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

IN RE: DELTA/AIRTRAN BAGGAGE FEE ANTITRUST LITIGATION	Civil Action No. 1:09-md-2089-TCB ALL CASES **Oral Argument Requested**

DEFENDANTS' JOINT SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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A. Plaintiffs' Outdated Cases on Predominance Are Not Good Law

In their class certification briefs, Plaintiffs rely heavily on three district court decisions involving airlines, from a decade ago or more, to argue that courts have rejected attempts to defeat class certification based on predominance arguments similar to those made by Defendants in this case: *In re Northwest Airlines Corp.*, 208 F.R.D. 174 (E.D. Mich. 2002); *Midwestern Machinery v. Northwest Airlines, Inc.*, 211 F.R.D. 562 (D. Minn. 2001); and *In re Domestic Air Antitrust Litig.*, 137 F.R.D. 677 (N.D. Ga. 1991). *See* Dkt. 124, Plfs' Br. at 20-23, 25, 26, 28-35; Dkt. 269, Plfs' Reply at 1, 2 n.1, 3, 17, 26, 27, 30-34. However, as Defendants explained in their supplemental briefs, those cases have not been good law since at least the Supreme Court's decisions in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).[1] *See* Dkt. 401, Delta Supp. at 23-25; Dkt. 403, AirTran Supp. at 1-4, 17. None of the courts in those cases performed the rigorous analysis of the evidence of individual issues that the law now unquestionably requires the Court to perform.

[1] *See also Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013) and *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (rejecting the notion, embraced by the court in *Domestic Air*, 137 F.R.D. at 693, that class certification is appropriate because the amounts at stake are too small to litigate individually).

In *Northwest Airlines Corp.*, plaintiffs alleged that the airline defendants' prohibition on "hidden city" ticketing caused them injury in the form of across-the-board fare increases on all routes to and from the airlines' hubs. The court granted class certification relying on plaintiffs' expert, but declined to "delve into the merits of an expert's opinion" or resolve a "battle of the experts." *Id.* at 218-19, 223. The court stated that, at the class certification stage, "it is enough that Plaintiffs and their experts have put forth a 'colorable method' of establishing their antitrust claims through generalized, class-wide proof." 208 F.R.D. at 219; *id.* at 223 (same). The court also found it unnecessary to look beyond plaintiffs' proof in making its predominance finding, ignoring defendants' individualized defenses because "this inquiry goes to the merits of each class member's claim." *Id.* at 225. And it deferred consideration of defendants' reimbursement defense until some later time, even though the court could find "*no principled basis* for denying Defendants the opportunity to at least explore out-of-pocket losses as a result of a Defendant's overcharge." *Id.* (emphasis added); *see also id.* ("At this juncture . . . the Court need not reach the issue [of reimbursement], and need not yet determine how to effectively and efficiently safeguard Defendants' entitlement to insist that each class member establish a right to recovery.").

Midwestern Machinery involved a challenge to the merger between Northwest Airlines and Republic Airlines in 1986 which, plaintiffs alleged, resulted in increased fares on all flights to and from Minneapolis. In granting certification of a class of ticket purchasers on those routes, the court determined that "Plaintiffs' proposed method of proof" to establish class-wide injury was "plausible." 211 F.R.D. at 571-72. As in *Northwest*, the court did not consider any of defendant's individualized defenses in determining predominance. Although it recognized that in "determining actual injury to each class member, it is inevitable that individualized proof will be presented," the court kicked the proverbial can down the road, explaining it would address these "complexities . . . when appropriate whether through the use of a special master, subclasses, or other available means." *Id*. at 572.

Domestic Air is another case in which plaintiffs alleged a conspiracy among airlines that increased fares on flights to and from their hubs. 137 F.R.D. at 683. As in *Northwest* and *Midwest Machinery*, the court focused solely on the susceptibility of plaintiffs' affirmative case to common proof. *Id*. at 684, 692. As in the other cases, the court deferred consideration of any of defendants' individualized defenses bearing on predominance, including reimbursement, as

"not properly raised at this time" because "defendants' argument goes directly to the merits of each plaintiff's claim." *Id.* at 696.

