**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF NEW YORK**

RUSSELL DOVER, JONATHAN STONE, CODY RANK, and SUZETTE PERRY, on behalf of themselves and all others similarly situated,

Plaintiff,

-vs.-

BRITISH AIRWAYS, PLC (UK),

Defendant.

Case No. 1:12-cv-05567 (RJD) (MDG)

**Oral Argument Requested**

Judge: Raymond J. Dearie

Magistrate Judge: Marilyn D. Go

# MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT BRITISH AIRWAYS PLC (UK)'S MOTION TO STAY DISCOVERY PENDING RESOLUTION OF ITS MOTION TO DISMISS

David S. Stellings
Nicholas Diamand
Jason L. Lichtman
Douglas I. Cuthbertson
**LIEFF CABRASER HEIMANN & BERNSTEIN, LLP**
250 Hudson Street, 8th Floor
New York, NY 10013-1413
212.355.9500

Clive Zietman
Fiona Stewart
Daniel Loblowitz
**STEWARTS LAW, LLP**
5 New Street Square
London, UK EC4A 3BF
+44 (0)20.7822.8000

*Counsel for Plaintiffs*

*Additional Counsel Listed on Signature Page*

# TABLE OF CONTENTS

**Page**

**TABLE OF CONTENTS**
**(continued)**

**Page**

# TABLE OF AUTHORITIES

**Page**

## CASES

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**



**RULES**



**TREATISES**



**OTHER AUTHORITIES**

## I. INTRODUCTION

When Defendant British Airways, PLC (UK) ("BA" or "British Airways") argued at the initial status conference that discovery should be stayed, the Honorable Raymond J. Dearie replied that he disfavored "holding everything up" during the pendency of BA's motion to dismiss. Lichtman Decl., Ex. G, (3/5/13 Hrg. Tr. at 20:6). Yet, BA now seeks a complete stay of discovery, even though Plaintiffs served narrowly targeted discovery requests designed to achieve progress without creating an undue burden on British Airways. (*See id*. at 20:7-8.) BA's motion is in error: as Judge Dearie anticipated, BA cannot satisfy the test for a discovery stay.

BA's motion also raises the additional question of whether any of Plaintiffs' specific discovery requests are overbroad or unduly burdensome.[1] For the reasons explained below, they are not.

### A. Discovery Should Not Be Stayed.

BA's motion to stay all discovery is built primarily around the argument that BA's motion to dismiss is likely to be successful. (*See* BA Stay Br. at 5-9.) This is misguided.

Plaintiffs assert a claim for breach of a contract that is governed by the law of England and Wales ("English Law"). (*See* Compl. at ¶¶ 74-76.) In BA's motion to dismiss, however, BA cites almost no English Law. Instead, BA attacks Plaintiffs' claim through "expert" testimony of an English lawyer at DLA Piper — *BA's counsel in this case* — who (unsurprisingly) argues that Plaintiffs' claim should be dismissed. (*See* Stone Opinion at ¶¶ 6.1-6.5.) Plaintiffs respond to BA's attorney with extensive citation to English Law and with *independent* expert testimony

[1] The Parties reached an agreement under which BA would specify all of its "primary" objections to Plaintiffs' discovery requests in this motion. The Parties did this, in part, to avoid burdening the Court with a separate round of motion to compel briefing in the coming weeks.

from Andrew Sutcliffe, a senior English barrister who is also a judge. *See* Lichtman Decl., Ex. A ("Sutcliffe Rep."). Sutcliffe's report explains in detail why Plaintiffs state a claim for breach of contract under English Law. Against this backdrop, BA is unlikely to prevail in its motion to dismiss.

BA also argues that Plaintiffs' claim should be dismissed because it is preempted by the Airline Deregulation Act of 1978 ("ADA"). (*See* BA Stay Br. at 8.) The Supreme Court disagrees: breach of contract claims involving an airline's frequent flier program are *not* preempted by the ADA. *See Am. Airlines v. Wolens*, 513 U.S. 219, 233 (1995); *see also In re Jetblue Airways Corp. Priv. Litig.*, 379 F. Supp. 2d 299, 313 (E.D.N.Y. 2005) (Amon, C.J.) (applying *Wolens* more broadly). BA's preemption argument simply misapprehends the law. *See id.*; *see also In re Nig. Charter Flights Contract Litig.*, 520 F. Supp. 2d 447, 469 (E.D.N.Y. 2007) (Dearie, J.) (ADA did not preempt plaintiffs' claims).

Accordingly, this litigation will not be resolved on the pleadings.

**B. <u>The Discovery Requests Are Not Overbroad or Unduly Burdensome.</u>**

Just as discovery should not be stayed, so too should Plaintiffs' discovery requests not be further narrowed. Indeed, the vast majority of BA's arguments in this portion of its brief rest upon a false premise: that Plaintiffs' claims involve only flights between the United States and the United Kingdom. (BA Stay Br. at 12-16, 18.) BA misdescribes the Complaint. Plaintiffs' claims involve all of BA's purported "fuel surcharges" that were imposed on Plaintiffs and class members, regardless of the route on which they were imposed. (*See, e.g.*, Compl. at ¶ 56.)

BA's other overbreadth and undue burden arguments are similarly unavailing, as detailed below in Section VI.

