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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DOVER, et al,		:
		:
	Plaintiffs,	:
	v.	:
		:
BRITISH AIRWAYS, PLC (UK),		:
		:
	Defendant.	:
		:
-----X		:

TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING
BEFORE THE HONORABLE MARILYN D. GO
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs:	JASON LICHTMAN, ESQ. DOUGLAS CUTHBERTSON, ESQ. NICHOLAS DIAMOND, ESQ. Lieff, Cabraser, Heimann & Bernstein 250 Hudson Street, 8th Floor New York, NY 10013
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For the Defendants:	COLLEEN CAREY, ESQ. TIMOTHY BIRNBAUM, ESQ. DLA Piper LLP 1251 Avenue Of The Americas New York, NY 10020
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Court Transcriber:	MARY GRECO TypeWrite Word Processing Service 211 N. Milton Road Saratoga Springs, NY 12866
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1 [Proceedings began at 10:15 a.m.]

2 THE CLERK: This is a Civil Cause For a Motion
3 Hearing in Dover, et al v. British Airways, docket number 12-
4 CV-5567. Counsel, please state your names for the record
5 starting with the plaintiff.

6 MR. LICHTMAN: For the plaintiffs, Jason Lichtman;
7 Lieff, Cabraser, Heimann and Bernstein.

8 MR. CUTHBERTSON: For the plaintiffs, Douglas
9 Cuthbertson; Lieff, Cabraser, Heimann and Bernstein.

10 MR. DIAMOND: And Nicholas Diamond for the
11 plaintiffs.

12 MS. CAREY: For the defendant, Colleen Carey; DLA
13 piper.

14 MR. BIRNBAUM: And for the defendants, Timothy
15 Birnbaum; DLA Piper.

16 THE COURT: It's the defendant's motion and I have
17 to say I always get a little skeptical on a motion to dismiss
18 when I see voluminous exhibits. But let me just -- and it's
19 also hard to follow up on a motion, to address a motion for a
20 stay before there's been oral argument and I think before I've
21 had a better opportunity to confer with the District Judge on
22 the motion. But be that as it may, we're here so we'll
23 proceed.

24 Now, I assume the gist of the plaintiffs' complaint
25 is that the fuel charges, the actual fuel charges assessed

1 were deceptive or violate the contract of carriage?

2 MR. LICHTMAN: No, Your Honor, it's not that they
3 were deceptive. The plaintiffs' complaint is that the charges
4 that were imposed violate the terms of the contract. The
5 distinction is very, very important because there is no cause
6 of action for a deceptive charge. There is a cause of action
7 for breach of contract.

8 THE COURT: Okay. Okay. Which leads me actually to
9 my question to the defendants. Are you contending that in
10 your motion to dismiss that the contract permits you to assess
11 a fuel charge pursuant to whatever the membership rules are?

12 MS. CAREY: Yes, Your Honor, we are.

13 THE COURT: So how many of the documents that you've
14 attached to your motion to dismiss are publicly available?

15 MS. CAREY: All of them. Most of them are SEC
16 filings and other information like that that disclose the
17 prices, fuel costs primarily [inaudible].

18 THE COURT: The fuel cost, that's required by SEC
19 filings or is that just part of the reports on the operating
20 cost?

21 MS. CAREY: It's primarily related to the reports on
22 the operating costs and cost of fuel today, especially in the
23 last decade, has become one of its largest operating costs and
24 it's a big concern to a lot of investors and the public is how
25 British Airways responds to that and their practices for

1 trying to mitigate the cost.

2 THE COURT: And I gather that the gist of your
3 motion to dismiss, there are two prongs to it. One is the
4 Airline Deregulation Act and the other prong is just that you
5 haven't violated the contract.

6 MS. CAREY: Correct.

7 THE COURT: How can you do that on the face of the
8 contract?

9 MS. CAREY: Well primarily, you know, the contract
10 is explicit and says that you can charge a field surcharge.
11 Plaintiffs have argued that the contract only permits you to
12 assess a fuel surcharge if it is external, that someone
13 outside of primarily a Government body would have to assess
14 it, but the actual language of the contract under Section 1314
15 allows for an or. It says any taxes, fees, or charges that
16 are from a person or other governmental body. We say that
17 their argument is not just accurate, that we are allowed to
18 assess a fuel surcharge under the plain actual terms of the
19 contract.

20 And then the second point that they've made is that
21 supposedly the fuel surcharge has some specific methodology
22 that should have been applied that we failed to apply here,
23 and our argument has been the fuel surcharges, an unambiguous
24 term, you look at a variety of definitions for the term and
25 it's just a charge for the cost of fuel and it doesn't require

1 any specific methodology that we supposedly failed to comply
2 with here.

3 THE COURT: Go ahead, Mr. Lichtman.

4 MR. LICHTMAN: Your Honor, it's true that plaintiffs
5 make two arguments, but in particular the second argument is
6 significantly different than British Airways has just
7 described it. The first argument is indeed that under English
8 law, which governs the terms of the contract, the way the
9 contract is written, or the argument from British Airways is
10 or is disjunctive, plaintiffs have submitted expert testimony
11 from an English judge that says that as used in this contract
12 or is conjunctive, the significance being that or is
13 conjunctive it means that British Airways can only apply a
14 [indiscernible] surcharge.

