UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

IN RE DOMESTIC AIRLINE TRAVEL ANTITRUST LITIGATION	MDL Docket No. 2656 Misc. No. 15-1404 (CKK)
This Document Relates To: ALL CASES.	

JOINT STATUS REPORT

Pursuant to the Court's Order Regarding Initial Scheduling and Case Management Conference (ECF No. 125), the parties submit this joint status report that outlines the proposed Case Management Plan, and the attached proposed Scheduling Orders. This report includes a succinct statement of all agreements reached and, where the parties could not agree, a description of the positions of each party.

I. Settlement

The parties do not believe there is a realistic possibility of settling this matter without further judicial action, but will consider and discuss settlement on an ongoing basis.

II. Mediation/ADR

The parties do not believe the case could benefit from the Court's Mediation Program or some other form of alternative dispute resolution at this time. The parties will continue to assess the possibility of mediation or ADR as the case progresses, and will promptly inform the Court if and when the parties believe some form of ADR would be beneficial.

III. Special Master/Magistrate Judge

***Plaintiffs' Position*:**

Defendants have proposed that a Special Master be appointed pursuant to Fed. R. Civ. Proc. 53 for discovery purposes. Plaintiffs believe that such matters should remain within the Court, either with Judge Kollar-Kotelly or with a magistrate judge. This is a large antitrust class action presenting the question of whether Defendants engaged in concerted conduct to harm the interests of Americans who purchase air transportation, a matter of great public interest. Plaintiffs have enormous respect for the judicial branch, and believe that it is most appropriate that an action like this be adjudicated through the Court rather than through a private attorney serving as a special master.

It has been the experience of Plaintiffs that the prompt and efficient resolution of discovery matters as required by Rule 1 is best accomplished when such matters remain with the Court. Too often, appointing a special master for discovery leads to the multiplication of proceedings, delay in resolving disputes, and greater expense for the parties (in this case the proposed class). Further, this is not a mass tort action with thousands of claimants, and thus does not present the resource and case management issues that sometimes justify appointment of a special master. Rather, there is one proposed class and four defendants. While the case may present some complex legal issues and the transactional data which Plaintiffs seek from Defendants is voluminous, the discovery issues are not so complex or difficult such that a special master would be appropriate or necessary. Plaintiffs respectfully request that all discovery matters remain within the Court and that a special master not be appointed.

***Defendants' Position*:**

Defendants believe that appointment of a special master pursuant to Rule 53 of the

Federal Rules of Civil Procedure would aid in the rapid and efficient resolution of discovery disputes. Defendants recommend that the Hon. Richard A. Levie (Ret.) ("Special Master") be appointed for the purpose of managing discovery and resolving discovery disputes. Due to his work on the American Airlines-US Airways merger case, which case figures prominently in Plaintiffs' complaint, Judge Levie is already familiar with the legal and economic issues affecting air transportation.

The Special Master would have the rights, powers, and duties provided in Rule 53 and may adopt such procedures as are not inconsistent with that rule or with this or other orders of the Court. The following matters would be referred to the Special Master for him to consider and rule upon: all disputes or matters relating to discovery, including but not limited to claims of privilege, motions to compel, motions for protective order, scheduling, e-discovery, and expert discovery.

IV. Rule 23 Procedures

The parties' proposed dates for Rule 23 discovery and briefing, including appointment of class counsel, are set out in the attached proposed Scheduling Orders. The parties' respective positions on the need for and timing of Rule 23 discovery are set out in Section XI below.

V. Narrowing of Factual or Legal Issues

The parties will consider and discuss whether some or all of the factual or legal issues can be agreed upon or narrowed on an ongoing basis. Defendants believe that some factual and legal issues can be narrowed or resolved by bifurcating discovery, as described in more detail at Section XI below. Plaintiffs do not believe that bifurcating discovery will assist in narrowing factual and legal issues, and believe that the only form of bifurcation proposed by Defendants to date – between "class issues" and "merits issues" – would create a significant risk of repeated

discovery disputes concerning where the line is between these issues. Plaintiffs further believe that such bifurcation would serve to delay the resolution of these proceedings.

VI. Initial Disclosures

The parties have been meeting and conferring about the transactional data that is reasonably available and would be produced. They are also meeting and conferring about whether there is a more effective alternative to initial disclosures required by Rule 26(a)(1) of the Federal Rules of Civil Procedure. The parties shall either agree on an alternative or present their respective positions to the Court within a specified number of days of entry of a scheduling order depending on the schedule ordered by the Court.

VII. Discovery Issues

The parties disagree on the anticipated extent of discovery and how long discovery should take, as described in more detail in Section XI below and in the attached proposed Scheduling Orders. The parties anticipate submitting a stipulated protective order, proposed alternative to Rule 26(a)(1) disclosures, protocol for production of ESI and documents, expert stipulation, privilege protocol, deposition protocol, preservation agreement, agreement on transactional data, and/or other agreements that the parties deem necessary, by the date reflected in the attached proposed Scheduling Orders. To the extent the parties cannot agree on any of these issues, they anticipate submitting disputed issues to the Court, Magistrate Judge, or Special Master, as the Court deems appropriate.

VIII. Expert Disclosures

The parties agree that expert disclosures shall be governed by Fed. R. Civ. P. 26, except as modified by an expert stipulation agreed to by the parties and ordered by this Court. The number of and timing for expert depositions is dependent on resolution of the discovery schedule

as described in Section XI below.

IX. Dispositive Motions

Defendants anticipate filing further dispositive motion(s). The timing for briefing such motion(s) is dependent on resolution of the discovery schedule as described in Section XI below.

