

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

<p><i>IN RE</i> NYC BUS TOUR ANTITRUST LITIGATION</p>	<p>Master Case File No. 13-CV-0711 (ALC)(GWG) <b>RELATED TO ALL CASES</b></p> <p><b>ECF Case</b></p> <p><b>JURY TRIAL DEMANDED</b></p>
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**PLAINTIFFS' REPLY MEMORANDUM OF LAW  
IN FURTHER SUPPORT OF CLASS CERTIFICATION**

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This is a case that the class-action mechanism was designed for. The class definition is clear, with membership defined by objective criteria; plaintiffs are consumers whose small individual claims for damages would be outstripped by the costs of litigation; the case involves common issues of law and fact, centering on a single ■ price increase in 2009; it presents no conflict with the parallel government action, and indeed, the treble damages sought in this case are unavailable in that one; the class representatives have no conflicts and have actively participated in the case; and plaintiffs have conducted an extensive analysis of damages and submitted an expert report showing that common issues will predominate over individual ones.

Reaching deep in the barrel, defendants raise arguments that have rarely been accepted by courts, and then only on extreme facts absent here. For example, defendants raise a challenge to class notice, but approval of a notice plan has never been a requirement for certification, and plaintiffs have in fact put forth an illustrative plan similar to those accepted in other cases. Defendants argue that the class is not ascertainable, but rely on outlier cases that involved dime-store purchases of vitamins or juice, where there were no credit card records, and where the plaintiffs could not remember their purchases. This case involves bus tours that can cost \$50 or more and where ■■■■■■■■■■ customers used credit cards. Finally, defendants challenge plaintiffs' proposed damages methodology, but there is no question that common issues predominate over individual ones—the only inquiry at this stage.

In short, defendants' arguments provide no basis to defeat certification, especially given the “substantial discretion” districts courts are afforded in making this determination. *Dodona I, LLC v. Goldman, Sachs & Co.*, No. 10 Civ. 7497 (VM), 2014 WL 300723, at \*3 (S.D.N.Y. Jan. 23, 2014) (explaining Second Circuit's “liberal interpretation of Rule 23” and citing Second Circuit precedent stating that “if there is to be an error made, let it be in favor” of certification).

**I. THE CLASS MEETS THE REQUIREMENTS OF RULE 23(A).**

**A. The Class Is Ascertainable.**

Defendants do not contest that “the class description is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member,” and the class definition here relies on no subjective criteria. Charles Alan Wright et al., *Federal Practice and Procedure* (“Wright & Miller”) § 1760 (3d ed. 2014). That is the end of the argument. *See, e.g., Jermyn v. Best Buy Stores, L.P.*, 256 F.R.D. 418 (S.D.N.Y. 2009) (rejecting ascertainability challenge where class definition was sufficiently definite).

Defendants argue that the Court can only determine whether someone is a class member if that person retained a receipt or proof of purchase, but courts regularly certify classes over similar objections.<sup>1</sup> Neither the Supreme Court nor the Second Circuit has held that certification requires that substantially all class members retained a receipt or proof of purchase, and such a rule would make consumer class actions involving cash purchases uncertifiable.<sup>2</sup> *See Jermyn*, 256 F.R.D. at 433 (“[E]ach class member will be responsible for documenting his or her injury, but that is true in many class actions.”); *Ries v. AriZona Beverages USA LLC*, 287 F.R.D. 523, 535 (N.D. Cal. 2012) (rejecting proof-of-purchase concerns at certification phase, noting that if accepted, “there would be no such thing as a consumer class action”).

Where courts have occasionally ruled that cash-purchaser class actions should not be certified due to these concerns, they have done so on facts very different from those at issue

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<sup>1</sup> *In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, 2013 WL 5429718, at \*8–9 (N.D. Cal. June 20, 2013); *Agne v. Papa John’s Int’l, Inc.*, 286 F.R.D. 559, 566 & n.6 (W.D. Wash. 2012); *Zeisel v. Diamond Foods, Inc.*, No. C 10-01192 (JSW), 2011 WL 2221113, at \*6 (N.D. Cal. June 7, 2011).

