct. 9, 2015) (evidence that a prison medical system received sick-call requests and ignored or disregarded them is "sufficient for a reasonable jury to conclude that [nurse administrator defendants] knew that plaintiff was in severe pain and acted deliberately to deny him treatment."); *Myers v. Dolac*, No. 09 Civ. 6642, 2013 WL 5175588, *12 (W.D.N.Y. 2013) ("Myers contends that . . . Dolac purposefully impeded Myers's treatment . . . by ignoring or destroying his sick call requests. Myers has testified that he received no treatment for his . . . condition. These factual assertions, if proved at trial, are sufficient for a reasonable jury to conclude that Dolac knew of Myers's medical condition and acted deliberately to deny him treatment").

Petitioners can also show that the destroyed evidence would have been favorable to their case. Based on a review of the paper sick-call requests records available (after Respondent

ceased shredding on April 23), it is clear that the destroyed documents would have provided many additional examples of patient reports of COVID-19 symptoms, evidence which is relevant to the prevalence of COVID-19 in the facility given the paucity of testing. This would support Petitioners' argument that many incarcerated people have reported COVID-19 symptoms, and that Respondent has failed to provide appropriate medical care including diagnostic care in the form of testing. Reviewing only the four days of paper sick-call documents that were preserved and produced to date, Petitioners have identified numerous reports of COVID-19 symptoms and complaints of other requests for care being ignored. *See* Ex. 5.

4. *Petitioners Are Prejudiced By the Destruction of the Sick-Call Records*

When a party seeks severe sanctions "such as dismissal, preclusion, or the imposition of an adverse inference," the court must consider "whether any missing evidence was relevant and whether the innocent party has suffered prejudice as a result of the loss of evidence." *Pension Comm. of Univ. of Montreal*, 685 F. Supp. 2d at 467. "Relevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner." *Id*.; *see Distefano*, 2017 WL 1968278, at *22, 25. When a spoliating party was only negligent, however, the moving party must show that the materials were relevant and that the innocent party was prejudiced. *See Residential Funding Corp*., 306 F.3d at 109; *Distefano*, 2017 WL 1968278, at *22, 25 ("[W]here the spoliating party has acted only negligently, the moving party must make a showing that the lost materials were relevant.").

Petitioners are prejudiced by Respondent's destruction of the documents in several ways. First, Petitioners are no longer able to establish with accuracy how many people reported symptoms of COVID-19 and requested medical care for those symptoms during the time period at issue in this case. Petitioners can still extrapolate those numbers based on what documents

remain, but it will be an estimate. Second, Petitioners have fewer documents and less data available to counter Respondent's claim that there are almost no symptomatic people in the facility. Respondent has been regularly reporting the number of people who have tested positive in the facility, but as Respondent's own witnesses have testified to, they do not report or test people they deem to be "presumptive positives." Vazquez Tr. 31-32, 37, 118-19. Third, Petitioners lack some of the records that likely would have corroborated their claim that symptomatic people repeatedly have requested medical care for COVID-19 symptoms but have been denied such care over periods of days, weeks, and months.

In addition, even with respect to their ability to evaluate on a qualitative basis the type of requests being made, Petitioners are prejudiced. As Judge Mann referenced at the April 14, 2020 hearing, the electronic sick-call requests may not reflect the same concerns from patients as the paper sick-call requests, because if a person is very ill, he is less likely to leave his cell to access the computer to submit an electronic request.

C. RESPONDENT′S ANTICIPATED DEFENSES TO THEIR SPOLIATION SHOULD BE REJECTED

Petitioners anticipate that Respondent will claim that it was not obligated to preserve the paper sick-call documents because, at the hearing on April 14, Petitioners agreed to accept electronic sick-call requests. Respondent's argument is misplaced. Petitioners' original request in this action was for "sick call requests," without reference to the manner in which a person requested medical care. Respondent objected, claiming that it would be burdensome to find and retrieve all sick-call requests, and would require an individualized search through each person's medical records. Importantly, Respondent did not disclose at that time that it was continuing to shred the paper sick-call requests. In an effort to reach compromise at that hearing, Petitioners

agreed to accept only the electronic requests, believing that this would largely represent the full universe of sick-call requests made during the time period.

Respondent has also wrongly claimed that the electronic and paper sick-call requests are "duplicative," and may attempt to argue that the paper records are somehow additive but not inherently different than what Petitioners already received. That is clearly not the case. Reviewing the four days of paper sick-call requests produced to date, these are discrete requests made by individuals for medical care. The paper sick-call requests are distinct medical records, not simply a transcription or copy of a request submitted via computer.

D. THE COURT SHOULD SANCTION RESPONDENT BY PRECLUDING EVIDENCE

"[A] district court has broad discretion in crafting a proper sanction for spoliation." *West v. Goodyear Tire & Rubber Co*., 167 F.3d 776, 779 (2d Cir. 1999). The authority to sanction litigants for spoliation arises, inter alia, under the court's inherent powers and such sanctions are assessed on a case-by-case basis. *Zubulake*, 220 F.R.D. at 216. An appropriate sanction upon a finding of spoliation "should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine. The sanction should be designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party." *West*, 167 F.3d at 779 (internal quotation marks & citations omitted).

As an appropriate and commensurate sanction for Respondent's spoliation of evidence, and for the preliminary injunction hearing on May 12, Petitioners seek an order precluding the Respondent from (a) offering evidence that Respondent screened for, or identified patient complaints of, COVID-19 symptoms in the MDC during the time period March 27 through April

23, (b) offering evidence that Respondent adequately responded to sick-call requests reporting COVID-19 symptoms during the time period March 27 through April 23, (c) representing that there were few people with COVID-19 symptoms, or in any way quantifying the number of symptomatic people in the MDC, during the time period March 27 through April 23, and (d) representing that Respondent has accurate and complete medical records for Petitioners or members of the putative class during the time period March 27 through April 23.

Respondent has repeatedly argued that it maintains a functional sick-call system that is responding well to the needs of people reporting COVID-19 symptoms. *See* Resp.'s Opp. at 23 (Dkt. 79) ("The MDC's sick call process is responsive to inmate complaints and certainly not deliberately indifferent to their needs."). Respondent should be precluded from advancing such arguments, which rely on the evidence that it failed to retain. *See Ayala v. Your Favorite Auto Repair & Diagnostic Ctr., Inc.*, No. 14 Civ. 5269, 2016 WL 5092588 (E.D.N.Y. Sept. 16, 2016), at *18 (finding spoliation of electronic employee work records and excluding records from evidence).

ARGUMENT RE: MS. TEKBALI

A. The Court Should Preclude Ms. Tekbali from Offering Opinions beyond Her Expertise

Ms. Tekbali purports to provide "expert opinion and analysis on this case as an epidemiologist and infection preventionist." Tekbali Rep. at 1. But Ms. Tekbali received a Master's in Public Health only one year ago. She has been employed in the epidemiology department of Lenox Hill Hospital, Northwell for ten months. While, Ms. Tekbali has recently been part of a team that addresses COVID-19 related issues at Lenox Hill Hospital, this brief experience does not qualify her to sustain the broad scope of opinions she purports to submit on the MDC's response to the COVID-19 pandemic. Given her lack of experience, Ms. Teklabi is

arguably unqualified to testify as an expert at all; she is certainly unqualified to testify on the vast majority of topics addressed in her report.

Throughout her report Ms. Tekbali offers opinions regarding appropriate medical care for COVID-19 and infectious disease prevention in correctional settings, but these are topics on which she has no expertise and is therefore unqualified to opine upon. Much of her report is devoted to restatements of website information from the CDC or the NYC Department of Health without offering any additional expertise or opinion. *See, e.g.,* Tekbali Rep. at 2 (referring to guidance from the NYC Department of Health); *id.* at 6 (referring to guidance from the CDC). Elsewhere, Ms. Tekbali offers opinions regarding the MDC's practices for which she has insufficient factual basis because she has not visited the MDC nor spoken to individuals incarcerated there. The Court should preclude these portions of Ms. Tekbali's opinion as unreliable and/or because she is not qualified to offer them. *See, e.g.*, *In re Rezulin Prods. Litig.*, 309 F. Supp. 2d 531, 549 (S.D.N.Y. 2004) (precluding portions of doctors' expert testimony as unreliable where the doctors' opinions "unequivocally discuss[ed], and evaluate[d] [defendant's] conduct against," regulatory standards in which the doctors were not expert); *Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 653 (S.D.N.Y. 2007) (precluding as unreliable expert testimony that is "beyond [the expert's] stated expertise").

B. Ms. Tekbali Is Not an Expert on Appropriate Medical Care

Despite having no medical training or experience caring for patients, Ms Tekbali opines about the appropriate medical care for people infected with COVID-19 at the MDC. These opinions include:

- Suggesting that people incarcerated at the MDC are not harmed by a lack of access to medical care because "most people will develop mild symptoms and can recover without medical intervention." Tekbali Rep. at 2.

- Stating, without citing any authority, that "[t]here are virtually no clinical interventions for patients who present with mild symptoms." *Id.*
- Stating that testing for COVID-19 is unnecessary in order for people at the MDC to get proper medical care because "[i]f patients have symptoms that are consistent with COVID-19, testing will not change their clinical management." *Id.*
- Declaring that "[it] is not the standard of care" to provide daily examinations to non-urgent COVID-19 patients. *Id.* at 4.
- Concluding that Petitioner Rodriguez had not required any medical care while ill with COVID-like symptoms at the MDC because his symptoms were "mild." *Id.* at 6.

None of these opinions falls within Ms. Tekabli's purported expertise of epidemiology. The Court should exercise its gatekeeping role to preclude Ms. Tekbali from testifying about necessary or adequate medical care for patients with COVID-19. Ms. Tekbali has no medical training and no expertise in the medical treatment of COVID-19. Her employment in a hospital currently caring for patients sick with COVID-19 does not imbue her with authority to opine on what medical care is or is not necessary for COVID-19 patients generally, let alone to conclude that an individual she has never met and whose medical records she has never examined "recovered without complication." *Id.* at 6. *See generally 523 IP LLC v. CureMD.Com*, 48 F. Supp. 3d 600, 642 (S.D.N.Y. 2014) (collecting cases striking expert testimony beyond the scope of the expert's expertise).

C. Ms. Tekbali Is Not An Expert on Correctional Settings

Ms. Tekbali has no background, training, or experience in correctional healthcare or management. She appears to have no experience whatsoever in correctional settings. Nevertheless, in her report, she opines at length about the MDC's procedures and practices, concluding that "[t]he MDC's procedures for preventing the spread of COVID-19 is [sic] consistent with CDC guidance and within the standard of care." *Id.* at 4. But a court may find an "expert[] unqualified when they d[o] not have direct experience with the particular product or

field pertinent to the litigation." *Jensen v. Cablevision Sys. Corp.*, 372 F. Supp. 3d 95, 113 (E.D.N.Y. 2019), *appeal dismissed, leave to appeal denied*, No. 19-628, 2019 WL 4296129 (2d Cir. Aug. 28, 2019). Ms. Tekbali's testimony about the sufficiency of the MDC's procedures and practices to address COVID-19 falls outside of the realm of her purported expertise. As her opinions about policies and procedures at the MDC are not grounded in any superior knowledge of correctional facilities, they should be excluded.

In addition to Ms. Tekbali's unsupported and sweeping conclusions about the appropriateness of MDC's practices at large, Ms. Tekbali also puts forward unsupported opinions on the MDC's housing policies, lockdown practices, intake procedures, and correctional healthcare. For example, she states:

- That "[c]ohorting is not necessary" for high-risk people. Tekbali Rep. at 3.
- "It is my understanding that inmates are now allowed out of their cell for one hour, instead of 30 minutes. This is the current standard for isolation to prevent the spread of the virus. This is an appropriate measure to prevent the spread. . . ." *Id.* at 5.
- "The MDC's practice has been to isolate an inmate who has tested positive for COVID-19 and the inmate's cellmate, if symptomatic. The MDC would consider the cellmate presumptively positive. The MDC's practice is consistent with CDC guidelines and the standard of care in the community." *Id.* at 5

Nothing in Ms. Tekbali's background or experience renders her qualified to reach conclusions about how incarcerated people should be housed and how their movements should be restricted. Any expertise she has in epidemiology is of no moment. Rather, Ms. Tekbali misapplies guidance intended for non-correctional settings to the inapposite correctional context of the MDC throughout her report.

For example, in concluding that the MDC's "process for self-monitoring for inmates" is "consistent with the standard of care and CDC guidelines," Ms. Tekbali cites to a CDC webpage titled "What to Do If You Are Sick" that has no application to correctional settings given its

recommendations to "not take public transportation and "stay in a specific room and away from other people and pets in your home." *See id.* at 7; What to Do If You Are Sick, Tekbali Rep. Exhibit 14. Ms. Tekbali's complete lack of experience in this area should preclude her from testifying about appropriate standards in correctional settings, including at the MDC. *See Gjini v. United States*, No. 16-CV-3707 (KMK), 2019 WL 498350, at *14 (S.D.N.Y. Feb. 8, 2019) (finding that a professor of anthropology, sociology, and social science did "not have any experience with jail administration or management" was not qualified to testify regarding a prison's institutional failures in handling a mentally ill person).

D. The Court Should Preclude Ms. Tekbali from Testifying about Practices at the MDC for Which She Has an Inadequate Factual Basis

Finally, Ms. Tekbali should not be permitted to testify about practices at the MDC because she lacks a factual basis for reaching conclusions about actual practice at the facility. The Court must "undertake a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand." *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002).

Here, Ms. Tekbali relies on several documents in her report in which MDC employees set forth supposed procedures and requirements at the MDC for fighting COVID-19. *See* Tekbali Rep. at 4 (citing Vasquez Deposition Transcript); 6 (citing King Deposition Transcript and Declaration of Lt. Cmdr. Jordan). But these statements reflect the MDC's aspirational policies and procedures; they are not based in the reality of what is actually occurring at the MDC. Ms.Tekbali has not visited the MDC nor engaged in conversations with individuals incarcerated there. Because her knowledge of the facility's practices derive solely from statements by MDC employees about MDC procedures and requirements, Ms. Tekbali has no basis on which "[t]o

conclude . . . that MDC *is following* proper infection control protocols that are adequate and in line with the standard of care and CDC guidance." *Id.* at 7 (emphasis supplied). This lack of factual basis for her opinions about the facility's practices "renders the analysis unreliable" and therefore "renders the expert's testimony inadmissible." *Amorgianos*, 303 F.3d at 267.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that the Court grant their motions in limine.

Dated: May 9, 2020
New York, New York

EMERY CELLI BRINCKERHOFF
& ABADY LLP

/s/ Katherine Rosenfeld
Katherine Rosenfeld
O. Andrew F. Wilson
Samuel Shapiro
Scout Katovich
600 Fifth Avenue, 10th Floor
New York, NY 10020
(212) 763-5000

CARDOZO CIVIL RIGHTS CLINIC
Betsy Ginsberg
Cardozo Civil Rights Clinic
Benjamin N. Cardozo School of Law
55 Fifth Avenue, 11th Floor
New York, NY 1003
(212) 790-0871

Alexander A. Reinert
55 Fifth Avenue, Room 1005
New York, NY 1003
(212) 790-0403

DEBEVOISE & PLIMPTON LLP
Yeugenia (Jane) Shvets
Noelle E. Lyle
919 Third Avenue
New York, NY 10022

(212) 909-6000

Attorneys for Petitioners and Putative Class

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HASSAN CHUNN; NEHEMIAH McBRIDE; AYMAN RABADI, by his Next Friend MIGDALIZ QUINONES; JUSTIN RODRIGUEZ, by his Next Friend JACKLYN ROMANOFF; ELODIA LOPEZ; and JAMES HAIR, individually and on behalf of all others similarly situated, Petitioners, *-against-* WARDEN DEREK EDGE, Respondent.	No. 20 Civ. 1590 **DECLARATION OF KATHERINE ROSENFELD**

I, Katherine Rosenfeld, an attorney duly admitted to practice in the Eastern District of New York, declare under penalty of perjury and pursuant to 28 U.S.C. § 1746:

1. I am a partner at Emery Celli Brinckerhoff & Abady LLP. Along with the Cardozo Civil Rights Clinic, Alexander A. Reinert, and Debevoise & Plimpton LLP, we represent the Petitioners and putative class.

