UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA *Plaintiff,* v. GRUPO VERZATEC S.A. DE C.V., et al. *Defendants.*	Civil Action No. 1:22-cv-01401 Judge Manish S. Shah

[JOINT PROPOSED] SCHEDULING AND CASE MANAGEMENT ORDER

In accordance with Federal Rule of Civil Procedure 26(f) and Civil Local Rule 16.1, Plaintiff United States of America and Defendants Grupo Verzatec S.A. de C.V., Stabilit America, Inc., Crane Company and Crane Composites, Inc., have met and conferred, and hereby submit this Scheduling and Case Management Order to the Court.

The parties have agreed on most provisions of this Proposed Order. The limited areas where the parties have differing positions are noted, and each side has included a brief explanation of their respective positions. In summary, the areas of remaining dispute are:

- Trial start date, length of trial, and corresponding case schedule (Part III);
- Whether to schedule expert reply reports to expert rebuttal reports (Part III, schedule chart at pg. 3);
- Whether to schedule a round of motions *in limine* (Part III, schedule chart at pg. 4);
- Limits on number of persons on witness lists (Part IV (4)); and
- Time cutoff for admissibility of remedies evidence (Part IV (12)).

I. Service of Complaint.

Counsel for Defendants, acting on behalf of Defendants, have accepted service of the Complaint, have waived formal service of a summons, and have filed their Joint Answer (ECF No. 27).

II. Jurisdiction and Venue.

Defendants consent to personal jurisdiction and venue in this Court.

III. Case Schedule.

Unless otherwise specified, days will be computed according to Federal Rule of Civil Procedure 6(a).

Event	Plaintiff's Position	Defendants' Position
Fact Discovery Begins	Thursday, March 17, 2022	Thursday, March 17, 2022
Each side exchanges preliminary trial witness lists and expert designations	Thursday, May 26, 2022	Plaintiff serves preliminary trial witness list and expert designations on Thursday, May 26, 2022 Defendants serve preliminary trial witness list and expert designations on Tuesday, May 31, 2022
Each side exchanges final trial witness lists, including identities of expert witnesses to the extent not otherwise previously disclosed.	Friday, July 15, 2022	Friday, July 15, 2022
Substantial Completion of Fact Discovery	Monday, August 8, 2022	Friday, August 5, 2022
Initial Expert Report(s)	Friday, August 12, 2022 Initial expert report on the issues on which the party bears the burden	Monday, July 25, 2022 Initial reports of the experts' expected testimony
Close of Fact Discovery	Monday, August 15, 2022	Monday, August 15, 2022

Event	Plaintiff's Position	Defendants' Position
Rebuttal Expert Report(s) to the Initial Expert Report(s) – 10 page limit	Wednesday, August 24, 2022	Monday, August 1, 2022
Reply Expert Reports(s) to the Rebuttal Expert Report(s)	Monday, September 5, 2022	N/A. Defendants' position is that a third round of expert reports—Replies to Rebuttal Expert Report—are unnecessary.
Each side exchanges initial exhibit lists and opening deposition designations	Monday, September 5, 2022	Monday, August 15, 2022
Each party informs each non-party of all documents produced by that non-party that are on that party's exhibit list and all depositions of that non-party that have been designated by any party	Monday, September 5, 2022	Monday, August 15, 2022
Each side exchanges its objections to the other side's exhibits (if necessary) and opening deposition designations and its deposition counter-designations	Friday, September 9, 2022	Wednesday, August 17, 2022
Each side exchanges its objections to the other side's deposition counter-designations and its counter-counter-designations	Monday, September 12, 2022	Friday, August 19, 2022
Non-parties provide notice whether they object to the potential public disclosure at trial of any non-party documents and depositions, explain the basis for any such objections, and propose redactions where possible	Monday, September 12, 2022	Friday, August 19, 2022
Parties and non-parties meet and confer regarding confidentiality of non-party documents on trial exhibit lists and non-party depositions	Wednesday, September 14, 2022	Friday, August 19, 2022
Close of Expert Discovery and Supplemental Discovery	Friday, September 16, 2022	Sunday, August 14, 2022
Parties meet and confer regarding: - proposed stipulations and uncontested facts pursuant to L.R. 16.1 - the addition of exhibits produced in supplemental discovery after	Friday, September 16, 2022	Monday, August 15, 2022

Event	Plaintiff's Position	Defendants' Position
the initial exhibit list exchange, the admissibility of trial exhibits and deposition designations - disputes about confidentiality of party documents on trial exhibit lists		
Motions *in limine* to be filed	Monday, September 19, 2022	N/A. Defendants' position is that Motions in Limine are unnecessary in Section 7 litigation.
Pretrial Statements of the Case	Friday, September 23, 2022	Monday, August 15, 2022
Oppositions to motions *in limine* to be filed	Monday, September 26, 2022	N/A. Defendants' position is that Motions in Limine are unnecessary in Section 7 litigation.
Joint submissions regarding: - disputes about admissibility of trial exhibits and deposition designations; - disputes about confidentiality of party documents on trial exhibit lists to be filed; - disputes about confidentiality of each non-party's documents on trial exhibit lists and non-party depositions to be filed.	Monday, September 26, 2022	Thursday, August 18, 2022
Final pretrial conference	Tuesday, September 27, 2022	Friday, August 19, 2022
Parties submit final trial exhibits to Court	Friday, September 30, 2022	Friday, August 19, 2022
Trial begins (or as soon thereafter as the Court's schedule permits)	Tuesday, October 4, 2022 (80 hours total trial time; 40 hours each side)	Monday, August 22, 2022 (40 hours total trial time; 20 hours each side)
Proposed Findings of Fact and Conclusions of Law.	Filed by the parties on a schedule to be determined by the Court	7 days after conclusion of Trial

The parties will meet and confer at the appropriate time to establish a process for trial exhibits, deposition designations, and confidentiality.

