IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: DELTA/AIRTRAN BAGGAGE FEE ANTITRUST LITIGATION	CIVIL ACTION FILE NUMBER 1:09-md-2089-TCB ALL CASES

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL

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I. INTRODUCTION

Plaintiffs seek to certify a class of similarly situated individuals and entities (defined below) who paid a "first bag fee" as a result of an alleged *per se* unlawful conspiracy perpetrated by Defendants Delta Air Lines, Inc. ("Delta") and AirTran Airways, Inc. ("AirTran") (collectively, "Defendants").[1] On behalf of themselves and the putative class, Plaintiffs seek as damages first bag fees paid to Defendants since December 5, 2008. *See* Plaintiffs' Consolidated Amended Complaint ("CAC"), ¶¶ 72, 88. Plaintiffs also seek an injunction to prevent Defendants from charging a first bag fee. *Id.* ¶ 88.

Factual and legal issues concerning the existence, scope, and effects of Defendants' alleged conspiracy are all common to the class. Moreover, by the very nature of the conspiracy, Plaintiffs and the members of the proposed class were injured in *exactly the same way* – each paid one or more first bag fees to the Defendants. Courts have routinely certified classes in far more complicated antitrust cases on behalf of airline passengers. *See, e.g.*, *In re Nw. Airlines Corp.*, 208 F.R.D. 174 (E.D. Mich. 2002); *Midwestern Machinery v. Nw. Airlines, Inc.*, 211 F.R.D. 562 (D. Minn. 2001); *In re Domestic Air Transp. Antitrust Litig.*, 137

[1] A "first bag fee" is a fee Defendants charge for the first piece of luggage a passenger checks.

F.R.D. 677 (N.D. Ga. 1991). As shown below, this case is ideally suited for class treatment.

Plaintiffs satisfy the four class certification requirements of Fed. R. Civ. P. 23(a). First, the proposed class is sufficiently numerous with millions of class members geographically dispersed throughout the country. Second, virtually all questions of law and fact in this litigation are common to the class. For example, discovery to date has revealed common evidence of conspiracy, including, *inter alia*, that: (a) Defendants communicated with each other concerning first bag fees before implementing the very same fee effective on the very same day; (b) Delta projected that first bag fees were likely to generate positive revenue – and thus decided to implement the fee – only after AirTran assured Delta that it would follow Delta's lead in implementing the fee; and (c) Delta publically provided pretextual reasons for its first bag fee. Third, the claims of the named Plaintiffs are typical of those of the class, as each seeks to recover overcharges from Defendants for first checked bag fees. Fourth, the named Plaintiffs will adequately represent the interests of the class, as there are no conflicts of interest, and Plaintiffs are represented by experienced counsel.

Plaintiffs also satisfy the class certification requirements of Fed. R. Civ. P. 23(b)(3). Plaintiffs' burden at this stage is *not* to prove their case on the merits, but rather to establish that common proof will predominate at trial with respect to three

essential elements of their antitrust claims, namely: (a) that Defendants violated the antitrust laws; (b) that the alleged violations caused Plaintiffs to suffer some injury to their business or property; and (c) that the extent of this injury can be quantified with requisite precision. *In re Domestic Air*, 137 F.R.D. at 685. Common evidence will predominate in the determination of each of these issues. This evidence will come in the form of the documents and data produced by the Defendants. Plaintiffs will also use common evidence to prove impact and damages. Specifically, Plaintiffs will rely upon Defendants' own documents to prove that they would not have imposed the first bag fee absent collusion and will use a general (and simple) formula to prove damages.

In addition to the evidence produced by Defendants, Plaintiffs will rely upon the testimony of an expert whose analysis will be common to the class. Plaintiffs have retained economist Hal J. Singer, Ph.D. as an expert witness to provide an expert opinion as to whether Defendants colluded, whether their collusion impacted the class, and, if so, to calculate the damages suffered by the class members. In a report attached to this Memorandum, Dr. Singer explains that his analyses will rely on documents and data common to the class. *See generally* Class Certification Report of Hal J. Singer, Ph.D. ("Singer Report") (Ex. 1).[2]

[2] Plaintiffs have filed documents along with this Memorandum as Exhibits 1 - 28. When citing those documents, Plaintiffs will include a reference to the Exhibit number at the end of the citation that will follow the format: "(Ex. NUMBER)".

Finally, the proposed class satisfies Fed. R. Civ. P. 23(b)(2) because, by jointly and unlawfully charging a first bag fee, Defendants have "act[ed] on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2). Injunctive relief rescinding the first bag fee is therefore appropriate.

Considering that courts (including this Court) have repeatedly certified classes of airline passengers seeking overcharges in far more complicated antitrust cases and that Plaintiffs satisfy the class certification requirements of Fed. R. Civ. P. 23, the proposed class should be certified.

II. CASE OVERVIEW

A. The Legal Framework Is Common to the Class.

Plaintiffs allege that Delta and AirTran conspired to impose a first bag fee in violation of Section 1 of the Sherman Act. Accordingly, proof of Defendants' conspiracy will be the overwhelming focus of the trial in this case. As Delta itself correctly acknowledges in its own Antitrust Compliance Manual, a *per se* unlawful conspiracy can include an "informal understanding" between competitors. *See* Delta Airlines, Inc. Antitrust Compliance Manual at 3 ("DL Antitrust Manual") (Ex. 2); *accord City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 569 (11th Cir. 1998) (noting that an antitrust conspiracy requires a "common design and understanding"). An unlawful conspiracy can be inferred when parallel conduct – such as imposing the same first bag fee effective the same date – is

accompanied by "plus factors." DL Antitrust Manual at 3 (Ex. 2); *see also City of Tuscaloosa*, 158 F.3d at 570-71. Consistent with the standard set forth in Plaintiffs' Opposition to the Defendants' Motions to Dismiss, Delta summarizes three plus factors, any one of which is sufficient for a jury to infer a conspiracy:

> Examples of plus factors include communications between competitors concerning the subject of the alleged agreement, actions contrary to the company['s] independent economic self-interest, or giving false reasons for price increases.

DL Antitrust Manual at 6 (Ex. 2).[3]

The very nature of these "plus factors" demonstrates that they will be proven by evidence that focuses on the Defendants, *not the Plaintiffs*, such that proof of these elements will necessarily rely on evidence that is common to the class. As discussed below, although discovery is ongoing, Plaintiffs have already developed abundant evidence common to all class members supporting the presence of all three of these plus factors. That evidence will predominate at trial.