<sup>2</sup> As a leading treatise notes: “[T]he class does not have to be so ascertainable that every potential member can be identified at the commencement of the action. . . . If the general outlines of the membership of the class are determinable at the outset of the litigation, a class will be deemed to exist.” Wright & Miller § 1760.

here.<sup>3</sup> In *Snapple* and *Bayer*, there were no sales records available to identify any class members, no basis to conclude that any class member retained a record of his or her purchase, and no reason to think that any class member could reliably remember any specific purchases of Snapple or a Bayer vitamin supplement (including the named class representatives, who could not do so at their depositions). *Snapple*, 2010 WL 3119452, at \*13 & n.21; *Bayer*, 727 F.3d at 309 & n.5. In contrast to these cases, defendants' own expert concedes that credit card records exist to confirm nearly █████ of class members' purchases (including those of the class representatives). Johnson Rpt. App. C. Additional records kept by defendants identify █████ of class members by name and address information.<sup>4</sup> Further, while defendants' cases involve forgettable purchases of Snapple or vitamins, this case involves memorable vacation purchases of tourism tickets that cost \$50 or more, where class members (such as the class representatives) will be able to furnish information and proof to establish the dates of their trips and purchases.<sup>5</sup>

### **B. The Class Representatives Are Adequate.**

Defendants' main argument on adequacy is that Mrs. Bhandari and Ms. Nobel have been insufficiently involved in this case. But "[t]he Supreme Court . . . [has] expressly disapproved of attacks on the adequacy of a class representative based on the representative's ignorance." *Baffa v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 222 F.3d 52, 61 (2d Cir. 2000).<sup>6</sup> Certification may only be denied where the representative has "so little knowledge of and involvement in the class

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<sup>3</sup> *Weiner v. Snapple Beverage Corp.*, No. 07-cv-8742 (DLC), 2010 WL 3119452 (S.D.N.Y. Aug. 5, 2010); *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013).

<sup>4</sup> Defendants' own failure to capture more complete contact information than this cannot be a ground for denying certification. *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 539-40 (6th Cir. 2012).

<sup>5</sup> For example, Natasha Bhandari's credit card statement shows a \$98 purchase from CitySights on May 28, 2012; she testified that she purchased two tickets for the "All Around Town" tour. Decl. of Arun Subramanian in Further Supp. of Class Certification ("Subramanian Decl.") Ex. 1 at 141-42. Tracey Nobel's credit card statement reflects a \$162 purchase from Gray Line on October 16, 2010; she testified in detail about her trip and purchase of three "All Loops" tour tickets. Subramanian Decl. Ex. 2 at 23, 26-29.

<sup>6</sup> Whether the representatives obtained information about this case from counsel or otherwise is irrelevant. *In re Live Concert Litig.*, 247 F.R.D. 98, 120-21 (C.D. Cal. 2007). It is also irrelevant whether a representative became involved in the case through attorneys. *In re Vitamin C Antitrust Litig.*, 279 F.R.D. 90, 108 (E.D.N.Y. 2012).

action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys.” *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1077–78 (2d Cir. 1995).

Mrs. Bhandari and Ms. Nobel showed in their declarations and at their depositions that they understand the case, the allegations against defendants, and their responsibilities as class representatives. Both spent time searching for documents and reviewing pleadings, and hours preparing for and attending depositions (Ms. Nobel travelled from Denver to New York to attend hers).<sup>7</sup> Both participated in a settlement conference before Judge Gorenstein. This case is miles away from defendants’ cases, such as *Moskowitz v. La Suisse, Societe D’Assurances sur la Vie*, 282 F.R.D. 54, 73-74 (S.D.N.Y. 2012), where the representatives learned that a lawsuit was filed in their name four years after the fact and had no idea who made decisions in the case.

## II. THE CLASS MEETS THE REQUIREMENTS OF RULE 23(B)(2).

Defendants contend that plaintiffs’ money damages claim is not “incidental” to their injunctive relief claim. However, plaintiffs have requested 23(b)(2) certification of only the injunctive relief class; plaintiffs separately request Rule 23(b)(3) certification of the monetary relief class. Even after *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), this remains standard practice. *Stinson v. City of N.Y.*, 282 F.R.D. 360, 380-82 (S.D.N.Y. 2012).<sup>8</sup>

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<sup>7</sup> Subramanian Decl. Ex. 1 at 24, 87-88, 150, 153, 167, 191, 193-95, 197, 211; Subramanian Decl. Ex. 2 at 20-21, 30, 38, 41, 55, 64-65, 73-75, 86, 94-95, 99, 100-02.