(1) *Plaintiff's Position on Schedule*

The United States has proposed an appropriately aggressive schedule that will narrow the issues so that a fair and orderly trial can occur less than six months from today – and over a month before the self-imposed date when Defendants may, but may also decline, to exercise an option and terminate their merger. This schedule would provide for four and a half months of fact discovery[1] followed by one month of expert discovery, concurrent with reasonably paced pretrial processes. Proceeding this quickly requires a streamlined discovery process, which Defendants have largely refused to agree to. To the contrary, Defendants propose a schedule rife with unrealistic deadlines that will not meaningfully narrow the issues during discovery, and will deprive the United States of the ability to gather and present evidence essential to its case, potentially resulting in "trial by surprise" – a result modern discovery rules seek to avoid. Defendants' proposal is flawed for a number of reasons, including: 1) it is premised on an artificial deadline; 2) it calls for expert reports three weeks prior to the close of fact discovery, and only a week after the United States learns the identities of up to 8 new potential fact witnesses; 3) it fails to provide for reply expert reports; 4) it does not place reasonable limits on the number of potential witnesses whose documents must be collected and who must be deposed in order to prevent surprise at trial; 5) it unfairly staggers the parties' initial witness disclosures; and 6) it contemplates unrealistic pre-trial deadlines that will impede the efficient presentation of evidence before the Court. Defendants primarily argue that their schedule is necessitated by the

[1] The parties, awaiting a schedule from the Court, have not yet issued document subpoenas to one another or to third parties, despite a month of this "discovery" having already passed. In reality, the schedule proposed by the United States will allow for slightly less than three months of actual fact discovery.

November 16, 2022 option date in their merger agreement. This argument is irrelevant because the United States has proposed a schedule that concludes the trial a month before this option date. Even if the United States' proposal were to encroach on the option date, the defendants selected the option date and can extend it if they wish. The relevant clause, found in Section 8.1(c) of the parties' merger agreement, merely provides the parties with the *option* to terminate their merger. Thus, the parties are free to decline to exercise that option or to amend their agreement to extend the deadline. *See Id.* Section 9.2 (allowing for amendment). An artificial and modifiable deadline negotiated between the parties should not be treated as an ironclad limit on the ability of the United States to obtain the necessary evidence to try this case or limit this Court's opportunity to decide this case based on a fulsome record.[2] The consequences of Defendants' disorganized schedule, paired with their refusal to narrow potential witnesses or issues prior to a short trial, will predictably result in an unfocused and disorganized trial.

Expert work will be critically important in this antitrust case. This work will likely include rigorous methodological analysis of large datasets from third parties. The United States has proposed a highly-accelerated one-month period of expert discovery that will nevertheless allow the experts to consider all the relevant facts in forming their opinions. In this matter, experts will be required to sift through large amounts of party and third-party data and documents in order to formulate their own opinions and, if reply reports are allowed, analyze and rebut the opinions of the other side's experts. Defendants' schedule, by placing the close of fact discovery three weeks after opening expert reports (and two weeks after rebuttal reports, with no

[2] The Timing Agreement signed by the parties during the Division's initial investigation does not "envision" a 150-day discovery period tailored to the needs of this case as Defendants claim. Instead, it is similar to a standard clause that the Division is beginning to introduce into Antitrust investigations that sets 150 days as an absolute floor for discovery in related actions. It specifically reads: "the Parties will not object to a reasonable post-complaint discovery period of not less than 150 days prior to any trial on the merits." Timing Agreement Section IV C. The Timing Agreement is attached to this filing as "Exhibit A."

reply reports at all), would require experts to prepare their opinions on an incomplete record, which significantly limits their utility–a particularly severe consequence for the United States, which ultimately carries the burden of persuasion.

Defendants' proposed schedule is also unrealistic in light of their refusal to agree to reasonable witness limits. The United States has proposed a schedule that allows for the timely disclosure of an appropriate number of witnesses, considering the anticipated length of trial and the need to focus discovery given our truncated deadlines. As discussed below, Defendants' proposal would result in the parties learning the identities of up to 8 new potential fact witnesses little more than one month before trial – requiring the parties to complete extensive deposition and document discovery on an entirely unrealistic timeframe that prevents the parties from substantially narrowing issues prior to trial. Defendants should also be required to provide their witness lists at the same time as the United States, instead of grabbing an early look at the United States' list before providing their own. The staggered dates proposed by Defendants is a transparent attempt to gain tactical advantage.

Finally, Defendants have proposed numerous deadlines that significantly limit the ability of the United States to adequately prepare for trial: one week to prepare sophisticated rebuttal expert reports, followed by one week to depose the experts; the submission of exhibit lists and deposition designations the day after fact and expert discovery close; a two-day turnaround for objecting to those exhibits and designations (which may be voluminous given Defendants' request for a trial witness list that includes 24 potential fact witnesses and an untold number of expert witnesses); providing non-parties with only four days in which to review and provide notice and redactions to their confidential documents; requiring the pretrial statement of the case the day after the close of fact and expert discovery. The United States will be prejudiced if

unnecessary deadlines and unfocused discovery leads to a trial where witnesses and issues are presented like a game of whack-a-mole.

Defendants' repeatedly claim that discovery should be truncated because of the United States' pre-complaint investigation. Although it is this investigation that allows the United States to propose an aggressive schedule, a government agency's pre-complaint investigation is not a substitute for post-complaint discovery. The United States' objective at the pre-complaint stage is not to prove its case, but rather to make an informed decision on whether to bring an enforcement action and, if so, the scope of the lawsuit. This investigation is no substitute for discovery rights necessary for the United States to prepare for trial and prove its case. Post-complaint discovery is especially important in this action, where Defendants have asserted numerous complex affirmative defenses, including efficiency and entry defenses, and claim a wide "breadth of product alternatives" to FRP – the full scope of which the United States can only learn through post-complaint discovery (or, if Defendants have their way, at trial). The Court should adopt the fair and even-handed schedule offered by the United States.