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[3] *Compare* DL Antitrust Manual at 5-6 (Ex. 2) *with* Plaintiffs' Opposition to Defendants' Motions to Dismiss at 11-19 (Apr. 12, 2010) (setting forth the "plus factors" test and citing the three "plus factors" noted in Delta's Antitrust Compliance Manual).

B. Facts and Evidence are Common to the Class.

Charging consumers a first bag fee represented a fundamental change in Delta and AirTran's business models. In the first half of 2008, when other airlines were instituting first bag fees, Delta viewed a passenger's ability to check a first bag without a charge as something akin to a "right" that – if violated – could lead to a consumer backlash. Delta's CEO, Richard Anderson, expressed this point of view in a May 27, 2008 e-mail responding to a recommendation not to initiate a first bag fee after other carriers had done so:

> I agree [that Delta should not initiate a first bag fee] and believe it is part of the basic bargain. A brief case or purse, roller bag carry on and check your 50LB bag. That is in the price of the ticket. The level of cust[omer] dissatisfaction is too high and the operating model is too difficult. Customers have accepted the second bag fee as have our employees. Our [satisfaction] scores are all moving in the right direction and we want to keep the momentum.

E-Mail dated May 28, 2008, [4] to S. Gorman *et al.* (Ex. 3). Delta's position regarding first bag fees would soon change – but only after a series of collusive communications with AirTran.

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[4] During a deposition taken by the Department of Justice in its ongoing investigation of Defendants, Delta's President, Ed Bastian, explained that . *See* Deposition of E. Bastian at 26:24-27:2 (Ex. 4).

Plaintiffs alleged in their CAC that Delta and AirTran used their earnings calls (and other channels) to communicate and coordinate pricing behavior. *See* CAC ¶¶ 32 - 55.[5] Discovery that is common to the class has validated Plaintiffs' allegations; internal documents indicate that Defendants were communicating through both private and public channels, including on earnings calls.

For example, in a July 31, 2008 e-mail exchange, Scott Fasano, AirTran's Director of Customer Service Standards, reported to other AirTran executives that – according to his "internal DL grapevine" – Delta was "carefully watching" AirTran "waiting for a move on 1st bag." *See* E-Mail dated July 31, 2008, from J. Smith to R. Fornaro, *et al.* (Ex. 5). In response, AirTran's CEO – Mr. Fornaro – instructed that Delta "should hear" about AirTran's programming to launch this effort:

[5] Delta's Antitrust Compliance Manual cautions that public announcements can heighten antitrust risk when the "information being announced involves pricing or marketing initiatives that likely must be matched by competitors to be sustainable in the market. Announcement of such initiatives before implementation can be interpreted as an effort to elicit matching announcements by other carriers." *See* DL Antitrust Manual at 6 (Ex. 2). Defendants' made public statements on earnings calls about pricing initiatives that "likely must be matched by competitors to be sustainable in the market," in direct contravention of Delta's antitrust compliance policy. *See, e.g.,* CAC, ¶ 38 (quoting Mr. Hauenstein's statement during Delta's April 23, 2008 earnings call concerning how Delta could work "in conjunction with [] other carriers" to "achieve a 10% reduction in capacity" to increase prices); CAC ¶ 55 (quoting Mr. Fornaro's statement during AirTran's October 23, 2008 earnings call concerning AirTran's willingness to follow Delta's lead in imposing a first bag fee).

> *AirTran Executive Jack Smith forwarding Fasano e-mail to Mr. Fornaro:* We are in a stand-off. DL is carefully watching us waiting for a move on 1st bag.
>
> *Mr. Fornaro:* How do we know?
>
> *Mr. Smith:* Scott's internal DL grapevine . . . . . .
>
> *Mr. Fornaro:* They should hear through the grapevine that we are doing the programming to launch this effort.
>
> *Mr. Smith:* It will be communicated today . . . . . .

Id.

Mr. Fasano then made direct contacts with Delta employees and conveyed the information they provided to him up AirTran's chain of command. *See* E-mail dated July 31, 2008, from S. Fasano to J. Smith (Ex. 6) ("I spoke with two more people over there. They are holding and our name has been included in every conversation."). The common evidence also indicates that Mr. Fasano attempted to contact an individual who had been with Delta and involved in first bag fee analyses presented to Delta executives. *See* E-Mail dated July 31, 2008, from S. Fasano to A. Burman (Ex. 7) ("When are you making the move [on First Bag]?").[6]

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[6] According to Delta, Ms. Burman was not a Delta employee when Mr. Fasano e-mailed her on July 31, 2008. But the evidence shows that Ms. Burman was employed by Delta when it was considering whether to impose (but declined to do so) a first bag fee in May 2008 and that Ms. Burman provided input for that consideration. *See* E-Mail dated May 22, 2008, from A. Burman to T. Keaveny *et al*. (Ex. 8) (providing estimates of the revenues that Delta could expect if it imposed a first bag fee). The fact that Mr. Fasano knew to contact Ms. Burman, who was involved with the team assessing whether to impose the first bag fee,

Mr. Fasano continued his communications with Delta/Northwest personnel and provided an update to Kevin Healy, AirTran's Senior Vice President of Marketing and Planning, and Jack Smith, AirTran's Senior Vice President of Customer Service, in an August 5, 2008 e-mail titled "DL 1st Bag." The e-mail summarized Mr. Fasano's in-person meeting with a colleague who was "embedded" in "the Northwest crew." Northwest – which had already implemented its own first bag fee – was being acquired by Delta, and Mr. Fasano represented to his fellow AirTran executives that his colleague was "connected on the high level operational and planning side of the house" – presumably within Delta. *See* E-Mail dated Aug. 5, 2008, from S. Fasano to K. Healy *et al*. (Ex. 9). Mr. Fasano's e-mail described with remarkable specificity Delta's wishes and concerns as to implementing a first bag fee:

> Following-up on our conversation from yesterday, I had a cup of coffee with one of my former colleagues who is still embedded in the team amongst the Northwest crew. He is very connected on the high level operational and planning side of the house. He claims that their functionality is ready to go live with 1st bag. He said their current conversations are centered around 2 issues – 1. They want us to jump first. (we need it more than they do) 2. They are feeling some pressure to make a move soon if oil continues to come down – they are worried about negative public perception – The other

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strongly suggests the Defendants were engaging in a series of collusive communications.