None of these cases would withstand scrutiny under current law.[2]

1. Under Current Law, The Court Must Consider at Class Certification Defendants' Individualized Defenses of Lack of Injury and Reimbursement

Defendants have offered substantial proof that determining injury-in-fact ("impact") will require extensive individualized evidence—under longstanding substantive law, "an issue 'of utmost importance' in the predominance inquiry." *In re Photochromic Lens Antitrust Litig.*, 2014 WL 1338605, at *19 (M.D. Fla. Apr. 3, 2014) (quoting *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 320 (5th Cir. 1978)).[3] Because the adoption of the first bag fee caused base fares to decline by different amounts for different passengers over hundreds of routes depending on a

[2] Plaintiffs also rely on *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 2009 WL 856306 (N.D. Ga. Feb. 9, 2009), where the district court certified the class based on its finding plaintiffs' expert's method of proving impact by common proof was "plausible." *Id.* at *9 n.8. As discussed below this is no longer the standard. *See infra* at 7-8. Moreover, the court in *Columbus Drywall* found "plaintiffs can easily prove class-wide impact in spite of the fact that prices are subject to individualized negotiations" because "the starting price for the negotiations was artificially increased." *Id.* at *9. But this case does not involve an alleged increase in the "starting price" for air travel; it involves unbundling the existing price. As the Court has already acknowledged, first bag fees are merely "part of the total price paid for air travel," Dkt. 137 at 41, and as Defendants have shown, the total price paid for air travel for many class members *decreased* as a result of the first bag fee.

variety of factors, proof of injury to any particular passenger depends on facts unique to that passenger. *See* Dkt. 221, Delta Opp'n at 8-18; Dkt. 222, AirTran Opp'n at 4-15, 25-32.[4] Further, it is beyond dispute that many purported class members were reimbursed for bag fees (as was true of some current and former named Plaintiffs) and therefore suffered no injury. *See* Dkt. 221 at 23-25; Dkt. 401 at 18-19.[5]

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[3] Contrary to Plaintiffs' arguments that they need only show "widespread" harm to satisfy Rule 23(b)(3), Dkt. 357 at 7-8, the Eleventh Circuit "require[s] [Plaintiffs] to present common evidence capable of demonstrating that *each member* of the class suffered antitrust impact." *Photochromic Lens*, 2014 WL 1338605, at *22 (emphasis in original) (analyzing *Shumate & Co. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 509 F.2d 147 (5th Cir. 1975), *Alabama v. Blue Bird Body Co.*, 573 F.2d 309 (5th Cir. 1978), and *Sikes v. Teleline, Inc.*, 281 F.3d 1350 (11th Cir. 2002)). *See also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) ("The plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy.").

[4] For these same reasons, some class members received net benefits from introduction of the bag fee, creating conflicts among class members and undermining Plaintiffs' obligations to show typicality and adequacy of representation. *Photochromic Lens*, 2014 WL 1338605, at *10 ("[A] class cannot be certified when some members of the class benefitted from the alleged wrongful conduct, such that the proposed class consists of winners and losers.") (citing *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000) ("Thus, a class cannot be certified when . . . it consists of members who benefit from the same acts alleged to be harmful to other members of the class.")); *see also* Dkt. 221 at 25-27; Dkt. 222 at 17-21.

[5] Delta's fully briefed and pending motion for summary judgment on the claims asserted by Plaintiff Henryk Jachimowicz, addresses an example of a putative class member who was fully reimbursed and therefore not injured. *See* Dkt. 219, 230. Another named Plaintiff dropped out of the case for the same reason—because he "had no skin in the game." *See* Dkt. 401 at 18.

In all three of the airline cases discussed above, these facts would have been no obstacle to class certification, since each court viewed individualized inquiries regarding injury as more properly an administrative matter or because the determination of individual injury improperly intruded into the merits. However, the Supreme Court's recent decisions in *Wal-Mart Stores, Inc. v. Dukes* and *Comcast Corp. v. Behrend* prohibit district courts from deferring individualized issues relevant to class certification "simply because those arguments would also be pertinent to the merits determination." *Comcast*, 133 S. Ct. at 1433; *Dukes*, 131 S. Ct. at 2551 ("Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped."); *see also Amgen*, 133 S. Ct. at 1195; *Rail Freight*, 725 F.3d at 253 ("It is now indisputably the role of the district court to scrutinize the evidence before granting class certification, even when doing so requires an inquiry into the merits of the claim.").

It is now equally clear that Defendants' reimbursement defense cannot be swept aside as it was in *Northwest* and *Domestic Air*. "Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right' . . . a class cannot be certified on the premise that [Defendant] Wal-Mart will not be entitled to litigate its statutory *defenses to individual claims*." 131 S. Ct. at

2561 (emphasis added); *see also id.* at 2560 ("Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay.").