<sup>8</sup> The requested relief—an injunction restraining defendants from maintaining the conspiracy and a divestiture order—is indivisible under *Wal-Mart*. It would aid all class members. *Wal-Mart*, 131 S. Ct. at 2557 (“The key to the [Rule 23](b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.”) (internal quotation marks omitted). Accordingly, Defendants’ focus on whether or not Ms. Bhandari or Ms. Nobel individually has concrete plans to take a hop-on, hop-off tour in the future is misplaced. Further, because the Rule 23(b)(3) superiority requirement does not apply to equitable relief classes, it also makes no difference that the government is seeking similar relief. *In re Conseco Life Ins. Co.*, 270 F.R.D. 521, 533 (N.D. Cal. 2010).

### III. THE CLASS MEETS THE REQUIREMENTS OF RULE 23(B)(3).

#### A. A Class Action Is Superior to Other Methods of Adjudication

1. The case is manageable as a class action.

“[F]ailure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule.” *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001) (internal quotation marks omitted) (Sotomayor, J.).<sup>9</sup> This is not the “exception” where certification is unwarranted.

(a) Class notice will be manageable.

Notice plans are usually presented to the district court after certification or after a settlement. Almost all of defendants’ cases address the sufficiency of notice in that posture, and presenting an adequate notice plan has never been a prerequisite to class certification. Rather, at the certification stage, the question is whether likely manageability problems are so intractable as to overwhelm a class proceeding. *Abrams v. Interco Inc.*, 719 F.2d 23, 30-31 (2d Cir. 1983); *In re Vivendi Universal, S.A.*, 242 F.R.D. 76, 107-09 (S.D.N.Y. 2007).

In *Abrams*, which defendants rely on, the plaintiffs “made no effort to pursue discovery . . . on the feasibility of class certification” and gave “no thought to the question of notice” before moving for class certification. *Abrams*, 719 F.2d at 25, 30. *Abrams* was also an extreme case where a number of defects led the Court to deny certification. No published court decision has ever cited or otherwise relied on the notice-related portion of *Abrams*, and the Second Circuit has construed the case narrowly as one involving convoluted allegations and impossibly complex damages.<sup>10</sup>

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<sup>9</sup> Overruled on other grounds by *In re IPO*, 471 F.3d 24 (2d Cir. 2006), and superseded by statute on other grounds as stated in *Attenborough v. Const. and Gen. Bldg. Laborers’ Local 79*, 238 F.R.D. 82, 100 (S.D.N.Y. 2006).

<sup>10</sup> *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d at 141-42 (concluding that class action defendants’ “reliance on *Abrams* [wa]s misplaced”). The *Abrams* court discussed the dubious merit of plaintiffs’ expansive claims, their unexplained failure to conduct discovery on those claims before seeking class certification, and the

Here, plaintiffs submitted an illustrative notice plan from Alan Vasquez, who has over a decade of experience developing notice plans and administering claims processes, and oversees notice work for a nationally-recognized firm. Mr. Vasquez's plan includes (1) direct notice to all email and postal addresses in defendants' transaction databases (approximately ██████ total addresses), (2) summary notice through an insertion in *USA TODAY*, (3) a neutral press release distributed through Businesswire or PR Newswire, (4) comprehensive internet banner advertising to direct potential class members to the case website, (5) content advertising with the Google Display Network, (6) sponsored links on major search engines, (7) a dedicated Facebook page and text advertising on Facebook, and (8) a case-specific website with a toll-free telephone number where class members can call for more information. Vasquez Decl. ¶¶ 10–30, 42.<sup>11</sup> According to Mr. Vasquez, a plan like the one he has proposed can, with the proper budget, reach between 70 and 95 percent of the proposed class. Subramanian Decl. Ex. 3 at 199:8-17.<sup>12</sup>

Mr. Vasquez's illustrative plan is far more than is required at the certification stage. *In re Vivendi*, 242 F.R.D. at 107 (relying on similar illustrative plan and rejecting defendants' notice argument). It is very similar to many final notice plans approved by other district courts.<sup>13</sup> To

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“even more serious” manageability problem that plaintiffs failed to present any method of determining damages, where the calculation of such damages would be complicated by a number of factors. *Abrams*, 719 F.2d at 31.