> carriers made 1st bag announcements when oil was at record levels and climbing. . . . .
>
> *I let him know that we have a confirmed delivery date for our automation that will give us versatility we need BUT our changes are dependent on moves by our competitors*.

Id. (emphasis added). While Delta may have wanted AirTran "to jump first" with a first bag fee, AirTran's CEO instructed that AirTran would not act without Delta. *See* E-Mail dated Aug. 8, 2008, from R. Fornaro to K. Healy, *et al.* (Ex. 10).

AirTran was simultaneously using public channels to communicate with Delta about the possibility of coordinating implementation of a first bag fee.[7] For example, two days after AirTran's second quarter earnings call, and in response to Mr. Fornaro's instruction to communicate AirTran's first bag fee efforts to Delta, Mr. Healy lamented that AirTran was not asked about its first bag fee plan on AirTran's earnings call and stated that AirTran had "all but given it to the" Atlanta Journal Constitution ("AJC"). *See* E-Mail dated July 31, 2008, from K. Healy to R. Fornaro *et al*. (Ex. 13). Mr. Healy committed to continue to "push it out there:"

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[7] AirTran's internal documents also indicate that Delta was communicating with AirTran on earnings calls. For example, consistent with Plaintiffs' allegations that Delta used its July 16, 2008 earnings call to threaten AirTran to encourage more capacity cuts to increase prices (*see* CAC, ¶¶ 42-43), Mr. Fasano sent a July 20, 2008 e-mail titled "DL Earnings Call," forwarding a transcript of Delta's earnings call to other AirTran employees and stating: "There is a very clear message from DL." *See* E-Mail dated July 20, 2008, from S. Fasano to AirTran Employees (Ex. 11); *see also* E-Mail July 18, 2008, from H. Johnson to J. Graham-Weaver at 2 (Ex. 12) ("DL going out of their way to say they're growing capacity in ATL.").

> *Mr. Fornaro*: They [Delta] should hear through the grapevine that we are doing the programming to launch this effort.
>
> *Mr. Healy*: I was hoping we'd be asked on the call. We've all but given it to the AJC, we'll push it out there.

Id.; *see also* E-Mail dated July 31, 2008, from T. Hutcheson to K. Healy *et al.* (Ex. 14) (stating that when Fox News informed Mr. Hutcheson that Delta planned to implement a first bag fee in August 2008, Mr. Hutcheson informed Fox News that AirTran was considering a first bag fee and working on the technology to impose the fee); E-Mail dated July 14, 2008, from J. Graham-Weaver to K. Healy *et al.* (Ex. 15) (discussing possibility of "floating" the idea of a first bag fee during an interview with Bloomberg).

The inter-company communications between AirTran and Delta regarding the implementation of a first bag fee culminated in AirTran's earnings call for the third quarter of 2008. AirTran held this call on October 23, 2008. On that call, AirTran signaled to Delta that – even though "the consumers got in their minds that airfares are through the roof" – it would nonetheless follow Delta's lead in implementing a first bag fee. CAC ¶ 55.

Delta received AirTran's message and acted on it. In October 2008, Delta was deciding whether to implement a first bag fee. Delta's Revenue Management team was preparing a detailed first bag fee presentation titled "Value Proposition" to review with the airline's executive leadership team. The presentation weighed

the pros and cons of imposing a fee, including whether the fee would be profitable. Prior to AirTran's third quarter earnings call, the presentation consistently concluded that the fee would not be profitable and recommended that Delta not impose the fee. *See, e.g.,* Value Proposition (Oct. 14, 2008) at 7 (Ex. 16); Value Proposition (Oct. 16, 2008) at 16 (Ex. 17); Value Proposition (Oct. 22, 2008) at 16 (Ex. 18).

The last such pre-call presentation was created on October 22, 2008 – one day before AirTran's earnings call. *See* Value Proposition (Oct. 22, 2008) at 2 (Ex. 18). This version of the presentation emphasized that, because it had not implemented a first bag fee, Delta was "competitive with LCCs" – *i.e.*, low cost carriers that employed low fare business models – namely AirTran, Southwest Airlines, and Jet Blue, none of which had implemented a first bag fee. *Id.*

Delta's Revenue Management team projected that if it imposed a first bag fee, it would collect $265 million in such fees. *Id.* at 9. In assessing the financial impact of a first bag fee, however, it offset these projected gains with projected losses associated with its expected loss in market share to AirTran, Jet Blue, Southwest, and the legacy carriers (*e.g.*, US Airways, American, Continental).[8]

[8] The three LCCs – AirTran, Jet Blue, and Southwest – had not implemented a first bag fee, and Delta recognized that its competitive exposure to these carriers was the reason it had not pursued a first bag fee. Delta also calculated that it achieved between $47 million and $118 million in annual market share gains when the other major carriers implemented a first bag fee and Delta did not. *Id.* at 15.

See id. at 7-15. This required Delta to estimate the probability that the low cost carriers would match the fee. Delta projected a zero percent likelihood that Southwest and Jet Blue would follow Delta's lead in implementing a first bag fee. *Id.* at 7. In contrast, it projected a 50 percent likelihood that AirTran would follow Delta's lead – almost certainly because of the signals it had already received from AirTran. *Id.* (referring to a 50% probability that "FL" would match). AirTran's reaction posed the largest risk for Delta because AirTran was Delta's closest competitor, and AirTran's decision about whether to match the fee would alone determine whether imposing the fee would be profitable for Delta. *Id.* at 15. In fact, Delta projected that AirTran's decision could result in a revenue swing to Delta of approximately $300 million. *Id.* at 11, 15.