2. I submit this declaration in support of Petitioners' motion *in limine*.

3. Attached as Exhibit 1 is the transcript of Telephonic Proceedings of April 13, 2020 in this action.

4. Attached as Exhibit 2 is the transcript of Telephonic Proceedings of April 25, 2020 in this action.

5. Attached as Exhibit 3 is an email from Respondent's counsel to Petitioners' counsel dated April 28, 2020.

6. Attached as Exhibit 4 is Respondent's Letter to Petitioners dated April 24, 2020.

7. Attached as Exhibit 5 and filed under seal are seven paper sick-call requests in which incarcerated people in the MDC reported COVID-19 symptoms, as excerpted from BOP_SCR 889-922 produced by Respondent to Petitioner on April 29, 2020.

8. Attached as Exhibit 6 is Respondent's Letter to Petitioners dated April 29, 2020.

9. I confirm that all of the documents exhibited to this declaration are true and correct copies.

Executed on: May 9, 2020
Lake Pleasant, New York

/s/
Katherine Rosenfeld

EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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	: 20-CV-01590 (RPK)
HASSAN CHUNN, et al	:
	:
Petitioners,	:
	: United States Courthouse
	: Brooklyn, New York
-against-	:
	:
	: April 13, 2020
WARDEN DEREK EDGE,	: 1:00 p.m.
	:
Respondent.	

- - - - - - - - - - - - - - - - - X

TRANSCRIPT OF CIVIL CAUSE FOR PETITION
FOR WRIT OF HABEAS CORPUS
BEFORE THE HONORABLE JUDGE RACHEL P. KOVNER
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S:

For the Petitioners:	EMERY CELLI BRINCKERHOFF & ABADY LLP 600 Fifth Avenue, 10th Floor New York, NY 10020 BY: KATHERINE RUTH ROSENFELD, ESQ.
	BENJAMIN N. CARDOZO SCHOOL 55 5th Avenue Eleventh Floor New York, NY 10003 BY: BETSY R. GINSBERG, ESQ.
For the Respondent:	UNITED STATES ATTORNEYS OFFICE EASTERN NEW YORK 271 Cadman Plaza East Brooklyn, NY 11201 BY: JAMES R. CHO, ESQ. JOSEPH ANTHONY MARUTOLLO, ESQ. SETH EICHENHOLTZ, ESQ.

ALSO PRESENT, DIERDRE VON DORNUM, ESQ.

Court Reporter: **SOPHIE NOLAN**
225 Cadman Plaza East/Brooklyn, NY 11201
NolanEDNY@aol.com

Proceedings recorded by mechanical stenography, transcript produced by Computer-Aided Transcription

(Telephonic conference.)

THE COURT: This is *Chunn versus Edge*. It's 20-CV-1590 and I would ask the parties state their appearances.

MS. ROSENFELD: Katherine Rosenfeld and Betsy Ginsberg for petitioners.

THE COURT: Great.

MR. CHO: Your Honor, if I may, James Cho for the Government and I can introduce my team as well. We have Seth Eichenholtz, U.S. Attorney's Office, Joseph Marutollo, U.S. Attorney's Office; Paulina Stamatelos, U.S. Attorney's Office; Lisa Olson, DOJ Federal Program; Kieran Howard (phonetic), Bureau of Prisons Regional Counsel and Holly Pratesi (phonetic), Bureau of Prisons.

I'm James Cho, U.S. Attorney's Office.

THE COURT: We also have Judge Mann on the line too.

MS. VON DORNUM: Dierdre von Dornum. I just joined.

THE COURT: Okay. So I know we've had a bunch of calls in this case, but I will just repeat my general conference call request which is, if you are speaking, if you could identify yourself at the start so the court reporter can take it down and try not to overlap with each other that would be helpful because that's hard to take down.

So I think we have a bunch of matters relating to discovery to talk about and I think the first bucket of them

are whether discovery should be allowed given that this is a habeas, whether discovery should be expedited and whether discovery should be stayed. So they are all pretty closely related questions I think, but that's sort of the first bucket of things that I have.

Well, I have read submissions that were put in on this up until an hour ago and I see that the Government just put in a submission maybe a half an hour ago and I received that -- because my ECF doesn't update immediately, I received it five minutes ago and I've sort of scanned it, but I have not read it in great detail. So let me turn it over on those three issues to you all; if there is anything you want to add from the submissions that were put in as of Saturday night, including the Government if there is anything you want to call to my attention from this letter that wasn't developed in the earlier submissions.

MR. CHO: The letter we submitted to Your Honor about a half an hour ago was in response to your order from Saturday asking us to be prepared to discuss objections to the discovery requests. So we outlined, I think in great detail, our overall objections to the discovery demands. Certainly our position is; one, we intend to dismiss and certainly no discovery is necessary on a motion to dismiss. So we want to request a stay of discovery for that reason, but also in federal habeas cases, courts generally do not provide for

discovery in those types of cases, and again this is a habeas case as well.

THE COURT: Got it. Okay.

Since I read your letter on this, is there anything else you want to add on whether the discovery should be allowed, whether discovery should be expedited or whether discovery should be stayed?

MS. GINSBERG: No, Your Honor. I don't think we have anything to add and I would say that I have also only scanned the respondent's long letter that we only just received and didn't actually know it was coming in our earlier meet and confer today, so I would be happy to respond to any of the objections they raised here, but we haven't gone through their letter thoroughly yet.

THE COURT: Okay. So on the issue of whether to allow discovery, I take the point that habeas petitioners are not entitled to discovery as a matter of ordinary course under the ordinary civil rules. I think both the Government and the petitioners agree, though, that there this is a good cause standard under which courts can allow discovery and so here I'm citing *Gracie versus Cramley* (phonetic) which is a Supreme Court case and it says: Where specific allegations before the court show reason jato believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief, it's the duty of the court to a provide

the necessary facilities and procedures for an adequate inquiry.

So under that I think courts look to whether if -- depending on how the evidence were developed, if petitioner could have a claim that that's something the courts consider in deciding whether to authorize discovery. So here I think that the may standard is a relatively low bar and the things that the petitioner is seeking discovery on are things that are relevant to an Eighth Amendment claim could potentially make out an Eighth Amendment claim at least potentially under a may Standard.

So petitioners should put forward evidence in their TRO papers suggesting there is some basis for disputing some important things about the conditions of the compliance at the MDC; the inmates saying they don't have access to soap. You have numbers suggesting that there is very, very little testing going on at a facility that is recently large. I don't remember the exact number in the most recent report, but it's on the order of about seven people tested in the most recent report. It's a large facility I think of about 1,500 or so people. And then you have the petitioners putting forward in their TRO paperwork some inmate accounts suggesting that there are people who are symptomatic and not being tested.

As you all know, there are a bunch of conditions of

confinement cases being litigated now during the COVID epidemic and I do think these questions of testing protocols and access to soap and sanitation are the kinds of things that courts are treating as a potential basis for an Eighth Amendment claim where one recent case focused very specifically on those two things where I think a TRO was issued recently.

So I'm not myself addressing making any decision obviously about the merits of any of those claims, but I think we're not talking about a may standard. I think we are talking about a relatively low bar because this here is good cause to allow some discovery into those things.

The respondent has argued some about the TRO in this case and highlighted that I didn't issue a TRO, but it does seem to me that there's a very different standard for a TRO than just for authorizing discovery. It's a pretty high bar to get a mandatory injunction at the very start of your case, but I think the standard to submit evidence that may support your claim at the end of the day is a lower one. So that's as to whether discovery should be allowed and I think it's reasonable to have some discovery here. There is due cause for some discovery here.

So then I think the next issue is that should discovery be expedited and here again I think it is a reasonableness or a good cause standard and one of the cases

that I look to is Judge Lynch case, *Ayyash versus Bank Al-Madina*, 233 FRE 325, SDNY 2005. So looking at the cases under -- certain cases addressing expedited discovery, it seems like it's a reasonableness or good cause is a flexible standard.

One thing that courts sometimes look to is whether a preliminary injunction request is pending or being made, expedited a factor but is not sufficient in and of itself. Other things they look at are the purpose of the discovery and the burden on the opposing party and here it seems to me like this is a pretty narrow discovery request being made and we can talk more about whether any specific pieces of it are burdensome or unreasonable.

But this is a relatively limited request seeking information that's relevant to the claims and I don't think it's going to be especially burdensome and, of course, it is a somewhat time-sensitive matter in light of the epidemic. So I think there's good reason to move forward quickly in this case in light of that. So it seems to me like there's good reason to have expedited discovery here.

So then the question is -- and obviously these factors are all pretty overlapping, but the stay of discovery question involves a number of similar factors. The petitioners argue that a good cause standard applies to this also and I don't take respondent to be disputing that there's

a good cause standard for a stay of discovery because they cite -- as setting out the standard that they want for stay of discovery, they cite this case *Spencer Trask Software and Info Services*, 206 FRD-367, and that's a good cause standard case.

So starting from that case, it says and other cases say as well: A stay pending a motion to dismiss is by no means automatic. You shouldn't routinely stay discovery simply because a motion to dismiss has been filed. Instead, you should consider the breadth of discovery sought, the burden of responding to it and the strength of the dispositive motion as a basis for the stay application.

So those are basically factors that I've talked about before with respect to burden and breadth and the only additional factor is the strength of the dispositive motion and here I think the petitioners are right that basically the respondent hasn't told us a lot about what the motion is going to be and that makes it hard to conclude much about the strength of the motion at this point.

The arguments that the Government was making at the TRO stage were mostly merits arguments which is completely appropriate to the TRO stage, but it's not clear to me that any of those -- obviously a motion to dismiss, there's a relatively limited set of arguments that can be made on that type of motion and it's not clear to me from papers that I've seen at this point what the strength of a motion to dismiss

will be.

And so, taking into account all those factors, I don't think that a stay is appropriate, you know, as with some of the earlier discovery points that respondent has alluded to, denial of the TRO as one of the reasons to stay discovery, and again I would say a mandatory TRO is very, very hard to get and I don't think a plaintiff's inability to meet that high standard with respect to the particular relief that we are seeking on a particular record shows that respondent has a meritorious motion to dismiss which I think is the real question when what is being sought is a stay in order to litigate a motion to dismiss.

So that's where I am on those preliminary issues which is, just to recap, under a good cause standard some discovery here is appropriate and it's appropriate to expedite that discovery. And based on what I know now, I'm not inclined to stay the discovery. So insofar as there is a stay request pending now, I would deny it. That kind of moves us to the scope and timing issues unless there is anything else you all want to talk about on those preliminary matters.

Okay, go ahead.

MR. CHO: Nothing from the Government at this time.

THE COURT: Okay. I think that what I am anticipating on scope and timing is that I'm hoping we can develop a little bit more what the objections are and I'm

anticipating that we may issue -- I may jointly with Judge Mann issue, an order on some of those issues. I may play more of a secondary role in talking through some of these discovery questions beyond this call because Judge Mann has expertise in these matters that exceeds my own.

But maybe a place to start will be -- and I think part of this may be addressed in the letter that the Government filed, so I'm just flagging that you may need to recapitulate some of it because I haven't had the opportunity to read it thoroughly and I think your friends on the other side may not have either, but if I'm right about the document demands, the three things that are being requested are the testing protocols from February 1st to date at MDC for COVID-19, documents that show how much soap was received at the facility from February 1st to date, and sick call requests from March 13th to date in redacted form.

Maybe it would make sense for us to talk about each of those in sequence.

Is there an objection to the testing protocols?

MR. CHO: I can go through our objections, which I also outlined in our letter as well, but for document request number one requesting testing protocols, those protocols are already being produced to the Court pursuant to Administrative Order 2020-14. That order specifically says the BOP needs to produce protocols for screening and testing inmates which is

exactly what the petitioners are seeking here in document request number one.

So we would obviously object on the grounds that that information is already available to petitioners on the Court's website and that information will continue to be updated pursuant to that administrative order. So that was the basis for our objection initially to that request.

THE COURT: If I remember right, I think that in their earlier letter petitioners suggested that the information that you're providing to the Court in the letters doesn't really say what the protocols are; it doesn't say whether you're testing people when they're symptomatic or what criteria your applying when you are deciding whether to test people. I don't want to get into a fight about whether or not what you are filing was contemplated in the administrative order which I think is part of what petitioners are raising, but I take it that petitioners' request is basically tell us what criteria you're applying to test people.

Is that something you think you are already disclosing?

MR. CHO: Yes, Your Honor. The request that was filed on Friday all it says is testing protocols for COVID-19 in effect at the MDC and that's also what the administrative order requires as well; protocols for testing inmates. So it it's almost verbatim. They don't ask for anything else on top

of that.

MS. GINSBERG: Your Honor, while the letter response to the administrative order talks some about the screening protocols, they do not explain what the testing criteria are. They say how many people have been tested but that's not the testing protocol and criteria. And so we're not here either to talk about whether they are in compliance to such order, but rather this is information that we need in this case.

THE COURT: So do you want to respond to that with a clarification of what they're looking for in some explanation of, when people are tested, what the criteria are for that? That doesn't seem like what you're providing already and it seems that's what they're looking for.

MR. CHO: Well, I can certainly refer to our responses to the administrative order, but again I can only rely upon what they ask for and they only asked for testing protocols and we believe we've already responded to those requests. I mean, we can certainly meet and confer with petitioners on that request but, I mean, their demand says what the says and it's identical to what the administrative order requires.

JUDGE MANN: I lost power this morning, so I can't even access ECF. So I haven't seen the Government's letter at all, let alone not had enough time to review it. So I'm at a great disadvantage, but I guess a more-pointed question I

would ask is this: Since the demand is not -- it's not an interrogatory, it's a request for documents, is it the Government's position that there are no responsive documents regarding testing protocols and the criteria used to determine when to administer tests other than what is set forth in the response to Judge Mauskopf's administrative order?

MR. CHO: At this time the Government is not prepared to say there are or not additional documents, but we certainly know the documents that have already been produced to the Court are certainly responsive because they're asking for same information. But I can't say, as we sit here today, that there are no additional documents.

JUDGE MANN: Well, since petitioners' counsel indicated that what they're looking for specifically would be documents that set forth what the testing criteria are, let's just drill down on that particular area. I take it you're not disputing that what's been posted on the website, the Court's website, does not contain such criteria; can you say whether or not there are documents that specify the testing criteria?

MR. CHO: I'm not sure whether the responses from BOP don't address that. I'm not exactly sure. I'd have to go back and check the submissions that have already been provided to the Court. So I can't say for sure whether they do or do not address that question.

MS. GINSBERG: Your Honor, I'm looking at the April

9th letter to Judge Mauskopf now and there is nothing in there about testing criteria at all. The fact that the Court asked for this doesn't mean that it's here and I think also Judge Mann pointed out to the extent that there are documents setting forth what those criteria are, we would ask for those.

MR. CHO: Your Honor, if I may, I think the nature of our discussions now reflects the reason why perhaps this call may be premature with Your Honor because, look, we have submitted our objections. We haven't had a chance to meet and confer in-depth with petitioners and they're raising additional inquiries now that we were not aware of before this call. So I don't know how productive it will be having a discussion with Your Honors on all of these points without having had those discussion.

Because, again, their request on Friday was very short. It just said testing protocols and now they're seeking information on testing criteria which is different from what they had requested before. So I just don't know how productive an ongoing discussion on each of these requests will be at this time without at least having the parties have a chance to talk about these issues and the Court having not seen our letter.

JUDGE MANN: Well, I certainly would and must defer to Judge Kovner on this, but my own view is it might be useful just to air some of these issues to help focus the parties in

their discussions and to assist the two judges in coming up together with some rulings.

MS. GINSBERG: Your Honor, the parties spoke today and we inquired as to whether there was anything else to meet and confer about. This isn't new. I don't actually think we're asking for something different right now, I think the protocol for testing includes the testing criteria and we would certainly like to hash this out now as much as possible given the need for expedited discovery here.

THE COURT: So let's at least talk through -- it sounds like testing protocols, the Government is not certain whether there are more written documents that exist beyond what's been given to the Court or submitted to the Court; is that right?

MR. CHO: That's correct, Your Honor.

THE COURT: Okay. And the objection I'm hearing is basically that insofar as what's being requested is for protocols and that it's protocols and information that has been submitted to Judge Mauskopf.

Judge Mann, do you want to ask anything else about that?