X. Other Matters for Inclusion in the Scheduling Order and Case Management Plan

a. Confidentiality

The parties shall meet-and-confer to negotiate a protective order, and propose a protective order to the Court, in the time frame reflected in the attached proposed Scheduling Orders. The protective order shall provide that the producing party may designate any or all documents produced to the Department of Justice as "Confidential" (or other appropriate designation under the final order) without attorney review. The protective order shall address, among other things, (a) restricting disclosure of confidential commercial information to business persons of competitors, (b) inadvertent production of privileged information, (c) inadvertent failure to designate material as confidential, (d) procedures for resolving disputes regarding confidential designations, and (e) protection of confidential information submitted to the Court.

Defendants produced documents to DOJ in conformance with the CIDs and applicable rules without designating specific documents as confidential. To facilitate the production of those documents to Plaintiffs, the parties agree that Defendants shall not be required to review those productions again and designate individual documents as confidential. The parties agree that all of those documents shall be treated as confidential under the protective order, that the Plaintiffs may identify documents that they believe are not confidential, that the parties shall meet and confer if they disagree about the appropriate designation for a document, and that any disputes shall be resolved under the procedures set forth in the protective order.

b. Document Production

The parties will produce documents to which they have not raised an objection on a rolling basis rather than waiting until all documents responsive to a request have been gathered. The parties will continue to meet and confer regarding the specific transactional data to be retained and produced, format for the production of data, sharing of costs of collecting and producing data and documents, and a schedule for the orderly and prompt production of different categories of documents.

c. Principal Designees

By Order dated February 4, 2016, the Court appointed Michael Hausfeld of Hausfeld, LLP and Steven Williams of Cotchett, Pitre & McCarthy, LLP as Plaintiffs' Co-Lead Interim Class Counsel. For the convenience of all parties, the Plaintiffs shall select a Principal Designee from each of the lead class counsel firms on which all discovery-related requests, productions, or correspondence shall be directed. The Plaintiffs' Principal Designees shall be responsible for distributing these materials to all plaintiffs. Similarly, Defendants shall select one Principal Designee for each Defendant to whom all discovery-related requests, productions, or correspondence shall be directed.

d. Electronic Service

In lieu of service of documents pursuant to Fed. R. Civ. P. 5, service of all correspondence and formal papers filed, whether under seal or otherwise, shall be done by electronic mail to counsel of record. In the event any documents are too voluminous for electronic mail, the parties shall serve an electronic disk, hard drive, secure download, or other electronic means agreed upon by the parties on each Principal Designee at:

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If service is made by physical mail, the serving party will email the other side's Principal Designee when the materials are sent to alert them that the materials are being served. Electronic delivery shall be treated the same as hand delivery for purposes of calculating response times under the Federal Rules. Service on the plaintiffs' Primary Designee shall be deemed service on all Plaintiffs. Plaintiffs' Primary Designee shall provide copies to all plaintiffs of any papers or documents served by defendants.

e. Nationwide Service

The parties will be allowed nationwide service of discovery subpoenas pursuant to Fed. R. Civ. P. 45 and 15 U.S.C. § 23, to issue from this Court.

XI. Bifurcated Discovery

***Plaintiff's Position*:**

While Plaintiffs are amenable to phased discovery in a manner described in more detail below, Plaintiffs do not believe fact discovery should be bifurcated into "class certification" discovery and "merits" discovery in light of the Supreme Court's analysis of the class certification standards in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). As the Court explained in *Comcast* (an antitrust case):

> Repeatedly, we have emphasized that it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question, and that certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied. Such an analysis will frequently entail overlap with the merits of the plaintiff's underlying claim. That is so because the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.

133 S. Ct. at 1432 (citations omitted). *Dukes* similarly "emphasizes that the district court's class certification determination must rest on a 'rigorous analysis' to ensure '[a]ctual, not presumed, conformance' with Rule 23."' *Burton v. District of Columbia,* 277 F.R.D. 224 (D.D.C. 2011) (quoting *Dukes,* 131 S. Ct. at 2551). In antitrust cases this means, among other things, that Plaintiffs must put forth a damages model tied to their theory of liability, *i.e.,* a model which matches the facts of the case. *Comcast*, 133 S. Ct. at 1433.

Courts have interpreted *Dukes* and *Comcast* to require discovery into the merits prior to the filing of class certification motions. *See e.g., Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294, 298 (S.D.N.Y. 2012) (the Supreme Court's decision in *Dukes* "illustrates the need to develop the record fully before a class motion is considered."); *Johnson v. Flakeboard Am. Ltd.*, No. 4:11-2607-TLW-KDW, 2012 U.S. Dist. LEXIS 83702, at *16-17 (D.S.C. Mar. 26, 2012) ("The Supreme Court's decision in [*Dukes*] supports Plaintiffs' contention that discovery into the merits of the claim is necessary before entering findings of fact on whether Rule 23 standards have been met."). Moreover, "because of the 'rigorous analysis' required by *Dukes*, courts are reluctant to bifurcate class-related discovery from discovery on the merits." *Chen-Oster*, 285 F.R.D. at 300 (collecting cases).[1]

[1] *See, e.g., City of Pontiac Gen. Employees' Ret. Sys. v. Wal-Mart Stores, Inc.*, No. 12-cv-5162, 2015 WL 11120408, at *1 (W.D. Ark. June 18, 2015) (denying motion to bifurcate class and merits discovery); *True Health Chiropractic Inc v. McKesson Corp.*, No. 13-cv-02219, 2015