15 Setting that argument aside, however, plaintiffs'
16 second argument, which is not that British Airways had to use
17 some particular methodology, plaintiffs' second argument is
18 that British Airways had to base their fuel surcharge on the
19 price of fuel. And plaintiffs have submitted, along with
20 their complaint, two very specific allegations that British
21 Airways does not base their fuel surcharge on the price of
22 fuel. First --

23 THE COURT: Okay. Well --

24 MR. LICHTMAN: Yes, Your Honor.

25 THE COURT: I guess from my Court perusal of the

1 discovery request I gather that -- or my sense is that the
2 requests regarding the price of fuel really comprise a rather
3 extensive part of the discovery being sought. So does it --
4 you know, don't you think, and I'll go back to the defendant,
5 that it is possible for you to prevail on your contention as
6 to the definition of fuel charge, surcharge, and still lose
7 the motion to dismiss?

8 MS. CAREY: No. We do believe it would be
9 dispositive at first primarily because of the ADA preemption.
10 We don't even think it would get to that point. However, even
11 if it does, as long as we'd be able to provide information,
12 publicly available information that says that it is related to
13 the price of fuel, then we do believe that is sufficient.
14 Plaintiffs in their complaint used some sort of outside
15 analysis where they tried to prove that it was not related to
16 the price of fuel, but the publicly available information we
17 submitted with the motion to dismiss shows a relationship and
18 there doesn't have to be anything more than a general
19 relationship. The contract has no specific requirements for
20 how that was supposed to be assessed, and that is our
21 argument. We believe that is enough to have the breach of
22 contract claim dismissed.

23 MR. LICHTMAN: Your Honor, again I'd like to
24 emphasis that plaintiffs do not allege that there has to be a
25 specific methodology. But the issue is there has to be more

1 than a general relationship. Fuel, as British Airways
2 trumpets in their opposition, excuse me, in their motion to
3 dismiss is British Airways' single largest cost. So a charge
4 that is designed to reap profits that is set based on market
5 conditions will necessarily merit is some relationship to the
6 market price of fuel. Plaintiffs' point is that it has to be
7 based on the price of fuel, not merely loosely related by
8 happenstance to the price of fuel. And Plaintiffs have
9 submitted statistical analysis that show that it is at most
10 loosely related to the happenstance of the price of fuel.
11 That British Airways has an alternative explanation for the
12 incredibly weak statistical correlation between the price of
13 fuel and the fuel surcharge, and again, it is as articulated
14 in the plaintiffs' complaint extremely weak correlation, is
15 not enough to get over the standard on a motion to dismiss.
16 Under Anderson News, plaintiffs are not even required to show
17 that our theory is the most likely theory, only that it's one
18 plausible description of events. The statistical analysis,
19 particular combined with British Airways' annual reports is
20 certainly enough to meet the Anderson News standard, Your
21 Honor.

22 MS. CAREY: And our response to that would be that,
23 you know, I think we have sort of glossed over the fact that
24 we keep saying the cost of fuel, the price of fuel to BA is
25 what the fuel surcharge is supposed to be related to.

1 Plaintiffs have said that it's not BA's cost of fuel that is
2 at issue. They have contended that it needs to be based on
3 the price of worldwide oil which is not what BA purchases.
4 It's not in any way -- you know, BA doesn't typically even pay
5 the spot price. So you know, this statistical analysis is
6 based on a premise that is just not accurate and we don't
7 believe that it is enough to meet the standard or overcome a
8 motion to dismiss because we're allowed to include publicly
9 available information to contradict allegations, and they
10 don't have to be accepted as true if the publicly available
11 information that's properly before the Court on a motion to
12 dismiss proves that those allegations are false.

13 THE COURT: So you're conceding that there has to be
14 some sort of relationship to the price of oil?

15 MS. CAREY: To the cost of fuel.

16 THE COURT: Yes, to the cost of fuel.

17 MR. LICHTMAN: Your Honor, two points. First of
18 all, plaintiffs vigorously dispute, as we did in our
19 opposition to the motion to dismiss, that what British Airways
20 has attached to their complaint proves what British Airways
21 purports it proves. Of particular relevance, British Airways
22 has made the argument both in briefing and again to this Court
23 that everything that they have attached is publicly available.
24 And that really depends on the definition of the word
25 attached. There is a graph and it's an extremely important

1 graph because it's the graph where British Airways purports to
2 show a relationship between the cost of fuel, or excuse me,
3 the price of fuel and the fuel surcharge. Plaintiffs asked
4 British Airways twice for the Excel spreadsheet data
5 underlying that graph. British Airways never provided it to
6 us. When plaintiffs endeavored to approximate that graph
7 using the information that we assume but are not sure that
8 British Airways used in the way that we assume but are not
9 sure that British Airways used it, we reached an extremely
10 different result as we display in the graph that's enclosed in
11 our opposition to the motion to dismiss. So I think the key
12 point is that plaintiffs dispute that that evidence shows what
13 British Airways claims it shows.

14 The only other point is that the one piece of
15 evidence that we were able to take a look at and verify, and
16 we again make this point in opposition to the motion to
17 dismiss, a sort a tertiary point, that British Airways made
18 the evidentiary claim that Delta Airlines charges a fuel
19 surcharge. They do not. And I'm sure that was an honest
20 mistake on the part of British Airways. But the bottom line
21 is, this is precisely why we have discovery and why defendants
22 do not typically or are not typically permitted to enclose
23 voluminous attachments in their opposition to a motion to
24 dismiss.

25 MS. CAREY: I believe our response to that would be,

1 you know, they actually asked for the spreadsheet. This was a
2 chart that was based off of public information. We publicized
3 the fuel surcharges over a period of time and all we simply
4 did was take that public information and make it into a chart
5 format so that it was simple for the Court to see the
6 relationship instead of just providing all of the numbers in
7 another format.