JUDGE MANN: Well, I guess the one thing I would want clarification from petitioners, in addition to testing criteria, is there other information that you are seeking in your document demand number one, that is not addressed in the

reports to Judge Mauskopf that have been posted?

MS. GINSBERG: Yes. What I see in those letters to Judge Mauskopf is the number of people tested and the number of people testing positive. So what we're looking for is their protocol, what procedures they follow in deciding who and when to test and how someone might request a test. So I don't see any of that laid out in those responses to Judge Mauskopf. And, so, we assume there must be a document that lays out what those are and whether that's a memo or an e-mail or something telling the people at MDC here is who you test. And, obviously, if no such written document exists, we would want to know that as well.

It strikes me as odd that at this stage in the litigation that the respondent isn't aware as to whether there's any document laying out what the testing protocol is.

THE COURT: Just to drill down on what you're seeking from the defense is what other criteria are being applied besides when testing occurs and how would you request a test; is that right?

MS. GINSBERG: Yes, Your Honor.

JUDGE MANN: I believe also petitioners indicated what procedures were followed regarding who and when to test and how requested. And the Government at the present time is unaware whether there are any such documents apart from the letter sent to Judge Mauskopf, so I don't think the Court can

decide anything at this point except ask the Government to look into that.

MR. CHO: Your Honor, should we talk the second request?

THE COURT: I was asking about the second request, which was documents to show how much soap was received at the MDC from February 1st to date.

MR. CHO: Your Honor, so, one overarching argument or objection that we have to the extent they're seeking information dealing with all inmates at the MDC and not just the two remaining petitioners Rodriguez and Rabadi. In their letter from Saturday, they say they are not seeking classwide discovery nor have they moved for class certification at this time. So one overarching objection we raised in our letter is that to the extent any discovery touches on information dealing with all inmates at the MDC that that request is overly broad and not important to the needs of this case.

In terms of specifics as to soap at the MDC, there are different departments within the MDC that order soap separately. Our records dealing with purchases and shipments of soap at the MDC are not maintained centrally or electronically. So there's some difficulty on the part of MDC to provide a quick response to that request for all soap shipments to the MDC at this time.

So we will certainly continue to discuss this

question with the BOP, but that was our initial objection to that overbroad request. But certainly to the extent that there are documents available dealing with soap shipments, we will provide those responsive documents if they are not privileged.

JUDGE MANN: How many different departments at the MDC put in orders for soap?

MR. CHO: At this time I don't know a specific number.

JUDGE MANN: When you say they're not maintained centrally, I assume we're not talking about the Bureau of Prisons, you're saying they're not maintained centrally even within MDC?

MR. CHO: That's correct. There are district departments within the MDC that make purchases as they see fit and there's not one centralized purchasing department or entity that could purchase soap at MDC.

JUDGE MANN: But you don't know how many departments there are, so you don't know -- you're saying that it's burdensome, but you don't know if there are two versus fifteen different departments?

MR. CHO: Right. Again, we just got the request. They're still checking but that's the information that I've been provided at this time.

JUDGE MANN: And you also say that it's not

maintained electronically. They don't have any record of invoices for example? Nothing is maintained electronically?

MR. CHO: Well, they're asking for shipments and what was received at the MDC. They're not asking for invoices. So certainly a request could be made for soap, as I'm sure all of us know now, we may make a request now, but we may not have the shipment anytime soon. So they're asking only for shipments and I'm not 100 sure -- I mean, we're trying to uncover the invoices but I'm not exactly sure of the shipments and how that would be recorded.

JUDGE MANN: But there may be an electronic record that is invoices?

MR. CHO: There might be, but there may not be as well. I'm not 100 percent sure because if an individual orders an online shipment that may be saved electronically but I'm not sure.

JUDGE MANN: So I take it you don't know, if there is an electronic record of the invoices, whether those invoices would have anything on it about estimated delivery date or actual delivery date?

MR. CHO: That's correct.

MS. GINSBERG: One of the reasons why we think this request is particularly important and quite narrow is that we have been receiving reports that there hasn't been soap handed out on the units in at least a week. And, you know, certainly

it seems like this information would be on invoices when it was shipped. There may even be records of distribution within the facility.

I would also note that BOP is on this call and to the extent that they can provide additional information, that could potentially move things along more quickly.

MR. CHO: I do want to note, Your Honor, that we're dealing with only two petitioners here and to the extent they have not received soap, they can certainly provide evidence to the Court in terms of which soap they have been able to use or what soap they have received. So, again, this broad request for all soap deliveries to the MDC is just far beyond the scope of the current litigation.

THE COURT: Well, it's true that the petitioners can submit their own evidence about a lack of soap, including a lack of soap for these two individuals. The Government has submitted a declaration that soap is being distributed and I'm thinking the Government would argue that it's to the two individuals here. If it's just focusing on the two individuals' claims, wouldn't evidence about whether soap was or was not being brought into the facility bear on whether these two individuals are getting soap or not?

MR. CHO: Your Honor, whether shipments of soap are coming into the MDC, it's different from whether these two petitioners are getting soap. Right? So it may be coming in

or certainly be there and if these petitioners aren't getting soap, then we don't see the relevance of shipments of soap to the MDC.

THE COURT: Well, let's say that evidence showed that no soap had been delivered to the MDC from February 1, 2020 to date and let's say that the Government was drawing on the declaration that individuals were getting soap and the two named petitioners were saying that they were not getting soap, isn't the evidence about whether any soap came into the MDC during that period be relevant to assessing those claims?

MR. CHO: Well, an argument can also be made if the MDC already had soap there is no need for additional soap shipments to be sent to the MDC.

THE COURT: There are other things you could argue. I guess it would depend on whether you might be able to put forward evidence that there was soap in the facility, you might not. It just seems like the evidence is relevant to these two individuals' claims even though you might make argument that the best explanation is the lack of soap orders or something else.

MR. CHO: Understood, Your Honor, but what we say in our letter is we will look for responsive documents and if any documents do exist, we will produce those documents.

THE COURT: Okay.

Judge Mann, is there anything else you wanted to ask

on the soap issue?

JUDGE MANN: Nothing beyond what Your Honor has already stated.

THE COURT: So then I think the final document request is that sick calls requests made from March 13th to the present in redacted form to omit the person's name and number.

MR. CHO: Your Honor, if I may correct that?

THE COURT: Yes.

MR. CHO: So, initially our response to both Rodriguez and Rabadi have indicated to the SDNY judges that they are asymptomatic. So presumably they would not have made any sick call requests. So their request for sick call is far beyond the scope of this litigation and we would certainly object to sick call requests for all other inmates at the MDC -- at any given time there are 1,700 inmates at the MDC -- for a couple of reasons.

First, sick call requests touch upon an inmate's private, confidential medical history and they have privacy rights which are not implicated in this case because they are nonparties to this litigation. And so the BOP certainly objects to producing sick call requests for anyone other than these two petitioners.

JUDGE MANN: I'm sorry, I just wanted to ask one question that goes to the HIPAA argument that you're making.

HIPAA, doesn't that relate to information with an identifiable patient so that if it's redacted it would not come within the HIPAA privacy requirements; isn't that correct?

MR. CHO: Understood, but to the extent we go through these sick call requests whether they have a name on there or not, or a registration number, we don't know whether that information could still implicate a certain inmate. For example, if people know a certain inmate has a certain condition which is reflected in the sick call request, people may still be able to figure out who the inmate is based on the conditions identified in the sick call request.

But I do want to add, in our letter to the Court, that we are prepared to produce medical records for these two inmates Rabadi and Rodriguez. We submitted to petitioners' attorneys this morning a HIPAA release for their medical records and we will conduct a search for any sick call requests that those two inmates have made. But in terms of sick call requests generally, there are many methods by which an inmate can request a sick call.

They can make an oral request to a BOP staff member, they can get a staff member a hard copy piece of paper requesting sick call or they can also submit a request electronically using the Trulincs system. So many of those methods would be maintained in the inmate's own medical record. So it would require the BOP to respond to this

request to go through all 1,700 inmates' medical records and other documents that those inmates may have to identify whether sick call requests were made. And, again, with the electronic systems there are certain records that are maintained electronically and an inmate could send an electronic request through Trulincs, but again those are requests made by the inmates and we would have to go through those inmates' e-mail accounts to identify at those sick call requests.

THE COURT: If somebody submits a sick call request through one of these methods, then at the point at which they are authorized by BOP and before a doctor sees them, I would think there is some central channeling mechanism, a doctor or another staff member --

MR. CHO: Well, when an inmate makes these sick call requests, it's the BOP position that they want to address those concerns as soon as they can. So either they may be scheduled to see a medical professional or the medical professional may respond immediately to their request without there being any paperwork or paper trail reflecting that request being made and the response to that request.

So there are many ways for inmates to receive medical care and that's why the BOP does it this way so if there are any issues an inmate can seek relief through the sick call process because they are given multiple avenues by

which to make those requests.

THE COURT: Just to make sure I understand this, just to go one by one, let's just set aside the oral requests for a moment. If somebody submits a hard copy request, is that request maintained anywhere after that aside from the individual person's file?

MR. CHO: It could be or may not be. I know those requests are then sent to the medical unit to schedule but what happens beyond that it may be maintained or it may not be maintained. The important thing is that the inmate gets seen by a medical professional. I think that's what the BOP's primary concern is.

THE COURT: I understand that, but I am trying to figure out what kinds of records exist and how they might be compiled. So I'm wondering if you know whether once somebody submits a hard copy request if there is a folder used to hold the sick call requests -- whether there's a centralized compilation of it or not.

MR. CHO: There may be, but I'm not sure.

THE COURT: Okay. And then through the Trulincs system, I'm sure these requests are kept in the individual e-mail account but I would think that they are also kept in the account of the recipient.

MR. CHO: Right. The thing is those requests can be made to multiple people, it doesn't have to be just one

person. For example, an inmate can make a request to their unit team who are not medical professionals. They can make a request to the medical staff. So there are many different repositories by which the call can be made but certainly those are electronic so conceivably there's a way to retrieve those electronic documents. But I believe in petitioners' letters they said they're not seeking ESI or electronic data at this time but certainly there is a mechanism by which sick call requests are made electronically but through multiple choices.

THE COURT: I was just asking, you can make a request to multiple sources if you're an inmate; if you're a recipient for a request like that, do you send it to a single centralized source?

MR. CHO: That's the thing, Your Honor, I don't think it's necessarily centralized. The reason why they do it this way is to make sure inmates have multiple ways to seek relief or to be seen by a physician. So certainly we can look into where these requests are sent ultimately, whether it's the medical unit or some other unit, but again there are multiple avenues by which they can make these requests and I don't necessarily think it's centralized.

MS. GINSBERG: Your Honor, my understanding is that it is somewhat centralized. My understanding is that BOP has taken a position that all sick call requests are made electronically and that they all end up in a centralized

location electronically. Obviously BOP can get back to us on exactly how that goes, but my understanding is that's how it goes. If there happens to be hard copy requests that somehow don't get logged electronically, we're not asking that the respondent go through individual medical records to look for those although my understanding is that also medical records are maintained electronically.

Our request here is to be able to look at how medical care is being delivered during this epidemic to understand whether people who need care are able to get care including the petitioners. So, we have said that they are at heightened risk for infection and have said that the facility is unable to care for them should they become infected and, so, the ability for the medical system to handle these requests and to address them in a timely way is critical to our claim.

Certainly to the extent that we're able to ask about some of this in the 30(b)(6) deposition, it may obviate the need certainly for looking through individual medical records to get at this information. Although, to the extent that it's all centralized and electronic, we think that should be easy enough to gather.

THE COURT: Do you have a response to the HIPAA claim?

MS. GINSBERG: My understanding on HIPAA is

consistent with what Judge Mann said which is that where the documents are deidentified there is no HIPAA concern. It is also true that HIPAA contains a provision that allows for the court order of confidential medical information. However, I don't think that matters here because we're not asking for anything that would violate HIPAA, Your Honor.

THE COURT: Judge Mann, is there anything else you want to ask about this medical request issue?

JUDGE MANN: I don't think so.

THE COURT: Okay. So should we talk about the 30(b)(6) at this point?

MR. CHO: Sure.

MS. GINSBERG: Sounds good, Your Honor.

THE COURT: Again, Government, this might be something that you have addressed in the submission that recently came across ECF. So you may just need to recapitulate any thoughts you have.

MR. CHO: Sure. So in the 30(b)(6) notice we received yesterday afternoon they set forth nine topics and by my count 46 subparts for a total of 55 distinct topics. Certainly our position is initially based on our read of the 30(b)(6) notice that the request is overly broad and very far reaching. In their letters they say they only seek to depose a witness but presumably, based on the 55 topics they have identified, I don't believe it would be possible to identify

just one witness who can address all 55 issues.

On top of that, we did have a brief meet and confer this morning regarding 30(b)(6). Many of these requests or many of the topics in the 30(b)(6) could be responded to through other discovery methods either through document requests or interrogatories. For example, in topic one they ask for total numbers of employees that can be responded to in either a document request or an interrogatory. Topic number two talks about housing units and to identify housing units. Again, that can be responded to in a document request as well and the other topics as well.

They seek housing assignments. For example in topic three; medical care available at MDC in topic four; procedures in topic five; rules and regulations in topic six; more procedures in topic eight; and removal in topic nine. Again, those are more akin to requests for documents or interrogatories and we think those are more-preferred methods to be able to respond to those requests for information.

THE COURT: It sounds like there was a meet and confer about the Rule 30(b)(6) this morning. I don't know if petitioners have thought about whether some of these requests could be handled through document requests or interrogatories.

MS. GINSBERG: Sure, Your Honor. You know, what respondent has just said is that document requests and interrogatories are the preferred way of handling this. I

think that means it's their preferred way of handling this, but it's certainly not our preferred way. And the reason it's not our preferred way is because we're looking for expedited discovery. We think that 30(b)(6) is the most efficient way to do this.

The respondent has said that we have lots and lots of topics in here. We could have noticed this 30(b)(6) deposition with the topics just being, you know, the MDC's response to COVID-19. The reason that we laid it out as we did was because we thought that would help expedite things. If we told the respondent everything that we intend to ask about in the deposition, it would allow them to prepare more quickly, to understand what it is we're looking for in the deposition rather than just seeking more generally about the response to COVID-19.

In terms of the number of witnesses, it's up to them whether they decide to present one witness who either has knowledge of these topics or who obtains knowledge of these topics or whether it's easier for them to just include different people to talk about the topics that they're most familiar with. When, during the meet and confer I asked whether there wasn't an individual who was tasked with responding to the MDC -- responding to COVID-19 on behalf of the MDC, they didn't know and I think that is an important thing for them to know and if there is someone I would imagine

that that person has knowledge of these topics and could speak to these topics.

THE COURT: Judge Mann, is there anything you want to ask about this 30(b)(6) issue?

JUDGE MANN: Not beyond what's been discussed and I obviously want to take a look at what the Government submitted earlier today.

Maybe I should ask, Mr. Cho, does your letter of this afternoon address these specific 30(b)(6) topics?

MR. CHO: We do in general form, Your Honor, given the time. We had less than 24 hours to review it before this call. We noted our initial objections generally to what we saw in the 30(b)(6) notice, but what I do want to apprise Your Honor is based on our meet and confer. We're not objecting to the 30(b)(6) objections, but we do object to the scope of the requests as made and I indicated to petitioners' counsel that to the extent they can further limit their request they may be more productive for us to be able to identify appropriate 30(b)(6) witnesses. We don't have a blanket objection to depositions generally, but we do object to the scope and the breadth of the topics that they're seeking at this time and we invited them to further limit their requests.

JUDGE MANN: Speaking for myself, I'm actually surprised to hear the Government say that the preferred way would be by responses to interrogatories or document demands

because if there are someone who is tasked or a group of individuals tasked with responding to COVID -- for example, take item number two, they may know off the top of their heads the response to that question about the housing units; whereas it would seem to me that it might be more burdensome to say, okay, go search for documents or having to write out responses to interrogatories that are then sworn to by that individual.

Now, I personally think that item number one that might be -- since we're talking about numbers, that an individual may not remember it, that one is more appropriate for an interrogatory, but for some of the others I'm a little puzzled that the Government would think that it's less burdensome to have to go search for documents, whether it's to produce the documents or whether it's to then provide interrogatory responses, so I would just ask the Government to, you know, to clarify and respond to that.