Defendants' chart below showing time to trial is not to the contrary. The chart shows that the United States' proposed schedule is not out of the ordinary compared to the more recent antitrust trial schedules. Further, the chart elides the core flaw in Defendants' schedule: 158 days from complaint to trial means that trial will occur only 8 days after the close of fact discovery. As discussed above, holding a trial 8 days after the close of fact discovery prevents effective and fair expert discovery, stymies any supplemental discovery, and impedes the orderly and efficient presentation of evidence at trial.

(2) ***Defendants' Position on Schedule***

The parties' primary dispute is on the trial start date (all other dates flow back from that date). Defendants seek a one-week trial (40 hours; 20 trial hours each side) starting on August 22, 2022, or such earlier date as the Court specifies. Defendants' proposed trial date and schedule is more than reasonable for a merger litigation, and it is more than generous given the particular facts of this case—that there is an alleged single, commodity product ("pebbled FRP wall panels") at issue, which Plaintiff has been investigating for more than 7 months already.

The merger agreement expires on Wednesday, November 16, 2022. In order for the parties to be able to close the Planned Transaction, the parties need to have a judgment from this Court by ***Friday, November 4, 2022*** (the Timing Agreement insisted on by the Antitrust Division with the merging parties[3] requires a 10-day notice before the merging parties can close). Plaintiff wins this case by default if the parties are unable to have a judgment rendered prior to November 4, 2022.

Defendants' proposal of a trial starting on August 22, 2022 and 7 days for the parties to submit findings of fact and conclusions of law after the trial is designed to permit the Court a reasonable window to render a decision, under the circumstances. Defendants request the above "Defendants' Position" schedule on the premise that such a schedule would allow sufficient time for the Court to reach a judgment on the merits after the conclusion of trial but with enough time to close the Planned Transaction before the merger termination date. Defendants are, however, respectful of the Court's calendar and would be pleased to accommodate the Court with an earlier trial date.

[3] The Antitrust Division and the two defendants entered into a Timing Agreement on November 17, 2021. *See*, Ex. A.

Defendants' proposed schedule is 158 days from Complaint to trial, which is far longer than the last fully litigated DOJ merger trial in this district (*UPM-Kymmene* – 56 days), more than reasonable for the needs of this case, and is consistent with schedules in other recent DOJ merger trials:

United States (DOJ) Merger Litigations, 2016 to Present[4] ***(in order from least days to trial to most)***		
Case Name (Court)	***Date of Complaint***	***Scheduled time from Complaint to trial***
UPM-Kymmene (N.D. Ill.)	April 15, 2003	56 days
AT&T, Inc. (D.D.C.)	Nov. 20, 2017	119 days
Anthem, Inc. (D.D.C.)	July 21, 2016	123 days
Aetna Inc. (D.D.C.)	July 21, 2016	137 days
U.S. Sugar Corp (D. Del.)	Nov. 23, 2021	139 days
Quad Graphics, Inc. (N.D. Ill.)	June 20, 2019	147 days
Aon Plc (D.D.C.)	June 16, 2021	155 days
Defendants' Proposal in this case	***March 17, 2022***	***158 days***
Energy Solutions, Inc. (D. Del.)	Nov. 16, 2016	159 days
United Health Group Inc. (D.D.C.)	Feb. 24, 2022	159 days
Sabre Corp. (D. Del.)	Aug. 20, 2019	160 days
Deere & Company (N.D. Ill.)	Aug. 31, 2016	180 days
Plaintiff's Proposal in this case	***March 17, 2022***	***201 days***
Visa Inc. (N.D. Cal.)	Nov. 5, 2020	235 days
Bertelsmann Se & Co. (D.D.C)	Nov. 2, 2021	272 days
Average (excluding UPM-Kymmene)	--	***165 days***

In contrast, the schedule proposed by Plaintiff would be 201 days from Complaint to trial, 36 days (more than a month) longer than the average. Plaintiff's schedule would conclude the

[4] The case information in this table is taken from Plaintiff's filing in the *UnitedHealth* merger litigation, *U.S. v. UnitedHealth Group*, Case. No. 1:22-cv-00481-CJN, Doc. No. 34 (D.D.C. Mar. 10, 2022), with the addition of *United States v. UPM-Kymmene* because *UPM* is the most recent DOJ merger challenge brought in this District that was fully litigated.

trial prior to the merging parties' merger termination date, but restricts the Court's time to digest the trial and reach a judgment.

The proposed August 22, 2022 trial date also accommodates the 150 days of fact and expert discovery in the November 17, 2021 Timing Agreement between the merging parties and the United States (attached as Ex. A). When the Timing Agreement was entered back in November, 2021, Plaintiff was investigating the Planned Transaction's impact on numerous products and markets that are not at issue here. The Complaint that Plaintiff filed alleges concerns in only one product market ("pebbled FRP wall panels"), meaning that the issues actually going to trial are significantly narrower than the issues on the table when the Timing Agreement was entered, which envisioned the 150-day discovery window.

Plaintiff's suggestion that there could be "trial by surprise" is hollow. The Division has been investigating this merger for more than 7 months. The Division requested and Defendants Verzatec and Crane produced 5.5 million pages from 1.5 million documents, from nearly 50 custodians. The Division obtained from Defendants translations of more than 58,400 documents. Plaintiff took 7 civil investigational demand (CID) depositions of Defendants prior to the filing of the Complaint, and Plaintiff's Investigation Materials reveal that Plaintiff contacted at least 116 third parties (including customers and competitors) to give evidence on the Planned Transaction.