The primary reason for this is that the line between class and merits discovery is often unclear.[2] As Judge Facciola explained in another complex antitrust case in this court, "the alleged conspiracy's operation and scope are so closely intertwined that it would be an 'arbitrary insistence . . . that thwarts the informed judicial assessment that the current class certification practice emphasizes' to insist that one be classified as 'certification evidence' and the other as 'merits evidence.'" *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 258 F.R.D. 167, 174 (D.D.C. 2009); *see also see also Hubbard v. Potter*, No. 03-1062, 2007 WL 604949, at *1

WL 273188, at *1-2 (N.D. Cal. Jan. 20, 2015); *Cabrera v. Gov't Employees Ins. Co.*, No. 12-cv-61390, 2014 WL 2999206, at *8 (S.D. Fla. July 3, 2014) (rejecting request to defer merits discovery prior to certification and setting one deadline for completion of discovery and merits discovery); *In re Groupon Secs. Litig.*, No 12-CV-2450, 2014 U.S. Dist. LEXIS 26212, at * (N.D. Ill. Sept.. 23, 2014) (relying on *Dukes* and *Comcast* in denying defendant's motion to bifurcate); *Paulino v. Dollar Gen. Corp.*, No. 12-cv-75, 2013 WL 1773892, at *4 (N.D.W. Va. Apr. 25, 2013); *In re Cmty. Bank of N. Virginia Mortg. Lending Practices Litig.*, No. 02-cv-1201, 2011 WL 4382942, at *3 (W.D. Pa. Sept. 20, 2011) (declining to bifurcate class and merits because "in light of the United States Supreme Court's decision in *Wal–Mart Stores, Inc. v. Dukes,* 131 S.Ct. 2541 (2011), this court's class certification analysis may entail a preliminary inquiry into the merits").

[2] *New England Carpenters Health & Welfare Fund v. Abbott Labs.*, No. 12-cv-1662, 2013 WL 690613, at *3 (N.D. Ill. Feb. 20, 2013) (denying motion to bifurcate class and merits discovery in antitrust action because, *inter alia*, class certification and merits issues overlap); *Chocolate Confectionery Antitrust Litig.*, No. 1:08-MDL-1935, slip op at 1 (M.D. Pa. Sept. 30, 2009) (ECF No. 693) (denying bifurcation because a "substantial overlap between class and merits discovery is likely"); *Lakeland Reg'l Med. Ctr. v. Astellas US, LLC,* No. 8:10–cv–2008–T–33TGW, 2011 WL 486123, at *2 (M.D. Fla.2011) ("The Court is not persuaded that phased discovery will conserve the resources of the parties or the Court. This is because the line between 'class issues' and 'merits issues' is practically difficult, if not impossible, to determine."); *Hines v. Overstock, Com, Inc.,* No. 09–CV–991, 2010 WL 2775921, at *1 (E.D.N.Y. 2010) ("[C]ourts in this and other circuits have recognized that where discovery relating to class issues overlaps substantially merits discovery, bifurcation will result in duplication of efforts and needless line-drawing disputes."); *In re Plastics Additives Antitrust Litig.*, No. 03-cv-2038, 2004 WL 2743591, at *3-4 (E.D. Pa. Nov. 29, 2004) ("There will be a substantial overlap between what is needed to prove plaintiff's price-fixing claims, as well as the information needed to establish class-wide defenses, and what is needed to determine whether the elements of class certification are met.").

(D.D.C. Feb. 22, 2007). Because evidence needed for class certification is so intertwined with the merits, Judge Facciola concluded that bifurcation would not promote judicial efficiency:

> If bifurcated, this Court would likely have to resolve various needless disputes that would arise concerning the classification of each document as "merits" or "certification" discovery . . . Furthermore, the continued need for supervision and the increased number of disputes would further delay the case proceedings. Such prevention of the "expeditious resolution of the lawsuit" would prejudice plaintiffs.

Rail Freight, 258 F.R.D. at 174 (internal and citing references omitted).

Plaintiffs' proposed schedule is predicated upon meaningful precertification *merits* discovery, as is now required under *Dukes* and *Comcast*. Plaintiffs' counsel have drawn on decades of collective class action experience as well as information learned in meet and confers with Defendants and selected the earliest practicable date—at the close of a 15-months merits discovery period—for moving for class certification that would be fair to both sides.[3]

During meet and confers, Defendants represented that it will take at least three months to produce transactional data after the scope of the production has been agreed to, which is anticipated to take a month or two. Thus, Plaintiffs' schedule (as well as Defendants' schedule) proposes a substantial completion date for the production of data six months after the opening of discovery. Plaintiffs' experts will only then be able to begin processing, reviewing, and analyzing the data necessary to prepare their expert reports. By conservative estimate, this process usually takes at least six months from the time usable transactional data becomes

[3] Although Judge Facciola entered a schedule in which merits discovery extended beyond the filing of the class certification motion, post-*Dukes* cases illustrate the potential inefficiencies of this approach. *See, e.g., In re High-Tech Employee Antitrust Litig.*, 289 F.R.D. 555, 584 (N.D. Cal. 2013) (granting leave to amend class certification motion because of significant merits discovery conducted after class certification briefing that may enable plaintiffs to establish common impact).

available, and the data in this case is expected to be particularly voluminous.[4] Plaintiffs' expert will then prepare reports based on the data produced by Defendants, evidence concerning the nature and scope of the conspiracy, and economic analysis to demonstrate a method to demonstrate class impact. Plaintiffs will need sufficient time to review the expert reports, confer with their experts, and prepare their class certification motion, a multi-month process.