<sup>11</sup> The notice vehicles were selected for good reason. Consumer data show that people who visit New York City and enjoy sightseeing (a group who would be representative of the class, Subramanian Decl. Ex. 3 at 141-42) are computer-savvy: 93% own a personal computer, 90% have used the Internet within the past seven days, and nearly 70% have visited one of Google, Facebook, or Yahoo in the last seven days. Vasquez Decl. ¶¶ 14, 16. *USA TODAY* was selected because it is delivered to many travelers free of charge, appropriate for a target audience of tourists. *Id.* ¶ 20. The press release can generate earned media, including international earned media. *Id.* ¶ 21.

<sup>12</sup> Defendants imply that using publication notice would somehow be improper. But Rule 23(c)(2)(B)'s flexible standard requires only that the court “direct to class members the best notice that is *practicable under the circumstances*,” (emphasis added) recognizing that individual notice need only be provided to “members who can be identified through reasonable efforts.” Publication notice can satisfy the due process rights of absent parties. *Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218, 224 (2d Cir. 2012); 7AA Wright & Miller s. 1786. As the *Manual for Complex Litigation* observes, publication notice is “especially useful” in consumer class actions, where “[s]ales records might be lost, incomplete, or unreliable, making identification and notification of individual class members difficult.” See Federal Judicial Center, *Manual for Complex Litigation* (4th ed. 2013).

<sup>13</sup> *Evans v. Linden Research, Inc.*, No. C-11-01078 (DMR), 2013 WL 5781284, at \*3, \*5 (N.D. Cal. Oct. 25, 2013); *In re Vitamin C Antitrust Litig.*, No. 06-md-1738 (BMC) (JO), 2012 WL 5289514, at \*8 (E.D.N.Y. Oct. 23, 2012); *In re Imprelis Herbicide Mktg., Sales Practices and Prods. Liab. Litig.*, No. 11-md-02284, 2013 WL 5655478, at \*7

the extent that defendants claim it will be impossibly difficult to provide notice to the between [REDACTED] and [REDACTED] of class members who are foreign according to defendants' rough estimates, Mr. Vasquez testified that he would use "the same exact tactics" for international publication notice as for domestic notice—banner advertising, sponsored links, and so on.<sup>14</sup> Courts have approved the use of these strategies to reach foreign class members. *In re Vivendi*, 242 F.R.D. at 108 (concluding that "issue of foreign notice [wa]s not sufficiently grave to defeat class certification" where 75% of the class was foreign).

(b) Claims administration will be manageable.

Although defendants claim that it will be impossible to administer a claims process, Mr. Vasquez has over a decade of experience administering class action claims processes, and has outlined how he would administer a claims process here. Vasquez Decl. ¶¶ 31–41. Defendants' transaction data may be used to validate claims where the data contains specific name and tour information, like it does for Mrs. Bhandari. *Id.* ¶ 34. For the [REDACTED] of purchases that were by credit card, credit card statements may be used to validate the claims. *Id.*<sup>15</sup>

Defendants exaggerate the difficulty to verifying from a credit card statement whether a particular customer purchased a qualifying hop-on, hop-off product. Mr. Vasquez's declaration explains how an interactive claims submission website can verify that the date and price of the documented purchase matches the Hop On Tour product or products the claimant allegedly purchased. Mr. Vasquez has used this methodology to validate cash purchases in other cases. Subramanian Decl. Ex. 3 at 221.<sup>16</sup>

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(E.D. Pa. Oct. 27, 2013); *Jermyn v. Best Buy Stores, L.P.*, No. 08-cv-00214 (CM), 2010 WL 5187746, at \*5-\*8 (S.D.N.Y. Dec. 6, 2010); *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007).

<sup>14</sup> Subramanian Decl. Ex. 3 at 147-50, 153–54.