8 I don't believe we're required to turn over our
9 actual chart because as their opposition --

10 THE COURT: You mean the underlying data?

11 MS. CAREY: Correct. Well, they asked for the
12 actual spreadsheet. They wanted to see the spreadsheet that
13 created the chart, and I don't believe we're under an
14 obligation to do that. You know, people routinely can include
15 charts and all sorts of things and they do not have to turn
16 that over. We said it was based on publicly available
17 information. And in fact they, in their own opposition,
18 created a chart. We did not go back and say okay, well, you
19 know, give us how you came at that chart. We just assessed it
20 and made our response to it based on that information. But
21 the point still is is it was publicly available information
22 that created that chart.

23 THE COURT: Well, isn't there a dispute over what
24 publicly available information is used in determining fuel
25 costs?

1 MS. CAREY: Yes, there is, but we believe the case
2 law is very clear that you are allowed to rely SEC filings in
3 a motion to dismiss. Plaintiffs argue that that's only
4 appropriate in a securities action. However, we then
5 responded there's a variety of different cases out there that
6 have allowed it in breach of contract disputes. It is
7 publicly available information. They were perfectly capable
8 before creating their complaint or in their opposition to
9 review that information and rely on it themselves. We did not
10 use anything that they did not themselves have access to. And
11 the case law is very clear that it's appropriate to use this
12 type of information on the issue.

13 As for the Delta comment, you know, as we said in
14 our briefing, that was based on explicit statements on Delta's
15 website. We did not go so far as to try to buy a ticket, but
16 Delta's website made it clear that they at least reserve the
17 right, and we believe that they were applying a fuel surcharge
18 to all their tickets. Once they raised it with us, we
19 actually tried it out, but that was our basis. If their
20 website says that they are doing it, we assumed that they were
21 doing it. We're not actually them. But that was where the
22 statement was based off of.

23 MR. LICHTMAN: Your Honor, if I could make two
24 points. The first is that just to be clear, plaintiffs have
25 never alleged and do not allege that there was any malfeasance

1 on British Airways' part. We understand that it was an honest
2 error to assert that Delta Airways charges a fuel surcharge.
3 The only point there is that this is precisely why discovery
4 is necessary because when there are evidentiary statements
5 made in briefing, the parties have a right to challenge those
6 statements. And so the fact that parties attach charts all
7 the time, one of the things the plaintiffs would like to be
8 able to do are things such as examine the chart and we will be
9 able to show the charts are misleading.

10 THE COURT: Well, at this point I think it's a
11 little too late. As I gather from the docket entries Judge
12 Dearie does not want any more submissions from either side in
13 this case. So really, I'm not necessarily persuaded that the
14 defendant will prevail, but on the other hand I do find that
15 the discovery is somewhat extensive and don't necessarily
16 correlate with your -- I mean aren't material to your
17 contentions because you go down to the very granular level in
18 trying to assess operating costs. I don't understand the
19 relevance of trying to get information about every airplane
20 and its fuel mileage. What relevance does that have to your
21 claims?

22 MR. LICHTMAN: Your Honor, one of our claims is that
23 a fuel surcharge must be based on price of fuel. British
24 Airways, on the other hand, says that it should be based on
25 cost of fuel. We believe we prevail under either contractual

1 interpretation.

2 THE COURT: What does that have to do with --

3 MR. LICHTMAN: Because that would tell us how much
4 British Airways spends on their fuel. But, Your Honor, let me
5 say that for this early stage of the case, plaintiffs'
6 overwhelming interest is in the 30(b)(6) depositions that we
7 can focus the case and get the case moving. It's not -- the
8 document requests can, and in fact of plaintiffs' view, should
9 wait until after the 30(b)(6) depositions have been taken.
10 And plaintiffs are certainly willing to forego any document
11 production until after Judge Dearie has at least indicated
12 which way he's thinking about ruling on the motion to dismiss.
13 It's the 30(b)(6) depositions that are really of the critical
14 importance to us.

15 THE COURT: Well, is there information that you
16 could obtain before the 30(b)(6) information that might limit
17 the extent of what you need to ask? As you know, frequently
18 in these 30(b)(6) depositions in a large corporation, the
19 information is scattered amongst many different individuals.
20 And while a corporate entity does have the obligation to
21 produce a witness knowledgeable, it's frequently not -- to
22 bone up on what is necessary in a 30(b)(6) notice is really
23 frequently not the best way to proceed.

24 MR. LICHTMAN: Not in this case, Your Honor. If I
25 could explain why, I think you see this in the briefing on the

1 motion itself. So an alternative -- so the key piece of
2 information plaintiffs would like to ask British Airways is
3 how do you set your fuel surcharge? Right? That really is
4 the key thing we'd like to know.

5 THE COURT: Well, actually, I channeled your
6 interrogatories.

7 [Laughter.]

8 THE COURT: And it strikes me that that's actually
9 information -- the interrogatories relating to how British
10 Airways goes about calculating fuel surcharges ought to come
11 first. And it's probably best initially provided in an
12 interrogatory response, don't you think?

13 MR. LICHTMAN: No, Your Honor, not in this specific
14 case. Let me explain to you plaintiffs' concerns and perhaps
15 there's a way around it. In this case, based on the way that
16 British Airways has responded, when we serve interrogatories -
17 - I agree that full and accurate interrogatories would be by
18 far the best way to start off. But when we serve
19 interrogatories, 30 days later what we're going to get are
20 pages and pages and pages of objections, and we will be right
21 back in front of you because they're going to object and
22 they're going to say that we're not allowed to get their total
23 methodology for setting fuel surcharges as they have in
24 briefs. And so we're going to be right back on a motion to
25 compel.