MR. CHO: Sure, understood.

Well, with respect to topic number two where they are seeking information dealing with housing units, again, typically when it deals with housing units those are documents where certain inmates are located. So one specific BOP official may not actually know where all inmates are housed at any given time at the MDC because there's always movement within the MDC. So essentially documents can show where inmates are being housed at any given time but a BOP official

may not know where any single inmate is at any given time.

JUDGE MANN: Well, I assume that in responding to that whether whatever form the discovery demand is in, you are not going to be searching for the records relating to individual inmates. So that -- wouldn't there be someone who knows what the MDC -- where the MDC has been placing individuals who are in isolation or quarantine without having to go search records?

MR. CHO: Well, in topic two they talk about people placed in isolation, people admitted to the facility, people transferred within the MDC. So these are inmate-specific decisions and I understand Your Honor's perspective of what about entire units, but I'm not sure if a response can be given that way because one inmate may be in an isolation unit today, in a quarantine unit tomorrow, in the SHU the next day. And so that fluctuates based on the inmate himself or herself.

So I think this just goes to the point of how the request is extremely broad and it's going to be difficult for us to ascertain exactly what they're seeking. Right? We are open to them limiting their request perhaps to the two particulars because that's easy. We can retrieve that information quite quickly, but for all 1700 inmates at the MDC that's a different story.

MS. GINSBERG: Your Honor, I think it's hard to imagine how to interpret topic number two as asking to be told

where each individual person at the MDC is being housed. What we want to know is which units specifically are being used for isolation, for quarantine, for exposure, where new people being admitted to the facility are being housed and for how long; where people are being transferred within the MDC. So I don't -- I don't think that that's a reasonable interpretation of what we're asking for here.

JUDGE MANN: I get your point about A and B. I understand those to mean you are asking which units are on isolation or quarantine, which units are new people being assigned to. I'm not sure I understand what C is asking.

MS. GINSBERG: So, Your Honor, I think with C what we want to know is about movement within the facility particularly from intake into other units and between isolation and non-isolation, quarantine and non-quarantine, because our understanding is that at least some of that has been happening inappropriately in a way that might further the spread of infection in the facility.

JUDGE MANN: Let me ask counsel for petitioners, is it the name of the unit that you're interested in or the general question of whether or not there is a specific housing unit or units in which -- in which quarantined or isolated individuals are placed due to suspected COVID-19 exposure and so on with respect to B and C. Is it you want to know whether there are particular units being used for those purposes or

whether there is no specific unit?

MS. GINSBERG: Well, I think it's both whether there is such a unit or are such units and also which units are so designated.

JUDGE MANN: Sorry, I'm hung up on this one piece of it but what is C? Is there a specific unit to which people are being transferred from -- I'm not sure I understand it. Is there a sentence you could give me that rephrases that request?

MS. GINSBERG: Can I try my hand at it? Just transfers within the MDC went from general population to the SHU. I assume that's what it's getting at are their intra-facility transfers, am I correct?

MS. ROSENFELD: Judge, just to jump in because I think I may have written this confusing sentence.

Yes, that's exactly right, Judge Mann. So we understand, that is right, people come into unit 41 through intake and then they're transferred. They went to unit 42 and then some people from unit 42 went to unit 72. So we just want to understand during the recent time period where intra-facility transfers have occurred, which unit.

MR. CHO: Your Honor, just to let you know and it is an issue that we haven't really addressed yet, but there are obviously security concerns dealing with where certain inmates are placed. Certain inmates cannot be placed on the same

unit; for example, they may be cooperators for the Government in criminal cases or there are other reasons why certain inmates can't be located within units with other inmates.

So again, as I read topic number two, while there may be general questions about certain types of units, ultimately where inmates are placed is an inmate-by-inmate specific inquiry that we can't ignore because decisions are often made based on a lot of criteria including separating information, because inmates can't be placed next to each other due to they are being cooperative with the Government for other reasons. So those are inmate-by-inmate inquiries.

JUDGE MANN: But I take it petitioners aren't asking for you to identify particular inmates and explain why they were placed in certain locations. Right? They're just asking you to say where inmates are placed in these particular categories; whether they're in isolation or quarantine, when new people are admitted to the facilities and then to explain or to say where inmates have been transferred to and from. So are you asserting that that implicates security concerns?

MR. CHO: Well, not just topic two, but I think one overarching question that petitioners are seeking here is why certain decisions were made. So I don't think you can divorce that inquiry from these attorneys' concerns. Right? I think that's one of the inquiries that they have in these requests overall; that they want to know why certain decisions were

made, why certain inmates were placed in certain areas within the MDC.

JUDGE MANN: I don't know how many inmates there are now. I know it was over 1,700. Is it down to 1,500 now?

MR. CHO: No, it's still hovering around 1,700 as of the past couple days, Your Honor.

JUDGE MANN: Do you happen to know just ballpark, of the 1,700 inmates, how many of people are subject to separation orders or requests or something similar that would be one of these overriding concerns that you have just referred to?

MR. CHO: Your Honor, that information is looked at for every single inmate. Those are part of every inmate's file. They look at those concerns for everyone. It's not just a select few.

MS. GINSBERG: Your Honor, I don't know why we're talking about this. We're not asking for any information about a particular individual. We're asking more generally here how they are housing people with exposure, with symptoms, who are newly admitted to the facility or moved around the facility. We're not asking about the particular placement of a named individual. So I don't think any of what we've asked for here contemplates any of these attorneys' concerns that we are talking about.

THE COURT: Did you have anything else to the

30(b)(6) issue?

MR. CHO: Not at this time, Your Honor.

THE COURT: Judge Mann, do you have anything else on this point?

JUDGE MANN: No other questions at this time.

THE COURT: So then I think the other discovery request is the notice of entry. I'm looking at the letter and I see there's some discussion of that subject again, but I have only just scanned it so I would be grateful if the Government would tell us where they are.

MR. CHO: Sure. Initially, we object on the grounds that petitioners have already submitted to the Court for expert reports dealing with conditions at the MDC for which they claim petitioners should be released. So any additional inspection of the MDC is unwarranted because these four experts, including the one they want to go back to the MDC for an inspection, have already expressed their unqualified opinions as to conditions at the MDC and in none of those expert reports have they said that they need an inspection of the MDC to come to their conclusions about how conditions are at MDC and that would warrant release of these petitioners.

So our additional objection was on the grounds that no expert inspection is necessary and would be duplicative of what is already in before Your Honor in terms of their expert declaration.

We had specific requests on top of that and I can go through those one by one. Certainly some of the requests from the inspection for logbooks and posted orders can be responded to in a document request or interrogatory, so an inspection would not be necessary for that request. The request is not limited by any specific time period or duration or scope or nature. Another objection is that the petitioners' attorneys and their expert want to confidentially interrogate incarcerated individuals.

There are two regulations that require a process -- well, I take that back. They also want to inquire of staff members as well. So with respect to the staff members, there is a process by which under the Touhy regulations that they need to make a request to the DOJ to talk to any staff members. But it's the Government's position that there should not be any discussion with staff members while they're working at the MDC and, in fact, one of the orders that they referenced in their Saturday letter, one of the orders specifically forbids the attorneys to conduct any interviews of inmates or staff members and that was cited in their letter to the Court. That was the *Mack versus City of New York* case, number 14-CV-3321 in the Southern District of New York, docket number 36.

But with respect to interviews of inmates, certainly the inmates have a right to privacy and not be subjected to

such interviews and we're not quite sure what the term "confidential" means, whether it means respondents cannot be present during those interviews.

We also note that presumably all these criminal defendants or inmates have had or currently have criminal defense counsel and there's no indication here that they would allow their criminal defense lawyers to be present during these confidential interviews, and we certainly object to any confidential interviews on the grounds that we cannot ascertain who these individuals talked to during this inspection, if they are indeed confidential.

Now, the request asking for an inspection of the entire MDC, including units were these two petitioners have never been housed, we certainly object to the breadth of an inspection of the entire MDC. For example, they identify the women's unit. These petitioners have not been housed in the women's unit, for example, and certainly the conditions at the MDC is fluid and constantly changing and any inspection on one given day would have limited relevance to this litigation going forward because conditions do change every day.

And one more point, and this is obviously an overarching argument we have in our objections, that this is a secure facility with both minimum and maximum security inmates and classifications and allowing an open-ended inspection of the entire MDC including interviews of inmates and BOP staff

would be extremely burdensome and disruptive to the security of the facility.

THE COURT: I want to give the petitioners an opportunity to respond to any of the points there that they want to, but three particular things I'm wondering if you could address are the utility of the site inspection by Dr. Venters given that he's already opined on these issues without having conducted a site visit, and then the issue of interviewing inmates and interviewing staff members including the Touhy issue and the counsel issue, and I would be interested if you have any site inspection cases where that has been ordered and then if there's any cases where scope of the facility issue giving access to the other staff.

MS. GINSBERG: So, with respect to the need for the inspection, of course we have experts who presented declarations to the Court about their understanding of COVID-19 and what was happening at the MDC, but my guess is that if we were to present these experts at a PI hearing they would be questioned about their knowledge of specifically what is going on right now at the MDC and we would want them to be able to testify with some particularity about what they see at the MDC. These Rule 34 inspections are quite common in prison litigations when we are talking about processes and procedures in medical care and certainly nobody has claimed that Dr. Venters is not a qualified expert to do this. And, of

course, having him be able to really evaluate and look at what is happening in the facility as someone with those correctional health and epidemiological experience, I think would provide great knowledge to the Court.

So I don't think it would be duplicative of what he's already put in or the other experts have already put in because none of them have had access to the facility and I think maybe my colleague wanted to also jump in on this point.

MS. ROSENFELD: I did, thanks Betsy.

Dr. Venters has not opined at all about conditions within the MDC. If you look at his declaration, it's a very short declaration that we put in on an expedited basis, but basically at paragraph 5 he talks about -- he's informed that there's one prisoner and two staff members who are positive and he opines on sort of epidemiologically where he would expect infections to be generally, and then in paragraph 6 he opines very generally about best practices for facilities managing COVID epidemics.

There is nothing in Dr. Venters' declaration about MDC in particular, how they're handling this. It was a statement in general of best practices for disease management within jails; so the Government is not correct that Dr. Venters has already opined on conditions within MDC. He did run the jailhouse system at Riker's Island for many years in many capacities, including during other infectious disease

outbreaks. And as my colleague said, having this expert go into the facility and see what is actually going on, how is social distancing being implemented there, where are medical staff in relation to where people are living, those kinds of things are extraordinarily useful and it can very easily and straightforwardly be done without interruption to the facility.

As Your Honor is probably aware, last winter there was a court-ordered inspection that involved Judge Torres and MDC, but Ms. von Dornum, who is also on the phone, conducted a two-person inspection under a court order. I think she said it was around two hours. They were accompanied by several BOP officials who are on this call. It was very uneventful and not disruptive in any way. So we certainly think that, given the long practice of allowing medical experts to go into prisons to gain the kind of firsthand knowledge that you can only gain by seeing and being somewhere in an orderly and careful way is appropriate here.

MS. GINSBERG: Your Honor, as to the question to employees that we've included in the notice of inspection, this is something also that happens regularly. In a case that I think we cited in our letter, *United States versus Dearie,* the civil division of the Justice Department took the position that this is permissible under the rules, that it's important in order to allow the expert to understand how processes

within -- in that case it was a jail -- worked, and it's something that in my 20-plus years of civil litigation experience happens all the time.

On the Touhy issue, my understanding is that what those regulations address are testimony and we're not asking for testimony. We're not asking that those statements go into the record, but it's really important for the expert to be able to speak to people in the facility, to say, hey, what is this; hey, what do we use this area for, to enable him to actually conduct the inspection properly. So I don't think that falls under Touhy.

With respect to what respondent called confidential interrogation -- and I would reject that characterization. We're not looking to interrogate anyone -- anyone our expert would speak to, they would speak to voluntarily. And in response to their concern about not ascertaining who they spoke to it would be in plain sight, but I think the reason that it's important that these are confidential and what I mean by that is it's really out of the earshot of the rest of us.

I think some people are fearful of reporting things right now. They're fearful they're going to end up in the SHU if they say they have symptoms. They worry about retaliation if they report conduct and so in order to protect them we would like our expert to speak to them somewhat

confidentially. We are not asking for a private room. We're talking about in-unit conversations out of earshot of the rest of the tour.

You know, in terms of the criminal defense counsel issue, I'm not sure this would be an issue that criminal defense counsel would be concerned about and of course we have Ms. von Dornum from the Federal Defenders who could certainly speak to whether her office would object to any of this. I would also note that BOP employees spoke to the two petitioners outside of their criminal defense counsel and outside of our presence. So that concern doesn't -- doesn't --

JUDGE MANN: Well, can I ask you just one question more specifically about that? As you all know, the EDNY and I'm sure at SDNY, folks are getting many, many bail applications that raise conditions of confinement issues and also compassionate release applications is raising those issues. So I guess I'm wondering if there were interviews that were being conducted about the nature of the conditions over there, it seems like you would be talking to people about the kind of issues that they may have pending and requests to the court about in their own cases.

MS. GINSBERG: It's certainly possible and I'm not sure -- I mean, we could certainly try to figure out a way to avoid those issues and we could certainly ask people about,

you know, whether they have submitted any requests or have attorneys representing them in those circumstances so that we don't ask them about things in which they're already represented. We could also speak to people who are represented by the Federal Defenders Office on consent from the Federal Defenders that they are fine with us speaking with clients at their office.

MS. VON DORNUM: Your Honor, I apologize for jumping in. First of all we would consent to our clients, even those with pending motions and perhaps particularly those with pending motions, being interviewed and I can do that on a formal basis if that's useful, but when I went on the blackout tour of the MDC ordered by Chief Judge Irizarry, I went with EDNY U.S. Attorney's Office Investigator John Ross. He and I walked around the facility, as counsel mentioned, for a couple of hours, escorted by staff.

He and I went up to each cell together and explained to the inmates exactly who we were and what we were going to ask about and said to each person you do not have to talk to us if you are at all uncomfortable, here is what we're asking, it could be publicly reported. And I would note that when Judge Torres went that I was with her again, three days later led by a troop of prosecutors, she also just made very clear to people that you don't have to talk to me at all, that that's totally up to you.

So there could be some objections, but I do think there are ways around that and we could also obviously inform defense lawyers in advance of when the expert would be going and that they could tell us if there are people they did not wish to be spoken to. So I think there are definitely ways around that issue. And of course, although we would be talking about conditions, we would not talking about their cases which is as you know some part of what the compassionate release motions hits on is the 3553(a) factors and I think those are the sensitive parts for the inmates, not whether they've been getting soap or not.

And just in terms of the inconvenience or burden to the facility, when I walked around with Investigator Ross and we were escorted by legal counsel and one of the assistant wardens, we were there for several hours and did not seem, even in the SHU, to disconcert any of the staff. We didn't get in anyone's way, we went exactly where they told us, but we were by direct order of the chief judge able to speak directly to inmates and to staff and both did speak to us. And as Ms. Ginsberg says, I do believe only two gave testimony and the BOP legal counsel did not object to us talking to staff and staff came up to us and volunteered information as they may well wish to do here.

But just to say I think it could be accomplished without too much disruption and we came basically unannounced

on a couple of hours notice, so this would be with even more notice, but it did not, as far as I know or as far as anyone has ever said, caused any problems for the facility.

JUDGE MANN: Well, was there an order in Chief Judge Irizarry's case? Do you know the docket in that case?

MS. VON DORNUM: Yes, I do, it was an administrative order. I believe it's docketed on the court website under administrative orders. It's from January -- I'm sorry, it's from February 2nd and there was no case. It was during the blackout and she just ordered us in.

I think at the very outset -- I don't know if it was Ms. Ginsberg or Ms. Rosenfeld, you had mentioned that there was another case that you were relying on but my phone chose that moment to be a little bit indistinct, so I wanted to ask you about that again on the interviewing issue.

MS. GINSBERG: Yes. That's *United States versus Erie County*. It's a 2010 Western District of New York case.

MS. VON DORNUM: Okay.

MS. GINSBERG: That was brought by the United States Department of Justice.

MS. VON DORNUM: Okay.

MS. GINSBERG: Your Honor, just one final point. We included a number of cites in our letter to cases where we, as lawyers, have gone into the facility and we also described a case where we went to the Riker's Island facility with expert.