<sup>15</sup> Defendants cite no evidence to support their assertion class members are unlikely to bother to request credit card records to verify their claims. There is nothing particularly burdensome about obtaining credit card records—the Court can take judicial notice of the common-sense fact that many such records are now easy to obtain online.

<sup>16</sup> Subramanian Decl. Ex. 3 at 99-102, 216-17, 258-60, 264-65.

This case is nothing like defendants' authorities. In their lead case, *Del Monte*, the court found that claims were likely to be of "questionable reliability" because claimants would be required to "estimate the number of Del Monte Gold pineapples they purchased during the 12-year Class Period"—a totally implausible basis to assess claims given that even the class representatives could not remember "the number (or brand) of past pineapple purchases they made with any degree of certainty." *In re Fresh Del Monte Pineapples Antitrust Litig.*, No. 04-md-1628 (RMB), 2008 WL 5661873, at \*8 (S.D.N.Y. Feb. 20, 2008) (emphasis added). These facts—involving class representatives who could not verify or even recall purchases—are strikingly similar to those of defendants' two lead ascertainability cases, *Snapple* and *Bayer*.

2. The parallel government action does not render class proceedings inferior.

Although defendants claim that the existence of a parallel government action seeking equitable monetary relief undermines superiority, private antitrust actions are routinely maintained alongside government antitrust actions. Defendants' cases involved rare circumstances in which the maintenance of a class action would "threaten or disturb the government's enforcement efforts" or it was "in the context of relief already obtained that the court denied certification." *In re Beacon Assocs. Litig.*, No. 09-cv-777 (LBS) (AJP), 09-cv-8362 (LBS), 2012 WL 1569827, at \*12-13 (S.D.N.Y. May 3, 2012) (discussing cases cited by defendants). Defendants' argument fails under *Beacon* because there is no conflict with the government and no prior settlement to undermine. Further, no future government settlement here could conflict with or moot the treble damages sought by the class based on non-identical claims. It is unclear whether the government is seeking relief in the form of disgorgement or restitution—if the former, victims would not necessarily be entitled to any share in the recovery. *Cf. SEC v. Moran*, No. 92-cv-5209 (TPG), 2012 WL 19386, at \*1 (S.D.N.Y. Jan. 3, 2012). Even

a full restitution recovery by the government would not bar the private plaintiffs from recovering treble damages under the Clayton Act, since the government action is not a *parens patriae* action seeking such relief. 15 U.S.C. § 15c.

3. The presence of some foreign class members does not render class proceedings inferior.

Defendants claim that the mere presence of some foreign class members weighs against a finding of superiority. This argument relies on securities fraud cases that have nothing in common with this case. *Anwar v. Fairfield Greenwich Ltd.*, 289 F.R.D. 105 (S.D.N.Y. 2013); *In re Vivendi*, 242 F.R.D. 76. Because those cases involved fraud claims against foreign defendants, there were threshold subject matter jurisdiction questions and significant risks that foreign courts might have jurisdiction over the same or related claims. That is not the case here.

Here, there is no risk that another court might be able to resolve any foreign class members' claims and no risk of wasted efforts or inconsistent results—the explicit Rule 23(b)(3)(c) factors at play in *Anwar* and *Vivendi*. Moreover, even if such a risk existed, defendants have made no effort whatsoever to show which class members' home countries would refuse to recognize a final judgment in this action. *In re IndyMac Mortgage-Backed Secs. Litig.*, 286 F.R.D. 226, 243 (S.D.N.Y. 2012); *Sgalambo v. McKenzie*, 268 F.R.D. 170, 176-77 (S.D.N.Y. 2010); *Marsden v. Select Med. Corp.*, 246 F.R.D. 480, 486 (E.D. Pa. 2007).