## II. BACKGROUND

### A. Relevant Facts

This dispute revolves around the meaning of the term "fuel surcharge." (Compl. at ¶ 6.) BA imposed what it terms a fuel surcharge (the "Fuel Surcharge") of hundreds of dollars on every ticket acquired by Plaintiffs and the proposed class members who redeemed their frequent flier points ("Miles") for travel on British Airways ("Reward Tickets"). (*Id*. at ¶¶ 7-9.) The Fuel Surcharge was not based on the price of fuel, nor did any outside entity impose such a charge on BA. (*Id*. at ¶¶ 7-8.) The question at the heart of this litigation is whether the contract between Plaintiffs and BA (the "Contract") allows BA to impose a Fuel Surcharge that is *not* a fuel surcharge (i.e., that is not based on the price of fuel or externally imposed on BA). (*Id*.)

Plaintiffs are members ("Members") in British Airways' frequent flier program, known as the Executive Club. (*Id*. at ¶ 3.) Members are promised that they will earn Miles in exchange for engaging in certain activity, including paying for flights on British Airways. (*Id*. at ¶ 1.) Miles are frequently redeemed for "free" airline travel (i.e., Reward Tickets). (*Id*. at ¶ 2.) Reward Tickets are not literally free; instead, Members pay certain taxes and fees when they redeem Miles for a Reward Ticket, including a "fuel surcharge." (*Id*.)

Plaintiffs assert that a fuel surcharge, among other things, should be a charge that is based on the price of fuel. (*Id*. at ¶ 7.) There is no serious dispute that, whatever the Fuel Surcharge is based on, it is not based on *that*; while BA (improperly) submitted voluminous extrinsic evidence in its motion to dismiss, none of it even purports to show that the Fuel Surcharge is actually based on the price of fuel. (*See generally* BA Motion to Dismiss Br.); *see also* Lichtman Decl., Ex. B (Motion to Dismiss Opp. Br.) at 4-6, 9-10. The Fuel Surcharge, moreover, is no minor fee. While other charges and fees associated with Reward Tickets are modest, the Fuel Surcharge is hundreds of dollars per ticket. (Compl. at ¶ 9.)

### B. Procedural History

Plaintiffs filed this lawsuit more than seven months ago, on November 9, 2012. Perhaps in part for this reason, at a pre-motion hearing preceding BA's motion to dismiss, Judge Dearie explained that he did not favor staying all discovery:

> I'll tell you what I'm going to do. I'm going to talk to the magistrate. Either she or I will issue an order regarding discovery. I'm not a fan of holding everything up. And yet, on the other hand, I know there are levels of discovery some of which are far more costly, far more time consuming.

Lichtman Decl., Ex. G (3/5/13 Hrg. Tr. at 20:4-9).[2]

On March 6, 2013, Plaintiffs served BA with the discovery that is the subject of this motion. *See* Lichtman Decl. at ¶¶ 6-8.

On March 26, 2013, BA served its motion to dismiss. In that motion, BA attached and referenced a significant amount of extrinsic evidence, some of which BA declined to provide to Plaintiffs for examination. *See* Lichtman Decl., Ex. C (4/3/13 e-mail & 4/4/13 e-mail). On May 10, 2013, Plaintiffs served their brief in opposition to BA's motion to dismiss. *See* Lichtman Decl., Ex. B (Motion to Dismiss Opp. Br.).

On May 10, 2013, BA filed the instant motion to stay. (*See* Doc. 18.)

## III. ENGLISH LAW

As indicated above, the Contract at issue in this litigation contains a choice of law clause that requires English Law to be applied to any dispute. (*See* BA Motion to Dismiss Br. at 12 n.9); *see also* Lichtman Decl., Ex. B (Motion to Dismiss Opp. Br.) at 7-8. Nevertheless, BA's

[2] For the Court's convenience, a copy of this transcript is attached as Exhibit G to the Lichtman Declaration.

motion to dismiss, incorporated here by declaration, cites almost no English law.[3] BA instead cites Solicitor Paul Stone, a partner at the law firm representing BA in this litigation.

As indicated above, Plaintiffs respectfully submit that BA's citation to its own counsel for propositions of English law should not be found persuasive. This is especially so because Plaintiffs directly cite English Law cases, and Plaintiffs also cite the independent expert testimony of a senior barrister ("Queen's Counsel") and Deputy High Court Judge who "often adjudicate[s] disputes" of this nature in England. *See* Lichtman Decl., Ex. A (Sutcliffe Rep.) at ¶ 4; *cf. Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1454 (11th Cir. 1985) ("The English differentiate between 'solicitors' and 'barristers.' Barristers receive special training and present the cases in court. Their traditional values, quality of scholarship and loyalty to the courts is known world-wide.").

## IV. LEGAL STANDARD

A motion to stay discovery is analyzed as a motion for a protective order. *See Razzano v. County of Nassau*, No. 07-3983, 2009 U.S. Dist. LEXIS 86716, at *20-21 (E.D.N.Y. Sept. 22, 2009). In other words, BA must demonstrate "good cause" to prevail. Fed. R. Civ. P. 26(c).

The mere presence of a motion to dismiss is insufficient to justify a stay. *See Alford v. City of New York*, No. CV 2011-0622, 2012 U.S. Dist. LEXIS 37876 at *2 (E.D.N.Y. Mar. 20, 2012) (Go, M.J.); *see also* 6-26 Moore's Federal Practice - Civil § 26.105 (same). Indeed, "[h]ad the Federal Rules contemplated that a motion to dismiss [under Rule 12(b)(6)] would stay

[3] BA's brief in support of its motion to stay repeatedly cites a declaration in support of critical legal propositions. (*See, e.g.*, BA Stay Br. at 5-9.) That declaration, in turn, cites BA's motion to dismiss, which in turn cites almost no English cases. (*See, e.g.*, Carey Decl. Ex. K: BA Motion to Dismiss Br. at 13-20.) While this is surely unintentional on BA's part, it would be possible to read BA's stay motion and to come away with the misimpression that BA has direct support for all of its various legal propositions, when it does not. *Cf. Reeves v. Case Western Reserve Univ.*, No. 1:07-1860, 2009 U.S. Dist. LEXIS 90308, at *3 n.1 (N.D. Ohio Sept. 30, 2009) (explaining that a court should not credit assertions backed by unclear citation).

discovery, the Rules would contain a provision to that effect." *Williams v. New Day Farms, LLC*, No. 2:10-cv-0394, 2010 U.S. Dist. LEXIS 98934 at *4 (S.D. Ohio Sept. 7, 2010) (quoting *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990)).