Unlike Plaintiff, which has had national subpoena power since June 2, 2021 (*see* 15 U.S.C. § 1311-13) the short post-Complaint discovery period of merger litigation cuts only against Defendants, who are only now with this Complaint having been filed gaining the national subpoena power in merger cases needed to obtain evidence to develop their defense (*see* 15 U.S.C. § 23). (Discovery in this matter has begun and Plaintiff will have its full 150 days;

Plaintiff should not be granted additional discovery time simply because Plaintiff has elected not to make use of the several weeks of discovery that have already passed. *See* FN 2 above.)

(3) *Plaintiff's Position on Motions in Limine*

Motions *in Limine* are useful mechanisms for narrowing issues for trial in this Section 7 and Section 2 case and for resolving potential evidentiary disputes prior to trial. Here, expert testimony could be the subject of motions *in limine* and it is possible, though by no means certain, that calculations, models, or opinions of an expert may be excludable. Using the motion *in limine* process could potentially save valuable trial time and enable streamlined presentation of the case. Motions *in limine* are also an appropriate venue through which the parties can present disputes regarding the admissibility of testimony from a particular witness (because they were disclosed late, or not made available for deposition, for example) or a particular category of documents (undisclosed efficiency or remedy evidence, for example). Of course, if there are no relevant disputes requiring pre-trial resolution, the parties need not submit motions *in limine*. Defendants' attempt to prevent this common trial-focusing mechanism would block the United States from narrowing issues prior to trial and limit the ability of the United States to present a focused and efficient case at trial.

(4) *Defendants' Position on Motions in Limine*

In this bench trial, scheduled motions in limine are simply a waste of precious time and resources. The Court can exclude inappropriate evidence during trial, or it can be addressed in post-trial conclusions of law. If there is a legal issue that needs to be briefed, it can be briefed at any time.

(5) ***Plaintiff's Position on Reply Expert Reports***

The vast majority of the expert opinion evidence offered by Defendants in this case will be addressed only in the Defendants' expert rebuttal report. For example, the United States carries the initial burden on market definition and anticompetitive effects and thus the United States will submit opening reports on this topic, while Defendants may not. By eliminating expert reply reports, Defendants would eliminate the ability of the United States to submit expert critique or economic analysis of the Defendants' experts on some of the central issues in this case, such as market definition and harm.

Economic expert testimony is particularly important in antitrust litigation, and to create a fair and complete record of expert discovery, it is imperative that each side's expert be permitted to review, analyze, replicate, and critique the economic work offered by the other side. By checking the data and methodology of the opposing economic expert – running the same and similar regressions, substituting variables, reviewing data selection – significant methodological flaws in that expert's reasoning can be uncovered and communicated to the Court.

Allowing Defendants' key experts' methodologies to go unanalyzed and unchallenged by the opposing expert would present this court with an incomplete record and would severely prejudice the United States. It is particularly unfair in a context where Defendants' expert on those key topics will be afforded the chance to analyze, critique, and otherwise undermine the United States' expert witnesses.[5]

[5] The United States first learned of Defendants' proposal for "a brief rebuttal report" shortly before filing and does not know what such a report would entail. Any such rebuttal report must allow each side's experts sufficient time and space to meaningfully analyze and critique the opposing experts' opinions and methodologies. The schedule proposed by the United States does that on an aggressive and realistic schedule.

(6) ***Defendants' Position on Reply Expert Reports***

In expedited merger litigation, 3 rounds of expert reports is unnecessary and time consuming. A single expert report providing each expert's work and conclusions would be sufficient, but Defendants are willing to compromise on a brief rebuttal report to accommodate Plaintiff. A reply—a third expert report—is needless.

IV. F.R.C.P. 26(f) Discovery Plan.

1. Electronically Stored Information (ESI).

Defendants shall produce all documents and ESI in accordance with the same procedures followed in the production of Investigation Materials to the United States, except for translation of foreign language documents addressed in this Order. Any party's production of documents and ESI received from non-parties shall be made in the form produced by the non-party.

2. Protective Order and Discovery of Confidential Information.

The Court entered the parties' stipulated protective order on March 30, 2022, at ECF No. 25 ("Protective Order"). Discovery and production of confidential information will be governed by the Protective Order entered by the Court in this action. When sending discovery requests, notices, and subpoenas to non-parties, the parties must include copies of any Protective Orders in effect at the time.

3. Attorney Work Product.

The parties must not request, nor seek to compel, production of any interview notes, interview memoranda, or a recitation of information contained in such notes or memoranda,

except for such material relied upon by a testifying expert and not produced in compliance with this Order.

4. Witness Lists. [Differing Positions]

The United States is limited to [***Plaintiff's proposal***: 20; ***Defendants' proposal:*** 30] persons (excluding experts) on its preliminary trial witness list, and Defendants collectively are limited to [***Plaintiff's proposal***: 20; ***Defendants' proposal:*** 30] persons (excluding experts) on their preliminary trial witness list. The preliminary witness lists will include the name, employer, address, and telephone number of each witness. At the same time as the exchange of the parties' preliminary trial fact witness lists, the parties will exchange designations of all experts that they intend to call in their respective case-in-chief and defense case, along with a brief statement of the subject matter on which the expert will testify.

