

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

ELECTRICAL MEDICAL TRUST and
PLUMBERS LOCAL UNION NO. 68
WELFARE FUND,

Plaintiffs,

v.

U.S. ANESTHESIA PARTNERS, INC.,
U.S. ANESTHESIA PARTNERS
HOLDING, INC., and U.S. ANESTHESIA
PARTNERS OF TEXAS, P.A.,

Defendants.

Civil Case No. 4:23-cv-04398

JOINT STATUS REPORT

Hon. Alfred H. Bennett

Plaintiffs and Defendant U.S. Anesthesia Partners, Inc. (“USAP”) (together, “the parties”) respectfully submit this Joint Status Report as ordered in the Court’s February 7, 2025, Minute Entry setting April 2025 as the deadline for their next report. Overall, the parties have worked cooperatively on discovery issues and report the status of discovery below. The parties have different views regarding the sequencing of the case schedule and request the Court’s guidance on this issue. The parties set forth their positions below. If the Court provides general guidance as to how it prefers the sequencing of the case schedule, the parties are amenable to working together to agree upon a schedule consistent with that guidance. The parties also submit their proposed schedules as Exhibits A and B pursuant to this Court’s Scheduling Order (ECF No. 114).

I. Status of Discovery

A. Written Discovery

The parties continue to meet and confer productively on Plaintiffs’ First Set of RFPs to

USAP and USAP's First Set of RFPs to Plaintiffs. The parties have not issued additional written discovery requests to each other since the February status hearing.

B. Protocols and Stipulations

The parties continue to negotiate an ESI Protocol and an Expert Stipulation.

The parties also intend to discuss a Deposition Protocol.

C. Party Productions

On February 4, 2025, Plaintiffs commenced their rolling production of documents to USAP. Plaintiffs made additional productions on March 14 and 24 and April 11. Plaintiffs have now produced approximately 140 unique documents in total.

USAP previously reproduced to Plaintiffs approximately 378,000 documents in total, comprised of (a) documents and data that nonparties produced to the FTC in its pre-filing investigation and in *Federal Trade Commission v. U.S. Anesthesia Partners, Inc.*, No. 4:23-cv-03560 (S.D. Tex.) ("FTC Action"), (b) documents and data that the FTC produced to USAP during the FTC Action, and (c) USAP's own productions during the FTC's pre-filing investigation and the FTC Action, except for portions of its pre-filing productions to the FTC that were unrelated to Texas as discussed in advance. Subsequently, USAP has actively engaged with Plaintiffs' requests for information about the pre-filing investigation and litigation productions and has provided Plaintiffs with the custodians, search terms, and date ranges for all custodial searches; copies of all discovery requests the FTC and USAP served upon each other during the FTC Action; and copies of all document subpoenas that USAP served upon nonparties in the FTC Action. On April 15, 2025, USAP made an additional production to Plaintiffs of documents USAP produced in the FTC Action after its initial reproduction. *See* Dkt. 114 ¶ 3. With that latest production, USAP has now produced approximately 385,000 documents to Plaintiffs.

D. Nonparties

Plaintiffs continue to meet and confer with the nonparties that objected to USAP reproducing their discovery in the FTC Action pursuant to Paragraph 2 of the Scheduling Order (ECF No. 114). Since the February status hearing, Plaintiffs have resolved Dallas Anesthesiology Associates' objection. On March 17, 2025, Dallas Anesthesiology Associates reproduced its discovery to Plaintiffs. Plaintiffs anticipate reaching an agreement with the remaining nonparties that objected—Memorial Hermann Health Systems, Tenet Healthcare Corporation, and United Surgical Partners International, Inc.—and do not anticipate requesting judicial assistance at this time.

E. Discovery Disputes

The parties are meeting and conferring about three issues that they may bring to the Court for resolution in the near term: (1) production of deposition transcripts from the FTC Action; (2) deposition limits; and (3) additional search terms potentially to be applied to Defendant's document custodians. If they are not able to reach agreement by May 16, 2025, the parties intend to raise the issues in accordance with the Court's Procedures and Practices relating to discovery disputes.

II. Case Schedule

The parties have a difference of opinion as to whether discovery should be bifurcated between class certification and merits.¹

A. Plaintiffs' Position

Bifurcating discovery, including two rounds of expert work plus separate class briefing,

¹ Defendant does not propose two separate sets of expert reports for class certification and merits issues in the event that discovery is not bifurcated between class certification and merits, and Plaintiffs do not propose a single set of expert reports combining class certification and merits issues in the event discovery is bifurcated.

will increase the burden on the parties and the Court and add nearly *six months* of unnecessary delay. Furthermore, a “class certification fact discovery cut-off” simply invites disputes about “class” versus “merits” discovery and guarantees that the Court will have to consider whether common issues predominate without a full factual record.² Most courts in antitrust cases have therefore abandoned bifurcation.³ Moreover, Plaintiffs intend to pursue their case through trial even without certification and are amenable to extending discovery, if needed, after certification.

Plaintiffs, by contrast, propose a single exchange of expert reports for all issues after fact discovery. Briefing on class certification, any *Daubert* challenges, and summary judgment would follow. This approach avoids two rounds of reports, depositions, and *Daubert* motions, and all the cost and delay associated with them. Many antitrust class actions have been litigated with similar schedules—often with the defendants’ agreement.⁴ District Courts in the Fifth Circuit have likewise entered schedules providing for a single round of expert discovery in antitrust and other class cases.⁵ The Supreme Court has recognized that antitrust class certification analysis will “frequently entail overlap with the merits of the plaintiff’s underlying claim.”⁶ The best way to judge whether Plaintiffs can make their case with classwide proof is to lay out that proof.