Rather than granting a stay as a matter of course, courts look to a number of factors to determine whether a defendant has shown "good cause." *See Alford*, 2012 U.S. Dist. LEXIS 37876, at *2-3 (citations omitted). The most important factor is whether the litigation is likely to be resolved on the pleadings. *See ITT Corp. & Goulds Pumps, Inc. v. Travelers Cas. & Sur. Co.*, No. 3:12CV38, 2012 U.S. Dist. LEXIS 100033, at *10-11 (D. Conn. July 18, 2012) (collecting cases). Accordingly, this Court has refused to stay discovery in the past when has been "doubtful that defendants will succeed in dismissing all of the claims against them." *Alford*, 2012 U.S. Dist. LEXIS 37876, at *3; *Freund v. Weinstein*, CV 2008-1469, 2009 U.S. Dist. LEXIS 57991, at *3-6 (E.D.N.Y. July 8, 2009) (Go, MJ) (same); *State Farm Mut. Auto. Ins. Co. v. Accurate Med., P.C.*, No. CV 2007-0051, 2007 U.S. Dist. LEXIS 74459, at *3-6 (E.D.N.Y. Oct. 4, 2007) (Go, MJ) (same). In evaluating "good cause", courts also must consider the risk of unfair prejudice and the burden imposed by discovery. *See, e.g., Alford*, 2012 U.S. Dist. LEXIS 37876, at *2-3 (citations omitted).

## V. THE MOTION TO STAY DISCOVERY SHOULD BE DENIED.

### A. This Litigation Will Not be Resolved on the Pleadings.

BA makes two arguments to attempt to persuade this Court that the litigation will be resolved on the pleadings: (1) Plaintiffs fail to state a claim; and (2) Plaintiffs' claim is preempted. Neither argument is persuasive. This alone is sufficient reason for the Court to deny the motion to stay. *See, e.g., Gray*, 133 F.R.D. at 40.

**1. Plaintiffs Assert a Valid Claim for Breach of Contract.**

As explained above, Plaintiffs' claim is that BA breached the Contract by assessing a Fuel Surcharge that was not a "fuel surcharge" — i.e., not based on the price of fuel and imposed by a third party. Under English Law, this claim can be analyzed in two discrete steps. First, the Court must determine the general meaning of the term "fuel surcharge." *See* Lichtman Decl., Ex. A (Sutcliffe Rep.) at ¶¶ 41-54. Second, the Court must consider whether "fuel surcharge" has a "more precise" definition in the Contract. *See id*. at ¶ 55.

**a. The Fuel Surcharge Must Reflect the Price of Fuel.**

The term "fuel surcharge" is never defined in the Contract. An English court would therefore look to extrinsic evidence regarding the Parties' intentions. *See Perrylease Ltd v Imecar A.G.* [1988] 1 W.L.R., 463, at 471; Chitty on Contracts § 12-117 ("[This] does not usurp the authority of the written document . . . ."); *accord CSI Inv. Partners II, L.P. v. Cendant Corp.*, 507 F. Supp. 2d 384, 413 (S.D.N.Y. 2007). In this case, BA explains on its website that it "applies a fuel surcharge to reflect the fluctuating price of worldwide oil." Lichtman Decl., Ex. A (Sutcliffe Rep.) at ¶ 42. This is the "only explanation offered by British Airways" for the term "fuel surcharge," and an English court would therefore conclude that this is the definition of a "fuel surcharge." *Id*. at ¶ 44; *accord Willig v. Exiqon, Inc.*, No. SA CV 11-399, 2012 U.S. Dist. LEXIS 662, at *21-22 (C.D. Cal. Jan. 3, 2012). In other words, the term "fuel surcharge" in the Contract refers, as Plaintiffs contend, to a charge based on the price of fuel. Lichtman Decl., Ex. A (Sutcliffe Rep.) at ¶ 54.

BA's protestations to the contrary are unavailing. (*See* Lichtman Decl., Ex. B (Motion to Dismiss Opp. Br.) at 12-14.) Of particular importance, BA's argument that it was not obligated to follow any "particular methodology" for setting the fuel surcharge (BA Stay Br. at 7-8) is not responsive to the allegations in the Complaint. Plaintiffs do not allege that BA chose the wrong

"methodology." Rather, Plaintiffs allege that BA's fuel surcharge is not based upon the price of fuel, although it was required to be under the terms of the Contract. (*See* Compl. at ¶ 7.) This is a straightforward allegation of breach of contract. *See* Lichtman Decl., Ex. A (Sutcliffe Rep.) at ¶¶ 41-54.

**b. BA's Contract Defines a "Fuel Surcharge" as a Charge Imposed by an Entity *Other* Than BA.**

BA's Contract permits BA to pass on a fuel surcharge only if it is levied by a third party. *See* Lichtman Decl., Ex. A (Sutcliffe Rep.) at ¶ 69 ("[A]n English court would conclude that . . . British Airways [may only] pass on certain charges imposed by third parties."). While the Contract explains that Members may be responsible for a "fuel surcharge," it defines that term as a fee or tax imposed *on* BA, not *by* BA. The relevant portion of the Contract provides:

> Members will be liable for all taxes and other charges associated with Reward travel on British Airways or a Service Partner airline, including without limitation, airport departure tax, customs fines, immigration fees, airport charges, customer user fees, fuel surcharges, agricultural inspection fees, security and insurance surcharge or other incidental fees or taxes charged by any person or relevant authority or body.