In addition to transactional data, Plaintiffs will need time to review and analyze documents. Defendants have proposed phased discovery in which Plaintiffs would only be entitled to production of the government documents prior to filing their class certification motion. While Plaintiffs are amenable to document discovery that starts with the government documents, Defendants have not provided Plaintiffs with sufficient information about the scope of those productions to permit them to evaluate whether these productions will be sufficient for class certification purposes.[5] Thus, Plaintiffs' proposed schedule anticipates additional meet and confers to understand the scope of the government production and whether documents beyond those productions will be necessary. In the likely event Plaintiffs need documents outside the scope of the government productions, they will endeavor to serve narrowly-tailored requests.[6] Plaintiffs' proposed schedule, with a substantial completion date for document productions six

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[4] Defendants' proposed schedule provides Plaintiffs with only three months to file their class certification motions and reports after Defendants complete substantial production of their transactional data, which is wholly inadequate given the volume of transactional data that is at issue in this case.

[5] At a minimum, Defendants would need to disclose the specific nature of documents searched for and produced, the identity of custodians searched, search terms used, and the date ranges the productions cover. In other cases, Plaintiffs have found government productions to not be fully aligned with their interests requiring them to seek additional documents and that is likely to be the case here. One defendant, for example, told Plaintiffs that its production only covers an 18-month time period, but did not identify that time period.

[6] Defendants will still have the right to object to the scope of any such requests, which will be governed by the Federal Rules, including the proportionality requirement.

month after discovery opens, provides sufficient time to negotiate the scope of additional productions, including custodians and search terms.[7]

Once Plaintiffs receive documents, they will need to undertake a detailed review, which will likely take months as the government productions alone total hundreds of thousands of pages. Once Plaintiffs are able to review the document productions, they will need to take both fact and 30(b)(6) party depositions, a process which will likely take months. Finally, Plaintiffs require certain targeted discovery from relevant third-parties, such as the International Air Transport Association, the Airline Tariff Publishing Company (an entity owned by Defendants through which data concerning their fares and charges is disseminated to the industry and to customers), and institutional investors that have common ownership in the Defendant airlines.[8] Plaintiffs require ample time to serve and negotiate the scope of third-party subpoenas, review the information produced, and take depositions in anticipation of moving for class certification—a process which will also take a number of months.

The 15-month discovery period that Plaintiffs propose before moving for class certification is therefore reasonable. Moreover, it is consistent with discovery periods in other complex antitrust cases. In *In re Air Cargo Shipping Services Antitrust Litigation*, for example, the plaintiffs filed their class certification motion after two years of discovery. *See Air Cargo*,

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[7] Contrary to Defendants' assertions, it is not Plaintiffs' intention to seek "boundless" discovery with wide-ranging requests. Nevertheless, Plaintiffs' alleged conspiracy has been deemed plausible by this Court, and Plaintiffs are entitled to discovery regarding that conspiracy. As noted above, at class certification, Plaintiffs must put forth a damages model tied to their theory of liability, *i.e.,* a model which matches the facts of the case, *Comcast*, 133 S. Ct. at 1433, and discovery regarding the contours of the conspiracy is necessary to do so.

[8] Defendants deem such third-party discovery outside of the scope of "class discovery." But Plaintiffs public signaling at IATA events and common control by institutional investors are at the heart of their conspiracy allegations and they are therefore entitled to such discovery prior to class certification.

No. 06-1775, ECF No. 993 (E.D.N.Y. Oct. 23, 2009) (order lifting discovery stay); *Air Cargo*, No. 06-1775, ECF Nos. 1599-1604 (E.D.N.Y. Oct. 28, 2011) (plaintiffs' class certification motion and supporting documents); *see also In re Credit Default Swaps Antitrust Litig*, No. 13-MD-2476, ECF No. 334 (S.D.N.Y. Sept. 18, 2014) (ordering fact discovery period of 16 months prior to class certification motion).

Defendants' proposed schedule, on the other hand, is impractical and inefficient. It is premised on bifurcation of class and merits discovery, which, as discussed above, has been largely rejected by courts in light of *Dukes* and *Comcast.* Defendants' argument in favor of bifurcation relies on selective quotes that mischaracterize the Manual for Complex Litigation.[9] *See generally* Manual for Complex Litigation (Fourth) § 21.14 (2014). Contrary to Defendants' assertion, the Manual recognizes the need for precertification merits discovery in cases such as this:

> There is not always a bright line between [class and merits discovery]. Courts have recognized that information about the nature of the claims on the merits and the proof that they require is important to deciding class certification. Arbitrary insistence on the merits/class discovery distinction sometimes thwarts the informed judicial assessment that current class certification practice emphasizes.

Id. (appearing to quote Judge Facciola without attribution). Moreover, Defendants cite only one antitrust case granting bifurcation post *Dukes* (although it pre-dates *Comcast*). *See In re Packaged Ice Antitrust Litig.*, No. 08-MDL-1952, 2011 WL 6178891 (E.D. Mich. Dec. 12, 2011). *Packaged Ice*, however, contains no discussion regarding the bifurcation issue, only a line at the end of the motion to dismiss opinion ordering the parties to "proceed immediately

[9] Defendants also appear to be citing an outdated 2004 version of the Manual for Complex Litigation.

with bifurcated discovery related solely to class certification." *Id*. at *11. Finally, Defendants' attempt to distinguish *Rail Freight*, a case recognized as controlling authority on the issue, is wholly unavailing.[10]

For the reasons set forth above, Plaintiffs respectfully submit that the Court should adopt their schedule as proposed with a 15-month merits discovery period preceding class certification. Any earlier deadline would contravene Rule 23(c)(1)(A)'s practicability requirement and unfairly prejudice Plaintiffs' ability to satisfy the prerequisites for class certification.