As of October 22, Delta's Revenue Management team concluded that in the best case scenario, in which AirTran would follow Delta's lead and implement a first bag fee, Delta could net $126 million in additional revenue by imposing the first bag fee. *Id.* at 15. In the worst case scenario, in which AirTran did not implement a first bag fee, the team projected Delta could suffer a net loss of $243 million. *Id.* Because of the uncertainty about whether AirTran would follow Delta's lead in implementing a first bag fee, the Revenue Management team projected: "Total revenue impact of first bag fee most likely negative." *Id.* The Revenue Management team recommended *against* implementation of the first bag

fee because: (1) projected revenues did not support implementing a first bag fee, (2) implementing a first bag fee would "negatively impact" Delta's "already middle-of-the road standing in customer preference," and (3) the economic environment had deteriorated and "affected demand" and was "not conducive to increasing or implementing new fees." *Id.* at 16. The presentation concluded with a firm recommendation *not* to implement a first bag fee. *Id.*

The next day, on its third quarter earnings call, AirTran announced its readiness to follow Delta's lead in imposing a first bag fee, and Delta's view of the bag fee changed. Upon hearing AirTran's commitment, the Revenue Management team revised its analysis, raising the probability that AirTran would match the fee from 50 to 90 percent, and concluded that implementation of the first bag fee would now be profitable. *See* Value Proposition (Oct. 24, 2008) at 4, 16 (Ex. 19). Delta's executive leadership team met on October 27, 2008 to review the Value Proposition presentation and decide whether to implement a first bag fee. *See* E. Phillips Deposition Testimony at 262:6-16 (stating that the Value Proposition was presented to the executive team and had been provided in advance for their review) (Ex. 20). Because a first bag fee was expected to be a net revenue generator, Ed Bastian, Delta's President, felt that walking away from the fee would be "irresponsible." *Id.* at 281:3-282:2. Delta decided to implement the fee.

Based on the Value Proposition presentation, the first bag fee was a net revenue generator only because AirTran had assured Delta that it would follow Delta's lead in implementing the fee. *See* Value Proposition (Oct. 24, 2008) at 16 (Ex. 19). If AirTran did not follow Delta's lead, Delta risked losing hundreds of millions of dollars. *Id.* But because AirTran had assured Delta it would follow its lead, Delta expected to profit. *Id.* The common evidence shows, in other words, that the Defendants developed a common understanding prior to imposing their first bag fee.

On November 5, 2008, Delta announced it was implementing a first bag fee. *See* Delta Press Release dated Nov. 5, 2008 (Ex. 21). In its announcement, Delta made no mention of AirTran's assurance to follow Delta's lead in describing why it decided to implement a first bag fee, which made Delta's decision a "net revenue generator." Rather, it used its acquisition of Northwest as a pretext for the fee, stating that it was implementing the fee to align its fees to Northwest's. *Id.*[9]

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[9] In July 2008 – after Northwest implemented its first bag fee and several months after Delta had announced its acquisition of Northwest – Delta assured investors that it had no plans to implement a first bag fee. *See* Transcript of Delta Airlines, Inc.'s Second Quarter 2008 Earnings Call at 15 (Ex. 22). Moreover, Delta's employees had initially created a chart demonstrating that neither Delta nor Northwest would charge a first bag fee – *i.e.*, first bags would be "free." *See* E-Mail dated Oct. 2, 2008, from E. Phillips to M. Zessin *et al.* with attachment (Ex. 23) (attaching a fee chart that proposed that the first bag be free for the combined Delta/Northwest).

The next day, on November 6, 2008, AirTran publicly communicated that it would likely make a formal announcement regarding its first bag fees the following week. *See* Article, "Delta to Start Charging Fee for Checked Luggage" (Nov. 6, 2008) (Ex. 24). In preparing a first bag fee announcement, AirTran internally expressed some concern about collusion if it publicly stated that it was following Delta's lead in implementing a first bag fee. *See* E-Mail dated Nov. 11, 2008, from M. Klein to K. Healy (Ex. 25). It thus made no mention of Delta in its first bag fee announcement, but nonetheless imposed the exact same fee as Delta ($15) on the exact same effective date (December 5).

C. Expert Testimony Common to the Class.

Plaintiffs have retained economist Hal J. Singer, Ph.D., as an expert witness in this case. Dr. Singer is employed by Navigant Economics and is an Adjunct Professor at Georgetown University's McDonough School of Business. Dr. Singer has extensive experience with antitrust issues and his work has been cited by numerous authorities. *See* Singer Report ¶¶ 10 - 15 (Ex. 1).

Dr. Singer has prepared a report for consideration with this Motion for Class Certification, expressing his opinion that his analysis of violation, impact, and damages will proceed based on information that is common to the class members. *See generally id.* Dr. Singer's analysis demonstrates that the elements of each

class member's claim – violation, impact, and damages – can and will be assessed using predominantly, if not entirely, common evidence. *Id*.

III. PROPOSED CLASS DEFINITION

A class definition must meet a minimum standard of definiteness that will allow the court to determine whether a particular individual is a member of the proposed class through reasonable effort. *In re Polypropylene Carpet Antitrust Litig.*, 178 F.R.D. 603, 612 (N.D. Ga. 1997). The class may consist, for example, "of those persons and companies that purchased specified products . . . from the defendants during a specified period." Manual for Complex Litigation § 21.222 (4th ed. 2004).

Plaintiffs propose certifying the following class:

> All persons or entities in the United States and its territories that directly paid Delta and/or AirTran one or more first bag fees on domestic flights from December 5, 2008 through the present (and continuing until the effects of Delta's and AirTran's anticompetitive conspiracy ceases).

Plaintiffs have slightly altered the class definition (from that alleged in the CAC)[10] to make clear that it includes individuals and entities in United States

[10] The proposed class definition may be altered from the definition contained in the complaint in response to the progression of the case. *See, e.g., Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 258 F.R.D. 545, 551-52 (N.D. Ga. 2007) (collecting cases).

territories (such as Puerto Rico) who paid a first bag fee.[11]

IV. ARGUMENT

Class actions are an essential tool for adjudication of multiple claims involving common factual and/or legal inquiries, as they offer substantial economies of time, effort, and expense for litigants and the courts, and permit the vindication of the rights of groups of people whose individual recovery might be too modest to warrant prosecution of the case on an individual basis. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1270 (11th Cir. 2004).

Courts have "long recognized that class actions play an important role in antitrust enforcement." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291, 299 (N.D. Cal. 2010) (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979); *Hawaii v. Std. Oil Co. of Cal.*, 405 U.S. 251, 262 (1972)).

Trial courts have "broad discretion" to grant class certification. *Klay*, 382 F.3d at 1251. Rule 23, which governs motions for class certification, "is to be construed liberally to permit class actions[.]" *Wells v. HBO & Co.*, No.

[11] The class definition is broad enough to encompass first bag fees paid to Delta's subsidiaries and predecessors in interest since December 5, 2008. Delta has argued that its acquisition of Northwest forced the airline to either decide to impose a bag fee for both Delta and Northwest or rescind the first bag fee for Northwest. *See* Defendant Delta Airlines, Inc.'s Memorandum of Law in Support of its Motion to Dismiss at 10-11 (Mar. 8, 2010) (Dkt. # 73-2). If a jury accepts that argument, damages for Northwest bag fees (from December 5, 2008 onward) would be recoverable, assuming the jury finds the Defendants conspired.