Compl. at ¶ 40 (quoting Contract at § 13.14).

Under English Law, when a contract includes both specific and general terms in a single sentence, the more general terms are interpreted as belonging to the class of words implied by the more specific term. Lichtman Decl., Ex. A (Sutcliffe Rep.) at ¶¶ 30-31, 63-65, 70; *accord Regent Ins. Co. v. Storm King Contr., Inc.*, No. 06 Civ. 2879, 2008 U.S. Dist. LEXIS 16513, at *23 (S.D.N.Y. Feb. 26, 2008) (same under New York law). In this case, because the specific words such as "airport departure tax" and "customs fines" are all "levied by third parties" and outside "the control of British Airways", the term "fuel surcharge" must be interpreted in this way as well. Lichtman Decl., Ex. A (Sutcliffe Rep.) at ¶¶ 65, 70; *accord Barkwell v. Sprint*

*Communs. Co. L.P.*, No. 4:09-cv-56, 2010 U.S. Dist. LEXIS 128831, at *14-16 (M.D. Ga. Dec. 6, 2010) (holding that similar contractual language only allowed charges levied by third parties). BA's conclusory arguments to the contrary cannot change this result. *See* Lichtman Decl., Ex. B (Motion to Dismiss Opp. Br.) at 17.[4]

**2. Plaintiffs' Claim Is Not Preempted By The ADA.**

BA argues that Plaintiffs' claim is preempted by the ADA (*see* Stay Br. at 8-9), but controlling case law holds otherwise. Courts have consistently upheld contract claims analogous to those at issue here. *See, e.g.*, *In re Jetblue*, 379 F. Supp. 2d at 314; (explaining that "a breach of contract cause of action" is not preempted by the ADA). The rule is straightforward: the ADA does not bar "a contractual claim where the suit seeks recovery solely for the airline's alleged breach of its own, self-imposed undertakings' and does not allege violation of any state-imposed obligations." *Id.* at 313 (internal quotation marks and citation omitted).

In *Wolens*, the Supreme Court explained clearly that an airline must adhere to the terms of its contracts or be subject to suit for breach. *Id.* at 228-29 ("A remedy confined to a contract's terms simply holds parties to their agreements — in this instance, to business judgments an airline made public *about its rates and services*." (emphasis added).) *Wolens*, moreover, involved claims about the terms and conditions of an airline's frequent flier program, the precise situation before the Court here. *See id.* Accordingly, BA's preemption arguments are foreclosed by a directly-on-point Supreme Court decision. *See id.*; *see also* Lichtman Decl., Ex. B (Motion to Dismiss Opp. Br.) at 19-20.

[4] In its motion to stay, BA's main argument on this point is that the term "or" *must* be read disjunctively. (BA Stay Br. at 7.) This is wrong as a matter of English law. *See* Lichtman Decl., Ex. A (Sutcliffe Rep.) at ¶ 73 (collecting cases); *see also* Lichtman Decl., Ex. B (Motion to Dismiss Opp. Br.) at 17.

### B. Plaintiffs Will Be Prejudiced By A Stay.

While BA would be unable to demonstrate "good cause" for a discovery stay even in the absence of prejudice to Plaintiffs, in this case, Plaintiffs would experience prejudice from a stay.

#### 1. Plaintiffs Would Suffer Two Forms of Prejudice From a Stay.

Most cases discussing prejudice do not involve routine civil commercial litigation. *See, e.g.*, *Xerox Corp. v. 3Com Corp.*, 69 F. Supp. 2d 404, 407 (W.D.N.Y. 1999) (discussing lengthy delay in patent litigation).[5] Therefore, relatively few cases provide guidance on this factor. Nevertheless, this case involves two specific types of prejudice.

First, BA continues to impose the Fuel Surcharge on both Plaintiffs and the proposed class. Plaintiffs respectfully ask this Court to find that ongoing harm militates against a stay.

Second, BA has attached voluminous extrinsic evidence to its motion to dismiss, and has declined to provide support for that evidence to plaintiffs. *See* Lichtman Decl., Ex. C (4/3/13 e-mail & 4/4/13 e-mail). Discovery is critical so that Plaintiffs may understand this evidence in context. This is particularly important because, to the extent Plaintiffs *were* able to investigate one of the (improper) factual assertions in BA's motion to dismiss, BA was wrong. *See* Lichtman Decl., Ex. B (Motion to Dismiss Opp. Br.) at 1 n.1.

#### 2. A Defendant Cannot Secure a Discovery Stay Merely By Promising Not to Destroy Evidence.

BA's representation that it is not destroying evidence (*see* Stay Br. at 19) does not somehow entitle it to a discovery stay. *See, e.g.*, *Williams*, 2010 U.S. Dist. LEXIS 98934, at *4 (refusing to grant a stay of discovery despite argument that all relevant evidence was subject to

[5] In its motion to dismiss, BA cited a number of Private Securities Litigation Reform Act ("PSLRA") cases. Those cases are not relevant because the PSLRA expressly requires an automatic discovery stay unless *plaintiffs* can demonstrate prejudice, whereas BA's motion to stay discovery requires *defendants* to demonstrate good cause. *See, e.g.*, *In re Initial Pub. Offering Sec. Litig.*, 236 F. Supp. 2d 286, 287 (S.D.N.Y. 2002).

preservation orders). Presumably every defendant assures the Court that it has taken appropriate steps to preserve evidence, yet courts — including this one — routinely deny stay motions.[6]

### C. Even if Discovery Were Overbroad or Unduly Burdensome, it Would Not Support a Total Stay.

BA erroneously contends that the breadth and burden of Plaintiffs' discovery supports a total stay. (*See* BA Stay Br. at 9-10.) As an initial matter, and as explained more fully below, Plaintiffs' discovery requests are *not* overbroad or unduly burdensome. More importantly, however, Plaintiffs are aware of no case in which all discovery was stayed solely because of overbreadth or undue burden.

