UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: POOL PRODUCTS DISTRIBUTION MARKET ANTITRUST LITIGATION	*	**MDL NO. 2328**
	*	**SECTION R/2**
	*	**JUDGE VANCE**
THIS DOCUMENT RELATES TO:	*	**MAG. JUDGE WILKINSON**
All Actions	*	

JOINT RULE 26(f) AND LOCAL RULE 26.2 REPORT ON THE PARTIES' PLANNING MEETING

On May 14 and 21, 2012, counsel for plaintiffs and defendants met via teleconference and discussed the requirements of Rules 26(a) and 26(f) of the Federal Rules of Civil Procedure, Local Civil Rule 26, and Pretrial Order No. 1. The following parties were represented during the May 14th call:

- Defendants Pool Corporation, SCP Distributors LLC, and Superior Pool Products LLC: David H. Bamberger and Deana L. Cairo of DLA Piper LLP (US), and William B. Gaudet of Adams and Reese LLP.
- Plaintiffs: Jay Himes and Meegan Hollywood of Labaton Sucharow LLP; Ronald Aranoff of Bernstein Liebhard LLP; Robert N. Kaplan, Gregory K. Arenson, and Elana Katcher of Kaplan Fox & Kilsheimer LLP; and Camilo Salas III of Salas & Co., LC.
- The same counsel were present on the May 21, 2012 teleconference and were also joined by Russ Herman of Herman, Herman & Katz LLP and Dana Statsky Smith of Bernstein Liebhard LLP.

1. Initial Disclosures. The parties agreed that required initial disclosures under Rule 26(a)(1) of the Federal Rules of Civil Procedure should not be made in the circumstances of this complex antitrust case, because they are irrelevant (insurance agreements), premature (a calculation by experts of plaintiffs' damages without defendants' transaction information), or not tailored to the needs of this case at this time.

Plaintiffs' Position Instead, plaintiffs propose that defendants initially provide: (a) organizational charts for their businesses from 1995 through 2011; (b) a list of names, positions and locations of custodians whose electronically stored information ("ESI") defendants propose to preserve and collect; (c) a description of sources of transactional information from 1995 to the present, including the accessibility of ESI; (d) a description of defendants' electronic systems and protocols; and (e) an identification of the persons most knowledgeable about defendants' electronic systems and protocols. Plaintiffs also propose that, on or before June 30, 2012, defendants provide: (i) all documents and ESI defendants have produced to the United States Federal Trade Commission ("FTC"); (ii) all indices provided to the FTC; (iii) the identity of all persons whose files were searched to provide documents and ESI to the FTC; and (iv) the locations that were searched to provide documents and ESI to the FTC.

Defendants' document productions to the FTC can be disclosed with minimal burden to defendants. Such discovery, to a government antitrust enforcer, is analogous to the production of documents produced to the grand jury, which courts have repeatedly held appropriate. "[C]opies of material produced to a grand jury are subject to discovery." MANUAL FOR COMPLEX LITIGATION (Fourth) (Fed. Jud. Center 2007) § 11.491. The material that defendants produced to the FTC in the agency's civil

investigation is entitled to non-greater protection from discovery than that produced to a criminal grand jury. *Cf. United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960) ("[W]hen testimony or data [that was provided to a grand jury] is sought for its own sake – for its intrinsic value in furtherance of a lawful investigation – rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same documents had been, or were presently being, examined by the grand jury."). *See also In re Plastics Additives Antitrust Litig.*, Civ. No. 03-2038, 2004 WL 2743591, at *10-12 (E.D. Pa. Nov. 29, 2004) (granting plaintiffs' motion for discovery of all documents submitted to the DOJ, any grand jury, and any domestic or foreign investigatory body); *In re NASDAQ Market-Makers Antitrust Litig.*, 929 F. Supp. 723, 725-27 (S.D.N.Y. 1996) (granting motion to compel production of all materials defendant produced to the DOJ under a Civil Investigative Demand); *In re Wirebound Boxes Antitrust Litig.*, 126 F.R.D. 554, 555-56 (D. Minn. 1989) (granting in part motion to compel defendants to produce all documents relating to any investigation of the wirebound box industry which they created independently from any government investigation and which they submitted to the DOJ or any grand jury). *See also Vista Healthplan, Inc. v. Cephalon, Inc.*, 2:06-cv-01833 (E.D. Pa. Sept. 24, 2009) (ECF No. 93) (compelling production of documents produced to FTC).