Thus, contrary to the outdated law on which Plaintiffs rely, the Court cannot defer to a later stage the issue of reimbursement or whether Plaintiffs can prove injury to each class member with common evidence in the face of undisputed evidence that many class members have not suffered any actual injury.

2. The Court Must Resolve Conflicts in Expert Testimony and Rule on Expert Admissibility Questions

Defendants' experts submitted compelling evidence, consistent with basic economic principles, that unbundling first bag fees led to reductions in base fares that varied by route and passenger. This means that determining whether any passenger was injured, benefitted, or unaffected by the fee depends on highly individualized proof. *See* Dkt. 221 at 8-18; Dkt. 222 at 8-14, 25-35. Plaintiffs' expert denies that basic economic forces operated here to reduce base fares. Even if they did, he contends that any offsetting benefits to class members are irrelevant to whether they suffered injury or can be handled by averaging the injury to class members. Dkt. 403 at 21-24; Dkt. 399-1, AirTran *Daubert* Br. at 18-23.[6]

[6] The Supreme Court granted *certiorari* to review a decision using averages to presume class-wide injury without considering differences between class members. *See* Brief of Petitioner Tyson Foods, Inc., *Tyson Foods, Inc. v. Peg Bouaphakeo*, No. 14-1146 (Aug. 7, 2015).

Under *Northwest* and *Midwest Machinery,* Plaintiffs' expert's opinions might have passed muster as "colorable" or "plausible"—without considering Defendants' right to present individualized evidence. Now, after *Dukes* and *Comcast*, it is clear that more is required. To fulfill its obligation to perform a "rigorous analysis" a court must both rule on challenges to admissibility and resolve conflicting expert opinion. *Id.* at 2554 ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class action proceedings. We doubt that is so . . . ."); *Comcast*, 133 S. Ct. at 1433-34 (holding plaintiffs could not satisfy Rule 23(b)(3)'s predominance requirement due to flaws in plaintiffs' expert's analysis). The Eleventh Circuit agrees, holding that a "district court erred as a matter of law by not sufficiently evaluating and weighing conflicting expert testimony presented by the parties at the class certification stage." *Sher v. Raytheon Co.*, 419 F. App'x 887, 888 (11th Cir. 2011).[7] Here, AirTran has already filed a motion to exclude the class certification opinions and testimony of Plaintiffs' expert, which Delta will join (and supplement). *See* Dkt. 551, Order at 2. That motion must be resolved before certifying the class.[8]

[7] *See also In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015).

[8] Numerous courts have recently excluded or rejected Dr. Singer's expert opinions, including at class certification, as unreliable and inconsistent with the evidence. *See, e.g.*, *Kamakahi v. Am. Soc'y for Reprod. Med.*, 305 F.R.D. 164, 182 (N.D. Cal. 2015) (excluding Dr. Singer's opinions on class certification, finding "his

3. The Court Cannot Defer Individualized Damages Issues

Contrary to the decisions in *Northwest*, 208 F.R.D. at 224, and *Domestic Air*, 137 F.R.D. at 693, *Comcast* makes clear that Defendants' challenges to Plaintiffs' proposed method of calculating damages cannot be deferred for the future, and that individualized damages questions can defeat predominance and bar class certification. 133 S. Ct. at 1433-35 (concluding plaintiffs' expert's model for damages "falls far short of establishing that damages are capable of measurement on a classwide basis," and finding that "[q]uestions of individualized damage calculations will inevitably overwhelm questions common to the class."). Relying on *Comcast*, the Eleventh Circuit recently reversed class certification where the district court improperly deferred resolution of individualized damages issues to the merits stage. *Bussey v. Macon Cty. Greyhound Park, Inc.*, 562 F. App'x 782, 790 (11th Cir. 2014) (explaining that "[i]n *Comcast*, the Supreme Court reiterated

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analysis does not reliably support his conclusion that impact or damages are subject to classwide proof"); *Jarrett v. Insight Commc'ns Co., L.P.*, 2014 WL 3735193, at *7 (W.D. Ky. July 29, 2014) (finding Dr. Singer's opinion "is not supported by the record," and granting summary judgment to defendant); *Photochromic Lens*, 2014 WL 1338605, at *23-25 (finding Singer's methodology deficient and denying class certification); *In re Fla. Cement & Concrete Antitrust Litig.*, 278 F.R.D. 674, 683-87 (S.D. Fla. 2012) (rejecting Dr. Singer's methodology and denying class certification); *In re Cox Enter., Inc. Set-Top Cable Television Box Antitrust Litig.*, 2011 WL 6826813, at *16 (W.D. Okla. Dec. 28, 2011) (denying class certification, noting Dr. Singer's methodology for calculating damages "rests on unstable ground").

