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

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| IN RE: DELTA/AIRTRAN BAGGAGE FEE ANTITRUST LITIGATION | CIVIL ACTION FILE NUMBER 1:09-md-2089-TCB<br><br>ALL CASES<br><br>**FILED UNDER SEAL**<br>Unsealed 11/10/2014 |

**REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL**

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## I. INTRODUCTION AND SUMMARY

This case involves Defendants' *per se* unlawful conspiracy to charge a new fee – a first bag fee – for a service that both Defendants previously offered for free. The proposed class is comprised of those who paid this new fee. This case presents a simple and straightforward basis for class certification, particularly when compared to other antitrust cases in which courts have repeatedly certified classes of purchasers of airline services. *See In re Northwest 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 Antitrust Litig.*, 137 F.R.D. 677 (N.D. Ga. 1991).

Defendants do not contest that evidence of a first bag fee conspiracy is common to Plaintiffs' proposed class. Thus, no dispute exists that the primary focus at trial – whether the Defendants conspired – will involve evidence and arguments common to the proposed class. Nor do Defendants contest that the proposed class members all have been affected by the alleged conspiracy – *i.e.*, all proposed class members paid a first bag fee.

Rather, similar to other airline defendants that have unsuccessfully opposed class certification, Defendants advance a host of arguments that seek to complicate

and confuse an otherwise strikingly simple class certification determination.[1] Defendants' arguments have no basis in fact and would require this Court to prematurely resolve the merits of this case and the parties' competing expert opinions. *In re Netbank, Inc. Sec. Litig.*, 259 F.R.D. 656, 675 (N.D. Ga. 2009) ("[I]t is inappropriate [on class certification] to delve into the merits of the case, and entertain the parties' battle of the experts."). Each of Defendants' arguments lack merit and should be rejected.

First, Defendants argue that antitrust injury cannot be proven with common evidence because some class members (a) enjoyed benefits – *i.e.*, lower base fares, expanded routes, and a reduced second bag fee – from Defendants' imposition of a first bag fee or (b) were reimbursed. *See* Delta Opp'n Br. at 7-8; AirTran Opp'n Br. at 20-21. Defendants are wrong as a matter of law and fact. As a matter of law, Defendants' alleged "offsetting benefits" are not relevant to antitrust injury in

[1] This Court and other courts have previously rejected airline defendants' attempts to oppose class certification by advancing arguments designed to overcomplicate class issues. *See Northwest Airlines*, 208 F.R.D. at 219 ("[W]hile Defendants make much of the complexity of the economics of the airline industry, and contend that the determination of each fare involves myriad context-specific considerations, Plaintiffs remind the Court that this precise argument has been made, and emphatically rejected, in the past."); *Midwestern Machinery*, 211 F.R.D. at 572 (certifying class despite airline's "attempts to inflate and exploit the size and complexity of the current dispute"); *Domestic Air*, 137 F.R.D. at 689 (certifying class despite defendants' argument that impact could not be demonstrated with common evidence because of the "nonstandardized nature of the airline industry and the variety of competitive factors that may affect a specific sale").

a horizontal price-fixing conspiracy. *See Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 350 F.3d 1181, 1192-93 (11th Cir. 2003) (finding that a direct purchaser that paid a price-fixing overcharge has suffered antitrust injury "even if they experienced a net gain"); *see also Domestic Air*, 137 F.R.D. at 689 (certifying class despite defendants' argument that "millions of passengers flew on hub fares that . . . actually decreased [because of the challenged conduct]").

Further, whether any proposed class member was reimbursed for the first bag fee is irrelevant under long-standing Supreme Court precedent holding that a direct purchaser is entitled to recover the full extent of any overcharge paid, regardless of what happens after the payment. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Accordingly, analogous cases have held that inquiries into reimbursement are not relevant at the class stage. *See Northwest Airlines*, 208 F.R.D. at 225; *Domestic Air*, 137 F.R.D. at 696.

Aside from the legal insufficiency of Defendants' arguments about alleged "offsetting benefits," as a factual matter, Plaintiffs in this case can present common evidence to show that class members did not benefit from Defendants' collusive imposition of a first bag. For example, common evidence will show that Defendants' first bag fees did not cause base fare or fee reductions. Contrary to Defendants' experts' post-hoc speculations, the record evidence makes clear that first bag fees constitute "pure profit" that goes directly to the Defendants' bottom

line. Plaintiffs can also use common evidence to rebut Defendants' argument that the conspiracy caused route expansions or a reduction in the second bag fee. Furthermore, even if any of Defendants' alleged price-fixing "benefits" were legally and factually relevant, Plaintiffs' expert has provided a reliable methodology to prove antitrust injury (and damages) that, in the alternative, incorporates Defendants' alleged benefits.

