UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BASEL MUSHARBASH, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. U.S. ANESTHESIA PARTNERS, INC., WELSH, CARSON, ANDERSON & STOWE XI, L.P., WCAS ASSOCIATES XI, LLC, WELSH, CARSON, ANDERSON & STOWE XII, L.P., WCAS ASSOCIATES XII, LLC, WCAS MANAGEMENT CORPORATION, WCAS MANAGEMENT, L.P., and WCAS MANAGEMENT, LLC, Defendants.	Case No. 4:25-cv-116

JOINT DISCOVERY/ CASE MANAGEMENT PLAN UNDER RULE 26(f)
FEDERAL RULES OF CIVIL PROCEDURE

1. **State when the parties conferred as required by Rule 26(f), and identify the counsel who conferred.**

   The parties conferred via video conference call on Thursday, April 10, 2025, at 6:30 PM ET. Counsel for Plaintiff included Harrison McAvoy, Kimberly Justice, Brice Wilkinson, Michael Davis, and Keagan Potts. Counsel for defendant U.S. Anesthesia Partners, Inc. included David Beck, Garrett Brawley, and Kenneth Fetterman. Counsel for the defendant Welsh Carson entities included Elena Davis, Rory Skowron, and Tyler Young.

2. **List the cases related to this one that are pending in any state or federal court with the case number and court.**

   Federal Trade Comm'n v. U.S. Anesthesia Partners, Inc., No. 4:23-cv-03560, S.D. Tex. (Hoyt, J,) (the "FTC Action").

   Electrical Med. Trust, et al. v. U.S. Anesthesia Partners, Inc. et al., No. 4:23-cv-04398, S.D. Tex. (Bennett, J.) (the "EMT Action").

3. **Briefly describe what the case is about.**

Plaintiff alleges multiple antitrust claims based on Defendants' alleged actions in the Texas market for in-hospital anesthesia services. Plaintiff alleges that Defendants executed a scheme to acquire multiple anesthesia practices across the major Texas cities, which allowed them to exclude competition, wrongfully acquire monopoly power, and raise prices. Plaintiff further alleges that Defendants entered into a series of unlawful horizontal agreements with other competitors in this market. Plaintiff alleges that, as result of Defendants' conduct, he and other similarly situated patients overpaid for hospital anesthesia services. Plaintiff's claims based on these actions are for violations of the Sherman Act Section 2 (monopolization, conspiracy to monopolize, and attempted monopolization), the Sherman Act Section 1 (horizontal conspiracy), and the Clayton Act Section 7 (wrongful acquisition). Defendants deny the allegations.

4. **Specify the allegation of federal jurisdiction.**

Plaintiff alleges federal subject matter jurisdiction under Sections Four and Sixteen of the Clayton Act, 15 U.S.C. §§ 15, 26, and 28 U.S.C. § 1331, 1337.

5. **Name the parties who disagree and the reasons.**

Defendant U.S. Anesthesia Partners, Inc. ("USAP") challenges Plaintiff's Article III standing for the reasons set forth in USAP's pending motion to dismiss [Dkt. 48].

6. **List anticipated additional parties that should be included, when they can be added, and by whom they are wanted.**

No additional parties should be included at this time.

7. **List anticipated interventions.**

There are no anticipated interventions in this case.

8. **Describe class-action issues.**

Plaintiff will file a motion for class certification that will involve expert testimony. Defendants reserve the right to oppose that motion.

9. **State whether each party represents that it has made the initial disclosures required by Rule 26(a). If not, describe the arrangements that have been made to complete the disclosures.**

The parties have not yet made initial disclosures.

Plaintiff requests that initial disclosures be made promptly, within 2 weeks of the entry of the Court's first scheduling order.

Defendants respectfully submit that initial disclosures should be completed within 14 days of the Court's order on pending dispositive motions.

10. **Describe the proposed agreed discovery plan, including:**

A. **Responses to all the matters raised in Rule 26(f).**

(1) Changes in timing, form, or requirement of Rule 26(a) disclosures:
The parties do not seek any changes to the Rule 26(a) default disclosures.

(2) Subjects on which discovery may be needed:

The parties anticipate taking discovery on all issues relating to liability, defenses, damages, and class certification.

Plaintiff also anticipates discovery of Defendants' and third parties' structured data, including pricing and claims data.