#### **B. Common Issues Predominate Over Individual Issues.**

Defendants argue that the issues of antitrust impact and damages involve individualized issues, and that, for this reason, Rule 26(b)(3)'s predominance requirement is not satisfied. Defendants' contention is meritless. Common issues clearly predominate over any individual issues: Defendants conspired to implement a uniform ■■■ price increase on hop-on, hop-off bus ticket packages; and plaintiffs' expert, Dr. Hal Singer, has presented a common methodology to

calculate damages suffered by the class that can be allocated formulaically to class members based on an estimated [REDACTED] for each tour. Singer Decl. ¶¶ 40-49. Courts have regularly approved methodologies similar to the one used in this case.<sup>17</sup>

Defendants argue that there are potential differences in the damages that each class member has suffered due to variations in bus tour products and the existence of discounts. However, courts have routinely rejected predominance arguments focused on “the fact that damages may have to be ascertained on an individual basis,”<sup>18</sup> and arguments based on the existence of discounts. *In re Industrial Diamonds Antitrust Litig.*, 167 F.R.D. 374, 377, 383 (S.D.N.Y. 1996) (noting that “the negotiated transaction prices would have been lower if the starting point for negotiations had been list prices set in a competitive market”).<sup>19</sup> Courts have rejected the opinion of defendants’ expert, Dr. Johnson, on this exact point. *In re Chocolate Confectionary Antitrust Litig.*, 289 F.R.D. 200, 221 (M.D. Pa. 2012). These arguments have even less force in this case given Dr. Singer’s analysis that [REDACTED], a conclusion that defendants fail to rebut. Singer Decl. ¶ 11; *id.* at Table 2.

This case also is worlds apart from the two cases denying certification on predominance grounds cited in defendants’ brief, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *In re*

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<sup>17</sup> *In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 116 (S.D.N.Y. 2010); *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 88 (D. Conn. 2009); *In re Chocolate Confectionary Antitrust Litig.*, 289 F.R.D. 200, 211-12, 224-25 & n.14 (M.D. Pa. 2012). Defendants argue that plaintiffs cannot rely on a methodology focusing on “average” prices, but aggregate damages methodologies have been routinely accepted by courts, including in the *Nexium* case, where the court accepted an average damages methodology, rejecting the opinion of Dr. Johnson, the defendants’ expert *in this case*. *In re Nexium Antitrust Litig.*, No. 12-md-02409 (WGY), 2013 WL 6486917, at \*8-9 (D. Mass. Dec. 11, 2013); *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 197 (1st Cir. 2009) (“The use of aggregate damages calculations is well established in federal court and implied by the very existence of the class action mechanism itself”).

<sup>18</sup> *Seijas v. Republic of Argentina*, 606 F.3d 53, 58 (2d Cir. 2010); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d at 139–140; *In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. at 115–16; *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 523–24 (S.D.N.Y. 1996).

<sup>19</sup> See also *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. at 518.

*Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013). In *Comcast*, the plaintiffs conceded that their damages methodology was based on theories of liability that had been rejected by the district court, and was divorced from the single theory that remained in the case. *Id.* at 1433 (“There is no question that the model failed to measure damages resulting from the particular antitrust injury on which petitioners’ liability in this action is premised.”). Here, there is no question that Dr. Singer’s model is directed to the impact of the [REDACTED] price increase that defendants imposed in early 2009 in connection with their joint venture.

In *Rail Freight*, shippers alleged that they were injured by a conspiracy by railroads to raise fuel surcharges, but plaintiffs’ damages methodology wrongly predicted damages for shippers who “were bound by rates negotiated before any conspiratorial behavior was alleged to have occurred.” 725 F.3d at 252. Seizing on *Rail Freight*, defendants and their expert try to manufacture similar “false positive” results in this case. But defendants were unable to find a single member of the proposed class, or even a single hop-on, hop-off bus purchaser, for whom plaintiffs’ methodology produced a false positive. Undeterred, defendants’ expert conjured false positives where they don’t exist, by applying Dr. Singer’s methodology—which was designed for the hop-on, hop-off bus market and joint venture that these defendants engaged in—to products and parties that are not even at issue, including travel packages offered by third parties On Board Tours and Circle Line, and Woodbury Commons mall bus rides offered by defendants.<sup>20</sup> There is no basis to apply a methodology designed for one market to another. According to defendants’ expert, to apply a damages methodology in any setting, one would have to “control for or find the factors” that would explain any observed price increases, which

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<sup>20</sup> The Woodbury Commons products are not hop-on, hop-off bus tours. Further, defendants previously competed on these routes, and implemented a uniform [REDACTED] on these products upon the joint venture. Subramanian Decl. Ex. 5; *id.* Ex. 6. While those products are not at issue in this particular case, it is unsurprising that plaintiffs’ damages model would also produce damages for those routes as well. That is surely not a reason to decline to certify the class in this case.

the expert made no attempt to do for the products he analyzed. Subramanian Decl. Ex. 4 at 146-47.