Here, the material produced to the FTC is likely to include highly relevant information to plaintiffs' case. For example, such material will almost certainly include any records of communications relevant to allegations that defendants communicated with manufacturers to induce them to stop selling, or to limit their sales to other distributors. Defendants' contention that they must make a document-by-document

review of the FTC production against the backdrop of the issues framed in this case is unpersuasive. Defendants do not suggest any basis for believing that the issues in this litigation will be narrower than those arising in the FTC investigation, much less sufficiently so as to justify any delay in producing the FTC material here.

See Section 5.a below for plaintiffs' position on the commencement of discovery prior to the Court's decision on any dispositive motion under Federal Rule of Civil Procedure 12(b)(6).

Defendants' Position

Defendants agree that initial disclosures are inappropriate in this case and should be waived. The remainder of plaintiffs' requests are improper, however, for two reasons. First, they ask the Court to enter a Case Management Order that requires the production of a huge amount of documents and information when no proper and timely discovery requests have been served, let alone responded to, by the Defendants. More fundamentally, defendants submit that they should not be put to the costs and burdens associated with discovery unless and until the Court has determined that the pleadings are sufficient. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007). It is routine in the this Circuit that discovery is stayed pending a motion to dismiss on the pleadings. *Brown v. DFS Servs., LLC*, 434 F. App'x 347, 354 (5th Cir. 2011); *Bell Helicopter Textron, Inc. v. Vector Aerospace USA, Inc.*, No 4-12CV-034-Y, 2012 WL 1419435 at *2 (N.D. Tex. Mar. 14 , 2012). Discovery stays are particularly appropriate in antitrust cases like this one, where proceeding to discovery can be extremely expensive and time-consuming. *Twombly*, 500 U.S. at 559; *DSM v. Desotech, Inc. v. 3D Sys. Corp.*, No. 08 CV 1531, 2008 WL 4812440 *2 (N.D. Ill. Oct. 28, 2008).

The relatively short amount of time necessary for the motions process to be complete will not prejudice the plaintiffs' case, and discovery is not needed for the opposition to, or evaluation, of, Rule 12 motions. *See Dowdy & Dowdy P'ship v. Arbitron Inc.*, No. 2:09-cv-253, 2010 WL 3893915 (S.D. Miss. Sept. 30, 2010); *McLafferty v. Deutsche Lufthansa A.G.*, No. 08-1706, 2008 WL 4612856 (E.D. Pa. Oct. 15, 2008); *Rio Grande Royalty Co. v. Energy Transfer Partners L*, No. 08-cv-0857, 2008 WL 8465061 at *1 (S.D. Tex. Aug. 11, 2008).

Plaintiffs seem to argue that the documents produced to the Federal Trade Commission ("FTC") in connection with its investigation could be produced "with the press of a button" to the plaintiffs, but that is simply incorrect. The FTC's investigation was much broader at the outset, when the requests for documents were originally made on the defendants. Also, "turning over documents to the government does not mean everyone else has an equal right to rummage through the same records." *In re Graphics Units Processing Antirust Litig.*, No. C-06-07417, 2007 WL 21277577 at *5 (N.D. Cal. July 24, 2007).[1] The objections to be asserted based upon relevancy and privacy are different in a private action then they are in a government proceeding. *Id.* The task of reviewing those documents prior to production would be a burden that Defendants should not be required to shoulder until after a decision on any Motions to Dismiss, when the scope of the remaining claims, if any, has been determined by the Court. *See In re Air*

[1] The plaintiffs' statement that "[c]opies of material produced to a grand jury are subject to discovery" from the MANUAL FOR COMPLEX LITIGATION (FOURTH), does not stand for the blanket proposition for which it is cited. That statement stands for the proposition that documents that are otherwise responsive to a properly-lodged document request are not shielded from discovery by Federal Rule of Criminal Procedure 6(e). That is not what plaintiffs are proposing, however: they propose that defendants turn over all the documents produced to the FTC. The wholesale disclosure of grand jury materials, however, must be based upon "a showing of particularized need." MANUAL FOR COMPLEX LITIGATION (FOURTH), § 11.491, at 120. Plaintiffs can not make such a showing here.