BA's cases are not to the contrary. For example, BA cites *Josie-Delerme v. Am. Gen. Fin. Corp.* No. 08 Civ. 3166, 2009 U.S. Dist. LEXIS 15525, at *5 (E.D.N.Y. Feb. 26, 2009) (Go, M.J.). In that case, this Court found that "defendants [had] *not* shown that they w[ould] be unduly burdened by having to respond to plaintiff's discovery requests." *Id*. (emphasis added). And in another of the cases cited by BA as "supporting" its motion to stay, the defendant's motion to stay was *denied*. *See In re Currency Conversion Fee Antitrust Litig*., MDL 1409, 2002 U.S. Dist. LEXIS 974, at *7-10 (S.D.N.Y. Jan. 22, 2002).

## VI. PLAINTIFFS' DISCOVERY REQUESTS ARE NARROWLY TAILORED AND SHOULD NOT BE CIRCUMSCRIBED FURTHER.

BA claims that Plaintiffs' targeted and focused discovery requests are premature, that they would unduly burden BA, and that the requests are premature. (*See* BA Stay Br. at 9-19.) BA is wrong on all fronts.

---

[6] BA's sole citation in this section of its brief is inapposite. *See Giminez v. Law Offices of Hoffman & Hoffman*, Nos. 12 Civ. 0669, 12 Civ. 2844, 2012 U.S. Dist. LEXIS 96168, at *6 (E.D.N.Y., July 11, 2012). In that case, a stay was granted primarily because of an issue relating to attorney-client privilege. *Giminez* is also distinguishable because it involved only a very short period of delay. *See id*.

First, contrary to BA's description of Plaintiffs' requests as "premature," the speed with which Plaintiffs filed their discovery requests weighs *against* a stay. *See ADL, LLC v. Tirakian*, 06 Civ. 5076, 2007 U.S. Dist. LEXIS 48640, at *8 (E.D.N.Y. July 5, 2007) (Go, M.J.) ("The fact that plaintiff is pursuing discovery expeditiously weighs against delaying discovery by granting a stay."); *cf.* Lichtman Decl., Ex. G (3/5/12 Hrg. Tr. at 20:2-3) ("How quickly can you get the motion to me?").[7]

Second, and as explained more fully below, BA's primary objection to Plaintiffs' discovery requests rests upon a false premise. Moreover, each individual category of Plaintiffs' discovery is appropriate and narrowly tailored not to create an undue burden on BA.

**1. BA's Characterization of the Scope of this Case is Inaccurate, and Its Objections Based on that Misunderstanding Must be Overruled.**

The majority of BA's specific discovery objections argue that Plaintiffs' discovery is overbroad and irrelevant because the requests seek information regarding BA's fuel surcharges imposed on flights throughout the world. (*See* BA Stay Br. at 12-13, 14-16, 17-18.) BA asserts that "the only fuel surcharge relevant to this litigation" involves "the U.S. to U.K. route[.]" (*Id.* at 12-13.) BA is wrong. Plaintiffs' breach of contract claim includes *all* fuel surcharges imposed on Reward Tickets anywhere in the world that were purchased by class members. (*See* Compl. at ¶ 56). The proposed class is defined as:

> All residents of the United States who are members of the British Airways Executive Club, who purchased a Reward Ticket with frequent flier miles from November 9, 2006 to the present (the "Proposed Class"), and who paid a purported "fuel surcharge" when making the purchase.

[7] BA notes that Plaintiffs originally suggested depositions "within two weeks of the stay being lifted," but this does not change the analysis. Should the Court deny BA's motion to stay, Plaintiffs will, of course, work cooperatively with BA to select mutually agreeable and workable dates for depositions.

(*Id.*)

Plaintiffs and class members purchased Reward Tickets for travel among various countries around the world, not only between the U.S. and the U.K. In other words, Plaintiffs did not limit their discovery requests to the U.S. to U.K. route, and their claims are not limited to that route. *Cf., e.g., Condit v. Dunne*, 225 F.R.D. 100, 105 (S.D.N.Y. 2004) (explaining that relevant "is an extremely broad concept") (citation omitted).

Accordingly, Plaintiffs respectfully ask the Court to overrule BA's objection that is based upon its inaccurate description of the scope of Plaintiffs' Complaint. (*See* BA Stay Br. at 12-15, 17-18.)[8] BA has asserted that same objection to all of the following requests, which are attached as Exhibits D (Deposition Notices), E (Requests for Production), and F (Interrogatories) to the Lichtman Declaration:

- Plaintiffs' 30(b)(6) Notice regarding hedging practices, application of fuel surcharges, and competitor practices in the industry (manner in which fuel surcharges are set).
- RFP # 1 ("Documents sufficient to Identify the average number of passengers for every Route on which a Fuel Surcharge is assessed.").
- RFP # 2 ("Documents sufficient to Identify the total amount of Fuel Surcharges BA charged Members for Flights using Reward Tickets.").
- RFP # 7 ("All Documents in which BA discusses revenue derived from Fuel Surcharges.").
- RFP # 8 ("All Documents relating to any complaints, inquiries, questions or comments regarding the Fuel Surcharge from Members as well as any responses to those complaints, inquiries, questions, or comments made by BA.").
- RFP # 9 ("All Documents or communications relating to BA's evaluation, analysis, observation, of any fuel-related surcharges or fees levied by competitor airlines.").
- 'Rog # 1 ("Describe the methodology or methodologies used by BA to calculate the Fuel Surcharges that BA charged travelers flying on BA Metal Flights.").