***Defendants' Position*:**

A. Introduction

Although Plaintiffs' suit arises out of an alleged conspiracy to reduce airline capacity, Plaintiffs' wide-ranging complaint repeats virtually every criticism, complaint, and allegation made against the airline industry in litigation, in the press, by NGOs, and by public figures since 2009 and treats each as evidence of a supposed industry-wide tendency toward conspiracy. The complaint contains allegations regarding: the history of airline mergers; how airlines decide

[10] First, it is premised on a mischaracterization of the nature of the transactions in that case. Regardless, Judge Facciola's ruling did not turn on the nature of the transactions in that case, but rather the general need in all cases for discovery regarding the scope of the conspiracy in order to satisfy the Rule 23 predominance requirement. *Id.* at 173-74 ("To satisfy this 'predominance' requirement, plaintiffs must secure evidence concerning 'Defendants' adoption of the fuel surcharge program, how it was imposed, and the Defendants' purposes in doing so' which bears directly on the element of common impact. In essence, the scope of defendants' alleged conspiracy is indistinguishable from its operation. Plaintiffs need evidence concerning the operation of the conspiracy—evidence defendants classify as 'merits-based'—to establish the scope of the conspiracy. In turn, plaintiffs need evidence of the scope of the conspiracy to prove common impact and thereby satisfy Rule 23's 'predominance' requirement. Here, the alleged conspiracy's operation and scope are so closely intertwined that it would be an 'arbitrary insistence ... that thwarts the informed judicial assessment that the current class certification practice emphasizes' to insist that one be classified as 'certification evidence' and the other as 'merits evidence.'").

where and when to fly; how they compete with one another; how they relate to investors and stock analysts; how they publish prices; and how they charge for ancillary services, manage distribution channels, and lobby the government. Taken together, the allegations touch virtually every aspect of the Defendants' businesses for many years. Unless measures are taken to manage discovery, Plaintiffs' approach threatens to devolve into an unfocused, unduly expensive, and unnecessarily protracted investigation in search of a claim, rather than an appropriately tailored search for information about whether Defendants actually conspired to restrict capacity. The flexibility afforded by the Federal Rules to investigate the circumstances of an alleged conspiracy is not unlimited; and it should not be exploited to amplify and accelerate the litigation burden when there is serious doubt as to whether the Defendants even engaged in a common course of conduct on capacity, much less whether common proof can establish injury to every member of a class of all air airline customers across all domestic air transportation markets over a long period of time.

Accordingly, Defendants propose that discovery in this case be bifurcated. Phase I would provide Plaintiffs all the discovery necessary to determine whether the proposed class should be certified under the requirements of Rule 23—including discovery that is relevant to both class certification and the merits—while postponing the extensive discovery related *only to the merits* and not to class certification to Phase II. As explained below, both sides would conduct discovery on potentially dispositive class certification issues relating to, *inter alia*, ascertainability, adequacy, typicality, and the important issue of whether impact or injury to putative class members can be shown with common proof.[11] All of these issues ultimately turn

[11] *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 262 (3d Cir. 2016) ("In antitrust cases, impact often is critically important for the purpose of evaluating Rule 23(b)(3)'s predominance requirement because it is an element of the claim that may call for individual, as opposed to

on an analysis of the comprehensive and voluminous capacity and transactional data, which Defendants will produce in Phase I and which is publicly available. In addition to the materials relevant for class purposes, Defendants would also produce to Plaintiffs the materials they have produced to the Justice Department. Review of these materials, which number in the hundreds of thousands of pages and deal with the central issues of actual and planned capacity at the heart of this case, will allow Plaintiffs to more efficiently frame their requests for additional merits only discovery to be conducted in Phase II, should such discovery be necessary after the Court's ruling on class certification.

Defendants believe that, as in many antitrust cases, the question of whether injury to class members can be proven with common evidence will be central to whether a class can be certified. Defendants expect to show that injury cannot be proven with common evidence because, *inter alia*, competition in the domestic airline industry occurs on thousands of city-pair routes, and capacity decisions (not to mention actual pricing decisions) are made on a route basis and respond to competitive and other market conditions unique to each of these routes.[12]

Defendants expect that Plaintiffs will rely on, *inter alia*, the same nationwide conspiracy allegations to show common injury on which the Court substantially relied in denying Defendants' motions to dismiss—namely that a "[c]onsensual capacity reduction among United States airlines commenced in 2009" and that there was a supposed structural break in airfares relative to "the air fares of non-Defendant airlines beginning in 2009." Consolidated Amended

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common, proof"); *Kottaras v. Whole Foods Mkt., Inc.*, 281 F.R.D. 16, 22 (D.D.C. 2012) (noting that "key issue [is] whether common or individual questions predominate as to adverse impact").

[12] Plaintiffs have alleged a single nationwide conspiracy to restrict capacity. As in most such conspiracy cases, it is likely to be uncontested for purposes of the class inquiry that such an alleged conspiracy is susceptible to proof that is common to the class.

Complaint ("CAC") ¶¶ 88, 65.[13] Defendants have attempted to recreate the charts and calculations that Plaintiffs allege show a divergence in capacity and pricing starting in 2009, but have been unable to re-produce the changes that Plaintiffs claim occurred. Part of Defendants' discovery from Plaintiffs will be directed toward determining the basis for Plaintiffs' assertions that Defendants have systematically limited or reduced capacity and increased prices relative to non-Defendant airlines beginning in 2009.