that class certification is an *evidentiary* question," and that the district court's "failure" to resolve "important [damages] questions bearing on the class certification . . . cannot be overlooked") (emphasis in original).[9]

Here, Plaintiffs have offered *no method at all* for allocating their expert's estimate of "aggregate" class-wide damages to each class member, and instead would award each class member an award based on "average" damages.[10] This failure defeats class certification. *In re Fla. Cement*, 278 F.R.D. at 687 (denying class certification because Dr. Singer "does not even opine that a method exists to properly apportion those damages to the class members"); *see also id. at* 686-87 (rejecting Dr. Singer's method of multiplying an "average overcharge . . . against all of the sales from Defendants to direct purchasers during the class period to provide an aggregate 'pot' of damages" because "it would assign damages to

[9] *See also Auto. Leasing Corp. v. Mahindra & Mahindra, Ltd.*, 2014 WL 988871, at *6 (N.D. Ga. Mar. 14, 2014) ("The need for individualized assessments of damages counsels against class certification under Rule 23(b)(3).") (citing *Comcast*, 133 S. Ct. at 1426, 1433).

[10] Dr. Singer claims that "aggregate damages to the class [can] be computed using standard economic methods common to the class as a whole," and estimates aggregate damages by "comput[ing] . . . the total bag fees paid by Class members to Defendants, minus the hypothetical *aggregate discounts* to base fares paid by Class members." *See* Dkt. 269-1, Singer Reply Report ¶¶ 93-94 (emphasis added). In order to calculate "aggregate discounts," however, Singer improperly relies on *averages*—multiplying the "*average discount* per flight by the number of flights taken by Class members." *Id.* ¶ 93 (emphasis added).

indirect purchasers who suffered no harm at all"); Dkt. 221 at 35-37; Dkt. 222 at 25-35; Dkt. 403 at 22-24; Dkt. 399-1 at 18-23.

B. Recent Eleventh Circuit Case Law Underscores Plaintiffs' Failure to Establish The Ascertainability of Putative Class Members

In seeking class certification, Plaintiffs bear the burden of proving members of the proposed class can be ascertained. *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012) ("[A] plaintiff seeking to represent a proposed class must establish that the proposed class is 'adequately defined and clearly ascertainable.'"); *Karhu v. Vital Pharms.*, --- F. App'x ---, 2015 WL 3560722, at *2 (11th Cir. June 9, 2015) ("the plaintiff seeking certification bears the burden of establishing the requirements of Rule 23, including ascertainability."); *Bussey*, 562 F. App'x at 787.

To satisfy the ascertainability requirement, "the plaintiff must propose an administratively feasible method by which class members can be identified." *Karhu*, 2015 WL 3560722, at *2. A method of class identification is "administratively feasible" only when it requires little, if any, individual inquiry. *Id.* at *1 ("Identifying class members is administratively feasible when it is a manageable process that does not require much, if any, individual inquiry.").

As previously discussed, Plaintiffs have not offered *any* method, let alone an administratively feasible method, for identifying class members. *See* Dkt. 221 at

27-33; Dkt. 401 at 2-6. Plaintiffs completely ignored their burden of establishing ascertainability in their initial class certification brief, and side-stepped the issue in their later briefs by focusing only on the adequacy of their class definition. Dkt. 269, Plfs' Reply at 42-43. But the ascertainability problem in this case is ***not*** that the proposed class definition is indefinite or imprecise—it is that Plaintiffs have not offered a way to identify the members of the class as defined. Although Plaintiffs alleged in their complaint that "the Class is readily identifiable from information and records in possession of the Defendants," *see* Dkt. 53, Consol. Am. Compl. ¶ 74, the Eleventh Circuit recently confirmed this is insufficient:

> A plaintiff cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible.

Karhu v. Vital Pharms., 2015 WL 3560722, at *3; *see also id.* at *5 ("Karhu's bare proposal that the district court ascertain class members through VPX's 'sales data' was insufficient to satisfy the ascertainability requirement.")