(3) When discovery should be completed:

Plaintiff believes that fact discovery should begin immediately and can be completed within 12 months after USAP produces the existing discovery materials from the FTC Action and the EMT Action, which USAP should be required to do as soon as possible. Plaintiffs further submit that Defendants cannot justify their request to stay discovery until resolution of their pending motions to dismiss. Such a stay is "by no means automatic," and instead requires that Defendants show "good cause." *United States ex rel. Gonzalez v. Fresenius Med. Care N. Am.*, 571 F. Supp. 2d 766, 767-68 (W.D. Tex. 2008) (quoting Fed. R. Civ. P. 26(c)). Here, where much of the necessary discovery has already been collected, reviewed, and produced in two separate proceedings and can be re-produced here, Defendants cannot meet that standard. Neither is this a case in which the parties may reasonably expect rulings on the motion to dismiss "to preclude the need for the discovery altogether," *see id.*, as similar claims against USAP have survived motions to dismiss in two related proceedings. Unlike in the EMT Litigation, where the Court delayed discovery because "the pending related case is set for oral argument before Judge Hoyt Monday" (Ca. No. 4:23-cv-04398, 4/5/24 Minute Entry), there is no similar potential efficiency to be gained by delay here.

Defendants believe that fact discovery should commence after the Court resolves their respective motions to dismiss, as in the EMT Litigation, and should be completed no later than eighteen months after the Court's ruling on their respective motions to dismiss. The Court's ruling may substantially narrow the scope of discovery, or eliminate the need for it completely. In addition, Defendants believe there is discovery unique to remedies, including but not limited to possible injunctive relief, that should be deferred until after a ruling on liability. In addition, Defendants believe that fact discovery should be phased with class certification fact discovery closing ten months after the motions to dismiss are decided and eighteen months for all discovery.

(4) Phasing of discovery:

Plaintiff does not anticipate any need to phase discovery in the case. Plaintiff is aware of no discovery unique to equitable remedies that does not substantially overlap with discovery into liability and damages.

Defendants believe there is discovery unique to remedies, including but not limited to possible injunctive relief that should be deferred until after a ruling on liability. In addition, Defendants believe that fact discovery should be phased with class certification fact discovery closing ten months after the motions to dismiss are decided and eighteen months for all discovery.

(5) Issues regarding disclosure, discovery, or preservation of ESI:

The parties will draft an ESI protocol that will address these issues. The parties are not aware of any ESI preservation issues at this time. Plaintiff will likely be amenable to signing onto a substantially similar ESI protocol to the EMT Action, once finalized.

Defendants submit that this process should commence after the Court resolves their respective motions to dismiss to avoid potentially unnecessary expense.

(6) Issues regarding claims of privilege and protection of materials:

Plaintiff has offered to agree to entry of essentially the same Protective Order in the EMT Action, as set forth in the letter sent to the Court on March 14, 2025.

Defendants submit that this process should commence after the Court resolves their respective motions to dismiss to avoid potentially unnecessary expense, as set forth in their response letter of March 19, 2025. Defendants also note that, in the event discovery proceeds, a 502(d) order should be entered in this case.

(7) Changes in limitations on discovery:

Plaintiff is seeking access to the existing FTC Action and EMT Action discovery to assess whether discovery in excess of that afforded under the Federal Rules is required for this case.

Defendants submit that Plaintiff should not have access to discovery in the FTC Action and EMT Action until after the motions to dismiss are resolved, in light of Plaintiff's long delay in bringing this case after those actions were filed.

(8) Other orders the Court should issue under FRCP 26(c) or 16(b)-(c):

The parties do not anticipate any additional orders at this time.

B. **When and to whom the plaintiff anticipates it may send interrogatories.**

Plaintiff expects to propound interrogatories during the discovery period on Defendants and potentially third parties as well.

C. **When and to whom the defendant anticipates it may send interrogatories.**

Defendants expect to propound interrogatories but have not yet identified to whom they will send those interrogatories. Defendants will propound all interrogatories within the discovery period.

D. **Of whom and by when the plaintiff anticipates taking oral depositions.**

Plaintiff anticipates deposing witnesses from both defendants and potentially third parties as well and will work to identify specific deponents after receiving Defendants' initial disclosures and discovery from the FTC Action. Plaintiff will conduct all depositions during the discovery period. Plaintiff intends to coordinate depositions with the EMT Action to the extent reasonably possible.