The United States is limited to [***Plaintiff's proposal***: 14; ***Defendants' proposal:*** 24] persons (excluding experts) on its final trial witness list, and Defendants collectively are limited to [***Plaintiff's proposal***: 14; ***Defendants' proposal:*** 24] persons (excluding experts) on their final trial witness list. Each side's final trial witness list may identify no more than [***Plaintiff's proposal***: 3; ***Defendants' proposal:*** 8] fact witnesses that were not identified on that side's preliminary trial witness list. If any new witnesses are added to a final trial witness list that were not on that side's preliminary trial witness list, a deposition(s) by the other side of such witness(es) will not count against that other side's total number of depositions. The final trial witness lists will include the name, employer, address, and telephone number of each witness. At the same time as the exchange of the parties' final trial fact witness lists, the parties will exchange designations of all rebuttal experts that they intend to call, along with a brief statement of the subject matter on which the expert will testify. In preparing preliminary trial witness lists,

final trial witness lists, and expert designations, the parties shall make good-faith attempts to identify the witnesses (including expert witnesses) whom they expect that they may present as live witnesses at trial. No party may call a person to testify as an expert or a fact witness at trial, either live or by deposition designation, unless (a) that person was designated as an expert or identified on any party's final trial witness list; (b) all parties agree that that party may call that person to testify; or (c) that party demonstrates good cause for allowing it to call that person to testify, despite that party's failure to designate that person on the final witness list.

(a) ***Plaintiff's Position***

In order to accommodate Defendants' request for an aggressive trial schedule, the United States has proposed a reasonable limit to the number of potential fact witnesses a party may identify. First, each side may identify up to 20 fact witnesses on the initial list on May 26, with a narrowing to 14 fact witnesses on the final lists on July 15 – one month before the close of fact discovery. In order to account for any potential fact witness whose identity is discovered after May 26, the United States proposes that up to 3 witnesses not disclosed on the initial list may be disclosed on the final. This narrowing is required to ensure that discovery is focused and productive, that there is sufficient time to incorporate all necessary third-party discovery into experts' opinions, and that the parties are well-prepared for trial.

Defendants instead propose initial witness lists of up to 30 fact witnesses (with Defendants' initial fact witness list due a week after the United States' list), "narrowed" to 24 fact witnesses on July 15. Defendants also ask for the ability to swap-out 8 fact witnesses, *i.e.*, a third of the witnesses on their July 15 witness list,. If Defendants' proposal and schedule were accepted, the United States' expert(s) would be unable to rely on the documents and depositions of these new trial witnesses in reaching their opinions (Under Defendants' schedule, opening

expert reports would be due one week later, with no possibility for reply reports). Allowing identification of 16 new fact witnesses on the final witness lists would create an unnecessarily compressed final month of discovery, particularly after the preceding two months of document and deposition discovery from up to 60 potential fact witness.[6] This is simply not realistic in the time frame proposed by Defendants, and is a recipe for "trial by surprise."

Defendants claim to need the additional time prior to the final witness list deadline to identify new third-party witnesses. But to the extent that they claim they need to call witnesses to testify about the uses of their own products, or about other wall-covering products that they will assert at trial compete with FRP, defendants should already know those firms: their identity cannot possibly be a mystery to defendants when they claim to make competitive decisions in response to those firms. Finally, Defendants' suggestion that that they might actually require 24 fact witnesses to appear in an antitrust trial they claim will take only 20 hours of their time, is simply not credible.

Defendants' request for unfocused discovery on dozens of witnesses, including up to eight new third-party witnesses to be identified just five weeks before trial, should be rejected.

[6] Curiously, defendants agreed to limit the number of allowed depositions to a reasonable limit of 25 fact witnesses – is their proposal that the parties are forbidden from deposing 10 of the other parties' disclosed witnesses?

(b) ***Defendants' Position***

Defendants do not see a need for a limit on the number of trial witnesses. Instead, Defendants have proposed a 40-hour trial (20 hours to each side). Artificial limits on the number of witnesses are simply a way to limit the proof on the much larger and true size of the product market, rather than Plaintiff's narrow product market of "pebbled FRP wall panels."

Plaintiff has proposed a trial of 80 hours (40 to each side). If the Court permits such a trial, Defendants would present additional witnesses. Artificial limits on the number of trial witnesses are unnecessary.

If the Court is inclined to impose witness limits, then Defendants propose that the limit of the number of persons on each side's preliminary trial list be 30; that the limit on each side's final witness list be 24; and that the limit of new fact witnesses who may appear on the *final* list who were not on the *preliminary* list be 8.

Plaintiff has investigated this Planned Transaction for more than 7 months (since June, 2021), but Defendants are only now endowed with subpoena power to seek the third-party discovery. In the Investigation, Plaintiff contacted 116 third parties to develop evidence. Given the necessary expedited schedule for this matter, Defendants need more flexibility than the limits proposed by Plaintiff allow. For example, given the breadth of product alternatives, Defendants may need the option of calling at trial a number of witnesses for very brief and narrow testimony about the other wall cover materials that compete with FRP, to defend against Plaintiff's product market allegations. And there is no concern that Defendants' trial witness list will prolong the trial—the trial length will be set and will inherently limit the number of witnesses the parties can call. Given the number of alternatives to FRP, an artificial limit on the number of witnesses

restricts the ability of Defendants to establish evidence of the numerous FRP substitutes, thereby restricting Defendants' ability to rebut Plaintiff's claim of monopolization.

In addition, because Defendants' third-party discovery efforts are just beginning, the discovery that will take place between the preliminary trial witness list and the final list may reveal more than 3 additional parties who would make key trial witnesses; Defendants' proposal of 8 new witnesses is reasonable and there will be plenty of time for Plaintiff to depose up to 8 new witnesses should they choose.