Moreover, Plaintiffs' conclusory allegation is factually incorrect. The proposed class is defined as persons or entities "that ***directly paid*** Delta and/or AirTran one or more first bag fees…." Dkt. 122, Plfs' Mot. at 1 (emphasis added). The uncontroverted record evidence is that Delta's records did not identify the

person or entity that ***paid*** for a bag fee. Dkt. 224-31, Liptak Decl. ¶¶ 10-19; *see also* Dkt. 221 at 30-32; Dkt. 401 at 2-3. Evidence gathered from the named Plaintiffs confirms that the person or entity who "directly paid" a first bag fee—the proposed class member—is frequently not the same as the passenger (the person who appears in Delta's records). In the limited sample provided by the named Plaintiffs, first bag fees were often not paid by the passenger reflected in Delta's records, but were paid by employers, spouses, ex-spouses, and family members. *See* Dkt. 221 at 30-32 (discussing Exs. 7, 8, 11, 22, 31-39). Identifying who actually paid the fee just for the named Plaintiffs required extensive written discovery and depositions. This is just the tip of the iceberg of what would be required for the purported class, but an apt illustration of why Plaintiffs' proposed method is not "administratively feasible" on a class basis. *See* Dkt. 221 at 30-32.[11]

C. A Class Cannot Be Certified to Continue After AirTran Was Acquired by Southwest Airlines

In addition, the proposed class cannot be certified because AirTran was acquired by Southwest Airlines Co. ("Southwest"), stopped charging bag fees, and is no longer in business. Plaintiffs seek to certify a class of persons who paid first

[11] Like other courts, *Karhu* rejected the notion that Plaintiffs can "satisfy the ascertainability requirement by proposing that class members self-identify (such as through affidavits) without first establishing that self-identification is administratively feasible and not otherwise problematic." *Karhu*, 2015 WL 3560722, at *3; *see also* Dkt. 401 at 5-6.

bag fees "from December 5, 2008 through the present." Dkt. 125 at 1. As previously shown, after adopting the same $15 fee previously adopted by other major airlines, the Defendants soon began charging different fees, confirming their independent decision-making:

Changes in First Bag Fees		
	Delta	**AirTran**
Dec. 5, 2008	$15	$15
Aug. 4, 2009	$20 ($15 online)	$15
Jan. 12, 2010	$25 ($23 online)	$15
Sept. 1, 2010	$25 ($23 online)	$20

Sources: Dkt. 350-11, Dick Rpt. ¶ 129, 350-15, Dick Rpt. Ex. 6; Dkt. 350-19, Kasper Rpt. Ex. 2.

In May 2011, AirTran was acquired by Southwest. Shortly thereafter, Southwest began to phase out AirTran's first bag fee, and eliminated it entirely on November 1, 2014. AirTran's last flight was on December 28, 2014. *See* Tenley Decl. ¶¶ 5-14, attached hereto as Exhibit 1.

Defendants' non-parallel adjustments of first bag fees—followed by Southwest's elimination of the fee—undermine any inference of a conspiracy, much less a "continuing" conspiracy from 2008 to present.[12] Plaintiffs cannot

[12] *See United States v. United States Gypsum Co.*, 438 U.S. 422, 464-65 (1978) ("Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment" of an antitrust conspiracy); *United States v. Nippon Paper Indus.*, 62 F. Supp. 2d 173, 190 (D. Mass. 1999) (alleged conspiracy ended when defendants charged individualized prices and prices fell).

seriously contend that the alleged conspiracy continued after AirTran stopped charging first bag fees, and then ceased to exist. It is equally implausible that the alleged conspiracy continued during the transition period, when some passengers on AirTran flights paid first bag fees and others did not. Ex. 1, Tenley Decl. ¶ 11. And the elimination of AirTran's first bag fee by Southwest—which carries more passengers in the United States than any other airline—reveals the implausibility of the allegation at the core of Plaintiffs' conspiracy theory: that Delta could never have adopted a first bag fee unless AirTran (now Southwest with its "bags fly fee" policy) also did so.

The divergence among Defendants' bag fees also means that both the theory of liability and evidence of conspiracy is not the same for every class member, but varies depending on when the putative class member paid the bag fee. This creates conflicts among class members, precluding a finding of adequacy under Rule 23(a)(4). *See* Dkt. 222 at 12 (discussing *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181 (11th Cir. 2003) and *In re Fla. Cement*, 278 F.R.D. 674 (S.D. Fla. 2012)).

Dated: September 11, 2015

Respectfully submitted,[13]

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[13] Pursuant to L.R. 7.1D, counsel for Defendants certify that this brief was prepared with a font and point selection approved in L.R. 5.1B.

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this day the foregoing DEFENDANTS' JOINT SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION was filed with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to counsel of record in this matter.

This 11th day of September, 2015.

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