E. **Of whom and by when the defendant anticipates taking oral depositions.**

Defendants expect to take oral depositions, but have not yet identified deponents. Defendants will conduct all depositions within the discovery period.

F. **When the plaintiff (or the party with the burden of proof on an issue) will be able to designate experts and provide the reports required by Rule 26(a)(2)(B), and when the opposing party will be able to designate responsive experts and provide their reports.**

The parties anticipate designating experts and providing their reports after the close of fact discovery. The parties anticipate three rounds of expert reports: opening, rebuttal, and reply.

Plaintiff proposes that the deadlines for expert disclosures should be:

Opening: 30 days after close of fact discovery
Rebuttal: 45 days after opening expert deadline
Reply: 45 days after rebuttal expert deadline

Plaintiff does not believe there to be any efficiency benefit to creating two rounds of expert discovery.

Defendants propose exchanging expert reports in two phases. The Court should first establish a period for the parties to exchange expert reports on issues related to class certification. Once the Court resolves Plaintiff's motion for class certification, the parties can then exchange expert reports on merits issues.

Defendants propose that the deadlines for expert disclosures related to class certification should be:

Opening Expert Reports in Support of Class Certification Issues for Which a Party Bears the Burden of Proof: five (5) weeks after the close of fact discovery on issues related to class certification.
Rebuttal Expert Reports: seven (7) weeks after the exchange of Opening Expert Reports.
Reply Expert Reports: six (6) weeks after the exchange of Rebuttal Expert Reports.

Defendants further propose that the deadlines for expert disclosures related to merits issues, if necessary, should be:

Opening Expert Reports in Support of Merits Issues for Which a Party Bears the Burden of Proof: five (5) weeks after the close of fact merits discovery.
Opposing/Rebuttal Expert Reports: seven (7) weeks after the exchange of Opening Expert Reports.
Reply Expert Reports: six (6) weeks after the exchange of Opposing/Rebuttal Expert Reports.

G. **List expert depositions the plaintiff (or the party with the burden of proof on an issue) anticipates taking and their anticipated completion date. See Rule 26(a)(2)(B) (expert report).**

Plaintiff anticipates deposing all experts designated by Defendants after the close of the discovery period. Expert depositions should be completed 6 weeks after the reply expert report deadline.

Defendants propose that expert depositions on issues related to class certification be completed two (2) weeks after the exchange of Reply Expert Reports on class certification issues. The deadline for completing expert depositions on merits issues, if necessary, should be two (2) weeks after the exchange of Reply Expert Reports on merits issues.

H. **List expert depositions the opposing party anticipates taking and their anticipated completion date. See Rule 26(a)(2)(B) (expert report).**

Defendants anticipate taking expert depositions on issues related to class certification after the close of fact discovery related to class certification, and then, if necessary, completing expert depositions on issues related to the merits after the close of fact discovery.

Defendants propose that expert depositions on issues related to class certification be completed two (2) weeks after the exchange of Reply Expert Reports on class certification issues. The deadline for completing expert depositions on merits

issues, if necessary, should be two (2) weeks after the exchange of Reply Expert Reports on merits issues.

11. **If the parties are not agreed on a part of the discovery plan, describe the separate views and proposals of each party.**

When discovery should commence:

Plaintiff's position: Discovery should commence immediately, including initial disclosures and production of existing discovery materials from the FTC Action and the EMT Action. Given that the claims against USAP have survived motions to dismiss in two related proceedings and that a majority of the initial discovery need only be re-produced in this case, Defendants cannot show "good cause" to stay discovery.

Defendants' position: As in the EMT Litigation, discovery should commence after the Court resolves Defendants' motions to dismiss.

Exchange of expert reports:

Plaintiff's position: The parties' exchange of expert reports on class certification and merits issues should be simultaneous. While Plaintiff agrees with Defendants that a class should be certified "[a]t an early practicable time," Fed. R. Civ. P. 23(c)(1)(A), Plaintiff's proposed schedule for expert discovery (roughly a year after Defendants' re-production of the materials produced in related proceedings) accomplishes that goal. As is common in class cases, there is substantial "overlap between certification and merits issues, which counsels against bifurcation." *See Mogollon v. Bank of N.Y. Mellon*, 2024 WL 4406959, at *4 (N.D. Tex. Feb. 14, 2024). The effect of Defendants' consolidation scheme on competition and its impact on consumer pricing are central to both issues; staggering them would lead only to unnecessary delay. Worse, it would make the initial discovery *more* burdensome, as bifurcation would "most likely lead to disputes about what constitutes class certification discovery." *Id.* at *5 (citing *Back v. Chesapeake Op'g, LLC*, 2020 WL 2537479, at *5 (E.D. Ky. May 19, 2020) ("Resolving these disputes will take the time and other resources of the parties and the Court.")). In particular since the Supreme Court's emphasis and re-emphasis that issues relevant to certification "frequently" entail "overlap with the merits of the plaintiff's underlying claim." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011); *see also Comcast v. Behrend*, 569 U.S. 27, 34 (2013) (explaining, in class-action antitrust suit, that it would be improper to "refus[e] to entertain arguments" at class certification "simply because those arguments would also be pertinent to the merits determination"), "district courts have been reluctant to bifurcate class-related discovery from discovery on the merits," *Taylor v. GAINSCO Auto Ins. Agency, Inc.*, 2025 WL 906233, at *2 (N.D. Tex. Mar. 24, 2025), particularly in "complex class actions" where "the class certification analysis will frequently overlap with the merits," *Piney Woods ER III, LLC v.*

Blue Cross & Blue Shield of Tex., 2020 WL 13042506, at *1 (E.D. Tex. Oct. 2, 2020) including in antitrust cases like this one.[1]

Defendants' position: The parties' exchange of expert reports on class certification and merits issues should not be simultaneous. The Court should establish a period for the parties to exchange expert reports on issues related to class certification first. That approach is most faithful to Rule 23, which provides the court "must determine by order whether to certify the action as a class action" "[a]t an *early practicable time*." Fed. R. Civ. P. 23(c)(1)(A) (emphasis added). As this Court has recognized in prior cases,[2] it is unnecessary to complete full fact discovery to decide whether common questions of law and fact exist. *See id.* R. 23(a)(2), (b)(3); *see also Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460 (2013) (plaintiffs need not "win the fray" at the certification stage). The scope of the class, if any, will inevitably and significantly impact merits discovery. Defendants therefore propose that Plaintiffs' motion for class certification be adjudicated before the parties incur the time and expense of exchanging expert reports on merits issues.[2]

12. **Specify the discovery beyond initial disclosures that has been undertaken to date.**

None; as set forth in the parties' letters to the Court, Defendants' position is that any discovery activity is premature until the Court rules on the pending motions to dismiss.

13. **State the date the planned discovery can be reasonably completed.**

Plaintiff believes that fact discovery should begin immediately and can be completed no later than 12 months after USAP produces the existing discovery materials from the FTC Action and the EMT Action. Expert discovery should then be completed approximately 160 days later (120 days for reports and 40 days for depositions).

Defendants believe fact discovery should commence after the Court resolves Defendants' motions to dismiss and should be completed by 18 months following the Court's resolution of the pending motions to dismiss. Expert discovery should then be completed

[1] *E.g.*, *In re Domestic Airline Travel Antitrust Litig.*, 2017 WL 11565592, at *4-5 (D. D.C. Jan. 30, 2017); *New England Carpenters Health & Welfare Fund v. Abbott Labs*, 2013 WL 690613, at *4-5 (N.D. Ill Feb. 20, 2013); *Lakeland Regional Med. Ctr., Inc. v. Astrellas US, LLC*, 2011 WL 486123, at *2 (M.D. Fla. Feb. 7, 2011).

[2] *See, e.g.*, *In re Oakbend Med. Ctr. Data Breach Litig.*, Lead Case No. 4:22-cv-03740 (S.D. Tex. Apr. 14, 2023) (Bennett, J.), ECF No. 36 (bifurcated expert report and briefing schedule for class certification and merits proceedings); *Cook v. AT&T Corp.*, No. 4:16-cv-00542 (S.D. Tex. May 22, 2017) (Bennett, J.), ECF No. 37 (same); *Monson v. McClenny, Mosely & Assocs.*, No. 4:23-cv-00928 (S.D. Tex. Oct. 2, 2023) (Bennett, J.), ECF No. 37 (class certification motion deadline set for ten months before the close of discovery); *In re RCI Hospitality Holdings, Inc. Sec. Litig.*, No. 4:19-cv-01841-AHB (S.D. Tex. June 14, 2021), ECF No. 55 (Bennett, J.) (similar; six-month gap); *Prause v. TechnipFMC, PLC*, No. 4:17-cv-2368 (S.D. Tex. Jan. 18, 2019) (Bennett, J.) (similar; five-month gap). Indeed, other Texas federal courts have adopted a similar approach in class action antitrust cases. *See, e.g.*, *Corrente v. The Charles Schwab Corp.*, No. 4:22-cv-00470-ALM (E.D. Tex. Dec. 7, 2022), ECF No. 38 (bifurcated expert report and briefing schedule for class certification and merits proceedings); *Ion v. Pizza Hut, LLC*, No. 4:17-cv-00788-ALM-KPJ (E.D. Tex. Apr. 19, 2018), ECF No. 37 (same); *Kjessler v. Zaappaaz, Inc.*, No. 4:18-cv-00430 (S.D. Tex. May 17, 2019) (Atlas, J.), ECF No. 169 (class certification motion deadline set for four months before close of fact discovery).