[8] BA raises this objection to Plaintiffs' 30(b)(6) Notice at pages 12-13 of its stay brief. It raises this objection to Plaintiffs' RFPs at pages 14-15 and to Plaintiffs' Interrogatories at 17-18.

- 'Rog # 2 ("Describe the methodology or methodologies used by BA to calculate the Fuel Surcharges that BA charged travelers flying on non-BA Metal Flights.").

- 'Rog # 4 ("Identify each person who participate(d) in creating, modifying or implementing the methodology or methodologies described in response to Interrogatories Numbers 1 and 2.").

- 'Rog # 7 ("Identify all aircraft You operate (e.g., Boeing 747, Airbus 318) and state the average Fuel consumption per seat for each type of aircraft during take-off and when cruising.").

- 'Rog # 13 ("For each calendar year, Identify the total number of Reward Tickets that were used on Flights.").

- 'Rog # 14 ("For each calendar year, Identify the total amount of Fuel Surcharges BA charged Members for Flights using Reward Tickets.").

- 'Rog # 15 ("To the extent that the data is reasonably accessible via a query or queries of BA's database(s), identify in electronic spreadsheet format each Fuel Surcharge that was paid by a Member who flew during the Relevant Time Period using a Reward Ticket, and specify the date, Route, and the type of aircraft that was used to fly the Route.").

- 'Rog # 18 ("Describe all taxes, fees, and surcharges (excluding Fuel Surcharges) that BA includes or included in Reward Tickets, and the manner in which each of the taxes, fees, and surcharges were calculated.").

**2. <u>Plaintiffs' 30(b)(6) Notices are Specific and Narrowly Tailored.</u>**

BA objects to three of Plaintiffs' 30(b)(6) deposition notices on the grounds of undue burden and overbreadth. (*See* BA Stay Br. at 11-12.) In particular, BA objects to Plaintiffs deposing the witnesses most knowledgeable and competent to testify regarding:

- "The manner in which Fuel Surcharges have been set, the revenue generated by Fuel Surcharges, and BA's knowledge of its competitors' practices regarding Fuel-related charges to their customers."

- BA's "initial decision to impose Fuel Surcharges, as well as each subsequent decision to modify the amount of Fuel Surcharges that BA imposed on its customers."

- BA's "Hedging strategy and practices as they relate to the cost of Fuel."

*See* Lichtman Decl., Ex. D (Plaintiffs' 30(b)(6) Notices). These objections are unfounded.

**a. BA's Objections to Plaintiffs' 30(b)(6) Notices are General and Conclusory.**

BA offers no supporting testimony or explanation as to how or why Plaintiffs' depositions notices might be overbroad or unduly burdensome.[9] This is error, because "[g]eneral and conclusory objections . . . are insufficient to exclude discovery of requested information." *U.S. Bank Nat'l Ass'n v. PHL Variable Ins. Co.*, No. 12 Civ. 6811, 2013 U.S. Dist. LEXIS 57642, at *7 (S.D.N.Y. Apr. 22, 2013) (citation and quotation marks omitted); *see also Chembio Diagnostic Sys. v. Saliva Diagnostic Sys.*, 236 F.R.D. 129, 135 (E.D.N.Y. 2006) ("Generally, discovery is only limited when sought in bad faith, to harass or oppress the party subject to it, when it is irrelevant, or privileged." (citation and quotation marks omitted)). BA simply says that Plaintiffs' deposition notices are "broad and premature." (BA Stay Br. at 11.) This type of objection is "patently insufficient." *Cipriani v. Buffardi*, No. 9:06-CV-0889, 2008 U.S. Dist. LEXIS 42404, at *6 (N.D.N.Y May 29, 2008).

**b. Plaintiffs' Deposition Notices Are Not Unduly Burdensome.**

BA argues that Plaintiffs' 30(b)(6) deposition notices are unduly burdensome because Plaintiffs have not designated the subject areas for which it seeks to depose a BA representative with "painstaking specificity." (*See* BA Stay Br. at 10-11 (citing *Berwick v. Hartford Fire Ins. Co., Inc.*, C.A. No. 11-1384, 2012 U.S. Dist. LEXIS 21747, at *6 (D. Colo. Feb. 21, 2012).) The problem for BA is that "painstaking specificity" is not the standard in the Second Circuit. In *this* Circuit, a party must simply "describe the matters for examination with reasonable particularity." *See, e.g. Century Jets Aviation LLC v. Alchemist Jet Air LLC*, No. 08 Civ. 9892, 2011 U.S. Dist. LEXIS 20540, at *9-10 (S.D.N.Y. Feb. 7, 2011); *S. Boston Mgmt. Corp. v. BP Prods. N. Am.*,

[9] The primary exception, discussed above, is BA's inaccurate and repeated insistence that this case is only about flights between the United States and United Kingdom.

No. 03 Civ. 6845, 2006 U.S. Dist. LEXIS 2282, at *2-3 (S.D.N.Y. Jan. 19, 2006); *accord* Fed. R. Civ. P. 30(b)(6).