5. Translation of Foreign Language Documents.

Each party is responsible for providing a copy of any foreign language document and a certified translation for any responsive, non-privileged documents, as well as those redacted for privilege, that are wholly or partially in a language other than English ("foreign language") if the party uses such foreign language document in a pleading, during a deposition, listed as a trial exhibit, or in cross-examination of a trial witness. If a party is seeking to use a translation as an exhibit, it will be exchanged as early as possible in good faith but no later than the exhibit exchange. Any enhanced machine translations previously produced by Defendants Grupo Verzatec S.A. de C.V. and Stabilit America in the production of Investigation Materials to the United States are not certified translations.

6. Written Discovery on Parties.

(a) **Document Requests**.

There is no limit on the number of requests for the production of documents that may be served by the parties pursuant to Federal Rule of Civil Procedure 34. The parties must serve any objections to requests for productions of documents within 5 days after the requests are served. Within 4 days of service of any objections, the parties must meet and confer to attempt to resolve

in good faith any objections and to agree on custodians to be searched. The parties must make good-faith efforts to make rolling productions of responsive productions (to the extent not subject to any objections or custodian issues that have not been resolved), including any portion(s) of responsive productions that are not subject to any objections or custodian issues beginning no later than 17 days after service of the request for production. The parties must make good-faith efforts to complete responsive productions no later than 20 days after service of the request for production. Should any objections or custodian issues remain unresolved for 14 days or more after service of the request for production, the parties must make good-faith efforts to complete such remaining responsive productions no later than 14 days after resolution of such objections or custodian issues.

Notwithstanding this section, in responding to requests for production of documents that are part of Supplemental Discovery, the parties must (i) serve any objections to such requests for production of documents within 3 business days after the requests are served; (ii) make responsive productions (subject to any objections or custodian issues that have not been resolved) on a rolling basis; (iii) make good-faith efforts to begin such productions no later than 7 days after the requests are served; and (iv) make good-faith efforts to complete such productions no later than 7 days after resolution of objections and custodian issues.

Throughout the meet-and-confer process, the parties will work in good faith to complete production of data or data compilations, but must employ good-faith efforts to comply with the requests for production no later than 30 days after service of the requests for production, unless otherwise extended by agreement between the parties.

(b) **Interrogatories**.

Due to the compressed schedule before trial, the parties have agreed that no written interrogatories under Federal Rule of Civil Procedure 33 will be served in this action.

(c) **Requests for Admission**.

Due to the compressed schedule before trial, the parties have agreed that no written requests for admission under Federal Rule of Civil Procedure 36 will be served in this action.

7. Discovery on Non-Parties.

The parties will in good faith cooperate with each other with regard to any discovery to non-parties in an effort to minimize the burden on non-parties. Every subpoena to a non-party shall include a cover letter requesting that: (a) the non-party identify any applicable confidentiality designation prior to producing it; and (b) the non-party provide to the other parties copies of all productions at the same time as they are produced to the requesting party.

If a non-party fails to provide copies of productions to the other parties, the requesting party shall provide such copies to the other parties, in the format the productions were received by the requesting party, within 3 business days of the requesting party receiving such materials from the non-party. In addition, if a non-party produces documents or electronically stored information that are not Bates-stamped, the subpoenaing party receiving those materials shall work in good faith with the other parties to produce Bates-stamped copies.

8. Depositions.

The United States is limited to 25 depositions of fact witnesses, and Defendants collectively are limited to 25 depositions of fact witnesses. Each deposition of a party to be taken under Federal Rule of Civil Procedure 30(b)(6) counts as one deposition, regardless of the number of witnesses produced to testify on the matters for examination in that deposition.

Where the topic(s) on notice(s) of deposition(s) pursuant to Rule 30(b)(6) differ from an earlier notice(s), leave of court is not required to take more than one deposition of a corporate entity.

The following depositions do not count against the 25-deposition caps imposed by the preceding sentences: (a) depositions of any persons identified on a party's final trial witness list who were not identified on that party's preliminary trial witness list; (b) depositions of the parties' designated expert witnesses; (c) depositions taken in response to Civil Investigative Demands; and (d) depositions taken for the sole purpose of establishing the location, authenticity, or admissibility of documents produced by any party or non-party, provided that such depositions may be noticed only after the party taking the deposition has taken reasonable steps to establish location, authenticity, or admissibility through other means, and further provided that such depositions must be designated at the time that they are noticed as being taken for the sole purpose of establishing the location, authenticity, or admissibility of documents.

The parties will make reasonable efforts to make witnesses available for deposition upon 7 business days' notice. Witnesses on a party's preliminary trial witness that are under that party's control must be made available for deposition prior to the date of the exchange of final trial witness lists, provided the deposing party gives 7 days' notice. Witnesses on a party's final trial witness list not on that party's preliminary trial witness list must be made available for deposition on 7 days' notice, provided that witness is under the party's control.

Depositions may be conducted in-person or remotely, taking into account the witnesses' personal circumstances and the status of the pandemic. For any party or non-party deposition conducted remotely, the deposition will take place by videoconference. The court reporter will swear the witness remotely by means of the videoconference. As is the case for in-person depositions, the witness may not engage in conversations with counsel or third parties while the

deposition is proceeding, whether by instant message, text message, email, or any other means not recorded on the record. For videoconference depositions where individuals are physically present who are not otherwise the deponent, court reporter, or videographer, the individual will be subject to an additional camera recording of his or her own attendance. No participants other than the court reporter, and videographer if applicable, will record the deposition.

If a party serves a non-party a subpoena for the production of documents or electronically stored information and a subpoena commanding attendance at a deposition, the party serving those subpoenas must schedule the deposition for a date at least 4 business days after the return date for the document subpoena, and if the party serving those subpoenas agrees to extend the date of production for the document subpoena in a way that would result in fewer than 4 business days between the extended production date and the date scheduled for that non-party's deposition, the date scheduled for the deposition must be postponed to be at least 4 business days following the extended production date, unless the parties consent to fewer than 4 business days.