Cargo Shipping Services Antitrust Litig., 06-md-01775-JG-VVP (Dkt. No. 993) (E.D.N.Y, Oct. 23, 2009) (discovery stayed until after a decision on the motions to dismiss in a case where there were productions to the DOJ in parallel criminal proceedings).

2. Discovery Agreements. On May 21, 2012, the parties discussed previously exchanged written proposals for stipulations to be entered as orders regarding: (a) the confidentiality of documents under Rule 26(c) of the Federal Rules of Civil Procedure; (b) the disclosure of privileged or protected information under Rule 502 of the Federal Rules of Evidence; and (c) expert discovery. The parties will attempt to present agreed stipulations for items in (a)-(c) to the Court by May 28, 2012, or, if agreement is not possible, proposals showing areas of agreement and disagreement. The parties also discussed proposals for handling collection, review and production of ESI. The parties will attempt to present agreed stipulations for the preservation, handling, and production of ESI to the Court by July 13, 2012, or, if agreement is not possible, proposals showing areas of agreement and disagreement.

3. Consolidated Amended Complaint. Plaintiffs shall serve and file a consolidated amended complaint on or before the date 45 days after the appointment of Plaintiffs' Steering Committee or Interim Co-Lead Class Counsel.

4. Response to Pleadings. Defendants shall have until 45 days after the filing of a consolidated amended complaint to answer the consolidated amended complaint or serve and file motions under Rule 12 of the Federal Rules of Civil

Procedure. If defendants submit motions under Rule 12, plaintiffs shall have 45 days to respond, and defendants shall have 30 days to reply.

5. Fact Discovery. The parties take different positions on the timing and extent of disclosure and discovery. In summary, plaintiffs suggest that certain disclosures and document discovery should commence immediately. Defendants suggest that disclosure and discovery should not commence until after a decision on a motion to dismiss under Rule 12 of the Federal Rules of Civil Procedure or the filing of the defendants' answer to plaintiffs' consolidated amended complaint, for the reasons discussed above, and any discovery should be bifurcated between class and merits discovery. Plaintiffs oppose bifurcation.

a. Commencement of Document Discovery.

Plaintiffs' Position. Plaintiffs oppose a stay of document and ESI discovery pending a decision on a motion to dismiss under Rule 12 of the Federal Rules of Civil Procedure. Allowing document discovery to proceed in a timely manner will allow plaintiffs to complete their review and prepare to take depositions as soon as practicable after a decision on a motion to dismiss, thus minimizing the risk of key witnesses becoming unavailable or memories fading before plaintiffs have a chance to preserve their testimony. Also, the case will proceed much more expeditiously if discovery is not delayed.

Defendants will be unable to show the "good cause" required for a stay of discovery. *See, e.g. United States ex rel. Gonzalez v. Fresenius Med. Care N. Am.*, 571 F.Supp.2d 766, 767 (W.D. Tex. 2008); *Glazer's Wholesale Drug Co. v. Klein Foods Inc.*, No. 3-08-CV-0774-L, 2008 WL 2930482 (N.D.Tex. Jul. 23, 2008) (discovery stay is the

exception not the rule); *Weitzner v. Sciton, Inc.*, No. CV 2005-2533, 2006 WL 3827422, at *1 (E.D.N.Y. Dec. 27, 2006) (party requesting stay must show good cause). To determine whether a stay is warranted, a court must evaluate both the breadth and burden of the discovery requested, and the likelihood that a dispositive motion will eliminate the need to undertake the discovery requested. *See Gonzalez*, 571 F.Supp.2d at 767-78; .*Glazer*, 2008 WL 2930482, at *1.