1 THE COURT: Okay. Let's go through the
2 interrogatories. And what I would propose is we'll go through
3 the interrogatories that the defendant is required to answer.
4 And given the timing of this, perhaps I could just slightly
5 shorten the defendant's time and you'll bring it to my
6 attention and I'll meet with you after oral argument before
7 Judge Dearie. But I'm uncomfortable having you charge forward
8 and taking depositions without having had a further
9 opportunity to consider the arguments and to see how Judge
10 Dearie is reacting to all of the motion papers. I have not
11 had an opportunity to delve quite as deeply as I would like,
12 but I'm not deciding the motion so I certainly think it would
13 be useful to get some feedback from him. And I'll be in the
14 gallery on the 28th of August to hear what he has on his mind.

15 MS. CAREY: Your Honor, I believe it's actually
16 September 20th.

17 MR. LICHTMAN: It's in September.

18 THE COURT: Oh, it got put off. Okay.

19 MS. CAREY: Yes. Just so you don't waste your time
20 and go there.

21 THE COURT: So then we don't need to shorten -- then
22 we don't have to shorten the time frame. But I --

23 MS. CAREY: Yes, Your Honor. Is this --

24 THE COURT: -- I think it might just make sense to
25 identify some interrogatories to be answered. If your fears

1 are founded, I'll address it. But it's not appropriate to
2 engage in anticipatory discovery on the assumption that the
3 other side will be objecting to the responses. I think given
4 the way this case has come to me, I don't know if I filed my
5 standard discovery order which I now file in most cases on a
6 regular conference which has -- one component is just a
7 preservation order. So some people seem to need reminding,
8 unfortunately. And another component deals with objections so
9 that if there are any objections, I require the party who's
10 answering that says notwithstanding the foregoing, blah,
11 blah, blah, blah, and I want a clear indication whether
12 or not the answer is complete. Okay. So I'll file that
13 discovery order after this conference, but let's just go
14 through the interrogatories, what I'd like the defendants to
15 respond to.

16 MS. CAREY: Your Honor, can we just raise one
17 overarching issue that I think both sides really would like a
18 resolution to sort of assess this. I think one of our major
19 concerns with the interrogatories, document requests, and even
20 some of the 30(b)(6)s is they touch upon fuel surcharge
21 worldwide for a company that has more than 400 destinations.
22 And our concern is then the plaintiffs in this case have all
23 taken primarily flights from somewhere in the US to the UK.
24 There is one plaintiff who then continued on to I believe
25 Amsterdam. However, the scope and the way these are written

1 it gets into how fuel surcharges are assessed for flights
2 within Europe and how fuel surcharges are assessed all over
3 the world. And there may be different procedures for that.
4 And they're also asking for a time period that covers from, at
5 least for certain -- you know, the fuel surcharge ones I
6 believe cover from when it started in 2004 to present, so a
7 nine year period. So you know, fuel surcharges can change
8 numerous times a year, and this is getting to -- if it's
9 really allowed worldwide, which we don't believe is fair
10 because we don't think you can just set your own unapproved
11 class definition as we cited in the brief, and have that be
12 the touch tone for discovery here. We believe it should be
13 limited to the flights that the actual plaintiffs took at this
14 point. I think that is going to be our big concern with a lot
15 of these requests since it's just to ask for us to explain the
16 fuel surcharge decision for every route, for every flight for
17 a nine year period all around the world is just too --

18 THE COURT: Okay. Just preliminarily, and I have to
19 apologize that I didn't carefully read the British law, I mean
20 the expert affidavits on British law, but what's the statute
21 of limitations for a breach of contract claim?

22 MR. LICHTMAN: It's the same six years in both the
23 United States and England. So there's no dispute that -- and
24 most of our interrogatories are limited to the six years.
25 There are I believe two interrogatories where we seek to go

1 nine years, and we seek to go nine years because that previous
2 period is relevant solely to the issue of how British Airways
3 is creating the fuel surcharge. It's the only reason we want
4 to go back.

5 THE COURT: Why is it relevant if you just get
6 information on how British Airways calculates the fuel
7 surcharge for the period in question?

8 MR. LICHTMAN: Because how British Airways decided
9 to impose the fuel surcharge, which is what happened in 2001,
10 is highly probative to what British Airways is doing today.
11 In other words, knowing how British Airways is modifying its
12 fuel surcharge is only half of what plaintiffs are entitled
13 to. We're also entitled to know how British Airways started
14 charging a fuel surcharge in the first place because that's
15 the complete picture of what British Airways is doing.

16 THE COURT: Well, let's just go over the
17 interrogatories to the answer and perhaps we have to look at
18 the propriety of the interrogatories on a request by request
19 basis.

20 MR. LICHTMAN: Your Honor, may I address the
21 overarching argument that British Airways just made that we're
22 only entitled to discovery on specific routes?

23 THE COURT: I think it's implicit in what I'm saying
24 --

25 MS. CAREY: Yes, Your Honor.

1 THE COURT: -- that we're not necessarily going to
2 limit that discovery, but I think once the plaintiff -- once
3 there's a better exploration of how the surcharge is
4 calculated, that may actually tighten up discovery I should
5 hope. And I would think that it's not onerous discovery
6 because that's information -- if we're talking about the
7 methodology and what is done to impose the surcharge, it
8 really should all be information that's readily within the
9 grasp of British Airways and not burdensome. So interrogatory
10 one I assume is not limited to the six years?

11 MR. LICHTMAN: No, it's limited to the six years.

12 THE COURT: It is?

13 MR. LICHTMAN: Your Honor, we specifically indicate
14 the requests that are not limited to the six years in the
15 request. Number ten --

16 THE COURT: No, no, you do talk about the class time
17 period as to some interrogatories but not as to others, so I
18 assume the ones that don't refer to the -- oh, you say it's
19 not limited to the class time period. I've got it now. Okay.
20 I apologize.