B. <u>Except for the DOJ Production, Defendants Propose Limiting Phase I Discovery to Class Certification Issues</u>

Defendants propose Phase I discovery taken by Plaintiffs would be limited to:

1. Defendants' capacity data for the period in dispute (much of which is publicly available).
2. Defendants' transactional and pricing data regarding flights for the period in dispute.
3. Documents from Defendants' network planning departments regarding capacity planning and changes.
4. Fact depositions of a limited number of each of Defendant's employees directed at class certification issues.
5. Depositions of class certification experts designated by Defendants.
6. All materials produced by Defendants to the Department of Justice pursuant to CIDs issued in July 2015.

Phase I discovery taken by Defendants would be limited to:

1. Discovery from Plaintiffs on the issue of common proof of impact and other class certification issues, including the bases for Plaintiffs' allegations that capacity and pricing diverged from historical patterns in 2009.
2. Depositions of class certification experts designated by Plaintiffs.
3. A deposition of each Plaintiff.

[13] *E.g.*, ECF No. 124, Mem. Op. at 21 (relying on Plaintiffs' allegations regarding a divergence in capacity beginning in 2009); at 21-22 (relying on a chart in the CAC that allegedly shows "after January 2009 . . . a deviation between fares on routes that a Defendant was the largest carrier and routes when another airline was the largest carrier"); at 22 (relying on two additional charts purporting to show a rise in air fares beginning in 2009).

C. Absent Bifurcation, Discovery Would Be Onerous, Expansive, and Unwieldy

The CAC contains broad allegations that touch on almost all facets of the airline industry. Plaintiffs contend the following allegations give rise to an inference of conspiracy:

1. Presentations and statements to investors and the analyst community (CAC ¶¶ 88-112);
2. Stock ownership by major investors in multiple airlines (*id.* ¶¶ 43-45);
3. Membership in trade associations (*id.* ¶¶ 113-14);
4. Use of the Airline Tariff Publishing Company ("ATPCO") (*id.* ¶¶ 48-56);
5. Use of cross-market initiatives and other pricing issues (*id.* ¶ 57);
6. Imposition of ancillary fees (*id.* ¶¶ 78-79);
7. Jet fuel prices (*id.* ¶¶ 74-75);
8. Industry concentration and barriers to entry, including airport and gate constraints (*id.* ¶¶ 40-47);
9. Lobbying efforts (*id.* ¶ 136);
10. Conduct concerning online travel agencies (*id.* ¶¶ 136-38);
11. Government investigations (*id.* ¶¶ 83, 124-29, 141); and
12. Prior governmental suits and private class actions involving alleged violations of the antitrust laws unrelated to capacity (*id.* ¶¶ 48-56, 59-62).[14]

Without conceding the relevance of these topics to any alleged conspiracy, left unchecked, discovery regarding these issues would concern most aspects of Defendants' businesses, including network planning, revenue management, pricing, investor relations, slot management, lobbying and regulatory affairs, ticket distribution, fuel hedging, joint ventures, and fleet maintenance, among others. Without a phased approach, discovery would likely involve: (1) production of millions of pages of documents (in addition to the hundreds of thousands produced to DOJ), including from prior lawsuits and investigations referenced in the CAC; (2) third-party discovery, including from ATPCO, investors, analysts, trade associations,

[14] *See also* Pls.' Opp'n to Mot. to Dismiss at 13-14, 24-43.

travel agencies, and other airlines; (3) foreign discovery regarding Defendants' joint ventures and purported lobby efforts concerning foreign airlines (even though the alleged conspiracy pertains only to domestic conduct); and (4) innumerable depositions.

Prior to undertaking such a boundless and potentially wasteful exercise, the parties should focus on class certification discovery. At the same time, Plaintiffs can review the very substantial production made to DOJ which addresses the core capacity conspiracy issues raised in the CAC. If further discovery is warranted at the close of the class certification process, both sides will be in a better position to design an efficient discovery plan going forward.

D. The Federal Rules and the Manual for Complex Litigation Encourage Bifurcated Discovery

Rule 23(c)(1)(A) says that the Court "must" determine whether a class should be certified "[a]t an early practicable time after a person sues or is sued as a class representative." Fed. R. Civ. P. 23(c)(1)(A).[15] Defendants' proposal would fulfill that objective; Plaintiffs' would not.

Further, this is exactly the type of case the Manual for Complex Litigation recognizes as appropriate for phased discovery.[16] The Manual recognizes that courts frequently bifurcate discovery in class actions: "Discovery relevant only to the merits delays the certification decision and may ultimately be unnecessary. Courts often bifurcate discovery between certification issues and those related to the merits of the allegations. Generally, discovery into certification

[15] *See also* LCvR 23.1(b) ("Within 90 days after the filing of a complaint in a case sought to be maintained as a class action, unless the Court in the exercise of its discretion has extended this period, the plaintiff shall move for a certification under Fed. R. Civ. P. 23(c)(1), that the case may be so maintained.")

[16] The Court has ordered that it "will be guided by the *Manual for Complex Litigation Fourth* (2004), approved by the Judicial Conference of the United States. Counsel are directed to familiarize themselves with that publication." ECF No. 4, Initial Practice and Procedure Order Upon Transfer Pursuant to 28 U.S.C. § 1407 (Oct. 31, 2015).

issues pertains to the requirements of Rule 23 and tests whether the claims and defenses are susceptible to class-wide proof; discovery into the merits pertains to the strength or weaknesses of the claims or defenses and tests whether they are likely to succeed." Manual for Complex Litigation (Fourth) § 21.14 (2004). The Manual also recognizes that in antitrust litigation it is particularly important to address "pivotal" issues at the outset—including class certification: "Effective management of antitrust litigation requires identifying, clarifying, and narrowing pivotal factual and legal issues as soon as practicable. Unless the judge and the attorneys give early attention to these issues, substantial time may be wasted . . . on class action disputes not critical to the class-certification ruling." *Id.* § 30.1 (citation omitted).