1:87CV657JTC, 1991 WL 131177, at *1 (N.D. Ga. Apr. 24, 1991). As part of a rigorous analysis of the facts and arguments asserted in support of class certification, a court is permitted to look beyond the pleadings to determine if certification is appropriate. *Nat'l Air Traffic Controllers Ass'n v. Dental Plans, Inc.*, No. 1:05-CV-882-TWT, 2006 WL 1663286, at *3 (N.D. Ga. June 12, 2006). "[T]he trial court should not determine the merits of the plaintiffs' claim at the class certification stage." *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1188 n.15 (11th Cir. 2003). Rather, the trial court should consider the merits of the case only "to the degree necessary to determine whether the requirements of Rule 23 will be satisfied." *Id.* The court examines "whether sufficient evidence exists to reasonably conclude that Plaintiffs may proceed in the manner proposed, not whether the evidence can withstand any and all factual challenges leveled by Defendants." *In re Polypropylene*, 178 F.R.D. 603, 611 (N.D. Ga. 1997).

Plaintiffs satisfy the requirements for class certification. First, courts – including this Court – have repeatedly certified classes of consumers alleging antitrust overcharges in the airline industry. Second, Plaintiffs satisfy the requirements of Fed. R. Civ. P. 23(a). Third, Plaintiffs satisfy the requirements of Fed. R. Civ. P. 23(b).

A. Classes of Airline Consumers Asserting Antitrust Claims and Seeking Recovery of Overcharges Have Routinely Been Certified.

Antitrust claims brought on behalf of proposed classes of airline passengers – whose individual recoveries are relatively modest – have been certified repeatedly, including claims against Delta, Northwest, and other airlines. *See, e.g.*, *In re Nw. Airlines Corp.*, 208 F.R.D. 174 (E.D. Mich. 2002); *Midwestern Machinery v. Nw. Airlines, Inc.*, 211 F.R.D. 562 (D. Minn. 2001); *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677 (N.D. Ga. 1991).[12]

In these three cases, plaintiff purchasers of domestic airline tickets alleged that the airlines conspired to fix ticket prices or monopolized markets in violation of Sherman Act § 1 and/or § 2. *Nw. Airlines*, 208 F.R.D. 174 (section 1 and 2 claims against Delta, Northwest, and others); *Midwestern Machinery*, 211 F.R.D. 562 (section 2 claim against Northwest); *Domestic Air*, 137 F.R.D. 677 (section 1 claim against Delta, Northwest, and others). In the cases, Delta, Northwest, and other defendants argued, *inter alia*, that certification should be denied because of the economic complexity of the airline industry, the myriad context-specific considerations relating to each fare, and other individualized inquiries. In

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[12] *But see Rodney v. Nw. Airlines, Inc.*, 146 Fed. Appx. 783, 792 (6th Cir. 2005) (affirming denial of class certification where plaintiffs alleged monopolization, and market-by-market analysis of 74 separate routes "would inevitably degenerate into 74 mini-trials"). Unlike *Rodney*, the present action asserts a *per se* violation of Section 1 of the Sherman Act on behalf of the class. Accordingly, the class claims do not require a market-by-market analysis.

Domestic Air, consistent with other courts, this Court rejected these arguments, stating that failing to certify a class would be tantamount to "exempting" airlines from the "purview" of the antitrust laws:

> [T]he overriding question before the Court today is whether participants in a massive, nationwide industry are exempted from the purview of the civil antitrust laws of the United States because of their ability to portray the class as so large and the industry as so complex and complicated that an action to hold the participants accountable for the injuries they have caused cannot possibly be brought as a class action.

137 F.R.D. at 683; *accord Nw. Airlines*, 208 F.R.D. at 219 (quoting *id.*). Each court rejected the airlines' arguments against certification as overstated. *Nw. Airlines*, 208 F.R.D. at 219 ("Like Judge Shoob [in *Domestic Air*], this Court finds that the Airlines have dramatically overstated the idiosyncrasies of the claims and defenses in this case."); *Midwest Machinery*, 211 F.R.D. at 572 ("Northwest's opposition to class certification attempts to inflate and exploit the size and complexity of the current dispute.").

This case presents much simpler claims and even more common issues than the issues presented in *Northwest Airlines*, *Midwest Machinery*, and *Domestic Air*. *Domestic Air*, for example, involved "thousands of different fares and fare codes" at issue that defendants described as "fare chaos." 137 F.R.D. at 691; *see also Nw. Airlines*, 208 F.R.D. at 219 (certifying class despite defendants' argument that "each fare involves myriad context-specific considerations"); *Midwest Machinery*,

211 F.R.D. at 572 ("[A]n industry [that] involves an elaborate pricing system that results in a range of prices often individually negotiated is an insufficient reason for denying class certification."). Here, by contrast, Plaintiffs seek to recover an alleged overcharge of a newly imposed fee for a service that both Defendants had previously provided for free. The overcharge here, therefore, is simply the *entire fee* each class member paid each time he or she checked a first bag from December 5, 2008 until the present. *See* Singer Report ¶¶ 88 - 89 (Ex. 1). Indeed, both Defendants recognized that a first bag fee constituted a price increase. [13]

Consistent with *Northwest Airlines*, *Midwest Machinery*, and *Domestic Air* – all of which involved substantially more complicated class certification issues – this straightforward price-fixing case is ideally suited for class treatment.

B. Plaintiffs Satisfy the Requirements of Rule 23(a).

Pursuant to Rule 23(a), a class may be certified if:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or

[13] At the time they imposed the fee, AirTran and Delta both recognized that the fee provided incremental revenue that was wholly separate from the fares for the tickets themselves. *See, e.g.*, Value Proposition (Oct. 24, 2008) (Ex. 19) (considering the revenue impact of the first bag fee without any analysis of changes to fares); E-Mail dated Nov. 6, 2008, from M. Klein to K. Healy *et al.* (Ex. 26) (referring to the "staggering potential for 1st bag revenue" and not indicating any likelihood of reduced fares to offset the revenue); *see also* Deposition of R. Fornaro at 44:17-45:14 (Ex. 27); Deposition of K. Healy at 194:13-196:6 (Ex. 28).

> defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). These four prerequisites of Rule 23(a) are commonly referred to as numerosity, commonality, typicality, and adequacy of representation. As with previous classes of airline passengers, the present putative class readily satisfies these requirements. *See Nw. Airlines*, 208 F.R.D. at 174; *Midwestern Machinery*, 211 F.R.D. at 562; *Domestic Air*, 137 F.R.D. at 677.

1. Plaintiffs' Proposed Class Size Satisfies the Numerosity Requirement.

The proposed class includes millions of persons and entities that paid Defendants a first bag fee, *see* Singer Report ¶¶ 84 - 85 (Ex. 1), and is therefore so numerous that joinder of all members is impracticable. *See* Fed. R. Civ. P. 23(a)(1); *see also Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) ("[G]enerally[,] more than forty [class members is] adequate" to satisfy the numerosity requirement.).

2. Plaintiffs Satisfy the Commonality Requirement.

Virtually every question of law and fact in this litigation is common to the class. *See* Fed. R. Civ. P. 23(a)(2) (requiring the presence of common questions of law *or* fact). The commonality requirement presents a "low hurdle," which Plaintiffs easily satisfy. *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1356

(11th Cir. 2009).[14] For example, proof of the violation in this case will involve, among other things, the common evidence discussed above demonstrating satisfaction of the three "plus factors" indicating the presence of an illegal conspiracy:

- *Communications Between Defendants*: The classwide evidence strongly supports that Defendants used private communications and earnings calls to reach a common understanding concerning a first bag fee.
- *Actions Contrary to Individual Economic Interests*: The classwide evidence strongly supports that implementing a first bag fee during the worst recession in the airline industry history was contrary to both Defendants' individual economic interests (absent collusion).
- *Pretextual Explanation for the First Bag Fee*: The classwide evidence strongly supports that it was AirTran's assurance that it would follow Delta's lead in implementing a first bag fee, and not Delta's acquisition of Northwest, that led Delta to decide to impose the first bag fee. As such, Delta's public announcement that it was implementing a first bag fee to "align" its fees with Northwest's was pretextual.

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[14] *See also In re Polypropylene Carpet Antitrust Litig.*, 178 F.R.D. 603, 612 (N.D. Ga. 1997) ("Typically, questions concerning the existence and scope of an alleged conspiracy will satisfy the commonality requirement." (citing *Domestic Air*, 137 F.R.D. at 699)).

Other common issues of law or fact include: whether Defendants' collusion impacted class members who paid a first bag fee and whether class members are entitled to recover as damages first bag fees paid to Defendants. *See* Singer Report ¶¶ 78 - 89 (Ex. 1).

3. Plaintiffs Satisfy the Typicality Requirement Because They Assert Claims Based on the Same Events and Same Legal Theory.

Plaintiffs' claims are also typical of the claims of the class. Fed. R. Civ. P. 23(a)(3). As discussed above, Plaintiffs' claims arise from the same events and practices of Defendants and are based on the same legal theory as those of the members of the proposed class – *i.e.,* that Defendants conspired to introduce a first bag fee. Plaintiffs therefore satisfy Rule 23(a)(3). *Williams*, 568 F.3d at 1357 ("The claim of a class representative is typical if 'the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory.'" (quoting *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984)); *Domestic Air*, 137 F.R.D. at 698-99 (finding typicality requirement was "easily met" where plaintiffs asserted claims under the theory that Delta and others conspired to fix ticket prices).

4. Plaintiffs Satisfy the Adequacy Requirement Because They Share Common Interests with Other Class Members and They Are Represented by Qualified Counsel.

Plaintiffs will fairly and adequately protect the interests of the class. This requirement has two elements: (a) the named plaintiffs must share common

interests with the other class members; and (b) the proposed counsel must have the qualifications and experience necessary to represent the class in the litigation. *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 2009 WL 856306, at *8 (N.D. Ga. Feb. 9, 2009); *see also* Fed. R. Civ. P. 23(g)(4) (requiring class counsel to "fairly and adequately represent the interests of the class"). Plaintiffs meet both of these elements.

First, each Plaintiff shares common interests with other class members – *i.e.*, to recover for first bag fees paid to Delta and AirTran and to prevent additional first bag fees from being charged. No conflict of interest exists between the Plaintiffs and the class that would preclude certification. Each Plaintiff and member of the class has been similarly injured by Defendants' wrongful conduct in the form of overcharges for first bag fees. *See id.* (finding no conflict where class representatives had identical claims to putative class of airline passengers seeking to recover overcharges); *Nw. Airlines*, 208 F.R.D. at 225-26 (finding no conflict where airline passenger class stood to benefit if plaintiffs prevailed even if elimination of premiums in some markets may lead to price increase in other markets).

Second, proposed class counsel have the requisite qualifications and experience to vigorously and effectively prosecute this antitrust class action. *See* Order Appointing Interim Lead Counsel and Liaison Counsel (Jan. 5, 2010), Dkt.

#48 ("[T]hese firms have extensive antitrust and class action experience, and have abundant resources to effectively litigate this action.").

Thus, Plaintiffs and the proposed class satisfy the requirements of Rule 23(a).

C. Plaintiffs Satisfy Rule 23(b)(3)'s Predominance and Superiority Requirements.

Plaintiffs also meet the requirements of Rule 23(b)(3), which provides for class certification where: (1) common questions of law or fact predominate over any questions affecting only individual members; and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3).

1. Common Questions of Law and Fact Predominate.

"To satisfy the predominance requirement, the plaintiffs must establish that 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole . . . predominate over those issues that are subject only to individualized proof.'" *Brenner v. Future Graphics, LLC*, 258 F.R.D. 561, 568 (N.D. Ga. 2007) (alteration in original) (quoting *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997)).[15] In making its

[15] The question of predominance under Rule 23(b)(3) overlaps significantly with the question of commonality under Rule 23(a)(2). *Nat'l Air Traffic Controllers*, 2006 WL 1663286, at *4.

predominance determination, the court first identifies the causes of action in the complaint, and then examines whether the issues that are subject to generalized proof predominate over individual issues. *Allapattah Servs. v. Exxon Corp.*, 333 F.3d 1248, 1260 (11th Cir. 2003); *Domestic Air*, 137 F.R.D. at 684. It is generally only when significant individualized questions about liability exist that the need for individualized assessments will be found to predominate over common issues. *Williams*, 568 F.3d at 1357-58 (citing *Klay*, 382 F.3d at 1260).