The cases where lawyers have gone to tour jails for the purpose of understanding where a specific incident might have occurred, like an incident of excessive force; obviously different than the medical expert inspection. And the Macks case was one of those cases where lawyers went to simply look at photographs of a place where an incident of violence had occurred and so there was no need for interviews. I just wanted to draw a distinction.

THE COURT: Yes.

MS. GINSBERG: Your Honor, I think some of the other orders included would be more akin to what we are talking about. Your Honor also asked about, you know, orders generally and one thing I would note is that in a lot of cases, and certainly in the most recent Rule 34 inspection that I did, there would be no order because oftentimes the parties negotiate these including with staff interviews and confidential prison interviews. Certainly the last time I did this all of that was included in the ultimate Rule 34 notice, but never an order from a court.

THE COURT: The warrant issue --

MR. EICHENHOLTZ: Your Honor?

THE COURT: Yes.

MR. EICHENHOLTZ: If I may quickly, Seth Eichenholz from the Government. I was the discovery officer in the civil division for a long time and I just wanted to weigh in very

briefly on the Touhy issue. Obviously Touhy would not apply to these inspections in state and city facilities the plaintiffs are referring to. I also am not clear whether Touhy would apply in the context of which Ms. von Dornum is referring to where it's outside of litigation.

But within litigation, Touhy regulations apply to documents, information and testimony about those documents. So I do believe that they would apply in this case and I think it's an issue that -- I'm sure Your Honor isn't ruling at this moment about it, but it is an issue that I don't think should be dismissed as easily as I heard from petitioner.

MS. VON DORNUM: Your Honor, I was just going to ask that when I returned with Judge Torres it was under active litigation in *United States versus Winston Perez* and she directly interviewed a number of staff, including the warden, the SHU tenant, the electrician. It was all on the record with a court reporter and there was no Touhy objection lodged -- but there were many, many prosecutors there so that is not to say that one could not be lodged, but she did exactly that and on the record with a court reporter during that litigation.

JUDGE MANN: So, Mr. Eichenholtz, the text that you read -- which I think you're quoting from the regs or paraphrasing it -- was documents, information or testimony about those documents and where is it that you think this

would fall within that group?

MR. EICHENHOLTZ: I believe it would be information. Information because it's not sworn testimony. So it would be providing information about BOP's policies and procedures which, pursuant to the Touhy regs, is not information and not documents, but it was in the possession, custody and control as an individual but rather in the United States and they would be providing that information in the context of their role as an employee of the United States, or in this case the BOP.

It doesn't have to be a complicated process in terms of seeking approval and the regulations I think would tend to allow for approval in certain situations, but you can't just walk up to a BOP staff member. It would be the Government's position that for information we need to know who is going to be approached in advance and the Government would need the opportunity to approve that individual to provide that information.

THE COURT: Well, let me ask petitioners, I think the last question I had to you all in response to the objections that the Government had raised was the issue of the physical scope of the toured facility and I wanted to know if you wanted to respond to that and the women's unit does seem like the place where that argument is especially strong perhaps, although I understand the Government is making a

broader argument.

MS. GINSBERG: On the women's area, I think our concern with the MDC generally is that there are staff moving, staff and other employees, moving around the facility, and just as they cannot unfortunately limit the virus to one place within the facility, we wouldn't want to limit our inspection because clearly what they're doing in other parts of the facility impact where the petitioners are going to be.

That said, we would certainly be open to some narrowing and not going to actually every single housing unit, but, for example, maybe not going to the women's unit and having the opportunity to request certain housing units based on what we understand they're doing in those different housing units.

THE COURT: Judge Mann, do you want to go down any the notice and --

JUDGE MANN: I'm sorry, Judge Kovner, was that addressed to me because you were very indistinct.

The only additional question that I would ask is, apart from the objections that the Government has articulated in its letter and during this proceeding, do you have any specific objections to the proposed expert, Dr. Venters, in terms of his qualifications?

MR. CHO: We may, Your Honor, but we haven't had a chance to fully vet and evaluate his credentials.

THE COURT: Okay. I appreciate you all talking through the discovery issues. I think you all submitted kind of different proposed timing on different events in this case and I wonder if you all have a thought on how to proceed. Do you want us to evaluate and so order a schedule or do you want to meet and confer about it further or how do you propose that we proceed?

MS. GINSBERG: Your Honor, I think our preference would be, given the need for expedited discovery that the Court has acknowledged, that the Court enter a discovery schedule that we don't meet and confer on this and we just move forward with discovery.

MR. CHO: Your Honor, I think it would be productive for us to have additional time to meet and confer with petitioner's counsel. As we have said today, there are a lot of open issues. We're seeking further limitation in terms of their discovery requests. I think it would be more productive for us to have that opportunity to meet and confer like a normal course to kind of hash out some of these issues before coming back to Your Honor for a discovery schedule.

THE COURT: The timing that you all proposed, it seems to have certain dates and then -- I think the third entry on here is respondent provides responsive documents or objections and discovery demands and responses or objections to notice of inspection. So it seems like that schedule was

contemplating that you would already have an additional opportunity to come back.

Well, do you want more time? Because it seems like you are going to have some time built into the schedule for raising objections to the petitioners' discovery demands if you want to under either parties' schedule, so do you want more time even before a schedule is set?

MR. CHO: Well, we set forth our schedule on Friday taking into account anticipated discovery demands from petitioners. Again, I'm trying to streamline discovery here and if we can work out some things I think that's great. But, you know, we set forth our schedule in our letter on Friday so that's our position today but certainly we would be open to trying to resolve some these issues beforehand.

MS. GINSBERG: Your Honor, we appreciate that in the normal course we would take more time to meet and confer and of course we would do that, but I think that where we are right now in this case and in the world is anywhere but normal and we have been really trying to move things along and I think that having a schedule set now that does build in some additional time to have the Court hear objections on discovery issues, allows for whatever the Government might need there, but also allow them to press forward and to take this discovery. And I think my colleague also has something to add there.

MS. ROSENFELD: Yes, I just wanted to let you know that we think it's -- the expedited schedule to be set by the Court is incredibly important. We are happy to confer with counsel once the schedule is set to work on issues as they come up, but we do think a schedule is needed. Just today we received information from people at the facility who reported that there were multiple ambulances at the facility this weekend; that officers are telling symptomatic persons that there are not enough tests, that the fifth floor and the eighth floor are on quarantine with conditions being extremely bad; dirty, garbage not being collected; that there is no soap or toilet paper on Unit 72; that there are serious staff shortages such that the assistant warden was handing out commissary on Unit 72 on Friday; that people were making medical requests for attention that are not being responded to. This is all just information that was trickled down to us today.

So I know that the Court is aware of this, but we feel that it is urgent. There are now four reported positive tests at the MDC as of April 12th and 12 staff members. So we feel that every day that goes by that we're not getting information and moving forward is a lost day.

JUDGE MANN: Would Judge Kovner prefer if I just sign off now so as to not disrupt the rest of the proceedings?

THE COURT: Absolutely not, unless you want to. I'm

fine with the beeping.

JUDGE MANN: All right. Well, again I apologize.

I do have one question and I think this should be one that maybe we can just take it off the checklist and that is, is the Government going to be seeking to serve any discovery demands on petitioners?

That's one of the items that's included in the proposed case management plan containing deadlines.

MR. CHO: Yes, we do intend to serve discovery, Your Honor.

JUDGE MANN: All right. I would just add that, in terms of going forward, there were a number of questions that came up and Mr. Cho indicates that he didn't have the answers and I think it would be very useful to get answers to those questions very quickly because that may determine the scope of the discovery and how much time is needed.

MR. CHO: Understood, Your Honor.

THE COURT: So unless Judge Mann has anything else on this, maybe we should take all of this under advisement at this point.

JUDGE MANN: I don't have anything further. Fortunately, no beeps either. I guess the one non-discovery-related thing that is on my list is the issue of timing for a motion to dismiss and I think the Government proposed a schedule for that.

Government, is that still a schedule you want or is that something that is contingent on -- that you don't want me to order at this point?

MR. CHO: Yes, that's still the schedule that we would like, Your Honor.

JUDGE MANN: Okay.

And Ms. Ginsberg, is that schedule amenable to you?

MS. GINSBERG: Yes, Your Honor, it is.

JUDGE MANN: Okay. So then that's at least one thing I can quickly accomplish.

THE COURT: Anything else from either side?

MS. GINSBERG: No, Your Honor, not from Petitioners.

MR. CHO: And nothing for the Government, Your Honor.

JUDGE MANN: Well, thanks again. I appreciate you all jumping on this call and spending so long and also all of your work over the holiday period.

MS. GINSBERG: Thank you, Your Honor.

MR. CHO: Thank you, Your Honor.

THE COURT: Thank you.

JUDGE MANN: Goodbye.

(Matter adjourned.)

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EXHIBIT 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CHUNN, et al., Plaintiffs, - versus -	**Docket#** 20-cv-01590-RPK-RLM U.S. Courthouse Brooklyn, New York
EDGE, Respondent	April 25, 2020 11:00 AM

TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE CONFERENCE
BEFORE THE HONORABLE ROANNE L. MANN
UNITED STATES MAGISTRATE JUDGE
AND
THE HONORABLE RACHEL B. KOVNER
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiff:

Betsy R. Ginsberg, Esq.
Alexander A. Reinert, Esq.
Benjamin N. Cardozo School
55 5th Avenue, Eleventh Floor
New York, NY 10003

Katherine R. Rosenfeld, Esq.
Scout Katovich, Esq.
O. Andrew F. Wilson, Esq.
Emery Celli Brinckerhoff
& Abady LLP
600 Fifth Avenue, 10th Floor
New York, NY 10020

For the Defendant:

James R. Cho, Esq.
Seth Eichenholtz, Esq.
Joseph A. Marutollo, Esq.
Paulina Stamatelos, Esq.
U. S. Attorney's Office
271 Cadman Plaza East
Brooklyn, NY 11201

Transcription Service:

Transcriptions Plus II, Inc.
61 Beatrice Avenue
West Islip, New York 11795
laferrara44@gmail.com

Proceedings recorded by electronic sound-recording, transcript produced by transcription service

THE CLERK: This is Judge Mann on the line. I'm conducting a telephone discovery hearing in Chung v. Edge, 20-cv-1590. Before I have the parties state their appearances on the record, just a couple of preliminary observations.

Judge Kovner is on the line. She wants to be able to keep abreast of all the developments in the case, but she has asked me to take the lead in conducting this proceeding.

Also, I do understand that we do have a representative of the media on the line, and I would just remind you that you are not permitted to make recordings of this court proceeding.

Could counsel for petitioners please state their appearances.

MS. ROSENFELD: Good morning, Judge Mann. This is Katie Rosenfeld for petitioners. Also on the line and speaking for petitioners is Betsy Ginsberg, and also on the line but not speaking today are Andrew Wilson, Alexander Reinert and Scout Katovich for petitioners.

THE COURT: All right. And who is on on behalf of the respondent?

MR. CHO: Good morning, your Honors.

James Cho with the United States Attorney's

Office. I'm joined by my colleagues Seth Eichenholtz, Deputy Chief Field Division, United States Attorney's Office, Joseph Marutollo, Deputy Chief Field Division, United States Attorney's Office, and Paulina Stamatelos, Assistant United States Attorney's, United States Attorney's Office, Eastern District.

THE COURT: And do we have any representatives of the Bureau of Prisons on the line?

MR. CHO: Not today, your Honor.

THE COURT: All right. I guess unlike the rest of us, they take Saturday off.

The purpose of this proceeding was to address the petitioner's April 20th letter which is docket entry number 54, to quash Dr. Venters' deposition, the respondent's demand or notice of deposition of Dr. Venters, a letter that also raises issues regarding other discovery demands by respondents and the government's response of April 22nd, docket enter number 57 to that letter.

Literally minutes ago, I was looking at the docket in this case, and I saw that last night at 10:30, petitioners filed another motion that they asked to have addressed at this hearing, and the government this morning filed its response.

I had a very brief opportunity to review those

letters. I hope we'll be able to at least address some of those issues, but I can't promise you that they're going to be resolved today, given the limited amount of time that the Court has to consider these issues.

So let's turn first to the petitioner's April 20th motion to quash the notice of deposition, and the other issues that are raised in that letter. The government's response argues that -- opposes the motion to quash, and then with respect to the remaining issues, argues that the Court's consideration of those issues, is premature because the parties haven't completed their meet and confer regarding those issues. The letter refers to future conferrals. So let me see whether we can move on from this contretemps.

Have the parties conferred further on these other issues? That is the respondent's demands for depositions, interrogatories, and document demands of petitioners?

MR. CHO: Your Honor, I can address that for the government, if you would like.

THE COURT: All right.

MR. CHO: So we did receive responses to our interrogatories, and requests for documents, I believe on Tuesday in the evening. So we're in the process of reviewing those materials.

There's still a pending issue. We did serve notices of depositions on the petitioners that are still incarcerated, and we've had an exchange of emails, even as recently as this morning regarding logistics for those depositions. So those are still ongoing discussions that we don't think are ripe for the Court at this point.

THE COURT: All right. Ms. Rosenfeld, I heard you chomping at the bit.

MS. ROSENFELD: Your Honor, the issue of the duplicative nature of the requests for interrogatories, document demands, and depositions of the petitioners, I think is ripe for the Court because we have now been conferring about it since Tuesday, and I don't believe that respondent has been willing to withdraw the requests for interrogatories and document requests and depositions of the petitioners who are incarcerated.

So I think from our perspective, we have sent emails suggesting certain logistical issues around the deposition process, and of course we're certainly willing to work with everybody on the other team to produce the client's for depositions but I think we do need the Court to address the question of the multiple discovery devices that they seemed to want to pursue.

THE COURT: Well, respondent notes in their letter of April 22nd that they haven't moved to compel.

MS. ROSENFELD: We responded, your Honor, to the discovery -- to the interrogatories in the document requests in full because we did not want to not respond to these pending requests, and follow the schedule that the Court had set for them.

So we've already spent considerable time responding to the interrogatory and document requests for the petitioners, the original petitioners.

I think the question now is is there going to be subsequent, you know, letters, and motion practice, about the sufficiency of those responses, and should we also be required to now spend more time responding to additional interrogatories and document requests that were served for Ms. Lopez and Mr. Hair.

THE COURT: I'm sorry, there have been additional notices --

MS. ROSENFELD: There have been, yes.

THE COURT: -- or you're just saying there --

MS. ROSENFELD: No, no, there -- your Honor, I'm sorry to interrupt you, your Honor.

THE COURT: All right. So for the two additional petitioners, there now have been sets of discovery demands served on them.

MS. ROSENFELD: Correct, your Honor, last night, I think at around 11, or maybe it was earlier.

There was a lot going on last night.

And so we -- I do think that the parties can work together to resolve, I hope the deposition parameters, and the issues around, you know, how long, and what access for preparation and what safe conditions our clients can be produced in, but I do think that given the nature of this proceeding, and given the timing, it isn't reasonable or appropriate to have all of these different tools going on at the same time, and we'd like to focus on one or the other.

We're happy to do the depositions, we're happy to do the interrogatories for the new petitioners, but I haven't heard respondent be willing to confer further on the double nature of the request, so I do think it's ripe for the Court to decide that today.

THE COURT: They may not have responded --

UNIDENTIFIED SPEAKER: (Indiscernible).

THE COURT: They may not have responded, but they have not moved to compel, correct?

MS. ROSENFELD: Correct, your Honor --

THE COURT: So let me --

MS. ROSENFELD: -- but we did respond to them.

THE COURT: Well, you've now responded, and they haven't moved to compel. So certainly let's put aside the two additional petitioners with respect to, I

believe it's Rabadi and Rodriguez. Petitioners have now responded. The parties are conferring with respect to the parameters of the depositions of these individuals. So there really is no issue before the Court, absent a motion to compel by respondent.

So what needs to be resolved with respect to Rabadi and Rodriguez?

MS. ROSENFELD: The part -- for today, I think I agree with you, there is nothing else because the parties are conferring about the depositions, although if the respondent could clarify that they don't intend to have further motion practice on that, I think it would be helpful to know how everybody should proceed in terms of scheduling their depositions.