1. Defendants' "No Injury" Argument is Meritless

Defendants argue that plaintiffs included in their class definition "individuals who suffered no injury," pointing to purchasers of tickets from third-party resellers. Def. Br. at 13-14. These purchasers did suffer injury and are clearly part of the class. Defendants contend that these purchasers were "excluded" from Dr. Singer's damages analysis, but that is untrue. Dr. Singer simply did not have [REDACTED] data for certain purchases through third-party channels due to the limitations of defendants' own record-keeping. That does not mean that these purchasers did not suffer injury, and the record shows the opposite, given that [REDACTED]

[REDACTED].

Defendants counter that "some" third parties had discretion over ticket prices, Def. Br. at 14, without explaining which ones. Their sole support is boilerplate language in a single contract stating that [REDACTED] one third party reseller, [REDACTED] Johnson Rpt. ¶ 35, n.80. That language is absent from every other contract the defendants had. Moreover, that same contract stated that [REDACTED] [REDACTED] which the defendants' expert did not inquire into. See Subramanian Decl. Ex. 7 at TWIN0021803; *id.* Ex. 4 at 154-55. The record also shows that defendants' standard third-party contracts set forth [REDACTED],<sup>21</sup> and defendants' own financial reporting is predicated on the assumption that third parties sell Hop-On tours [REDACTED].<sup>22</sup> And to be clear, even if third parties [REDACTED] their prices, cases such as *Diamonds*

<sup>21</sup> Subramanian Decl. Ex. 9; *id.* Ex. 10.

<sup>22</sup> [REDACTED]

have rejected such an argument as a bar to certification, and defendants cannot honestly contend that the existence of some discounted prices means that common issues would not predominate over individual ones.<sup>23</sup>

2. Common issues predominate as to impact and damages.

Continuing on a common theme, defendants argue that Dr. Singer improperly assumed that customers [REDACTED] and did not rely on [REDACTED] [REDACTED] Def. Br. 22. This argument is irrelevant under cases such as *Diamonds*, and also wrong. Once again, Dr. Singer did use actual transaction data to the extent that it was available, using [REDACTED] only where defendants themselves used those prices in their financial reporting (as discussed above) or where more accurate data was unavailable. Subramanian Decl. Ex. 8 at 81-83. Further, defendants' failure to rebut the fact that [REDACTED] dooms their argument.<sup>24</sup>

Second, defendants claim that Dr. Singer's analysis "omits important factors that affect the prices paid by proposed class members" including "labor, insurance, healthcare, or garage costs." Def. Br. 23-24. Defendants may argue at trial that these factors, and not defendants' joint venture, caused the [REDACTED] price increase at issue. But plaintiffs are not required to disprove

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[REDACTED] Subramanian Decl. Ex. 11 at 81-83, 157-161.

<sup>23</sup> Defendants also claim that Dr. Singer "confirmed" at his deposition that customers who purchased tour packages that were created after the joint venture were not impacted by the alleged illegal conduct. Def. Br. 23. That is a grossly misleading characterization of his testimony; in fact, Dr. Singer stated that while these packages were not included in his demonstrative analysis, as noted in his report, "if a tour that came into existence post-JV contained a hop-on component that existed both pre and post, it would be reasonable to use the inflation in that component as a measure of determining impact." Subramanian Decl. Ex. 8 at 56.