21 MR. LICHTMAN: Yes, Your Honor. Absent any
22 [indiscernible] of the class time period we intend to limit
23 the interrogatories [inaudible]. As per instruction number 11
24 on the interrogatories --

25 THE COURT: Yes. I understand now. I'm sorry. I

1 had forgotten.

2 Now, the other point raised by the defendant is that
3 the methodology changes from area to area?

4 MS. CAREY: The way British Airways is organized is,
5 you know, there are certain areas within the UK, there might
6 be one -- there's several different revenue managers and there
7 may be several different procedures for how this is
8 calculated. It's not uniform. So again, asking for it
9 worldwide means they're implicating lots of different people
10 in several different parts of the organization [inaudible].

11 THE COURT: So it's determined on a regional basis?

12 MS. CAREY: In certain circumstances, yes. And
13 again, because you're talking about --

14 THE COURT: Well, what do you mean in certain
15 circumstances?

16 MS. CAREY: Well, it certainly depends -- our
17 understanding at least currently how it operates, and again
18 we're talking about now a six year period so it may have
19 changed during it, but at least currently there are decisions
20 within the UK, there are decisions that they would classify
21 around the world or the rest of the world, and then there's
22 also decisions about US [indiscernible]. So you're
23 implicating three different, at least three different groups
24 and their methodologies may be different.

25 MR. LICHTMAN: Your Honor, two points. First of

1 all, to plaintiffs' ears, that proves our case, that whatever
2 they're doing, and we don't know what they're doing, it is not
3 based on the price of fuel. If it were based on the price of
4 fuel, there wouldn't be different methodologies around the
5 world for calculating it.

6 More importantly though, our complaint is based on a
7 uniform contract that applies to all United States citizens
8 traveling anywhere in the world. All flights from the United
9 States to other destinations necessarily go through London.
10 That's how British Airways is set up. So saying that of
11 course our travel all encompasses flights through London, it's
12 a tautology. It's necessarily true. British Airways does not
13 get to redefine our complaint in its objections to discovery.
14 It's a uniform contract that applies uniformly all over the
15 world. And to the extent that we would be required to have a
16 plaintiff who actually flew somewhere other than London, we do
17 have a plaintiff who flew somewhere other than London.

18 MS. CAREY: If I could just respond for a moment?
19 Again, it doesn't all necessarily involve London. They refuse
20 to understand that British Airways operates just intra-Europe
21 flights. So it is totally conceivable that someone in the US
22 could be in Germany and decide to fly to Africa and never
23 having a flight that originated in the US The wording that
24 they have here still encompasses those types of fuel
25 surcharges on different flights, and that's our concern is

1 flights that are based from the US to the UK, great, you know.
2 Mr. Rank also went to Amsterdam and connected through the UK,
3 but we don't say flights between Southeast Asia and Africa are
4 relevant here, or intra-Europe flights, especially since none
5 of their plaintiffs have alleged anything like that.

6 MR. LICHTMAN: Your Honor, they could have moved to
7 dismiss on those grounds, they could have moved to strike part
8 of our complaints. They didn't. And we have a properly
9 supported complaint that alleges one contract. It is the same
10 contract that applies whether someone flies from Germany to
11 South Africa, as long as they're United States residents, that
12 applies when they fly from New York to South Africa.

13 THE COURT: Why don't we first start with figuring
14 out getting some information on how the organizational
15 structure in the determination of the fuel surcharges, and I
16 have no idea what has been said by defense counsel is correct.
17 And then we'll -- I'm not persuaded that it's unduly
18 burdensome. And sometimes it may be easier to bite the bullet
19 and provide the information up front rather than surgically
20 removing certain areas now subject to further exploration down
21 the line. Let's just go through the interrogatories and then
22 perhaps I'll get a better idea of what's done.

23 There are actually -- okay. Let's start with
24 interrogatory three and see if -- I mean I know one and two
25 talk about the methodology but -- and I'm prepared at this

1 point to agree to the methodology for flights involving the
2 United States and Europe only and anything that affects
3 worldwide flights generally. So I do think at some point
4 you're going to find it's easier to respond. But I want to
5 see what the response is to interrogatory number three and
6 then perhaps you can provide some basis for why you're
7 hesitant to provide this additional information on other
8 parts, on flights to other parts of the world. I
9 preliminarily will limit one and two methodologies for as I've
10 said Europe and the United States.

11 MR. LICHTMAN: Your Honor, could we ask just that
12 one answer that they confirm this answer that there were other
13 ways that they calculated fuel surcharges? We don't need to -
14 - we understand they don't want to tell us what those other
15 ways are at this point. We just want to know a formal
16 confirmation.

17 THE COURT: Well, that's what I'm going to -- in
18 number three, it won't be limited to how they calculate but
19 once we find out who calculates, then perhaps you will get
20 some information on whether or not they use other
21 methodologies.

22 MR. LICHTMAN: Could we simply make sure that they
23 tell us that? Because they could simply say here are the
24 people involved, here's the methodology, and we could be left
25 wondering is there a different methodology or is there not a

1 different methodology. We just want British Airways to give
2 us a straight answer on what they're doing, and to the extent
3 that there's a different methodology, we want them to confirm
4 that.

5 MS. CAREY: I mean I think our position is just
6 again, we had an issue with the burden of having to go out,
7 contact all these people, get all of this down and we haven't
8 even had document production. So if we're going to have to go
9 down the road of speaking with all these individuals, figuring
10 out their methodologies since it's not been a methodology
11 we've been concerned with, we're sort of going down that path
12 already.