Second, and similar to the above, Defendants argue that damages cannot be proven using a common methodology if first bag fees must be offset by alleged base fare declines. *See* Delta Opp'n Br. at 35-37; AirTran Opp'n Br. at 35-38. The offset argument is flawed both legally and factually (as described above), and in the alternative, Plaintiffs' expert has proposed methodologies to calculate damages using base fare offsets. Singer Reply ¶¶ 112-21, Ex. 29.

Third, Defendants argue that conflicts among class members preclude certification of the class. *See* Delta Opp'n Br. at 25-27; AirTran Opp'n Br. at 17-25. Specifically, Defendants argue that, because Defendants' joint imposition of a first bag fee allegedly caused base fare reductions, a fundamental conflict exists between class members who benefited from the conspiracy and those who did not. But Defendants' speculation about possible net beneficiaries from Defendants' price-fixing scheme is contrary to the evidence, and is insufficient to rise to the level of a fundamental conflict. *See Northwest Airlines*, 208 F.R.D. at 225

(rejecting the argument that fare reductions caused some class members to benefit and thereby created a conflict precluding certification); *Valley Drug*, 350 F.3d at 1190 (finding a conflict could exist where Plaintiffs "ha[d] not offered any facts to challenge defendants' assertions" about net benefits).

AirTran argues that because some class members paid different first bag fee amounts as the Defendants increased the fees over time, they somehow have fundamental conflicts over the proof necessary to establish a conspiracy. *See* AirTran Opp'n Br. at 24-25. AirTran is wrong, as proof of conspiracy is uniform for all class members, and there is no fundamental conflict between those who purchased at different times during a class period. *See In re Miller Indus., Inc. Sec. Litig.*, 186 F.R.D. 680, 686-87 (N.D. Ga. 1999) (certifying class despite alleged conflicts between "shareholders who purchased early in the proposed Class Period versus shareholders who purchased late in the proposed Class Period.").

Finally, Delta repeats here the same argument that was unsuccessful and rejected by this Court in *Domestic Air* – namely, that class certification should be denied because class members are not sufficiently identifiable from Defendants records, which list passengers rather than purchasers. 137 F.R.D. at 695; Delta Opp'n Br. at 27-33. Plaintiffs are only required to identify a class that is identifiable by reference to objective criteria – *e.g.*, persons who directly paid first bag fees to Defendants – and that requirement is clearly met here, where the

definition provides prospective class members objective and clear criteria for determining membership.

In sum, similar to other airline antitrust cases, this Court should not countenance Defendants' effort to overly complicate what is a simple class certification determination. As in *Domestic Air*, this Court should find that the airline industry is not "so complex and complicated that an action to hold the participants accountable for the injuries that they have caused cannot possibly be brought as a class action." *Id.* at 683. Plaintiffs have satisfied the requirements of Rule 23, and the proposed class should be certified.

## II. ADDITIONAL EVIDENCE COMMON TO THE CLASS

In their response briefing, Defendants' primary arguments against class certification rest on a flawed factual premise: that first bag fees caused base fare reductions. Defendants argue, in effect, that a first bag fee is a consumer-friendly pricing option that has benefited consumer choice and led to lower prices. *See* AirTran Opp'n Br. at 6 ("Through unbundling [the first bag fee] passengers pay for only the services they want"); Delta Opp'n Br. at 8 ("The Adoption of First Bag Fees Resulted in Lower Fares Benefitting Some Class Members"). Nothing could be further from the truth. The factual record clearly demonstrates that first bag fees represented "pure profit" to the Defendants and did not lead to lower base fares. By conspiring to charge this new fee, Defendants implemented a new

lucrative fee for a service that both Defendants admit they previously offered for free.

While a jury will ultimately decide whether to accept or reject Defendants' erroneous base fare reduction argument (and this is not a summary judgment motion),[2] Plaintiffs – in response to Defendants' factual representations – nonetheless briefly describe evidence common to the proposed class that demonstrates that first bag fees did not affect base fares.