Courts routinely bifurcate discovery in class actions (including large antitrust cases) to expedite a class certification decision and avoid the burden of full discovery (which can force unwarranted settlements).[17] As in those cases, here bifurcation would provide a useful tool for effectively and efficiently resolving whether this case is appropriate for class-wide treatment.

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[17] *See, e.g.*, *Medlock v. Taco Bell Corp.*, No. 1:07-CV-01314-SAB, 2014 WL 2154437, at *1 (E.D. Cal. May 22, 2014); *Reid v. Unilever U.S., Inc.*, 964 F. Supp. 2d 893, 933 (N.D. Ill. Aug. 7, 2013); *Conner v. Perdue Farms, Inc.*, No. CIV.A. 11-888 MAS LH, 2013 WL 5977361, at *7 (D.N.J. Nov. 7, 2013); *Christian v. Generation Mortg. Co.*, No. 12 C 5336, 2013 WL 2151681, at *4 (N.D. Ill. May 16, 2013); *Harris v. comScore, Inc.*, No. 11 CV 5807, 2012 WL 686709, at *1 (N.D. Ill. Mar. 2, 2012); *In re Packaged Ice Antitrust Litig.*, No. 08-MDL-1952, 2011 WL 6178891, at *11 (E.D. Mich. Dec. 12, 2011); *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 609 (8th Cir. 2011); *In re Apple & AT & TM Antitrust Litig.*, No. C07-05152 JW PVT, 2010 WL 1240295, at *2 (N.D. Cal. Mar. 26, 2010); *In re Flash Memory Antitrust Litig.*, No. C 07-00086 SBA (N.D. Cal. June 28, 2009) (court order); *In re Comp. of Managerial, Prof'l & Tech. Employees Antitrust Litig.*, No. 02-CV-2924(GEB), 2008 WL 3887619, at *1 (D.N.J. Aug. 20, 2008); *In re Urethane Antitrust Litig.*, No. 04-md-1616-JWL-DJW, 2007 WL 140987, at *3 (D. Kan. Jan. 17, 2007*)*.

As the above list makes clear, courts have continued to bifurcate between class and merits discovery after the Supreme Court's decisions in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (Mar. 27, 2013), and *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (Feb. 27, 2013). While the Supreme Court has made clear that "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class

E. Bifurcation Will Serve the Interests of Economy and Expediency, And Class Discovery Can Be Easily Delineated from Merits Discovery

Courts generally consider three factors when assessing whether bifurcation is appropriate: "(1) expediency, meaning whether bifurcated discovery will aid the court in making a timely determination on the class certification motion; (2) economy, meaning the potential impact a grant or denial of certification would have upon the pending litigation and whether the definition of the class would help determine the limits of discovery on the merits; and (3) severability, meaning whether class certification and merits issues are closely enmeshed." *Harris*, 2012 WL 686709, at *3 (quotation marks and citations omitted).

Severability: The discovery proposed for Phase I will cover all requirements for class certification under Rule 23, including whether injury to class members from an alleged nationwide conspiracy to restrict capacity can be proven with common evidence. Defendants will produce data showing their actual capacity changes on a route-by-route and domestic system-wide basis for the time period at issue, as well as their transactional and pricing data for the same period. Defendants will also produce to Plaintiffs hundreds of thousands (if not millions) of pages of documents, including from the files of the employees responsible for making capacity decisions. And Plaintiffs can depose a limited number of employees of each Defendant, including those responsible for planning and implementing capacity on each Defendant's domestic network. This discovery is readily severable from discovery on such

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certification are satisfied," *Amgen*, 133 S. Ct. at 1195. In *Comcast*, the plaintiffs had four different theories of antitrust liability and impact, so the court needed to consider each of those theories to the extent necessary to evaluate whether plaintiffs could prove antitrust injury for each theory with common evidence. Here, in contrast, Plaintiffs allege that they were injured by Defendants' capacity decisions, which means the capacity evidence is relevant to determining whether they can prove injury with common evidence. The merits issues discussed above are not relevant to that determination.

disparate matters as public statements by Defendants concerning capacity, interactions among defendants such as through trade associations, Defendants' contacts with industry analysts and shareholders, the operation of ATPCO, Defendants' lobbying efforts, price wars on particular routes, Defendants' relationships with on-line travel firms, adoption of bag fees and other ancillary fees, investor relations, and unrelated government investigations and private lawsuits. Putting aside their lack of relevance and materiality, all of these topics, by their nature, involve proof that is common to the class and thus need not be subject to discovery for purposes of class certification.[18]

Economy: Bifurcating discovery may eliminate the need for vast amounts of expense and burden if the Court declines to certify a class. Even if a class is certified, the Phase I discovery proposed by Defendants will help streamline any additional discovery that is required after the Court rules on class certification. Defendants are producing substantial amounts of material already produced to DOJ, which bears on the exact subject matter of this case. Review of that material should help to more precisely define and limit any further discovery that is necessary. *Reid*, 964 F. Supp. 2d at 933 ("it is axiomatic that defining the class will make it easier to determine the limits of discovery on the merits").