A motion to dismiss is highly unlikely to resolve this action, which is based on the same allegations as a related action that the FTC brought against the defendants. The FTC complaint alleged that "beginning in 2003 and continuing to today, PoolCorp has implemented an exclusionary policy that effectively impeded entry by new distributors by preventing them from being able to purchase pool products directly from manufacturers." On January 10, 2012, the FTC issued its Decision and Order, which prohibits defendants from: (i) conditioning the purchase or sale of pool products, or membership in defendants' preferred vendor program, on the intended or actual sale of pool products by a manufacturer to any other distributor; (ii) pressuring, urging, or otherwise coercing manufacturers to stop selling, or to limit their sales to other distributors; and (iii) discriminating or retaliating against a manufacturer for selling, or intended to sell, pool products to any other distributor. Defendants were also ordered to establish an antitrust compliance program. Under these circumstances, defendants simply cannot show that at this stage that they are likely to prevail on a dispositive motion. *See, Glazer*, 2008 WL 2930482, at *1-2; *Weitzner*, 2006 WL 3827422, at *1 (party requesting stay must show that dispositive motion has "substantial grounds")

Thus, plaintiffs propose that, beginning on June 1, 2012, the parties may serve document requests. Document and ESI discovery will proceed in accordance with the Federal Rules of Civil Procedure regardless of whether defendants file Rule 12 motions.

Defendants' Position.

Staying discovery until the motions to dismiss have been decided makes abundant sense in a case such as this. Put simply, the burden on defendants of engaging in discovery, even if it is only document discovery, is large and the plaintiffs have identified no prejudice that will accrue to them, because there is none, by waiting the short period of time while the motions to dismiss are under consideration.

It is simply incorrect to suggest, as plaintiffs do, that this case could not be resolved, at least in part, if not entirely, by preliminary dispositive motions. Regardless of what happened in any prior proceeding, plaintiffs must have a complaint that is sufficiently and plausibly pled to survive a motion to dismiss, and plaintiffs must sufficiently allege their own standing, injury and damage, among other things, none of which were even addressed, much less disposed of, by the FTC proceeding. That is why it is necessary for defendants to review the documents produced to the FTC before any production is made in this proceeding, and that is burdensome, despite plaintiffs' protestations to the contrary.

b. Bifurcation of Class and Merits Discovery.

Plaintiffs' Position. It is impracticable under the prevailing case law to divide class and merits discovery. First, recent class certification decisions have suggested that plaintiffs must be prepared to show "how specific issues will play out in order to determine whether common or individual issues predominate [at trial] in a given case."

See In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008), quoting *In re New Motor Vehicles Can. Exp. Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008). Accordingly, on a class certification motion, courts look at how plaintiffs propose to prove the merits of their claims. *Id.* The elements of a Sherman Act § 1 claim are: (1) the existence of a contract, combination or conspiracy; (2) an unreasonable restraint of trade; and (3) an effect on interstate commerce. *Dillard v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.* 961 F.2d 1148, 1158 (5th Cir. 1992). The elements of a Sherman Act § 2 monopolization case are: "(1) possession of monopoly power in the relevant market, and (2) that the monopolist achieved or is maintaining monopoly power through anticompetitive conduct." *Research in Motion Ltd. v. Motorola, Inc.*, 644 F. Supp. 12d 788, 792 (N.D. Tex. 2008). The elements of an attempted monopolization case are: (1) that the defendant engaged in predatory or exclusionary conduct, (2) that the defendant possessed the specific intent to monopolize, and (3) that there was a dangerous probability that the defendant would succeed in the attempt. *Spectrum Sports v. McQuillan*, 506 U.S. 447, 456 (1993). Moreover, under each section, to secure relief plaintiffs must show impact (a causal connection between defendants' conduct and injury cognizable under the antitrust laws), and damages.

To demonstrate on class certification that proof of these elements at trial will be predominantly common to the class, plaintiffs should be entitled to discovery of the facts that will be used to make that proof. There can be no distinction between class and merits discovery.