13 MR. LICHTMAN: Your Honor, how is it that British
14 Airways doesn't know what it's doing?

15 THE COURT: Believe me, that's precisely my point is
16 that you may find it easier to just come forward with the
17 information. I would be shocked if there's no one at a
18 central level who could just provide a general question to
19 confirm. Maybe this will be the Court's interrogatory. You
20 know, are there different methodologies used for each -- I
21 can't remember the terms that British Air uses.

22 MR. LICHTMAN: Calculated fuel surcharge.

23 THE COURT: Yes. And you have different areas.
24 They have on their cute little chart some of the different
25 areas, the regions, I think the flight regions and other

1 flight sectors and whatever.

2 MR. LICHTMAN: Thank you, Your Honor.

3 THE COURT: So just a general question, you know,
4 whether there are different methodologies used. Initially,
5 one and two will be limited to the methodologies with respect
6 to surcharges and [inaudible] flights in the United States and
7 Europe. Three will not be so limited. Or I'll limit it but
8 at some point you may have to come forward with additional
9 information.

10 MS. CAREY: I just want to clarify. Are we limiting
11 interrogatory number three or no?

12 THE COURT: No.

13 MS. CAREY: Okay.

14 THE COURT: Five was a curious interrogatory. It's
15 interesting. Do you anticipate getting information on just
16 the drafting of what's posted and sent?

17 MR. LICHTMAN: Yes, Your Honor. We --

18 THE COURT: And that's different from the -- that
19 could conceivably be different from the persons who make the
20 determination.

21 MR. LICHTMAN: We don't know, Your Honor. We wanted
22 to be thorough so we hypothesized that maybe the people who
23 create the fuel surcharge are different from people who
24 communicate about the fuel surcharge. Since we anticipate
25 that one of the major issues in this litigation will be what

1 British Airways told its customers about a fuel surcharge. In
2 other words, what is part of the contract which has already
3 been disputed on the motion to dismiss. We'd like to
4 understand not only created the fuel surcharge but who was
5 responsible for communications about the fuel surcharge.
6 Perhaps it's the same people.

7 THE COURT: Well, what would be evidenced by the
8 actual documents communicated?

9 MR. LICHTMAN: Well, the what would be evidenced by
10 the documents, but one of the things we'd like to figure out
11 is to whom do we need to speak? In other words, this is our
12 attempt to get discovery --

13 THE COURT: Well, why don't we just limit it rather
14 the persons is, you know, to identify if there are any
15 departments.

16 MR. LICHTMAN: Yes, Your Honor.

17 THE COURT: I think a full response to that will
18 implicate a lot of people aren't involved in substantive
19 communications, whatever fliers there may be. You've got the
20 webmasters, people sending out monthly newsletters. Wouldn't
21 you also be wanting information on that?

22 MR. LICHTMAN: Well, with this question it's just
23 content and method of communications, so presumably it
24 wouldn't be a whole bunch of technical people. It would
25 simply be the people responsible for the substantive content

1 and how that was --

2 THE COURT: Well, and the people who send out
3 newsletters, right?

4 MR. LICHTMAN: Yes, Your Honor.

5 THE COURT: So anyway, why don't you reformulate
6 that a little bit? I think it's just sort of maybe what you
7 need to know is just the structure and the process of how
8 communications are made to the customers. And once they're
9 properly identified, you might be able to focus your questions
10 more.

11 MR. LICHTMAN: Yes, Your Honor.

12 [Pause in proceedings.]

13 THE COURT: This is very much at the heart of
14 dispute here.

15 [Pause in proceedings.]

16 THE COURT: Okay. I'll permit it as limited to
17 regions US and Europe. Interrogatory seven I'm going to
18 strike for the time being. Eight, why don't we wait on eight
19 and nine until after oral argument? I'll get a better sense.

20 MR. LICHTMAN: Your Honor, plaintiffs just wish to
21 note for the record that we'd like to reserve the ability to
22 come back here and --

23 THE COURT: Oh, yes. No, no, I think if there's
24 anything I've said, and perhaps strike as to interrogatory
25 seven is too strong, but I do think that the costs, the

1 operating costs ultimately is less significant than the actual
2 cost of fuel. And you know, I would assume it's just a -- I
3 don't think you get that far in your complaint as to
4 challenging, and I don't think any consumer can really
5 challenge how the pricing of tickets and the pricing of
6 charges ultimately generally. I'm not talking about this
7 frequent flier program but, you know, it reaches far beyond I
8 think what the --

9 MR. LICHTMAN: Your Honor, down the road --

10 THE COURT: -- appropriate -- and by --

11 MR. LICHTMAN: -- British Airways' defense -- I
12 apologize.

13 THE COURT: Go ahead, go ahead.

14 MR. LICHTMAN: British Airways' defense in the
15 motion to dismiss is partially that the term price means cost,
16 the costs and expenses incurred by British Airways. We
17 dispute that, but assume that British Airways is right that
18 the term price actually means cost. If British Airways is
19 right the term price means cost, then this is precisely the
20 information plaintiffs require to understand their cost.

21 THE COURT: Maybe. The cost of fuel. You know, it
22 depends on how you look at it. We'll see. I'm not -- it'll
23 be without prejudice. I went back to it just to say that
24 striking may perhaps be too strong, but I need to get a better
25 handle on what the case will involve too.

1 MR. LICHTMAN: Thank you, Your Honor.

2 THE COURT: The average price of fuel, that requires
3 the -- I have no idea how fuel is acquired, whether it's
4 regionally, globally.

5 MS. CAREY: Well, Your Honor, it can be regionally.
6 They purchase it and they also have hedging practices, and
7 there's a variety of factors that go into determining what the
8 price is overall for BA.