An alternative formulation of this test is whether the addition or subtraction of any plaintiffs to or from the class has a substantial effect on the substance or quantity of the evidence offered. *Klay*, 382 F.3d at 1255. In other words, if the addition of more plaintiffs leaves the quantum of evidence introduced by the plaintiffs as a whole relatively undisturbed, then common issues are likely to predominate. *Id.* That test is readily satisfied here, as the evidence proving one plaintiff or class member's claim will be almost entirely the same as the evidence proving the claim of any other.

"Predominance is a test readily met in certain cases alleging . . . violations of the antitrust laws." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). "[A]ntitrust price-fixing cases by their very nature raise common questions of fact and law concerning the alleged conspiracy." *Columbus Drywall*, 2009 WL 856306, at *8 (citing *In re Commercial Tissue Prods.*, 183 F.R.D. 589, 593 (N.D.

Fla. 1998)). In price-fixing cases, individual issues are "often overshadowed by the legal and factual questions surrounding the alleged conspiracy." *Id.*

Plaintiffs' burden in this antitrust case is to establish that common proof will predominate at trial with respect to three essential elements of their claim, namely: (a) that Defendants violated the antitrust laws; (b) that the alleged violation caused Plaintiffs to suffer some injury to their business or property; and (c) that the extent of this injury can be quantified with requisite precision. *Domestic Air*, 137 F.R.D. at 685. Each of these elements will be proven with classwide evidence.

a. Defendants' Antitrust Violation Can Be Demonstrated Through Common Proof.

Common proof of the existence of an antitrust violation will predominate at trial where, as here, Plaintiffs will rely upon evidence of Defendants' conduct, rather than the conduct of individual class members. *Columbus Drywall*, 2009 WL 856306, at *9; *Polypropylene*, 178 F.R.D. at 619 (citing *Domestic Air*, 137 F.R.D. at 688-89). As set forth above, the evidence in this case involves the anticompetitive conduct of Delta and AirTran, such that "'the addition or subtraction of any of the plaintiffs to or from the class [should not] have a substantial effect on the substance or quantity of evidence offered.'" *Columbus Drywall*, 2009 WL 856306, at *9 (quoting *Klay,* 382 F.3d at 1255) (alteration in original). Specifically, Plaintiffs' evidence of an antitrust violation will consist primarily, if not exclusively, of common evidence from Defendants' own files and

statements, including e-mails and other documents concerning: (a) Defendants' communications (and the use of earnings calls for inter-company communications); (b) the effect of Defendants' communications on their decisions to implement a first bag; (c) Defendants' imposition of the first bag fee in spite of a concern that a severe recession and falling oil prices did not support implementing the fee; and (d) Defendants' pretextual reasons for implementing a first bag fee.

b. Antitrust Impact Can Be Demonstrated Through Common Proof.

Plaintiffs are required to show that proving antitrust injury, or impact, will not require individual inquiries that would predominate over all of the other common evidence at trial, such as the common proof of conspiracy. *In re Polypropylene Carpet Antitrust Litig.*, 996 F. Supp. 18, 29. Proving impact requires a showing that the class members suffered an injury – *e.g.*, an overcharge – due to the alleged antitrust violations. *See Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 114 n.9 (1969). Proving an impact does not require proof of an amount of damages. *In re Magnetic Audiotape Antitrust Litig.*, 2001 U.S. Dist. LEXIS 7303, at *14 (S.D.N.Y. June 6, 2001).[16]

Plaintiffs can prove class-wide impact if prices or fees were increased as a

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[16] *See also Panache Broad. of Pa., Inc. v. Richardson Elecs., Ltd.*, 1999 U.S. Dist. LEXIS 7941, at *20 (N.D. Ill. May 14, 1999) ("the issue in the common impact analysis is the fact, not the amount of injury; *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 246-47 (E.D.N.Y 1998).

result of a common conspiracy. *See Columbus Drywall*, 2009 WL 856306, at *9 (citing *Domestic Air*, 137 F.R.D. at 689).[17] When an industry features homogenous products, a finding that common proof of antitrust impact predominates "usually is appropriate because the conspiracy claim readily lends itself to common proof of impact." *Polypropylene*, 178 F.R.D. at 620.[18]

Here, Plaintiffs will prove impact using entirely common evidence. Indeed, in this case, proof of impact is simplified because if Plaintiffs prove the violation (*i.e.*, that Defendants' conspired to jointly introduce the first bag fee), they have necessarily proven impact on the entire class (which is made up of those who paid the illegal bag fees). *See* Singer Report ¶ 77 (Ex. 1). Moreover, Plaintiffs allege overcharges related to a homogenous service: transportation of a first checked bag on a domestic airline passenger flight. *See id.* ¶ 73; *Domestic Air*, 137 F.R.D. at 687 ("All airline service is homogenous in that it performs substantially the same function, in substantially the same manner, and for the same purpose."). Thus, the

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[17] On a motion for class certification, Plaintiffs must show that antitrust impact *can* be proven with common evidence on a classwide basis; they need not show that antitrust impact *in fact* occurred on a classwide basis. *Nw. Airlines*, 208 F.R.D. at 223 (citing *In re Polypropylene*, 178 F.R.D. at 618).

[18] *Accord Davis v. Northside Realty Assocs., Inc.*, 95 F.R.D. 39, 46 (N.D. Ga. 1982) ("A certain category of price fixing cases is suited for class treatment by virtue of their relative factual simplicity – an unlawful overcharge with respect to a homogenous or fungible product and which was marketed in a similar manner throughout the geographic area is one such type.") (citing *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 324 (5th Cir. 1978)).

alleged conspiracy to charge first bag fees readily lends itself to common proof of impact. *Polypropylene*, 178 F.R.D. at 620.

c. Plaintiffs Can Prove Damages to Each Class Member and to the Class as a Whole with Common Evidence.

Courts have repeatedly held that antitrust overcharges to a class of airline passengers are sufficiently capable of calculation using common proof to warrant class certification. *Domestic Air*, 137 F.R.D. at 692 (finding that plaintiff had properly identified formulaic approaches for calculating damages caused by alleged conspiracy by airlines not to engage in price competition on routes to or from a defendant's hub airport); *Nw. Airlines*, 208 F.R.D. at 224 (same).

These decisions certifying classes in airline antitrust cases comport with Eleventh Circuit case law. On a motion for class certification, the court inquires only whether plaintiffs' proposed methods for calculating damages "are so insubstantial as to amount to no method at all." *Klay*, 382 F.3d at 1259 (internal quotations and citations omitted). Particularly where damages can be computed according to some common formula or statistical analysis, the fact that damages must be calculated on an individual basis is not an impediment to class certification. *Id.* at 1259-60. "'[N]umerous courts have recognized that the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate.'" *Id.* at 1259 (quoting *Allapattah*, 333 F.3d at 1261).