Unsurprisingly, therefore, courts have found that the evidence plaintiffs need to certify a class in antitrust cases is closely intertwined with the evidence plaintiffs will

need to prevail on the merits. *In re Rail Freight Fuel* Surcharge *Antitrust Litig.*, 258 F.R.D. 167, 173 (D.D.C. 2009); *In re Plastics Additives Antitrust Litig.*, No. Civ.A. 03–2038, 2004 WL 2743591, at *4 (E.D. Pa. Nov. 29, 2004). Thus, in *Rail Freight*, Magistrate Judge Facciola found that much of the evidence defendants classified as "merits" discovery, was actually needed by the plaintiffs to demonstrate the scope of an alleged conspiracy, and thus, class-wide impact. 258 F.R.D. at 173-74. Magistrate Judge Facciola held bifurcation to be improper both because of the difficulty in disentangling merits from class evidence, and the waste of judicial resources and delay that would ensue if the court attempted to mediate every discovery dispute that would arise should the parties attempt such a bifurcation. *Rail Freight*, 258 F.R.D. at 173-74. The resulting delay in the resolution of this case would prejudice plaintiffs.

Moreover, bifurcation of class and merits discovery would result in multiple depositions of the same witness and needless deposition objections to "scope."

Defendants' Position.

When discovery commences, which defendants submit should be after the pleadings have been tested under Rule 12, the presumption in complex cases such as these is that discovery between class certification issues and merits should be bifurcated, both to prevent delaying class certification and to promote efficiency of party and judicial resources. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.14, at 256 ("courts often bifurcate between certification issues and those related to the merits of the allegation"); *see also Harris v. Option One Mortgage Corp.*, 261 F.R.D. 98 (D.S.C. 2009) (agreeing to bifurcate discovery in an antitrust case and finding an early class determination is "practicable and . . . best serve the ends of fairness and efficiency") (citing *Washington v.*

Brown & Williamson Tobacco Corp., 959 F.2d 1566, 1570-71 (11th Cir. 1992) ("[C]ourts may allow classwide discovery on the certification issue and postpone classwide discovery on the merits")).

This case is particularly well-suited for bifurcation, as in a monopolization case, class-wide impact must be susceptible to proof by common evidence for all members of the putative class in a properly-defined relevant market. Those inquires are entirely distinct from plaintiffs' allegations of exclusionary conduct, which go to merits issues.

A number of recent antitrust cases have bifurcated class and merits discovery:

1. *Maderzo, et al v. VHS San Antonio Partners, L.P., et al.*, Case No. 06-cv-00535 (Dkt. No. 51) (W.D. Tex. Oct. 6, 2006), ¶ 4 (stating " parties shall complete all discovery on class certification issues by May 4, 2007").

2. *Harris v. Option One Mortgage Corp.*, 261 F.R.D. 98, 111 (D.S.C. 2009) (granting defendants' motion to bifurcate discovery in an antitrust case and finding that proceeding in such a fashion would promote the interests of fairness and efficiency).

3. *In re Apple & AT&TM Antitrust Litig.*, Case No. C 07-05152 (N.D. Cal., Dec. 12, 2008) (permitting bifurcation of class certification and merits discovery).

4. *Clarke v. Baptist Memorial Healthcare Corp.*, Case No. 2:06-cv-02377 (Dkt. No. 127) (W.D. Tenn. July 6, 2007) (granting bifurcation in antirust case).

5. *Unger v. Albany Medical Center, et al.*, Case No. 06-cv-0765 (Dkt. No. 57) (N.D.N.Y. Oct. 26, 2006) (granting bifurcation of class and merits discovery in an antitrust case).

6. *In re Publication Paper Antitrust Litig.*, No. 3:04 MD 1631 (SRU), 2005 WL 1629633 at *1 (D. Conn. March 15, 2005) (In an opinion denying defendants' motion to compel discovery, the court took note that "[m]erits discovery in this consolidated litigation is currently stayed. Discovery related to class certification, however, is proceeding in the class action component of the litigation").