Depositions of fact witnesses are limited to no more than one (7-hour) day unless that deponent requires an interpreter. Depositions of witnesses who require an interpreter are limited to no more than two 7-hour days. During non-party depositions, the non-noticing side will receive at least 2 hours of examination time. If a non-party deposition is noticed by both sides, then time will be divided equally between the sides, and the deposition of the non-party will count as one deposition for both sides.

Any party may further depose any person whose deposition was taken pursuant to a Civil Investigative Demand, and the fact that such person's deposition was taken pursuant to a Civil Investigative Demand may not be used as a basis for any party to object to that person's deposition.

9. Evidence from a Foreign Country.

Before any party may offer documentary or testimonial evidence from an entity or person located in a foreign country, the other side must be afforded an opportunity by the entity or person (or both, when applicable) to obtain documentary and deposition discovery.

For any non-party witness who resides outside the United States and is included on the witness lists of any party, any deposition of that witness may be conducted via remote means, as described in this Order, and any such deposition may be conducted under United States law. Additionally, for any officer, director, or managing agent of a Defendant who resides outside the United States and is noticed to be deposed whether or not on a witness list, Defendants will make the individual available for deposition.

Each party has agreed that its litigation counsel in this action will accept service of a deposition notice on its behalf for any witness who is an officer, director, or managing agent of a party, the party's subsidiary, or an affiliate of the party and who resides or is located outside the United States, without requiring additional or different procedures to be followed pursuant to the Hague Evidence Convention, or any other applicable convention, treaty, law, or rule. In addition, each party has agreed to make each such witness available for depositions in Washington, DC or another place in the United States determined by agreement of the parties or via remote means, as described in this Order, and that any such deposition will be conducted under United States law.

10. Presumptions of Authenticity and Admissibility.

Documents produced by the parties and non-parties from their own files will be presumed to be authentic within the meaning of Federal Rules of Evidence 901 and 902. Any good-faith objection to a document's authenticity must be provided with the exchange of other objections to

intended trial exhibits. To rebut this presumption of authenticity, the opposing side must serve a specific good-faith written objection establishing a factual basis to challenge the document's authenticity, and the parties will promptly meet and confer to attempt to resolve any objection. The parties have further agreed that documents produced by the parties and non-parties from their own files will be presumed to be records of a regularly conducted activity as described in Federal Rule of Evidence 803.[7] Any objections that are not resolved through this means or the discovery process will be resolved by the Court.

11. Expert Witness Disclosures and Depositions.

The schedule allows for opening initial expert report(s) by the party with the burden of proof or production on the subject, rebuttal expert report(s), and reply expert report(s). Any additional supplemental report may not be served without leave of court.

Each expert will be deposed for only one (7-hour) day, with all 7 hours reserved for the side noticing the expert's deposition. Depositions of each side's experts will be conducted only after disclosure of all expert reports and all of the materials identified in section 11(B) of this Order for all of that side's experts.

Expert disclosures, including each side's expert reports, must comply with the requirements of Federal Rule of Civil Procedure 26(a)(2) and 26(b)(4), except as modified by the following.

(A) Neither side must preserve or disclose, including in expert deposition testimony, the following documents or information:

(i) any form of oral or written communications, correspondence, or work product not relied upon by the expert in forming any opinions in his or her final report shared:

[7] This presumption does not preclude the parties from objecting to hearsay statements within these documents and it does not apply to documents created in anticipation of litigation.

(a) between the United States or any Defendant's counsel and the United States' or the Defendant's own testifying or non-testifying expert(s);

(b) between any agent or employee of the United States or Defendant's counsel and the United States or the Defendant's own testifying or non-testifying expert(s);

(c) between testifying and non-testifying experts;

(d) between non-testifying experts; or

(e) between testifying experts;

(ii) any form of oral or written communications, correspondence, or work product not relied upon by the expert in forming any opinions in his or her final report shared between experts and any persons assisting the expert;

(iii) the expert's notes, except for notes of interviews participated in or conducted by the expert, if the expert relied upon such notes in forming any opinions in his or her final report;

(iv) drafts of expert reports, affidavits, or declarations; and

(v) data formulations, data runs, data analyses, or any database-related operations not relied upon by the expert in forming any opinions in his or her final report.

(B) The parties have agreed that the following materials will be disclosed:

(i) all final reports;

(ii) a list by bates number of all documents relied upon by the testifying expert(s) in forming any opinions in his or her final reports;

(iii) copies of any materials relied upon by the expert not previously produced that are not readily available publicly;

(iv) a list of all publications authored by the expert in the previous 10 years and copies of all publications authored by the expert in the previous 10 years that are not readily available publicly;

(v) a list of all other cases in which, during the previous 4 years, the expert testified at trial or by deposition, including tribunal and case number; and

(vi) for all calculations appearing in the final reports, all data and programs underlying the calculations (including all programs and codes necessary to replicate the calculations from the initial ("raw") data files, in standard machine-readable format(s), and the intermediate working-data files that are generated from the raw data files and used in performing the calculations appearing in the final report) and a written explanation of why any observations in the raw data were either excluded from the calculations or modified when used in the calculations ("Backup Materials").

Notwithstanding any of the foregoing, both sides will have at least 7 days to respond to any econometric analysis included in the disclosure of the opposing expert, and will have the opportunity to depose that expert on the econometric analysis.

12. [*Plaintiff's additional proposed section:* Timely Production of Evidence Concerning Remedy.

Evidence related to a Defendant's attempt to address the United States' concerns about the Planned Transaction, whether by agreeing to divest or license assets or by making any other agreement, offer, or commitment, will be excluded under Federal Rule of Evidence 403 as unfairly prejudicial to the United States, unless Defendants provide written notice of the proposed remedy to the United States 90 days before the close of fact discovery.]