In this case, Plaintiffs will rely on a mechanical formula for determining damages to class members: the amount of the first bag fee multiplied by the number of times the fee was paid. *See* Singer Report ¶¶ 88 - 89 (Ex. 1).

2. Plaintiffs Satisfy the Superiority Requirement of Rule 23(b)(3).

Rule 23(b)(3) lists four non-exhaustive factors that the Court may consider when deciding whether a class action meets the superiority requirement, including: (1) the class members' interest in individually controlling the prosecution of separate actions; (2) the extent and nature of any litigation concerning the controversy which is already commenced; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action. *Williams*, 568 F.3d at 1358 (discussing Fed. R. Civ. P. 23(b)(3)). Plaintiffs meet each of these factors.

The first factor is satisfied because there is no reason to believe that any of the members of the proposed class has an interest in individually controlling the prosecution of separate actions. *Klay*, 382 F.3d at 1269. Considering the amount of each class member's claim in relation to the cost of litigating this case, the cost of pursuing independent actions "is likely prohibitive for most individual plaintiffs." *Columbus Drywall*, 2009 WL 856306, at *10; *see also Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative

to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.”).

Second, Plaintiffs are unaware of any class members pursuing other cases involving the same claims and parties, satisfying the second factor. *Klay*, 382 F.3d at 1269.

Third, the Judicial Panel on Multidistrict Litigation has already decided that it is desirable to concentrate the litigation of Plaintiffs' claims in one forum. *See In re Airline Baggage Fee Antitrust Litig.*, 655 F. Supp. 2d 1362 (J.P.M.L. 2009); *see also Polypropylene*, 178 F.R.D. at 625 (weighing MDL consolidation in favor of a finding of superiority). Litigating the claims of the proposed class in a single forum has at least three advantages: (a) economies of time, effort, and expense; (b) aggregation of claims makes it economical to bring suit; and (c) preliminary matters have already been handled in this forum. *Klay*, 382 F.3d at 1270-71.

Fourth, the Court must assess whether a class action will create relatively more management problems than other available alternatives, including separate lawsuits by the individual class members. *Columbus Drywall*, 2009 WL 856306, at *10 (citing *Klay*, 382 F.3d at 1273). Concern about manageability “will rarely, if ever, be in itself sufficient to prevent certification of a class.” *Klay*, 382 at 1272. “The Court cannot deny certification . . . merely because the number of plaintiffs makes the proceeding complex or difficult.” *Domestic Air*, 137 F.R.D. at 693

(citing 3 H. Newberg, *Newberg on Class Actions* § 18.37 (2d ed. 1985)). Even if Plaintiffs could afford to bring independent actions, those actions would require the same evidence to be presented on numerous occasions, imposing an enormous burden on the courts and the parties. *Columbus Drywall*, 2009 WL 856306, at *10.

Defendants in *Domestic Air* argued that the putative class of tens of millions of airline passengers was unmanageable. *Domestic Air*, 137 F.R.D. at 694 & n.20. This Court rejected the argument, finding that manageability would be enhanced by the availability of accounting firms specializing in class litigation, the capabilities of computers and scanners to manage vast quantities of data, and other resources that have only recently become available "to resolve the dilemma of the massive antitrust case." *Id.* at 694 (finding that complexities of airline industry did not exempt defendants from class action antitrust enforcement).

Here, as in *Domestic Air*, a class action is the *only* fair method of adjudication for plaintiffs, as individual litigation would be prohibitively costly. *Domestic Air*, 137 F.R.D. at 693, 694 ("Either the case proceeds as a class action or it is over.").

Thus, the requirements of Rule 23(b)(3) are satisfied, and the proposed class should be certified.

D. Plaintiffs Satisfy Rule 23(b)(2).

Under Rule 23(b)(2) a court may certify a class where, "the party opposing

the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Plaintiffs are also entitled to class certification under this rule, as they seek to enjoin Defendants' continued imposition of the unlawful first bag fee. Plaintiffs submit that neither Defendant would have charged a first bag fee but for their conspiracy. Thus Defendants' first bag fees have affected the class generally, making injunctive relief appropriate for the class as a whole.

E. Interim Class Counsel Should be Appointed Class Counsel.

Rule 23(g) provides that "a court that certifies a class must appoint class counsel." Fed. R. Civ. P. 23(g)(1). The Court previously appointed the present interim Co-Lead Counsel and Liaison Counsel after considering the factors specified in Rule 23(g). Order, Dkt. #48. For the same reasons, interim class counsel request that the Court appoint the same law firms as Lead Class Counsel and Liaison Counsel pursuant to Fed. R. Civ. P. 23(g).

Since their initial appointment by the Court, interim Co-Lead and Liaison Counsel have expended substantial time and resources vigorously litigating this case on behalf of Plaintiffs and the proposed class, including: (a) issuing discovery requests to (and negotiating responses with) Defendants, (b) organizing and reviewing substantial discovery produced by Defendants, (c) preparing for and

taking depositions of Defendants, (d) responding to Delta's discovery requests to Plaintiffs, (e) moving to compel AirTran to produce documents and complete its document production by a specified date, (f) researching and writing Plaintiffs' Opposition to Defendants' Motions to Dismiss, (g) researching and writing Plaintiffs' Memorandum in Support of their Motion for Class Certification, (h) corresponding with Defendants, (i) working with an expert witness, and (j) addressing a host of other procedural, organizational, and substantive issues.

V. CONCLUSION

For the foregoing reasons, Plaintiffs satisfy the requirements of Fed. R. Civ. P. 23(a) and 23(b). Accordingly, Plaintiffs' Motion for Class Certification should be granted, and, pursuant to Rule 23(g), interim Class Counsel should be appointed as Class Counsel on behalf of the certified class.

/s David H. Flint   Dated: June 30, 2010

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CERTIFICATION UNDER L.R. 7.1D

Pursuant to Northern District of Georgia Local Rule 7.1D, the undersigned hereby certifies that the above and foregoing is a computer document prepared in times new roman (14 point) font in accordance with Local Rule 5.1B.

So certified, this 30th day of June, 2010.

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this day the above and MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL was served upon Defendants via e-mail.

This 30th day of June, 2010.

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