<sup>24</sup> Defendants also argue that discounts were greater after the joint venture than before, focusing solely on a portion of web sales through Gray Line, one of the brands sold by the defendants. This argument is irrelevant to the fact of injury as even defendants do not claim that discounts would have negated the injury suffered by class plaintiffs. More importantly, however, defendants' expert committed a critical error by excluding from his analysis web discounts from before the JV. Due to an artifact of defendants' systems, [REDACTED]

[REDACTED] Subramanian Decl. Ex. 4 at 96.

defendants' unsupported conjectures at the class certification stage.<sup>25</sup> Moreover, Dr. Singer did control for the only variable—diesel fuel costs—that defendants relied on in the prior Surface Transportation Board case (an argument the STB rejected).<sup>26</sup> Defendants' expert here made no effort to determine what factors affected prices, Subramanian Decl. Ex. 4 at 133 (“I did not put forward any affirmative arguments about what are the factors that determine the prices of hop-on hop-off bus tours.”), and there is no explanation as to why these cost factors—which apply classwide—would give rise to individualized issues.

Third, defendants argue that in showing the impact on bundled tour products, Dr. Singer failed to account for the possibility that the price increase could be attributed to increases in the price of the bundled attraction ticket, and not an ██████████ associated with the joint venture. Once again, defendants' argument is wholly speculative. They fail to put forward any evidence that attraction price changes affected defendants' tour pricing, and their expert made clear that he made no inquiry into this issue. *Id.* at 120-21. And defendants' sole example of an attraction ticket price hike that could explain the █████ price increase for one bundle—an alleged increase of more than █████ to the price of Madame Tussauds wax museum tickets—was riddled with error. Instead of using data from Madame Tussauds' website, which showed that retail prices did not increase during the time of the joint venture,<sup>27</sup> defendants' expert relied on an internal spreadsheet provided by defendants, without inquiring as to what the numbers in that spreadsheet represented, or whether Madame Tussauds charged defendants those amounts. Johnson Rpt. ¶ 35 n.80; Subramanian Decl. Ex. 4 at 108-09, 126-28.

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<sup>25</sup> *In re Amaranth Natural Gas Commodities Litig.*, 269 F.R.D. 366, 383-85 (S.D.N.Y. 2010) (“[D]efendants objections go *solely* to whether plaintiffs' models will *in fact* demonstrate causation and artificiality, and hence, are unrelated to the requirements of class certification. Indeed, by arguing that plaintiffs' models . . . show that [the market was not manipulated] during the Class Period, defendants impliedly concede that causation can be evaluated on a class-wide basis.”).

<sup>26</sup> Subramanian Decl. Ex. 12 at 9; *id.* Ex. 13 at 10.

<sup>27</sup> Subramanian Decl. Ex. 4 at 104-05 (reviewing websites showing no increase between '08 and '09 and increase of only \$1 through 2011).

3. Common issues predominate over individual defenses.

Defendants argue that the possibility of affirmative defenses against certain members of the class is a reason to deny certification. The existence of such defenses, however, “does not compel a finding that individual issues predominate over common ones.” *Brown v. Kelly*, 609 F.3d 467, 483 (2d Cir. 2010) (internal quotation marks omitted). “As long as a sufficient constellation of common issues binds class members together, variations in the sources and application of a defense will not automatically foreclose class certification under Rule 23(b)(3).” *Id.* (internal quotation marks omitted). Here, the vast number of common issues overwhelms any potential individual defenses. And the specific defenses raised by defendants present no reason to deny certification. Courts in the Second Circuit have routinely rejected limitations defenses as defeating certification.<sup>28</sup> Defendants’ class action waiver defense—based on a waiver provision that defendants slipped into their web tickets in 2013 for the precise purpose of frustrating this lawsuit—presents no individualized issues given that it applies to a known subset of the class, and is based on a single, uniform provision in defendants’ tickets sold after a specific date.

**CONCLUSION**

For the reasons set forth herein, plaintiffs respectfully request that their motion for class certification be granted.

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<sup>28</sup> *Sykes v. Mel Harris & Assocs., LLC*, 285 F.R.D 279, 293-94 (S.D.N.Y. 2012); *Public Employees’ Retirement Sys. of Mississippi v. Goldman Sachs Grp., Inc.*, 280 F.R.D. 130, 139-41 (S.D.N.Y. 2012); *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D 267, 303 (S.D.N.Y. 2003).

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**CERTIFICATE OF SERVICE**

On February 21, 2014, I caused copies of Plaintiff's Reply Memorandum of Law in Further Support of Class Certification and all supporting documents and attachments thereto to be served on the following counsel via electronic mail:

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