7. *In re Urethane Antitrust Litig.*, No. 04-MD-1616-JWL (D. Kan. Feb. 4, 2005) (Dkt. No. 62), p. 2 (stating in its Order that "[t]he

court will endeavor to rule on plaintiffs' motion for class certification promptly after the class certification hearing. Once the court issues its ruling on the motion, it will refer this MDL proceeding to a magistrate judge to oversee merits discovery").

8. *In re Pressure Sensitive Labelstock Antitrust Litig.*, No. 3;03-MDL-1556 (Dkt. 64), p. 1 (M.D. Pa. April 15, 2004) (stating "[d]iscovery is to be bifurcated").

Plaintiffs' reliance upon standards and cases involving allegations of antitrust conspiracy is misplaced. Plaintiffs cite the standards for a Sherman Act conspiracy case in addition to the standards for monopolization and attempted monopolization, but none of the allegations in the complaints filed here involve allegations that Defendants conspired with anyone else. Similarly, cases cited by Plaintiffs in which the court did not order bifurcation (*Rail Freight* and *Plastic Additives*) involved antitrust conspiracy allegations, not monopolization claims. (Defendants note that courts have bifurcated discovery even in a number of antitrust conspiracy cases, some of which Defendants cite above). The courts in both *Rail Freight* and *Plastic Additives* found that bifurcation of discovery would be more difficult because common impact and damage can be bound up in the alleged mechanism used to carry out the conspiracy. The concern in both of those cases is not present here. Additionally, there are important threshold issues of relevant market and monopoly power that the plaintiffs will need to establish to certify a class, and bifurcation to allow for discovery of those issues to proceed first would be most fair and efficient, lest a "king's ransom" be spent on discovery that will never be used if this Court does not certify a class. *Rail Freight*, 258 F.R.D. at 176.

Defendants also note that the *Plastic Additives* court was also concerned about further delaying the case because bifurcation was being proposed ***eighteen months*** after the case had been consolidated. 2004 WL 2743591, at *3. And in *Rail Freight*, although the court did not bifurcate discovery, it allowed for a shortened period of discovery prior to class certification briefing beyond what plaintiffs proposed. 258 F.R.D. at 176 ("[t]his discussion is not to say that untrammeled and unlimited discovery is appropriate before the issue of class certification is addressed . . . .").

c. Non-Party Discovery

Plaintiffs' Position. Plaintiffs propose that discovery from non-parties may commence five days after the consolidated amended complaint is filed. As set forth in Section 5.b. above, no bifurcation of class and merits discovery is warranted under the prevailing case law.

Defendants' Position. As discussed, above, Defendants' position is that discovery should commence after the Court rules on the motion(s) to dismiss. Defendants propose that class discovery from parties and non-parties commence at that time.

d. Commencement of Non-Document Discovery.

Plaintiffs' Position. Plaintiffs propose that if defendants do not file motions under Rule 12, then non-document discovery shall commence five days after answers are filed. If defendants do submit motions under Rule 12, and the case is not dismissed in its entirety, non-document and non-ESI discovery shall commence five days after any decision. As set forth in Section 5.b. above, no bifurcation of class and merits discovery is warranted under the prevailing case law.

Defendants' Position. Defendants propose that the parties can begin serving discovery five days after the Court files its Order on the motions to dismiss, provided the case is not dismissed in its entirety.

e. Number of Interrogatories. The number of interrogatories each side may serve is limited to 25 per side, including all discrete subparts.

f. Number of Depositions. The parties have agreed to postpone negotiations on the number of depositions each party will be entitled to take until after the commencement of document discovery.

g. Duration of Depositions. The duration of depositions is limited in accordance with Rule 30(d) of the Federal Rules of Civil Procedure.

h. Requests for Admissions. Requests for admission are limited to 50 per side.

i. Completion of Fact Discovery.

Plaintiffs' Position. As set forth in Section 5.b above, plaintiffs do not believe that a bifurcation of class and merits discovery is warranted under the existing case law. If no bifurcation is ordered, plaintiffs propose that fact discovery be completed eight months after non-document and non-ESI discovery begins.

Defendants' Position. As discussed above, Defendants' submit that bifurcation is proper and propose that merits discovery be completed 120 days after a decision on the motion for class certification, if a class is certified.