in a staged version as described above.

14. **Describe the possibilities for a prompt settlement or resolution of the case that were discussed in your Rule 26(f) meeting.**

The parties have not identified a possibility for a prompt settlement or resolution of the case at this time.

Plaintiff is amenable to discussing a fair and reasonable resolution of this matter upon receipt of discovery and transactional data that would be necessary to engage meaningfully in settlement negotiations.

Defendants respectfully submit that discovery should not proceed until after the Court rules on the pending motions to dismiss.

15. **Describe what each party has done or agreed to do to bring about a prompt resolution.**

The parties have not identified a possibility for a prompt settlement or resolution of the case at this time.

Plaintiff has endeavored to get discovery underway, as reflected in the correspondence to the Court.

Defendants respectfully submit that discovery should not proceed until after the Court rules on the pending motions to dismiss, as reflected in their correspondence to the Court.

16. **From the attorneys' discussion with the client, state the alternative dispute resolution techniques that are reasonably suitable, and state when such a technique may be effectively used in this case.**

Plaintiff believes that at the appropriate time, a formal mediation may prove useful.

Defendants believe that a mediator may be appropriate at a later stage in the proceedings but that such use would be premature now.

17. **Magistrate judges may now hear jury and non-jury trials. Indicate the parties' joint position on a trial before a magistrate judge.**

The parties do not jointly consent to proceed before a magistrate judge for trial.

18. **State whether a jury demand has been made and if was made on time.**

Plaintiff made a timely jury demand.

19. **Specify the number of hours it will take to present the evidence in this case.**

The parties are unable to estimate the number of required trial hours at this stage of the case.

20. **List pending motions that could be ruled on at the initial pretrial and scheduling conference.**

No motions are pending other than Defendants' motions to dismiss.

Plaintiff has asked the Court via letter to enter a Protective Order substantially similar to the one entered in the EMT Action so that Defendants can promptly produce the existing discovery materials from the FTC Action.

Defendants have submitted a letter to the Court opposing that request.

21. **List other motions pending.**

Defendants have two pending motions to dismiss [Dkt. 35 and Dkt. 48].

22. **Indicate other matters peculiar to this case, including discovery, that deserve the special attention of the court at the conference.**

The parties expect to discuss coordination of discovery and other proceedings between this case and the pending FTC and EMT Actions.

Defendants' position is that Plaintiff should not have access to discovery in the FTC Litigation or the EMT Litigation until after the motions to dismiss are resolved.

23. **Certify that all parties have filed Disclosure of Interested Parties as directed in the Order for Conference and Disclosure of Interested Parties, listing the date of filing for original and any amendments.**

Plaintiff filed his disclosure on January 29, 2025 [Dkt. 25]; the Welsh Carson defendants filed their disclosures on January 29, 2025 [Dkt. 26]; and USAP has filed the required disclosures [Dkt. 55].

24. **List the names, bar numbers, addresses and telephone numbers of all counsel.**

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Date: April 11, 2025

Respectfully submitted,

/s/ Brice Wilkinson

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CERTIFICATE OF CONFERENCE

I certify that counsel for Plaintiff conferred by videoconference and email about the substance of this filing, and that counsel for all parties agreed on its form and substance.

/s/ Brice Wilkinson
Brice Wilkinson

CERTIFICATE OF SERVICE

I certify that contemporaneous with the filing of this document, it was served on all counsel of record via the Court's e-filing system.

/s/ Brice Wilkinson
Brice Wilkinson