BA does not even attempt to argue that Plaintiffs have failed to meet the standard in this Circuit. The notices, moreover, are sufficiently specific to permit BA to identify relatively easily "who within the corporation would be best able to provide the information sought." *Soroof Trading Dev. Co. v. GE Fuel Cell Sys.*, LLC, 2013 U.S. Dist. LEXIS 44977, at *5 (S.D.N.Y. Mar. 28, 2013) (citation omitted).

**c. Plaintiffs' Deposition Notices Are Not Overbroad.**

BA argues that the above three deposition notices are overbroad. BA is mistaken. Each of the three notices to which BA objects is directly relevant and narrowly tailored to Plaintiffs' claims or BA's defenses.

First, BA objects both to Plaintiffs' notices seeking to depose a witnesses explaining "the manner in which Fuel Surcharges have been set" and "BA's initial decision to impose Fuel Surcharges." *See* Lichtman Decl., Ex. D (Plaintiffs' 30(b)(6) Notices). But both of these are highly relevant to Plaintiffs' allegation that BA has violated its Contract with Executive Club Members because it charges a fuel surcharge that is not based on the price fuel. (*See* Compl. ¶¶ 7, 9-10, 50-55, 76.) Indeed, it is difficult to conceive of *more* relevant initial discovery.

Second, BA also objects to Plaintiffs' notice seeking a witness to explain BA's hedging practices as they relate to fuel. *See* Lichtman Decl., Ex. D (Plaintiffs' 30(b)(6) Notices). The Court should overrule this objection because Plaintiffs have alleged that BA's hedging practices show that the Fuel Surcharge is not based on the price of fuel. (*See* Compl. ¶ 49.) BA, moreover, argues in its motion to dismiss that it is the *cost* of fuel to BA rather than the *price* of fuel on the worldwide market that is relevant (*see* BA Motion to Dismiss Br. at 7), and the cost of fuel is a determined in part by BA's hedging.

**d. *Dealer Computer Services* is Inapposite.**

BA repeatedly cites *Dealer Computer Servs.* ("*DCS*") *v. Curry*, No. 12 Civ. 3457, 2013 U.S. Dist. LEXIS 18315, at *16-17 (S.D.N.Y. Feb. 7, 2013) in support of its argument that Plaintiffs' requests are overbroad (*see* BA Stay Br. at 11-13), but *DCS* does not support BA.

In *DCS*, plaintiff sued an individual (as well as various entities he controlled) for the debts of another entity, a car dealership known as "GEM." *See id*. at *1. Broadly speaking, the only issue in that case was whether the plaintiff was entitled to pierce GEM's corporate veil. Plaintiff, however, sought discovery that was grossly disproportionate to the scope of the case, including testimony regarding:

> The customary business practices of automotive dealers and dealership groups including practices relating to corporate structures and banking practices of multi-franchise dealership groups as known to Defendants from 2005 to present.

*Id*. at *15-16. Magistrate Judge Cott explained that this request was infirm because it requested information that was "often the subject of expert testimony" and "undefined in scope."

Without explanation, BA equates the above request to three of Plaintiffs' 30(b)(6) Notices. It is difficult for Plaintiffs to fully respond to this misguided assertion without understanding why BA has made it. Plaintiffs do not seek information that is "often the subject of expert testimony," nor do they seek information "undefined in scope." For example, Plaintiffs do not seek a witness to testify regarding *all* charges BA imposes on its customers, but rather a witness to testify about "the manner in which Fuel Surcharges have been set, the revenue generated by Fuel Surcharges, and BA's knowledge of its competitors' practices regarding Fuel-related charges to their customers." *See* Lichtman Decl., Ex. D (Plaintiffs' 30(b)(6) Notices). *DCS* simply has no relevance to this action.

### 3. Plaintiffs' Requests for Production Are Not Unduly Burdensome.

#### a. Plaintiffs Are Entitled to Documents Within BA's Custody or Control.

BA objects to Plaintiffs' instruction that a document shall be deemed to be within BA's control if BA has "the right to secure the Document or a copy of the Document from another person having possession or custody of the Document." (BA Stay Br. at 14 (objecting to a portion of Instruction I.4)); *see also* Lichtman Decl., Ex. E (Plaintiffs' Requests for Production) at 2. BA complains both that Plaintiffs do not define the term "right," and that it would be unduly burdensome to require BA to "reach out to unnamed or unidentified" individuals or entities. (BA Stay Br. at 14.)

This objection is inconsistent with both case law and with the text of the Federal Rules. *See Safeco Ins. Co. of Am. v. Vecsey*, 259 F.R.D. 23, 28-29 (D. Conn. 2009) (explaining that "control" is defined broadly under the federal rules); *see also generally* 8B C. Wright, A. Miller & R. Marcus, Federal Practice and Procedure, § 2210 (2010 ed.) More specifically, "[c]ontrol is defined as the legal right, authority, or ability to obtain upon demand documents in the possession of another." *Florentia Contracting Corp. v. Resolution Trust Corp.*, 92 Civ. 1188, 1993 U.S. Dist. LEXIS 5275, at *7-8 (S.D.N.Y. Apr. 22, 1993) (citations omitted); *accord Am. Rock Salt Co. v. Norfolk S. Corp.*, 228 F.R.D. 426, 460 (W.D.N.Y. 2005); *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 636 (D. Minn. 2000) (explaining that a party must produce documents that it has the "practical ability to obtain"). Thus, BA must produce responsive documents that are in its control, including responsive documents that it has the right to obtain upon demand from another person or entity.