9 THE COURT: How often are fuel surcharges adjusted?

10 MS. CAREY: There's no set pattern but like I said,
11 it can be several times a year. It also depends on the group,
12 groups or certain classes of fare. So you are talking about
13 an extensive -- I think we have an example. Like say for just
14 the US to UK route for I believe a four year time period there
15 was probably 20 changes. So you know, it can be very
16 extensive.

17 THE COURT: What's the extent of the fluctuation?
18 What's the amount of the fluctuation?

19 MS. CAREY: Again, it'll vary. Sometimes it goes
20 up, sometimes it goes down. It sometimes can go up by -- it
21 also depends on where it is. I mean the changes that are
22 occurring in UK are at pounds. I mean there's different
23 currency changes. It's usually \$10, \$20, it depends, but it's
24 hard to say a definitive because it changes significantly over
25 the nine year period, or six year period [inaudible].

1 THE COURT: Well, I guess with the hedging practices
2 it becomes a far more difficult calculus and determination of
3 what the actual price is because we're not even dealing with
4 just ordinary accounting principles and costs.

5 MR. LICHTMAN: Yes, Your Honor, but British Airways
6 itself asserts that this is what's relevant. And one point
7 that I think is critical is that British Airways is imposing
8 this fuel surcharge. They state, we disagree, but they state
9 this fuel surcharge is based on their costs. They must know
10 what their costs are if they're imposing a charge based on it.
11 I mean British Airways can't simultaneously say that they
12 don't know what their costs are but trust us, this charge that
13 we're imposing is based on it.

14 MS. CAREY: I mean I think obviously we do know our
15 costs. However, the way that, you know, they want an average
16 monthly price, there's nothing to indicate BA calculates on a
17 monthly basis. They certainly disclose in their SEC filings
18 on a yearly basis what their overall cost was for the year.
19 But to assume they normally track this information down to
20 that science when a lot of it is dealing with hedging and
21 other matters, you know, I don't think it's terribly difficult
22 for us to give it on a yearly basis.

23 MS. CAREY: That's not enough because they change
24 their fuel surcharge more than once a year.

25 THE COURT: Do they make these filings on a

1 quarterly basis? I assume they do, right?

2 MS. CAREY: Yes, we do make quarterly filings.

3 THE COURT: Okay. Then I'll limit it to a quarterly
4 answer.

5 MR. LICHTMAN: Your Honor, could we ask that that be
6 provided by region? We were not fully aware until right now
7 just how regionalized this all seems to be, so if we can have
8 that broken down for the US and Europe?

9 THE COURT: To the extent that's how it's done. I
10 have no idea.

11 MS. CAREY: Yeah, and I can't say for sure either
12 but --

13 THE COURT: Well, why don't you provide information
14 on how that determination is made and whether or not it's
15 broken down. It wasn't clear to me from the excerpts what was
16 being reported, the scope of what was being reported. I
17 didn't care to look at the full report even though it was
18 publicly available.

19 MS. CAREY: It's my understanding it's reported on a
20 company wide basis. It's not reported for regional.

21 THE COURT: Okay.

22 MS. CAREY: At least in the SEC filing.

23 THE COURT: All right. Well, why don't you make
24 clear what it is and to the extent that you do have
25 information available for the two regions on whatever basis

1 you have, you'll discuss with the plaintiff and provide
2 information that's broken down for the two regions we're
3 focusing on right now.

4 MR. LICHTMAN: Thank you, Your Honor. And just to
5 be clear, we don't want just their 10Qs unless that's truly
6 their average price paid for fuel per region. And when we
7 looked at their 10Qs it didn't appear to be in there. And
8 perhaps it is, and perhaps British Airways will explain to us
9 on the statement. But I mean we certainly know what their
10 10Qs say. The question is what are they actually paying for
11 fuel which actually seems to be closely held.

12 MS. CAREY: Again, I do believe that even if they
13 might not be specifically disclosed in a 10Q basis. I know
14 they are disclosed on a yearly basis. I still think probably
15 in all likelihood to actually calculate their 10Qs they must
16 have that information. So I don't think it would necessarily
17 be difficult to obtain on a quarterly basis.

18 THE COURT: Yes. I think quarterly should be
19 enough. You're getting it --

20 MR. LICHTMAN: No, it certainly is. We just don't
21 want them to hand us the 10Qs that we already have is the key.

22 THE COURT: I'm expecting something more than the
23 reports.

24 MR. LICHTMAN: Your Honor, just to clarify one
25 thing, we've been talking about the United States and Europe.

1 Are plaintiffs correct in assuming that includes both between
2 the United States and Europe and intra-Europe travel as one of
3 our plaintiffs had?

4 THE COURT: Yes, yes.

5 MR. LICHTMAN: Thank you, Your Honor. I just wanted
6 to make sure.

7 THE COURT: Yes. Just because a flight from the
8 United States could go to some part in Europe and stop at
9 Heathrow or some other city and I guess go someplace else as
10 airlines love to do to you now because they don't like to give
11 you nonstop flights.

12 I assume to the extent that I properly understood
13 what was said, 11 will get -- the answer to 11 will be
14 redundant with some other earlier answers as limited to the
15 two regions that we've talked about at least to the first part
16 of the question, the interrogatory. No, I'll permit that
17 question and I'll permit this question on the class time
18 period. Okay. Well, we'll perhaps shed some light on the
19 issue of hedging. I assume that's a global determination or
20 practice. You'll so make clear. 13 I think is fine as is 14.

21 I'll ask the parties to talk about 15 because I
22 don't think you contemplated having to answer anything and it
23 is qualified with the cost to the extent that data is
24 reasonably accessible. So we'll find out what's reasonably
25 accessible and provide the information.