THE COURT: All right. Mr. Cho, I was going to ask that. You say that it's premature to address these issues because respondent has not moved to compel. With respect to Rabadi and Rodriguez, is it your intention to move to compel? You've now had their responses since Tuesday, which seems like years, given the time line in this case.

MR. CHO: Your Honor, this is James for the government.

These are all discovery devices that are permitted in discovery, and pursuant to the Court's prior

orders on discovery. We're looking at it holistically. Petitioners have indicated today on this call that we are still working out details for the named petitioner's depositions. So they go hand-in-hand. If we can figure out the logistics for those depositions, we may not need the necessity for moving to compel on their responses which again, we're still meeting and conferring over these issues, so we don't want to waste the Court's time dealing with something that the parties can work out ourselves.

But in the event we can't figure out the logistics for the depositions, then there may be a basis for a motion to compel because the interrogatory responses, document production would be inadequate in the absence of a deposition. So it's not one or the other. I think we look at this holistically.

THE COURT: Ms. Rosenfeld, I don't know whether you're in a position to say at this time, but have petitioners thought about who they're going to be calling as witnesses at the preliminary injunction hearing, because the expedited discovery is intended to give the parties sufficient information to be able to go forward at the hearing that is scheduled for May 12th. It is not to take full discovery on all issues, and on the complete case. So let's talk about who is going to be a witness

at the preliminary hearing.

MS. ROSENFELD: Yes, your Honor. We agree that that is the length of this, and at this point, any of our petitioners who are incarcerated as of the date of the hearing, we believe will testify. So as of today, that's Mr. Rabadi, Ms. Lopez, Mr. Hair, and Mr. Rodriguez is still incarcerated as of today, but I understand when I saw him on Thursday at the inspection, that he's going to potentially be released on Monday to a halfway house. So we --

THE COURT: I'm sorry, which petitioner will be released?

MS. ROSENFELD: Mr. Rodriguez. Mr. Rodriguez, I believe is going to be released on Monday to a halfway house. So --

THE COURT: And if that happens, does that mean -- if in fact, he's released on Monday, does that mean that you will not be calling him as a witness at the hearing?

MS. ROSENFELD: I don't know, your Honor. I certainly can say for the three people who will still be incarcerated as of the hearing, we will definitely call them. I don't believe we would need to call all of the released petitioners, but we may want to call one, or two, or we can certainly give respondent, you know,

advanced notice of that far ahead, for the reasons you describe. I just don't think on this call, we're sure about which of the released people we might want to testify about conditions that existed as of the date of their release.

Your Honor, there is, I guess, with respect to these depositions, also the issue of whether -- actually, I'll just stop there, yeah.

THE COURT: Mr. Cho, did you want to respond?

MR. CHO: Sure. Obviously, we want to know who their witnesses are, so we can take the deposition discovery on those witnesses in advance. Obviously, if they're not going to have someone testify at the hearing, more likely than not, we're not going to take their deposition, so if Rodriguez is being let go on Monday, then I anticipate we will withdraw that notice of deposition. So again, that's moot, and again, it's not ripe for this Court's intervention at this point because of these moving targets, right? If they're not going to have him testify, then we're likely not going to depose them, I mean that moots that issue.

THE COURT: And in terms of the logistics of the deposition, does the government -- the respondent have plans as to how these depositions would take place, and the availability of the equipment needed to conduct

remote depositions?

MR. CHO: Yes, your Honor. Again, this James from the government.

We're trying to make this as easy and efficient as possible. So we propose just a telephone deposition, that's it, where we could all get on a call with all the parties by phone, just like the way we're doing it now for these depositions, just like the inmate calls into the Court for bail hearings, and whatnot as well, it would be the same exact mechanism by which we would conduct these depositions.

THE COURT: Well, this is news to me because the Court has not been conducting bail hearings with the inmates participating telephonically. If they're in custody in the cases before me, their lawyers have waived their participation, and the telephonic hearings have been with counsel, but not with the inmates. So that's one of the reasons that I asked logistically how you plan to go forward with depositions.

MR. CHO: If I may then, let me clarify. Maybe it wasn't bail hearings, but I know there have been some court proceedings where defendants have participated remotely in those court proceedings. I know my colleague, Seth Eichenholtz has been working on the issue with the Federal Defenders in making them available for

these legal calls. So they do have access to telephones.

MR. EICHENHOLTZ: Your Honor, this is --

THE COURT: How long -- yes?

MR. EICHENHOLTZ: -- Seth Eichenholtz.

THE COURT: Mr. Eichenholtz?

MR. EICHENHOLTZ: Yes, I was just going to weigh in very quickly because this has, for the most part, been my life for the past three weeks.

Yeah, so what's happened is there's a protocol in place for both the Eastern and the Southern District that's permitting, and it started kind of last week, but in earnest, this past week, that's producing telephone, and/or video appearances by inmates for criminal proceedings in court. I believe the time slots are 9 a.m., 10 a.m., and noon, every morning.

I know that there were some telephonic hearings from the EDNY this past week, and we're moving towards the system as Mr. Palmer gets the EDNY with a Zoom -- I think it's Zoom for Government System, where inmates will be able to do video appearances, as well.

I think the government -- you know, there is limited capacity, unfortunately, at MDC to make these appearances, and so that is, I think the one piece that I'll work with Mr. Cho, and the rest of the team on our end, then petitioners to try and find the time when we

can have -- our vision would be, the petitioners appear by phone, you know, but it's the exact same facility. They'd appear by phone.

We'd also, you know, I know that counsel also wants some prep time, so we try and work out all those details, but that is, I think the vision that we have the inmates appear as they have been for the past week or so for court appearances.

THE COURT: Well, before we move on from this issue, let me just make the following observation. I was on arraignment duty this past week. It was very busy. There is a written protocol in place for video conferencing capacity from the MDC, and the MCC. It is -- at this point in time, it's only a written document. It's aspirational. It was not in place this last week.

When, and if it is up and running, it will be -- for the MDC, it will be video conferences on the hour, Monday, Wednesday, and Friday in the mornings. The MCC will be for Tuesdays and Thursdays. So we're not talking about availability at the MDC every day of the week. So I just want to make that observation, so when the parties get to the point of addressing logistics, if that's the video conferencing capability that you're planning to use, just be aware of its limitations.

Also, does this mean that the respondent

anticipates that those depositions would be no more than an hour each?

MR. EICHENHOLTZ: Your Honor, Seth Eichenholtz again.

I just wanted to point out that the reason that those are -- it's only available from MDC on Mondays, Wednesdays, and Fridays, is because the SDNY certainly has Tuesdays and Thursdays.

And so I think that we'd need -- right, we'd need to find either some slack time, or sometime where staff would be available outside of those hours, which is pretty limited, but we'd have to work on that.

I would defer to the rest of the team. I think we're still conferring regarding timing of the deposition, but obviously, we're aware --

THE COURT: Timing, you mean the duration? You're talking about the duration of the deposition.

MR. EICHENHOLTZ: Yes, duration.

MR. CHO: Your Honor, this is James.

I can address the duration. We've indicated to the other side that we intend these depositions to be fairly short, and efficient, and streamlined. So we don't anticipate an all-day deposition. Given the expedited nature of these proceedings, I can't say it's going to be an hour. I think we suggested perhaps two

hours, just to build in some leeway, but I do anticipate these to be very short depositions.

MS. ROSENFELD: Your Honor, may I respond briefly to some of this?

THE COURT: Yes.

MS. ROSENFELD: So I just want to sort of step back for a second. I think there are two issues here that we're talking about; one is the discovery that's appropriate in advance of the preliminary injunction hearing, maybe there's three.

One is, the disclosures that need to be made in advance of the hearing about who will testify at the hearing and how, which the parties have not yet conferred about, and then the other, I guess, is the hearing itself.

With respect to this proceeding, we commenced it on Friday, March 27th. At that time we commenced with next friends, for two of our petitioners because we were not able to speak to them. So Mr. Rabadi, for example, was commenced via next friend of his common-law-wife, Ms. Quinones (ph.).

We have now spoken to our clients by phone once, and at the MDC yesterday, or on Thursday, I was able to speak to Mr. Rabadi and Mr. Rodriguez through the food slot of their cell doors for about five or ten

minutes with other counsel close-by.

So this is obviously an extraordinary proceeding. In the context of a pandemic we're saying is threatening the health and safety of the people who are incarcerated and work at the MDC. And so we very intentionally sought very expedited discovery, and very limited discovery, three kinds of documents, one deposition.

The respondents are attempting really to conduct full discovery here, your Honor, and the idea that these depositions are going to occur, I don't -- it's not clear to me how we would be able to meet with our clients to prepare them, that they would be in a safe and hygienic space for these depositions. I think we can confer about that, but the issue does remain for the Court's decision with respect to the two new petitioners as to whether the duplicative sets of discovery is appropriate, and I do think that the context here which is that we've spoken to Ms. Lopez and Mr. Hair, once by phone. We have almost no access to our own client.

And so we want to provide information, but we've also suggested that, you know, we might provide declarations in advance of the hearing, and similarly accept those, and that testimony might be on direct through declaration, and then cross at the hearing.

But the government doesn't seem to be willing to concede that this type of proceeding, and these sort of exigent circumstances mean that none of us are going to have perfect advanced information about all of the facts in advance of the hearing, when we have to do our best.

And so I do think the Court's guidance on whether the duplicative discovery as to new petitioners would be helpful today. We obviously have an ongoing duty to supplement our discovery responses that we made last Tuesday. So the fact that they may opt only to proceed with depositions doesn't remove our obligation to continue to supplement, if those are in fact correctly serve.

Mr. Cho also said that they want to depose everybody who is going to testify at the hearing which again, sounds like normal, full discovery in advance of trial, not in advance of an expedited preliminary injunction hearing.

THE COURT: All right. The petitioners are arguing that the discovery that's being sought by respondent is the equivalent of full discovery. They've made that argument this morning. They made it in their letters, and they're seeking expedited discovery on an expedited -- and they're seeking full discovery on an

expedited time line.

This court is not at this point going to get into specifics of the document demands, the interrogatories, the scope of the depositions. I think it would be premature to do that, and in particular with respect to the new petitioners, there hasn't been any written application made. The Court has not been provided with the discovery demands that have been served on them, although I presume I will be hearing that they're the same as those that were served on Rabadi and Rodriguez.

In any event, at this point in time, I'm not going to be down into the weeds with the parties, but I will say this, that the test that most courts apply in determining whether to allow expedited discovery, and if so, the scope of that discovery, is a flexible standard, a reasonableness, and good cause.

And in that connection, the Court should balance the need for expedited discovery against the breath and the burden of the discovery that's being sought.

This is a case in which the respondent is seeking full discovery from the petitioners on an expedited basis when the petitioners are in lockdown in a federal facility, and their attorneys have limited access

to them. And under the circumstances, this is the -- the scope of what they've sought is not reasonable. The demands for purposes of preparing for preliminary injunction hearing are overly broad. So the parties are to go back and confer in good faith to narrow what petitioners are required to do, in order for the government to have what it needs to prepare for the preliminary injunction hearing.

All right. Let's now address Dr. Venters' deposition. Let me ask counsel for respondent does respondent anticipate calling any experts at the preliminary injunction hearing?

MR. CHO: We haven't seen Dr. Venters' report yet. So we're not sure what he's going to say. Again, this is James for the government.

So a lot of it depends on the opinions that he articulates in his report. If there are certain opinions, or theories that he expresses for which we require a rebuttal expert, then we would anticipate identifying an expert, yes.

But if the opinions he expresses can be addressed by the witnesses that we already have on behalf of the BOP, then experts -- rebuttal experts may not be necessary, but again, that depends on what he articulates in his report.

THE COURT: Well, if that's the case, when do you -- when would you be serving a rebuttal report and would the petitioners have an opportunity to depose respondent's rebuttal expert?

MR. CHO: I have to look at the dates. I believe their report is due on April 30th. So on Thursday. So we would need at least a few days to identify an expert, and to provide a rebuttal to that. But it would certainly be our intention if we do identify an expert, and produce a report, to make him or her available for a deposition in advance of any preliminary injunction hearing.

THE COURT: Ms. Rosenfeld, do you want to address that?

MS. ROSENFELD: Oh, I'm sorry, your Honor, I was on mute.

I think when we first served the case management plan, we suggested to Judge Kovner that we would serve an expert report by date X, and we would make the expert available for testimony at the hearing, and it's our view that that's still the appropriate procedure for this kind of hearing for both sides. I mean, I think we -- in the normal course of regular discovery, we would have a report, and we would have depositions, and we would have all of the things that Mr. Cho is seeking, but

given this type of proceeding, it seems excessive, and we just feel that the parties should get each other's reports. If they're going to have a rebuttal report, and read them, and prepare a cross, and do the testimony at the preliminary injunction hearing, and just get to the merits.

You know, we are very anxious to have the preliminary injunction hearing occur on the schedule that Judge Kovner set, the conditions at the facility are bad, and every extra step here that's going to create more delay, and more time, and more burdens, it seems unnecessary.

MR. CHO: Your Honor, I need to correct myself, and I apologize. This is James for the government.

I'm looking back now again at the discovery order, docket number 43, and it provides in here that our expert report would be due May 5th. That day may have changed because I think the briefing on the preliminary injunction motion may have fluctuated, but the current discovery order or at least as of April 14th, provided for a date by which our expert report would be due, so I apologize for getting that.

THE COURT: All right. I'm looking at the docket entry 43, and I see that that document does include a reference to a deadline for any expert report

by respondent. I will make this observation, and that is both the petitioners' deadline for any supplemental expert report, and the deadline for respondent's expert report were the same dates as for the respective submissions on the preliminary injunction.

Judge Kovner has granted the request for two additional days for the briefing on the preliminary injunction. She was not asked to, and did not address the dates for serving any expert reports, so I don't know what her intent would be or what the parties' intent would be but it may well be that those deadlines were also moved, but her order didn't address that, and I don't believe the parties' submissions did either.

MR. CHO: I think the intent was for those dates to include both the brief and the reports. I think that's what we had consented to.

MS. ROSENFELD: That's correct. That was also the intention that the date for the submission for each side would be moved back by two days.

THE COURT: So if --

MS. ROSENFELD: So we're (indiscernible) --

THE COURT: -- that's the case, and if Judge Kovner agrees, then we're talking about respondent's expert report would be due by May 7th, which is a Thursday, and then have the hearing scheduled for the

following Tuesday, the 12th.

So when would the deposition, if there were going to be depositions, when would the deposition of respondent's expert take place?

MR. CHO: Well, one, I'm not sure whether we're going to actually have an expert on that. So that's still up in the air, but assuming we do identify an expert, we would certainly endeavor to make him available at any point in time between now and -- I'm sorry, between and the 7th, and the 12th, whether it's during the day, evenings, or even weekends, but again, I would have to check, assuming we'd get an expert on the expert's availability, but I think we would anticipate making him available at any point in time before the preliminary injunction hearing itself.

MS. ROSENFELD: And your Honor, I guess this just sort of -- I think your questions point out why we think this is unnecessary. I mean, each expert would be deposed, then there's a transcript, then people are going to have briefing based on the transcript, or there's some submission to the Court in advance of the preliminary injunction hearing about whatever information was gleaned from these depositions.

It just adds an additional layer of unnecessary inquiry here. I mean, I think everybody on this call is

a good lawyer, and we can get the reports, and we can question the experts at the hearing on Tuesday. I just think that adding these depositions, and the need for transcripts, and digesting of them, and presenting the evidence from the transcripts to the Court is not appropriate for this type of expedited proceeding, and again we're very concerned that the hearing not be delayed in any way.

And how would these depositions be conducted? Are we talking about telephonic hearings -- video conference -- not hearings, depositions?

MR. CHO: Your Honor, this is James from the government.

We anticipated for Dr. Venters' deposition can either by video, telephone, whatever is easiest for all the parties. We're open to any mechanism by which we conduct those depositions.

THE COURT: Does anyone else want to be heard on this issue?

MR. CHO: And one more thing, we also, given the timing, we even suggested if it's easier for them to depositions after hours, or even on weekends, we would make ourselves available at any point in time to conduct his deposition.

MS. ROSENFELD: And --

THE COURT: All right.

MS. ROSENFELD: -- and while we appreciate that, the sentiment, you know, we don't want to -- we don't think it's necessary, and frankly, we don't want to ask Dr. Venters or your expert to be available in the evening, on the weekends, for a deposition that we don't think is even necessary.