**b. None of the Terms Used by Plaintiffs are Vague.**

BA objects to six terms in Plaintiffs' Requests for Production ("RFPs") as vague. In particular, BA objects to Plaintiffs' use of the words: (1) discusses; (2) derived from; (3) evaluation; (4) analysis; (5) observation; and (6) fees. (*See* BA Stay Br. at 14-15); *see also* Lichtman Decl., Ex. E (Plaintiffs' Requests for Production) at 7. BA's claimed inability to understand the meaning of these commonly-used words strains credulity.

Nevertheless, to the extent that BA does not understand these terms, Plaintiffs represent that they adopt the meanings provided in the Merriam-Webster on-line Dictionary for the first five of these terms. *See* http://www.merriam-webster.com (last visited May 21, 2013).

In particular:

- "Discuss[es]" is defined as "to present in detail for examination or consideration" or "to talk about."
- "Derive" is defined as "to take, receive, or obtain especially from a specified source."
- "Evaluat[ion]" is defined as "to determine the significance, worth, or condition of usually by careful appraisal and study."
- "Analysis" is defined as "separation of a whole into its component parts."
- "Observation" is defined as "an act or instance of observing a custom, rule, or law," "a record or description so obtained," or "a judgment on or inference from what one has observed."

As for the final term, "fee," Plaintiffs adopt the meaning of "fee[]" that BA employs in the Contract.

**c. Privilege Logs Should be Created in Accordance with the Local Rules.**

BA objects that Plaintiffs asked for a privilege log in excess of the privilege log required by Local Civil Rule 26.2(a)(2)(A). (*See* BA Stay Br. at 13-14); *see also* Lichtman Decl., Ex. E

(Plaintiffs' Requests for Production) at 4. Plaintiffs agree that BA's privilege log need only include those items required by the Local Rules.

**4. Plaintiffs Did Not Serve "Contention Interrogatories."**

BA objects specifically to only two of Plaintiffs' Interrogatories:[10]

- 'Rog # 6 ("Describe if and how the Fuel Surcharges You charged Members reflect BA's fluctuating cost of Fuel or the fluctuating cost of worldwide oil.").
- 'Rog # 19 ("Identify any third parties, including governmental or quasi-governmental agencies or authorities, that impose any tax, fee, or charge that is factored into the amount of all or part of any Fuel Surcharges that BA levied on Reward Tickets, and describe the manner in which any such tax, fee, or charge was factored into the amount of Fuel Surcharges BA charged Reward Ticket holders.").

(*See* Lichtman Decl., Ex. F (Plaintiffs' Interrogatories) at 9, 11.) In particular, BA argues that these are "contention interrogatories," which "ask[] for an opinion or contention that relates to fact or the application of law to fact." Fed. R. Civ. P. 33(a)(2). Setting aside that contention interrogatories are "not necessarily objectionable," Fed. R. Civ. P. 33(a)(2), these are not contention interrogatories.

The first of these (# 6) asks BA whether and how the Fuel Surcharge reflects two different objective criteria: BA's cost of fuel or the price of worldwide oil. Plaintiffs are not asking for BA's opinion or for the application of law to facts. Through this interrogatory, Plaintiffs seek only factual data and specific descriptions or explanations of BA's Fuel Surcharge policies. Similarly, the second interrogatory (# 19) is a straightforward request that BA identify third-party taxes, fees, or charges that BA factors into its Fuel Surcharge and the manner in

[10] BA also objects to certain of Plaintiffs' interrogatories as part of its objection to Plaintiffs' request for information on routes other than those between the U.S. and the U.K. As explained above, this objection is in error because Plaintiffs' claim involves all routes on which class members traveled with Reward Tickets and paid the Fuel Surcharge.

which BA did so. It seeks only facts, not opinion or the application of law to facts. BA's objection to these interrogatories is meritless.

## VII. CONCLUSION

For the aforementioned reasons, Plaintiffs respectfully ask this Court to deny British Airways' Motion to Stay and to decline to further limit Plaintiffs' discovery requests.

Dated: May 24, 2013

Respectfully submitted,

*/s/ David S. Stellings*
David S. Stellings

David S. Stellings (dstellings@lchb.com)
Nicholas Diamand (ndiamand@lchb.com)
Jason L. Lichtman (jlichtman@lchb.com)
Douglas I. Cuthbertson (dcuthbertson@lchb.com)
**LIEFF CABRASER HEIMANN & BERNSTEIN, LLP**
250 Hudson Street, 8th Floor
New York, NY 10013-1413
212.355.9500

Clive Zietman (czietman@stewartslaw.com)
Fiona Stewart (fstewart@stewartslaw.com)
Daniel Loblowitz (dloblowitz@stewartslaw.com)
**STEWARTS LAW, LLP**
5 New Street Square
London, UK EC4A 3BF
Telephone: +44 (0)20.7822.8000

Mark Schlachet (mschlachet@gmail.com)
3515 Severn Road
Cleveland, Ohio 44118
(216) 896-0714

*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I, Douglas I. Cuthbertson hereby certify that on May 24, 2013, I served a true and correct copy of the foregoing (1) Plaintiffs' Memorandum of Law in Opposition to Defendant British Airway PLC (UK)'s Motion to Stay Discovery Pending Resolution of Motion to Dismiss, (2) Declaration of Jason L. Lichtman in Support of Plaintiffs' Opposition to Defendant's Motion to Stay Discovery Pending Resolution of Motion to Dismiss and the exhibits thereto, via the Court's Electronic Case Filing ("ECF") System upon all ECF-registered counsel of record.

New York, New York
May 24, 2013

Douglas I. Cuthbertson (DC1004)

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel.: 212.355.9500
Fax: 212.355.9592
dcuthbertson@lchb.com

*Attorneys for Plaintiffs*