[18] This case is distinguishable from *In re Rail Freight*, in which Judge Facciola denied a motion to bifurcate because the issue of common impact could not be disentangled from broader merits discovery. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 258 F.R.D. 167, 176 (D.D.C. 2009). In *Rail Freight*, plaintiffs alleged that defendants adopted a universal fuel surcharge for rail freight. The companies allegedly enforced the purported conspiracy through highly negotiated contractual terms in long-term contracts and by slowly transitioning to short-term contracts. The varied nature of the transactions at issue made it impossible to separate class and merits discovery, and there was no readily available data that could be used to assess the issue of common impact. 258 F.R.D. at 173-74. Here, by contrast, the pricing and capacity data regarding the transactions at issue are readily available for analysis, so Plaintiffs would not be deprived of any information required to fully argue their class certification motion. At the same time, discovery into merits issues unrelated class certification would be avoided until after determining whether class-wide impact can be shown using common evidence.

Expediency: Bifurcated discovery would expedite a decision on class certification and potentially the merits. As evidenced by Plaintiffs' proposed schedule, absent bifurcation a decision on class certification will be significantly delayed. *See* Manual For Complex Litigation (Fourth) § 21.14 (2004) ("in cases that are unlikely to continue if not certified, discovery into aspects of the merits unrelated to certification delays the certification decision and can create extraordinary and unnecessary expense and burden"); *Harris*, 2012 WL 686709, at *3; *Reid*, 964 F. Supp. 2d at 933 (N.D. Ill. 2013).

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CERTIFICATE OF SERVICE

I, Jaclyn Verducci, certify that on January 11, 2017, I caused a true and correct copy of the foregoing Joint Status Report to be served by the Court's Electronic Case Filing system on all counsel of record.

/s/ **Jaclyn Verducci**
JACLYN VERDUCCI

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

IN RE DOMESTIC AIRLINE TRAVEL ANTITRUST LITIGATION	MDL Docket No. 2656 Misc. No. 15-1404 (CKK)
This Document Relates To: ALL CASES	

PLAINTIFFS' PROPOSED SCHEDULING ORDER

Pursuant to the Court's Order Regarding Initial Scheduling and Case Management Conference (ECF No. 125), Plaintiffs hereby submit their proposed Scheduling Order.

EVENT	TIME AFTER ENTRY OF SCHEDULING ORDER
Fact Discovery Opens With No Bifurcation	0 days
Deadline For Submission of Agreed Protective Order, Disclosures in Lieu of Rules 26(a) Disclosures, Protocol for Production of ESI and Documents Expert Stipulation, Privilege Protocol, Deposition Protocol, Preservation Agreement and/or other agreements that the parties deem necessary	30 days
Substantial Completion of Production of Transactional Data and Documents	6 months
Close of Fact Discovery	15 months
Class Certification Motion (including motion for appointment of class counsel) and Expert Report(s)	15 months
Deadline for Defendants to Depose Plaintiffs' Expert(s)	16.5 months
Opposition to Class Certification and Expert Report(s)	17 months

Deadline for Plaintiffs to Depose Defendants' Expert(s)	18 months
Class Certification Reply and Expert Report(s)	18.5 months
Class Certification Argument/Evidentiary Hearing	At the Court's Discretion

EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

IN RE DOMESTIC AIRLINE TRAVEL ANTITRUST LITIGATION This Document Relates To: ALL CASES.	MDL Docket No. 2656 Misc. No. 15-1404 (CKK)

DEFENDANTS' PROPOSED SCHEDULING ORDER

Pursuant to the Court's Order Regarding Initial Scheduling and Case Management Conference (ECF No. 125), the Defendants hereby submit their proposed Scheduling Order.

EVENT	TIME AFTER ENTRY OF SCHEDULING ORDER[1]
Phase I Discovery Opens	0
Deadline for Submission of Agreement on Special Master Procedures	7 days
Meet-and-confer to negotiate a Protective Order, Protocol for Production of ESI and Documents, Expert Stipulation, Privilege Protocol, Deposition Protocol, Preservation Agreement, Agreement on Transactional Data, and/or other agreements that the Parties deem necessary	On or before 7 days
Meet-and-confer to negotiate schedule for Phase I document production	On or before 14 days
Deadline For submission of Agreed Protective Order, Protocol for Production of ESI and Documents, Expert Stipulation, Privilege Protocol, Deposition Protocol, Preservation Agreement, Agreement on Transactional Data, and/or other agreements that the Parties deem necessary, or for submission of any disputed issues to the Special Master.	30 days

[1] [Specific dates to be filled in once the contours of the schedule are agreed. To the extent any deadline falls on a weekend or holiday, the deadline shall be the next business day.]

ESI and Custodial Disclosures in lieu of Rule 26(a) disclosures	30 days (subject to resolution of disputed items from ESI and document protocols)
Deadline for the parties to agree on the transactional data to be retained or disputed issues to be submitted to the Special Master for resolution.	45 days
Substantial Completion of Phase I Discovery	6 months
Close of Phase I Discovery	9 months
Class Certification Motion (including motion for appointment of class counsel) and Expert Report(s)	9 months
Deadline for Defendants to Depose Plaintiffs' Expert(s)	10.5 months
Opposition to Class Certification and Expert Report(s)	13 months
Deadline for Plaintiffs to Depose Defendants' Expert(s)	14.5 months
Class Certification Reply and Expert Report(s)	16 months
Class Certification Argument/Evidentiary Hearing	At the Court's discretion
Meet-and-confer to negotiate scope and schedule for Phase II discovery	21 days after order on class certification motion
Joint Status Report with proposal(s) for Phase II discovery	To be ordered by the Court after the class certification order
Phase II Discovery Opens	At the Court's discretion or as agreed by the Parties