THE COURT: All right. I'm prepared to address this dispute. The petitioners have moved to quash the deposition of Dr. Venters. Respondent contends that conducting this deposition will streamline the hearing testimony by eliminating the need to go into exploratory areas that they would do as part of discovery, as opposed to a focused cross-examination.

I will say that the respondent has cited a series of cases supporting the propriety of expert depositions, all or at least most of those do not deal with the preliminary injunction context. So what we have here is a very compressed time line, and whether or not given that very compressed time line, it makes sense to have the parties conducting depositions.

The Court believes that it is not prepared to quash Dr. Venters' deposition. However, it is this Court's view that having him prepare a complete, supplemental expert report that he signed, and made

available for deposition is, under the circumstances, and given the expedited nature of the discovery, duplicative and unnecessary.

Judge Kovner did not expressly address whether or not the parties were required to serve signed expert reports by their experts. The parties had proposed deadlines for filing -- for serving expert reports, deadlines that corresponded with their briefing of the preliminary injunction issue, but she did not require it, and has not addressed it.

And it seems to me that given the fact that this needs to be a streamlined discovery process, that it makes more sense that if there is going to be a deposition, that then the expert -- in lieu of providing all the expert discovery that is normally required, if an expert is retained for litigation purposes, and that's set forth in Rule 26(a)(2)(B), that in lieu of that, and in order to assist the examining party in preparing for depositions, it's appropriate for the Court to say that the parties can instead utilize the procedures that are set forth in Rule 26(a)(2)(C) which usually applies to experts who are not retained specifically for litigation purposes.

The most typical example of that would be a treating physician who is going to serve as the expert in

a personal injury action. So if we are -- since we are talking about expedited discovery in a very compressed time line, if Dr. Venters is going to have to be made available for a deposition, to have him first write out all his opinions in a detailed report, and then be deposed on that in order to assist the government to prepare for a hearing thereafter, it seems like a lot of make-work, and unnecessary.

And therefore, it's this Court's ruling that the parties can confer and decide, does respondent want a written from Dr. Venters, or do they want his deposition? And if they want his deposition, then petitioners need only provide the information provided under Rule 26(a)(2)(C), which is counsel's summary of the expert's -- the matters on which the expert will opine. I mean, that's a very (indiscernible) but the parties should comply with Rule 26(a)(2)(C).

And similarly, with respect to the respondent's expert, if any, the parties should confer and petitioners should determine whether or not they want to signed report from the expert, or whether they want to take a deposition of the expert.

And I would further note that with respect to 26(a)(2)(C), there is not a need to provide the kind of detailed background information that normally would be

provided for specially retained expert such as a list of all proceedings in which the expert has testified for the last four years.

Respondent already has Dr. Venters' very lengthy CV, and to require him, and the petitioners to have to produce a list of every proceeding in which he's testified in advance of the preliminary injunction hearing is unnecessary.

Does that mean that that discovery would not be available down the road in the event that this case goes forward in the future? No. When we get to full discovery, that's information that could be made available at that point.

Is there anything else we need to address with respect to the deposition of Dr. Venters?

MR. CHO: Your Honor, just --

MS. ROSENFELD: I -- go ahead, James.

THE COURT: I'm sorry.

MR. CHO: Your Honor, James from the government.

Quick question.

THE COURT: Yes.

MS. ROSENFELD: If we go the route of just the written reports by Dr. Venters, and not the deposition, would his testimony at the preliminary injunction hearing

be confined to the four corners of his report, and nothing else?

THE CLERK: Hello, Judge Mann?

MR. CHO: She may have fallen off.

THE CLERK: I'm going to try to get Judge Mann back on the line.

MR. CHO: I heard some beeping.

THE CLERK: Yes. I'm going to text her now.

(Pause)

THE COURT: This is Judge Mann back on the line. My call failed. I'm sorry for the interruption.

What I started to say is that there is precedent on this issue. I'm not going to start making rulings now with respect to what clarifying testimony exceeds the scope of what's in the report, but for the most part, yes, an expert who serves a written report may not then at a hearing or trial, opine on matters not addressed in the expert, signed report.

MR. CHO: Well, thank you, your Honor.

THE COURT: And I don't know, Mr. Cho, whether respondent is prepared to state at this time whether you still want to have a deposition of Dr. Venters?

MR. CHO: I will need to confer with my folks, and I'll get back to the petitioners regarding that.

THE COURT: All right. Please, I know all of

you (indiscernible) much as, but please try to do that quickly because the petitioners will need to know that for their own scheduling purposes.

MR. CHO: Understood, your Honor. Thank you.

THE COURT: All right. Is there anything else we need to address with respect to docket entry 54 and 57?

MS. ROSENFELD: This is petitioners -- Katie Rosenfeld for petitioners.

I don't think so, your Honor. I think as long as we hear from the respondent, as you suggested, you know, as soon as possible, on Monday or on Tuesday morning about their decision, then that makes sense to us.

THE COURT: All right. So that then brings us to the dispute that was first raised late last night, and again this morning regarding the 30(b)(6) protocol, and just for the record, the petitioners' letter is docket entry 64 -- I'm sorry, docket entry 63. The government's response of this morning is docket entry number 64.

The first issue concerns the protocol at the 30(b)(6) depositions on Monday, and in reading the government's response, it seems to me there really isn't a dispute here. The government I think has agreed to five hours for the 30(b)(6) deposition of one witness,

and two hours for the other.

And petitioners have indicated that they believe that they could complete their depositions within those time frames. So is there a dispute here?

MS. GINSBERG: Your Honor, this is Betsy Ginsberg for petitioners.

I think the dispute is that we agreed to five hours on the condition that the respondent not make objections or instruct the witness not to answer, if they believe that questions are outside the scope of the 30(b)(6) notice, and we were just hoping to avoid having to call the Court during the course of the deposition for things like that, to really try to streamline this, so that the witness, and the attorneys for both sides can do this as quickly as possible.

And you know, unfortunately, there have been many discovery disputes to-date in this case, and I'm certainly not trying to lay blame on any party here but would like to avoid prolonging the time -- the total time of the deposition, if we can avoid those kinds of disputes, and just deal with them after the fact if they arrive. And certainly petitioners don't anticipate asking anything outside the scope, but we may not agree as to what is within the scope of the notice.

THE COURT: Well, the Court has a different

view of the government's position on this issue, than the petitioners do. I'm looking at their letter of this morning in which they quote Rule 30(c)(2), and they state that "An objection will be made at the time of the examination, but the examination still proceeds. The testimony is taken subject to any objection."

So the way I understood the respondent's position, and I will ask Mr. Cho if this is correct, if the government objects, that the examination, the line of inquiry, exceeds the scope of the 30(b)(6) notice, the government would say objection, beyond the scope, and then the witness answers.

So let me ask Mr. Cho, if my understanding of respondent's position is correct.

MR. CHO: Yes, that's our general practice again, your Honor. And again, this is James for the government.

But again, I can't say carte blanche at this point that if the question is far beyond the scope of the deposition notice, that there may not be additional challenges or objections to those types of questions, but typically as with any deposition, it's fact finding. So we will note the objection for the record, and move on, and let the witness answer, if the witness is able to, but again, what they want us to do is not object in

advance, and not note it on the record, and I think that would be prejudicial, and unwieldy for us to triage down the road was that question objectionable or not. We'd rather make the objection right then and there. So to the extent the questioner can rephrase their question, if necessary, then they will have notice of that objection, and can rephrase the question if they do not intend to go beyond the scope of the 30(b)(6) notice topics.

So I think it's more efficient to actually make the objection right then and there, so they can modify their questions as they think necessary to avoid that objection.

THE COURT: And indicated in Rule 30, when an objection is made, the examination still proceeds, and the testimony is taken subject to the objection. The exceptions to that rule under which -- pursuant to which a witness could be directed not to answer, are so limited, and here we're talking about a request for privileged information, for example, or a question that is so outrageous, if one of these witnesses was asked when did you stop beating your spouse, I mean obviously that's so beyond the pale, but if it's simply a quibble about whether or not an inquiry is beyond the scope, then the appropriate procedure is to note the objection, preserve it, and move on with the witness providing a

response.

And I believe that with that guidance from the Court, I would assume that that issue about the 30(b)(6) protocols has been resolved. I do think that not requiring the respondent to even note an objection at the time of the testimony, is as the respondent noted, more likely to result in further litigation down the road. So if there is an objection to a line of inquiry being beyond the scope of the notice, the respondent -- counsel for the respondent should note that objection on the record. The testimony should be provided, and there could subsequently be a motion to strike, but I presume, and insist that petitioners will proceed in good faith, and certainly will stay within the confines of the 30(b)(6) notice.

MS. GINSBERG: Yes, your Honor. This is Betsy Ginsberg again.

And we certainly have no problem with the respondent making contemporaneous objections, and as long as they are willing not to instruct the witness on anything other than privilege or outrageous questions, that's fine. I didn't get that from what Mr. Cho said but certainly your Honor has made that clear.

THE COURT: But that is not a license for petitioners to stray beyond the limits of the 30(b)(6)

notice.

MS. GINSBERG: No, your Honor. We have no intention of doing that. We just want to make sure that things go smoothly on Monday.

THE COURT: And with that guidance from the Court, does that resolve the parties' dispute regarding the 30(b)(6) deposition protocol?

MS. ROSENFELD: It does, your Honor. I do want to -- and I apologize for this, but just go back to our conversation about Dr. Venters because I may have missed something, and I just want to make sure I understand the respondent has a deadline for informing us, whether they are planning to request a written report or a deposition because we need to inform Dr. Venters as soon as possible to get that.

THE COURT: Let me ask Mr. Cho, I appreciate that you want to talk with the rest of the team, can you let petitioners know by Monday morning?

MR. CHO: I think Ms. Rosenfeld had said Monday or Tuesday was fine. I think Tuesday would be safer because we're in depositions all day Monday, 30(b)(6) depositions, so I may not have an opportunity to have a chance to communicate with my team, and the BOP. So at least perhaps till Tuesday.

THE COURT: Tuesday morning.

MR. CHO: Thank you, your Honor.

MS. ROSENFELD: Thank you, your Honor.

THE COURT: All right.

MR. CHO: And one clarification, on the 30(b)(6) depositions, so it is limited to five hours for Vasquez, and two hours for King? I think that's what the Court's ruling is.

THE COURT: I think the parties had agreed on that, provided that there weren't going to be -- from petitioners point of view, that there weren't going to be a lot of interruptions, and I believe that by addressing the 30(b)(6) deposition protocol, that the issue of having constant calls to the Court has now been eliminated, and petitioners have now accepted the five-hour time limit on Ms. Vasquez's deposition, and the two hour time limit for Ms. King's deposition.

MR. CHO: All right. Thank you, your Honor.

THE COURT: And those both are going to be going forward on Monday?

MR. CHO: Yes.

MS. ROSENFELD: Yes, your Honor.

THE COURT: All right. And the remaining issue that was raised in letter filed by petitioners' last night, and in the response of respondent from this morning, concerns the production of paper sick call

request. Respondent, among other, objects to that, notes that that was not part of Judge Kovner's ruling, which is true, but also notes that BOP does not have documents responsive to this request going back to March 13th, 2020.

And given the fact that this just came up in a motion late last night, I don't know whether respondent's counsel has answers to questions that I have, but to the extent how far back do responsive documents go?

MR. CHO: So this is James for the government.

These are living documents. So an inmate may submit a sick call request, and a health services provider may go and pick up the request. They will then triage the request, and decide this is urgent, and the inmates complaints are acute, and may go see the inmate immediately, or if it is not an acute situation, may input the request into the scheduling system.

I heard beeping, I just want to make sure Judge Mann, are you still there?

THE COURT: Yes, I'm still here. I don't know who is lost. Maybe my law clerk can tell as the host.

THE CLERK: I'm sorry, Judge, I don't know who the specific person who left was.

MR. CHO: Okay.

THE COURT: Judge Kovner, are you still there?

JUDGE KOVNER: I am still here.

THE COURT: And are Ms. Rosenfeld and Ms. Ginsberg still there?

MS. ROSENFELD: I'm here, your Honor.

MS. GINSBERG: We are, your Honor.

MR. CHO: All right. So then I guess I can continue.

THE COURT: Mr. Eichenholtz, are you there?

MR. EICHENHOLTZ: I am --

THE COURT: Mr. Eichenholtz?

MR. EICHENHOLTZ: I am -- yes, I am here, your Honor. I'm here.

THE COURT: I think we have a quorum.

MR. CHO: I think we do, your Honor.

THE COURT: So why don't we proceed.

MR. CHO: All right. Sure. I will continue then.

THE COURT: Maybe we were boring the reporter.

MR. CHO: I think that's probably the case, yes.

So because these are living documents, it's hard to ascertain exactly how long they are retained, but they are acted upon when they're received. So if they don't retain them because once they either see the inmate, or input the inmate's name into the scheduling

system, they are then discarded as is their normal protocol because they've either -- they've acted on it in some way.

So that's why there are no documents available because they don't go back in time. There's no filing system to retain these hard copy documents.

So I can't say for sure how far back they go. For example, if they schedule someone today, they may discard the request today, but if it took them a day or two to put them in the schedule, or to see the inmate, it may still be lingering for a day or two, but I can't say for sure how far back they go.

THE COURT: When you say that they were put into the scheduling system, is that electronic?

MR. CHO: So the way it works is if the inmate's condition is not acute, and doesn't require immediate attention, there's a queue and that queue is electronic, yes, but what they put in there is essentially the inmate's name, so they know if someone needs to go see the inmate, and that's how they -- it's basically first in, first out. So that's how they know who to go see first based on who is in the schedule, but yes, that schedule --

THE COURT: And --

MR. CHO: But that schedule changes, for

example, if they're seeing on that list today, once they see the inmate, they take them off the list because they've been seen. So it changes constantly. It's not a static document.

THE COURT: And the electronic queue, all it indicates is the inmate's name, and not the complaint of the inmate?

MR. CHO: I have to confirm that. It may have a note, but it may not be extremely detailed, but I can't say for sure how much information is contained in that schedule.

THE COURT: And you say that the queue is changing constantly, but is there a database that would show the queue for the last month, for example, or at least in the near past with the -- possibly with the complaint.

MR. CHO: That's an IT question, dealing with ESI. I have to dig deeper into that. I don't know the answer to that. The sting though is again, it's not -- it deals with inmates that may not have acute conditions, right? If an inmate needs immediate attention, they will go see the inmate immediately without even putting that person on the queue. Again, these providers are triaging these sick call requests, and deciding, okay, this inmate can wait a day or two to be seen by a provider, or I need

to go see the inmate right now, and they won't even put that inmate in a schedule. They will act on that sick call immediately.

THE COURT: I will hear from petitioners' counsel.

MS. ROSENFELD: So I think that there's no dispute that we had originally asked for all the sick call requests, and then the government indicated that they had a lot of objections to that, and we agreed to accept only the electronic ones.

You know, as Ms. Ginsberg said at that conference, I looked at the transcript, it was our understanding at that time that they were all put in electronically, so we thought we would get the entire universe that way, and we didn't want to create duplicative, you know, work.

It's now become very clear that everybody is -- that a number of people are putting in sick call requests, just on paper. So we spoke to one person on Thursday, who had been making sick call requests, and putting them in the box on the unit, and never -- and not by email, or in addition to email.

So it does seem that there is a universe of documents that show the sick call requests that have been made, that are relevant to our case, especially after

March 27th, that should have been preserved after we filed this lawsuit about the adequacy of medical care.

So we do want the paper sick call requests. I'm not completely clear from what Mr. Cho said, where those documents are, to be honest, your Honor. It sounds like in some cases they're saying that they throw them out, and in some cases, they say that -- I think what he is saying is that they are not kept in a hard copy form. That would be very surprising, your Honor, and I did have a chance to speak to Dr. Venters this morning. He says that the sick call requests are considered part of the medical record, and should be maintained. They could be scanned, and then discarded, but they can't simply note that a request was made without the original request being visible and available, and that's consistent with what I've seen in other medical records where the original sick call request which as your Honor notes, would explain what the complaint is, and why the person wants sick call, is preserved, so that the -- you know, it's part of the medical record, that information, and also to make sure that the person was seen.