1 I have to say, you know, I guess you're trying to
2 abide by the presumptive limit on the number of
3 interrogatories but you do have multiple interrogatories in
4 each interrogatory. Anyway, I'll permit the membership tiers.
5 I assume the membership is, I'll go back and look at your
6 definitions, are limited to the members in the United States,
7 right?

8 MR. LICHTMAN: Yes, Your Honor.

9 THE COURT: I mean legal residents of the United
10 States.

11 MR. LICHTMAN: This litigation is limited to United
12 States residents.

13 THE COURT: Okay. 17, she's quite limited. Okay.
14 18 I think is fine.

15 MS. CAREY: Your Honor, if I could just for a moment
16 on 18? You know, I don't think we object to just identifying
17 the other fees. However, the second part of it is asking us
18 to essentially determine the methodology for each of these. I
19 [indiscernible] being that the fuel surcharge is really the
20 only thing in dispute here. I think that that's going to be
21 burdensome for us.

22 THE COURT: Well, I assume taxes will be sufficient
23 because they are whatever the taxes are. It depends on what
24 the fees are. I'll ask you to break down the fees unless it's
25 not clear. That would be how those fees would be different.

1 I don't know what other fees would be.

2 MR. LICHTMAN: Your Honor, this actually goes to the
3 heart of one of the two disputes between the parties which is
4 whether British Airways is required to only charge pass
5 through charges as part of their taxes and fees.

6 THE COURT: Yes. I read that.

7 MR. LICHTMAN: But that's why we're asking how
8 they're calculating their other fees.

9 THE COURT: Well, I don't know what the fees are so
10 I don't know if it's --

11 MR. LICHTMAN: You [inaudible].

12 THE COURT: -- you know, whether or not there is
13 necessarily some sort of methodology. So to the extent it's
14 not apparent, I'd like you to explain how the fees and
15 surcharges are calculated. I don't think you need to talk
16 about airport taxes. Everybody's familiar with airport taxes
17 and security taxes [indiscernible]. And I assume 19 covers
18 the same charges in 18, so I'll permit general identification.
19 I don't think you need to identify the specific governmental
20 entity if it's an airport tax.

21 MR. LICHTMAN: Your Honor, it's a little different.
22 What we're trying to get at in number 19 is, and we actually
23 expect the answer will be there are none, what we're trying to
24 get at in number 19 is whether there are any third parties
25 that impose some sort of charge as part of the fuel surcharge

1 whereas 18 is talking about the other fees that are imposed on
2 one's ticket.

3 THE COURT: Oh, as part of the fuel surcharge.

4 MR. LICHTMAN: Right. 19 is very targeted for that.

5 THE COURT: Okay. All right. Fine. All right.

6 I'm sorry. I missed it. I overlooked that clause. Then go
7 ahead and answer that. We're again initially limited to the
8 two regions.

9 MR. LICHTMAN: Thank you, Your Honor. And Your
10 Honor, just so the record is clear, plaintiffs would just like
11 to note that we reserve the right to hopefully re-raise these
12 interrogatories at a later time and potentially to appeal if
13 necessary.

14 THE COURT: That's fine. I'm not barring an
15 expansion of these interrogatories to cover other areas of the
16 world, but I'd like to limit it initially to these areas. I
17 think that'll give you sufficient information to the extent
18 you want to proceed with depositions. But I'm going to stay
19 depositions until after oral argument and I'll meet with you
20 after oral argument.

21 MR. LICHTMAN: Thank you, Your Honor. Could we ask
22 that British Airways be required to respond to these
23 interrogatories with enough time for us to appear before the
24 Court prior to oral argument if there's an issue with their
25 interrogatory responses? Because we think it's very important

1 that we have the interrogatory responses prior to oral
2 argument. We think they could be quite helpful.

3 THE COURT: Well, I'm not going to subject Judge
4 Dearie to more briefing, so I'll give the defendants 30 days
5 to respond and you'll meet and confer and if we have to, we'll
6 have a conference before the 20th. I'm intentionally being
7 mean and not giving you very much time. But that also means I
8 get less time as attorneys get frantic. But I don't want the
9 parties to come forward to inundate Judge Dearie with more
10 stuff, more arguments that you have.

11 MR. LICHTMAN: Understood, Your Honor. Thank you.

12 THE COURT: Anything else?

13 MS. CAREY: I just want it all to be clear. I know
14 you said we're staying the depositions --

15 THE COURT: Yes.

16 MS. CAREY: -- we're also staying all document
17 production?

18 THE COURT: Yes. The plaintiff agreed to that.

19 MS. CAREY: Right. Just I want to be clear.

20 MR. LICHTMAN: So the responses to August 26th, Your
21 Honor?

22 THE COURT: Actually, the 25th.

23 MR. LICHTMAN: 25th. Oh. I almost gave them an
24 extra --

25 THE COURT: Oh no, the 26th because the 26th is a

1 Monday. I don't know if I'm doing the defendants a favor. I
2 should probably shorten it to the 23rd to the Friday. Anyway,
3 you get till the 26th. Okay. So I will meet with you after
4 your oral argument. Oh, I see, it was rescheduled to the 20th.
5 Okay. That's actually a good day for me, so I'll keep my
6 calendar free to meet with you afterwards. So I'm sure I will
7 enjoy the oral argument. I'm staying here so --

8 MR. LICHTMAN: Thank you, Your Honor.

9 MS. CAREY: Thank you, Your Honor.

10 [Proceedings ended at 11:18 a.m.]

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1 I certify that the foregoing is a court transcript from
2 an electronic sound recording of the proceedings in the above-
3 entitled matter.



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5 _____
6 Mary Greco

7 Dated: July 28, 2013
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