(a) ***Plaintiff's position***

This clause exists to ensure that the United States has adequate time before trial to investigate any remedy proposed by defendants. The need for certainty that Defendants will not spring last-minute theories or proposals without providing the United States with adequate time to investigate those theories or proposals before trial is particularly important where the United States has, in the interest of time and for the benefit of the defendants, proposed an accelerated fact discovery timeline. Nothing in this clause would prohibit the United States and Defendants from settling this case – it would only prevent defendants from radically changing the contours of the case with a last-minute "fix" to be litigated. Once again, the Defendants appear to prefer "trial by surprise" over a developed factual record.

(b) ***Defendants' position***

This substantive legal conclusion does not belong in the case management order. The Division's position—to exclude evidence of a resolution of the alleged competitive concerns—is contrary to public policy favoring settlement of disputes. Defendants should not be preemptively barred from proposing a remedy after a certain date. If Defendants propose a remedy at a point in the litigation that Plaintiff feels is too late, the Division is free to object and offer its position.

13. Timely Service of Fact Discovery and Supplemental Discovery.

All discovery, including discovery served on non-parties, must be served in time to permit completion of responses by the close of fact discovery, except that Supplemental Discovery must be served in time to permit completion of responses by the close of Supplemental Discovery. For purposes of this Order, "Supplemental Discovery" means document and deposition discovery, including discovery served on non-parties, related to any person identified on a party's final trial witness list who was not identified on that party's

preliminary trial witness list (including document and deposition discovery related to entities related to any such person). Depositions that are part of Supplemental Discovery must be noticed within 5 days of exchanging the final trial witness lists.

14. Trial Exhibit Lists and Demonstrative Exhibits.

Consistent with the schedule above, the parties will meet and confer about the maximum number of exhibits permitted on each side's trial exhibit list and jointly propose limits to the Court. Demonstrative exhibits do not count against the maximum number of exhibits permitted on each side's trial exhibit list, and they do not need to be included on the trial exhibit lists when those lists are exchanged.

Unless otherwise agreed or ordered, the parties must serve demonstrative exhibits on all counsel of record at least 24 hours before any such exhibit may be introduced (or otherwise used) at trial, except that the following types of demonstrative exhibits need not be pre-disclosed to the opposing party: (i) demonstrative exhibits used during opening statements or closing arguments; (ii) demonstrative exhibits used by experts that were disclosed in the experts' report, if the exhibit has not been materially changed; (iii) demonstrative exhibits used in cross examination of any witness or in direct examination of a hostile witness; and (iv) demonstrative exhibits created in court during a witness's examination. Demonstrative exhibits representing data must rely only on data that has been produced to the opposing party by the close of discovery or is readily available publicly.

15. Calculating Discovery Response Times.

For the purposes of calculating discovery response times under the Federal Rules of Civil Procedure, electronic delivery will be treated in the same manner as hand delivery at that time.

16. Nationwide Service of Trial Subpoenas.

To assist the parties in planning discovery, and in view of the geographic dispersion of potential witnesses in this action outside this District, the parties are permitted, under 15 U.S.C. § 23, to issue nationwide discovery and trial subpoenas from this Court. Subpoenas may be served by commercial overnight delivery. Non-parties may be required to provide testimony or documents under subpoena within 7 days. Non-parties shall serve any objections to subpoenas no fewer than 3 days before the return date.

17. Service of Pleadings and Discovery on Parties.

Service of all pleadings, discovery requests (including subpoenas for testimony or documents under Federal Rule of Civil Procedure 45), expert disclosures, and delivery of all correspondence in this matter must be made by ECF if required by applicable rule or otherwise by email, except when the volume of attachments requires overnight delivery of the attachments or personal delivery, such attachments will be served by overnight delivery or personal delivery to the following individuals designated by each party:

For Plaintiff United States of America:
Tai Milder (Tai.Milder@usdoj.gov)
450 Golden Gate Avenue, Room 10-0101
Box 36046
San Francisco, CA 94102-3478
Telephone: (415) 770-8714

Lowell R. Stern (Lowell.Stern@usdoj.gov)
U.S. Department of Justice
Antitrust Division
450 Fifth Street, NW, Suite 8700
Washington, DC 20530
Telephone: (202) 413-9528

For Defendants Grupo Verzatec S.A. de C.V. and Stabilit America:

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Kathryn Jordan Mims (Kathryn.mims@whitecase.com)
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Nate Martin (nate.martin@whitecase.com)
White & Case LLP
701 Thirteenth St. NW
Washington, DC 20005

For Defendants Crane Company and Crane Composites, Inc.:

Allen Bachman (allen.bachman@klgates.com)
Michael Martinez (michael.martinez@klgates.com)
Drew Mann (drew.mann@klgates.com)
Jason Semmes (jason.semmes@klgates.com)
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1601 K Street, NW
Washington, DC 20006

18. Completion of Planned Transaction.

Defendants have agreed that they will not close, consummate, or otherwise complete the Planned Transaction until 12:01 a.m. on the tenth (10th) day following the entry of the judgment by the Court, and only if the Court enters an appealable order that does not prohibit consummation of the transaction. For purposes of this Order, "Planned Transaction" means the proposed acquisition of Crane Composites, Inc. by Grupo Verzatec S.A.de C.V.

19. Modification of Scheduling and Case Management Order.

Modifications of the rights and responsibilities of the parties under this Order may be made by mutual agreement of the parties, provided any such modification has no effect on the schedule for pretrial filings or trial dates. Otherwise, any party may seek modification of this Order for good cause.

SO ORDERED:

_____

Honorable Manish S. Shah
United States District Judge

Dated: _____, 2022