² See *Mogollon v. Bank of N.Y. Mellon*, No. 3:19-CV-3070, 2024 WL 4406959, at *5 (N.D. Tex. Feb. 14, 2024); *In re Plastics Additives Antitrust Litig.*, No. 03- 2038, 2004 WL 2743591, at *5 (E.D. Pa. 2004).

³ See Ex. C, Pretrial Order No. 5 at 2, *In Re Pool Prods. Distrib. Market Antitrust Litig.*, No. 2:12-md-02328 (E.D. La. June 4, 2012), ECF No. 93 (“Discovery will not be bifurcated . . . because of the overlapping nature of the issues presented by the parties’ claims and defenses.”); Ex. D, Scheduling Order at 8, *In re: Domestic Airline Travel Antitrust Litig.*, MDL No. 2656, 1:15-mc-1404 (D.D.C. Jan. 30, 2017), ECF No. 152 (“[T]he Court sees an issue with permitting Defendants to determine the scope of discovery required for Plaintiffs to meet their burden.”).

⁴ See, e.g., Exs. D-Q.

⁵ See, e.g., Exs. R-V.

⁶ *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013).

B. Defendant's Position

A two-stage discovery process, beginning with class certification discovery followed, if necessary, by merits discovery, is appropriate. This Court has ordered this same two-stage discovery process in numerous other cases and should do so here for at least two reasons.⁷

First, Plaintiffs face formidable obstacles to class certification that are separable from the merits, so class certification discovery could bring the case to an early end. To take just one example: to establish antitrust standing, Plaintiffs must show that they and putative class members are direct purchasers of USAP's services; USAP believes they cannot. Resolving discrete threshold questions like this one have the potential to eliminate the need for most or all merits discovery. *See* Dkt. No. 104 at 15 & n.2. It is inefficient to conduct merits discovery before answering those questions, particularly given Rule 23(c)'s instruction that class certification should be decided "early" in the case. *Compare* Fed. R. Civ. P. 23(c) (class certification decided at "an early practicable time" in the case) *with* Fed. R. Civ. P. 56(b) (default deadline for summary judgment is "after the close of all discovery").

Second, the scope of the class, if any, will significantly affect merits discovery. For example, Plaintiffs' alleged class appears to include "private insurance companies." Compl. ¶ 130. If insurers are included in a certified class, that would entail many additional, distinct areas of merits discovery (and of unique merits defenses) as compared to a class consisting only

⁷ *See, e.g.,* Ex W, *In re Oakbend Med. Ctr. Data Breach Litig.*, No. 4:22-cv-03740 (S.D. Tex. Apr. 14, 2023), ECF No. 36; Ex X, *Cook v. AT&T Corp.*, No. 4:16-cv-00542 (S.D. Tex. May 22, 2017), ECF No. 37; Ex Y, *Monson v. McClenny, Mosely & Assocs.*, No. 4:23-cv-00928 (S.D. Tex. Oct. 2, 2023), ECF No. 37; Ex Z, *In re RCI Hospitality Holdings, Inc. Sec. Litig.*, No. 4:19-cv-01841-AHB (S.D. Tex. June 14, 2021), ECF No. 55; Ex AA, *Prause v. TechnipFMC, PLC*, No. 4:17-cv-2368 (S.D. Tex. Jan. 18, 2019). Other Texas federal courts have adopted a similar approach in class action antitrust cases. *See, e.g.,* Ex AB, *Corrente v. The Charles Schwab Corp.*, No. 4:22-cv-00470-ALM (E.D. Tex. Dec. 7, 2022), ECF No. 38; Ex AC, *Ion v. Pizza Hut, LLC*, No. 4:17-cv-00788-ALM-KPJ (E.D. Tex. Apr. 19, 2018), ECF No. 37; Ex AD, *Kjessler v. Zaappaaz, Inc.*, No. 4:18-cv-00430 (S.D. Tex. May 17, 2019), ECF No. 169.

of employers who sponsored employee healthcare plans. Combining class and merits discovery, as Plaintiffs argue, would force the parties and Court to waste time and effort on the broadest – but likely unnecessary – merits discovery. The Court should bifurcate discovery.

III. Amended Complaint

On April 3, 2025, Plaintiffs filed an Amended Class Action Complaint (ECF No. 128) adding U.S. Anesthesia Partners Holdings, Inc. and U.S. Anesthesia Partners of Texas, P.A. as Defendants. Because that amended complaint reflected information designated CONFIDENTIAL or HIGHLY CONFIDENTIAL by USAP or nonparty insurers, Plaintiffs filed a motion for leave to file temporarily under seal (ECF No. 126) and an unredacted amended complaint under seal (ECF No. 127) as required by Section 10 of the Protective Order (ECF No. 94). On April 8, 2025, Plaintiffs mailed U.S. Anesthesia Partners Holdings, Inc. and U.S. Anesthesia Partners of Texas, P.A. a Notice of a Lawsuit and Request to Waive Service of a Summons. The parties have engaged in discussions regarding how the defendants may efficiently respond to the Amended Class Action Complaint.

Dated: April 17, 2025 Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing was duly served upon all Counsel of record via the Court's CM/ECF system on April 17, 2025.

By: /s/ Brendan P. Glackin