You know, if they haven't maintained those documents, I guess that's one thing, and there's nothing we could do about it. Up until today, we would ask that they be preserved going forward. If there is an

electronic log of the paper requests, as your Honor was inquiring about, and Mr. Cho said that he would ask for, we certainly would ask that that be produced, and again, that doesn't seem burdensome, if it's an electronic document, but I guess I am just still stuck on the fact that the paper sick call request, and correctional health according to our expert, are part of the medical record, and should never be discarded without being scanned or maintained, and I am not completely clear if that is what's going on at MDC.

THE COURT: Well, the Court is not clear either, and I gather that Mr. Cho has not had a sufficient opportunity to consult with his client about the underlying facts. So at least this magistrate judge is not prepared to rule on this issue. The parties need to meet and confer further.

To the extent that these paper sick call requests are in fact incorporated into inmate's files, petitioners should understand that the Court would not be inclined to require the MDC to go through 1,700 files to try and locate these hard copy sick call requests.

Now I appreciate that the petitioners are claiming that the paper requests -- that the electronic sick call requests that they've gotten may not reflect the same concerns as the hard copy sick call request

because the sicker the inmate is, the less likely the inmate is to leave his or her cell to be able to access the electronic device in order to put in an electronic request.

So the Court is not saying that these are duplicative, and you're not entitled to -- this is information that you're not entitled to. The question is how burdensome is it. Is the documentation preserved? How burdensome would it be no only to locate it but then to have to redact hard copy sick call requests.

I think the parties need to confer further. To the extent that the paper sick call request, or at least some of them are preserved, there may be a way of getting a sampling but again, I'm not prepared to rule at this time. The issue is not properly teed up for the Court.

All right. Is there anything further?

MR. MARUTOLLO: Your Honor, this is Joseph Marutollo from the government. I just have one --

THE COURT: Yes.

MR. MARUTOLLO: -- clarifying question. Just going back, and apologies to go back to this, but with respect to the proposal regarding any expert depositions, and the expert report, just to clarify, so if the -- either party decides to forgo an expert report, that party would then be expected to have the witness appear

for a deposition, and the witness would then have to provide the summary of facts and opinions as detailed in Rule 26(a)(2)(C), as well as the subject matter on which the witness will testify. Is that a fair summary, your Honor?

THE COURT: Counsel will provide what is required under Rule 26 for witnesses who are not -- who normally, it would apply only to witnesses that are not specifically retained for litigation purposes, an in-house expert, or a treating physician, for example, and those would be provided on the governing deadline. Again, I'm a little uncertain as to whether or not those deadlines have been pushed back for two days. (Indiscernible) think the deadlines have, and Judge Kovner can agree or disagree, but whatever the operative date is --

JUDGE KOVNER: Sorry, I don't know if I should jump --

THE COURT: Sure.

JUDGE KOVNER: Could I address that? I mean, I took the parties' submissions to be -- that they wanted on consent to extend the deadlines for their briefs in support of, or in opposition to a preliminary objection, "including any supplemental expert report," was the way it was framed in the initial scheduling order. I took

the parties to be on consent, extending each of those deadlines by two days. So that's my understanding of what they were seeking, and what I was agreeing to.

THE COURT: Thank you. So we now have a definitive ruling. Those dates have been pushed back two days. But by the new deadline, the proponent of that expert will have to provide the report that's required under Rule 26 for experts who are not specially retained.

And later in the litigation, if those experts would be trial witnesses, or would be producing information in connection with summary judgment motions, then there can be full discovery, and if need be, although if there are already depositions of them, I don't know if that's necessary, but that's an issue for another day. This is simply what is the examining party entitled to in advance of the preliminary injunction hearing.

MR. MARUTOLLO: Thank you, your Honor.

MS. ROSENFELD: Your Honor, I have one follow-up question on the sick call request. This is Katie Rosenfeld.

We don't believe that the respondent should be disregarding sick call requests that are being made in the facility in the middle of this pandemic, and in the middle of this litigation. We think that those are

materials that should be preserved, and are relevant to this case, if not as a matter of appropriate medical record-keeping, and certainly as evidence in this case.

And so we would ask the Court to direct the respondent not to discard or throw away the paper sick call request going forward from today, if they have been engaged in that practice.

THE COURT: Petitioners have made that request. It's an appropriate request. I'm not going to opine now, whether or not the failure to preserve previously, you know, given the circumstances under which the Bureau of Prisons is operating, I'm not saying that that's spoliation of evidence but going forward, it certainly would be a better practice for the Bureau of Prisons, the MDC, to retain those written documents.

But what we're dealing with now is what petitioners are entitled to receive in advance of the preliminary injunction hearing, and again, there's insufficient information to determine what exists, and how burdensome it would be to produce those documents in advance of the hearing. So the parties should further confer, and try to come to some agreement.

MS. ROSENFELD: Thank you, your Honor.

MR. CHO: Thank you, your Honor.

MS. ROSENFELD: Your Honor, I'm sorry, one last

question. Because of the time-frame that we've all been discussing, we do want Dr. Venters to have the opportunity, if there is going to be a production, to review it because we think it would assist him in evaluating what's going on in the facility, could the provide a status update if there's one needed or resolve it by a date certain such as Tuesday?

THE COURT: Mr. Cho?

MR. CHO: I will endeavor to do so, your Honor. Again, we're in depositions all day Monday, so in between break, I will endeavor to track down the information that they are seeking. So I will endeavor to get back to them on Tuesday.

THE COURT: Well, respondent did note in response to one of petitioners' argument, that petitioners have six attorneys working on the case, and I believe that respondent has at least four, so if you're going to be defending the depositions, then perhaps one of your colleagues could be making the inquiry, and I'll expect a status report by Tuesday.

MR. CHO: Thank you, your Honor.

MS. ROSENFELD: Thank you, your Honor.

THE COURT: All right. Anything else?

MS. ROSENFELD: No, your Honor. Thank you for your time.

THE COURT: All right. Let me just ask Judge Kovner if there's anything that she wants to add before we conclude the proceeding?

JUDGE KOVNER: Nope, I'm good. Okay, thanks so much.

THE COURT: All right. Thank you, all, and everyone take care. This proceeding is concluded.

MR. CHO: Thank you, your Honor.

MS. ROSENFELD: Thank you, your Honor.

THE COURT: Goodbye.

(Matter Concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this **27th** day of **April**, 2020.

Linda Ferrara

Linda Ferrara

AAERT CET 656

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EXHIBIT 3

Chunn

Cho, James (USANYE) <James.Cho@usdoj.gov>

Tue 4/28/2020 3:56 PM

To: Katie Rosenfeld <Krosenfeld@ecbalaw.com>
Cc: Marutollo, Joseph (USANYE) <Joseph.Marutollo@usdoj.gov>; Eichenholtz, Seth (USANYE) <Seth.Eichenholtz@usdoj.gov>; Stamatelos, Pauline (USANYE) <Pauline.Stamatelos@usdoj.gov>; Betsy Ginsberg <betsy.ginsberg@yu.edu>; Alexander A Reinert <areinert@yu.edu>; Scout Katovich <SKatovich@ecbalaw.com>; Andrew Wilson <awilson@ecbalaw.com>; Sam Shapiro <sshapiro@ecbalaw.com>

Ms. Rosenfeld,

We want to get back to you regarding the questions raised at Saturday's Court conference before Judge Mann regarding petitioners' request for paper sick calls since March 13th.
As an addendum to our April 25 filed letter, it is not the practice for MDC to retain paper sick call requests as they are akin to appointment requests, not medical records, and for infection control purposes to the extent the documents may be contaminated. In response to paper sick call requests, medical providers triage the requests and either see the inmate immediately if the symptoms are acute, or place the inmate in an online scheduling system to be seen at a later time. No single health care provider adds an inmate's name to the schedule, and the paper sick call requests are not retained once inmate names are added to the scheduling system. The schedule is not static and changes daily as inmates are examined by providers and their names are removed from the schedule; further new inmates are added to the schedule daily. The schedule does not allow for the BOP to go back in time to determine who was on the schedule at some period time in the past given that the schedule changes daily. In light of petitioners' request for paper sick call requests, the MDC is retaining those requests at this time.
Per the Court's Order, in a status letter, we can notify the Court of the information outlined above. To the extent further discussion is warranted, we are happy to confer further, and can note the same in our letter.
Let us know if you have any further questions or would like to discuss further.

James R. Cho
Assistant U.S. Attorney
Chief, Bankruptcy Litigation
U.S. Attorney's Office
Eastern District of New York
271-A Cadman Plaza East, 7th floor
Brooklyn, New York 11201
718-254-6519 (direct)
718-254-7483 (fax)
james.cho@usdoj.gov

EXHIBIT 4

U.S. Department of Justice

United States Attorney
Eastern District of New York

271 Cadman Plaza East
Brooklyn, New York 11201

April 24, 2020

By E-mail

Katherine Ruth Rosenfeld
Emery Celli Brinckerhoff & Abady LLP
600 Fifth Avenue, 10th Floor
New York, New York 10020

Re: *Chunn, et al. v. Warden Derek Edge*,
Civil Action No. 20-cv-1590 (Kovner, J.) (Mann, M.J.)

Dear Ms. Rosenfeld:

We write to respond to your emails dated April 23 and 24, 2020, and pursuant to your request that we respond by today.

I. Hard-Copy Sick Call Requests

First, with respect to Petitioners' request for hard copy sick call requests, the parties have already addressed this issue with Court, and the Court has already denied Petitioners' request for hard copy sick call requests. Petitioners previously represented to the Court that they "seek only sick-call requests logged *electronically*." Dkt. No. 43 at 5 (emphasis added). After hearing argument on this issue, the Court required Respondent to produce "all sick-call requests for medical care submitted *electronically* by persons incarcerated at the MDC from March 13, 2020 to April 13, 2020, in redacted form that omits names and DIN numbers." Dkt. No. 43 at 5 (emphasis added). The Court did not require production of hard copy sick call requests. In response, Respondent fully complied with the Order and has already produced *888 pages* of sick call requests submitted electronically for the relevant time period.

Petitioners now contend, "We believe it's important for Dr. Venters to review the full universe of sick call requests, both electronic and paper, from March 13th to date." Petitioners claim that some inmates submitted only hard copy sick call requests. Petitioners were well aware at the time of the Court's discovery conference on April 13th -- at which time the parties addressed the production of sick call requests -- that inmates made sick call requests via hard copy or electronically or both. Petitioners already agreed, and the Court already approved, production of the *electronic* sick call requests only -- not hard copy.

Petitioners have failed to explain why the universe of 888 pages of sick call requests already produced is in any way deficient and not representative of all the sick call requests made -- whether electronic, hard copy or otherwise. Petitioners have not stated any reason for production of the hard copy sick call requests other than some unfounded belief that the hard copy request

would be "important." Petitioners do not claim that the nature of the hard copy sick call requests would differ to any significant extent from those submitted electronically. Petitioners do not contend that inmates would complain of some symptoms via hard copy sick call requests, but would not complain of those same symptoms in electronic sick call requests. As such, production of hard copy sick call requests would largely be duplicative of sick call requests submitted electronically -- that have already been produced.

Notwithstanding the above objections to Petitioners' request, BOP does not have documents responsive to this request going back to March 13, 2020. BOP does not retain hard copy sick call requests, unless, for clinical reasons, the sick call requests are made a part of the inmate's own medical file. When the hard copy requests are submitted to any of the BOP health care providers, the provider -- at the provider's discretion -- may immediately see the inmate based on the nature of the complaint raised in the sick call request. The provider, however, does not retain the hard copy sick call request after seeing the inmate. Alternatively, if, after reviewing the hard copy sick call request, the provider determines based on his or her clinical judgment, that the inmate does not present with any acute medical condition that warrants immediate attention, the provider would add the inmate's name to a sick call queue or schedule to be seen at a later time by a medical provider. Each provider at the MDC has access to the queue and there is no centralized repository of hard copy sick call requests. The provider does not retain the hard copy sick call request once the inmate has been entered into the schedule for infection control reasons to the extent the document may be contaminated in any way. Further, the schedule changes daily. As inmates are seen by a medical professional, they are removed from the schedule; new inmates are also added after they submit their sick call request.

II. Confidentiality Issues

Second, Petitioners contend that the 888 sick call requests submitted by non-party inmates at the MDC should not be marked confidential. The sick call requests are confidential records of inmates of non-parties to this action, and are entitled to protection from public disclosure. Even though Petitioners' attorneys may not be able "personally identify" specific inmates from the records, does not mean that other inmates at the MDC or members of the public similarly are not able to identify the inmate based on the complaints raised in the sick call requests. Nothing in the parties' agreed-upon protective order, So Ordered by the Court, precludes Petitioners from using the sick call requests in this litigation. Further, the protective order already excludes "[s]tatistics, numerical summaries, compilations of data, and other summary data gathered from the Sick-Call Documents."

Petitioners have not articulated any reason why each specific inmate's sick call requests, that includes highly personal and confidential medical information, is of "public concern" or "import" and should be made public. For example, if an inmate complains of an itch related to a sexually transmitted disease, Respondent fails to comprehend how making such a sick call request publicly available is of "public concern." The privacy interests of the inmates who submitted sick call requests and are not parties to this litigation dictate that their records remain confidential, consistent with the Court's prior order. Dkt. No. 43 at 4 ("Privacy interests can be further addressed through a protective order limiting any dissemination of the redacted sick-call requests.").

We are available, at your convenience, to meet and confer over any of these issues.

Very truly yours,

RICHARD P. DONOGHUE
United States Attorney

By: /s/
James R. Cho
Seth D. Eichenholtz
Joseph A. Marutollo
Paulina Stamatelos
Assistant U.S. Attorneys
(718) 254-6519/7036/6288/6198
james.cho@usdoj.gov
seth.eichenholtz@usdoj.gov
joseph.marutollo@usdoj.gov
pauline.stamatelos@usdoj.gov

cc: All Counsel of Record (by email only)

EXHIBIT 5

EXHIBIT 6

U.S. Department of Justice

United States Attorney
Eastern District of New York

271 Cadman Plaza East
Brooklyn, New York 11201

April 29, 2020

By E-mail

Katherine Ruth Rosenfeld
Emery Celli Brinckerhoff & Abady LLP
600 Fifth Avenue, 10th Floor
New York, New York 10020

Re: *Chunn et al. v. Warden Derek Edge,* Civil Action No. 20-cv-1590 (Kovner, J.)

Dear Ms. Rosenfeld:

In response to your April 28 email regarding sick-call requests, and without waiving any objections, please see below:

Petitioners' Request No. 1: Can you please advise if Respondent will agree to produce copies of the paper sick call requests from April 24, 2020 (the date that we understand preservation began and shredding ceased) through May 8, 2020 and/or the date of the PI hearing[?]

Respondent's Response: Respondent will produce paper copies of the sick call requests, subject to the same redactions as the already-produced electronic sick call requests, for the two-week period from April 25, 2020 to May 9, 2020.

Petitioners' Request No. 2: The Court inquired on Saturday regarding whether the MDC maintains or can produce an electronic log of who was seen in response to a sick-call request or any other summary document, if not the actual paper requests. Is that available? Please confirm.

Respondent's Response: Exams by medical providers are maintained in each individual inmate's own medical records. Those records may reflect whether the inmate was seen as a result of a sick call request, or otherwise, but, that would require a review of each individual inmate's medical records, which is burdensome and not proportionate to the needs of the case. To the extent that Respondent is able to identify an electronic log showing who was seen in response to a sick call request, Respondent will produce those logs, if any exist.

Petitioners' Request No. 3: Can you please advise regarding whether or when a litigation hold was communicated to the MDC regarding the sick-call requests?

Respondent's Response: MDC has been advised to retain the sick-call requests.

Petitioners' Request No. 4: Can you please provide a blank copy of a sick call request so we can see what the document looks like?

Respondent's Response: Attached is a blank sick call request Bates numbered BOP 237.

Respectfully submitted,

RICHARD P. DONOGHUE
United States Attorney

By: /s/
James R. Cho
Seth D. Eichenholtz
Joseph A. Marutollo
Paulina Stamatelos
Assistant U.S. Attorneys
(718) 254-6519/7036/6288/6198
james.cho@usdoj.gov
seth.eichenholtz@usdoj.gov
joseph.marutollo@usdoj.gov
pauline.stamatelos@usdoj.gov

Enclosure

cc: All Counsel of Record (by email) (w/ enclosure)