6. Amendment of Pleadings. No further amendment of pleadings or joinder of other parties will be permitted after defendants answer, except in accordance with Rules 15(a) and (b) of the Federal Rules of Civil Procedure.

7. Expert Discovery and Class Certification. To enable the parties to create a sufficient record for consideration of class certification under Rule 23 of the Federal Rules of Civil Procedure, the parties have agreed to extend the requirement of Local Rule 23.1(B).

a. Motion for Class Certification. Within 60 days of the close of fact discovery, or, if bifurcated, class discovery, plaintiffs shall serve and file a motion for certification of a class, classes or subclasses under Rule 23 of the Federal Rules of Civil Procedure, including any class certification expert disclosures required under Rule 26(a)(2).

b. Deposition(s) of Plaintiffs' Expert(s). Defendants shall have 30 days from the service and filing of any expert disclosures under Rule 26(a)(2) of the Federal Rules of Civil Procedure to take the deposition of any expert who provides such disclosures.

c. Response to Class Certification Motion. Defendants shall have 100 days from the filing of a motion for class certification to serve and file a response, including any class certification expert disclosures required under Rule 26(a)(2).

d. Deposition(s) of Defendants' Expert(s). Plaintiffs shall have 30 days from the service and filing by defendants of any expert disclosures under Rule 26(a)(2) of the Federal Rules of Civil Procedure to take the deposition of any expert who provides such disclosures.

e. Reply to Class Certification Motion. Plaintiffs shall have 75 days from the filing of any response by defendants to a motion for class certification to

serve and file a reply, including any rebuttal expert disclosures required under Rule 26(a)(2) of the Federal Rules of Civil Procedure.

f. Hearing Date. Upon the completion of briefing of class certification, the Court shall set a hearing date.

8. Further Schedule. The parties believe that it makes sense for them to meet and confer within two weeks of the Court's decision on plaintiffs' class certification motion regarding a schedule for any further discovery, expert disclosures, dispositive motions under Rule 56 of the Federal Rules of Civil Procedure and further pre-trial proceedings and then present any agreements or divergent recommendations to the Court, which will determine if a pretrial conference under Rule 16 of the Federal Rules of Civil Procedure is needed to set a further schedule. Nonetheless, in accordance with paragraph 4(b) of Pretrial Order No. 1, as an alternative, the parties propose:

a. Further Discovery. If the Court accepts defendants' proposal for bifurcated discovery (which plaintiffs oppose), then merits discovery will be completed within 180 days of the entry of an order on the motion for class certification. If there is no bifurcated discovery, than any additional discovery will be completed within 60 days of the entry of an order on the motion for class certification, if the Court certifies a class.

b. Merits Experts. The parties shall serve and file all affirmative expert disclosures pursuant to Rule 26(a)(2) within 30 days from the end of further discovery under paragraph 8(a).

i. The parties shall have 45 days from the service of any affirmative expert report pursuant to Section 8(b) to depose any expert that provides such a report.

ii. The parties shall have 90 days from the service of any affirmative expert report pursuant to Section 8(b) to serve and file rebuttal expert reports pursuant to Rule 26(a)(2) of the Federal Rules of Civil Procedure.

iii. The parties shall have 30 days from the service of any rebuttal expert report to depose any expert that provides such a report.

c. Summary Judgment Motions. Within 90 days from the date all expert reports, including rebuttal reports, are served, the parties may serve and file any dispositive motions under Rule 56 of the Federal Rules of Civil Procedure.

i. Within 60 days of the service of any dispositive motion under the Federal Rules of Civil Procedure, the parties opposing the motion shall serve and file a response.

ii. Within 45 days of the service of any response to a dispositive motion, the moving parties shall serve and file a reply.

iii. Upon completion of the briefing of dispositive motions, the Court shall set a hearing date.

DATED: May 23, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been filed via the Court's ECF System and properly served upon all counsel of record pursuant to the directives of Pre-Trial Order No. 1, on this 23rd day of May, 2012.

/s/ Soren E. Gisleson