**A. The First Bag Fee Did Not Affect Base Fares**

Unlike their experts, Defendants' executives have recognized that implementing the first bag fee did not result in reductions in base fares for either Defendant. Delta's CEO, Richard Anderson directly testified: "I don't think [the first bag fees] had any impact on average[] fares." Delta CEO Richard Anderson Depo. Tr. 102:5-6, Ex. 30.[3]

AirTran similarly recognizes that imposing the first bag fee did not result in lower fares. In 2009, AirTran Vice President Kevin Healy asked an AirTran

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[2] "[T]he trial court should not determine the merits of the plaintiffs' claim at the class certification stage." *Valley Drug Co.*, 350 F.3d at 1188 n.15.

[3] *See also* P. Dailey 30(b)(6) Depo. Tr. 17:4-6, Ex. 32 ("At the time the fee was implemented, we didn't make an immediate corresponding reduction in price."); M. Rossano Depo. Tr. 67:3-5, Ex. 33 ("Q. Are you aware of Delta lowering any of its fares as a result of charging a first bag fee? A. No."); *see also* J. Esposito 30(b)(6) Depo. Tr. 62:11-13, Ex. 34 ("Q. Did the implementation of a first bag fee have any effect on capacity levels for Delta? A. No, it didn't . . . .").

analyst to perform an "analysis of [AirTran] v. S[outhwest] head-to-head average fares, [and] pa[ssenger] share by quarter," with a goal of "identify[ing] any share shift or yield premiums [i.e., fare differences] attributable to bag fee v. no bag fee." E-mail from K. Healy to B. Munson (Aug. 26, 2009), Ex. 31. (Unlike AirTran, Southwest has not implemented a first bag fee). The resulting analysis showed that AirTran's fares *increased* relative to Southwest's in the fourth quarter of 2008 and in the first quarter of 2009 despite AirTran's introduction of a first bag fee in December 2008. *Id.*

These results were predictable, in light of the fact that an AirTran executive admitted that it does not consider the revenue generated from the first bag fee in setting base fares. *See* AirTran VP of Marketing and Planning K. Healy 30(b)(6) Depo. Tr. 55: 12-15, Ex. 35 ("Q: So there was no direct communication to people in the pricing group to lower prices because AirTran has introduced a first bag fee; is that right? A: Not that I recall.").

The pre-implementation analysis conducted by Defendants undermines any assertion that the first bag fees were linked to a reduction in base fares. At their depositions in this case, the executives for Delta and AirTran testified uniformly,

and unequivocally, that they did not consider the possibility of lowering base fares as part of their analysis of whether to impose a first bag fee.[4]

Delta prepared an extensive analysis of the likely revenue impact of imposing the first bag fee, which it called the "Value Proposition." Those presentations were prepared by the Revenue Management group – the group responsible for setting and managing fares – and it never once mentions the possibility that imposing the first bag fee would lead to reduced fares. *See generally* Value Proposition (Oct. 24, 2008, Ex. 19).

AirTran's analysis was similar. Prior to implementing a first bag fee, AirTran recognized that the fee had "staggering potential" and would yield revenues that were not offset by any reduction in base fares. *See* AIRTRAN00064935-37, Ex. 40; M. Klein Depo. Tr. 210:15-20, Ex. 41. Similarly, in explaining why AirTran did not conduct focus groups before implementing a

[4] *See* Delta Sr. VP G. Grimmett Depo. Tr. 183:7-11, Ex. 36 ("Q. Did anyone suggest if we impose this fee, we can reduce . . . fares at all and drive demand? A. No. Q. That was never considered? A. No."); P. Dailey Depo. Tr. 50:18-21, Ex. 37 ("Q. Was there any discussion at Northwest of reducing base fares to counteract some of the risk of market share shift? A. No."); AirTran CEO R. Fornaro Depo. Tr. 79:14-17, Ex. 38 ("Q. Were you having discussions about reducing base fares in connection with making a decision about whether to implement a first bag fee? A. I'm not sure we discussed that[.]"); AirTran Sr. VP J. Smith Depo. Tr. 50:4-7, Ex. 39 ("Q. Have you ever discussed the possibility that at the same time AirTran imposed the first bag fee, that it would reduce airfares? A. No, sir.");

first bag fee Kevin Healy recognized that the fee would represent an increase in "the cost of travel":

> We don't really go out and highlight [to consumers] the fact that we're raising fares or increasing the cost of travel [through first bag fees]. It just doesn't make sense. So, you know, that's sort of the delicate position of do you really want to do a focus group. Because if you ask somebody do you want to pay for something that you're currently getting for free, you know, everyone's going to say no.

K. Healy DOJ Tr. 195:6-13, Ex. 28. And, AirTran's internal analyses recognize that bag fee revenues (and other ancillary revenues) "go directly to bottom line results: almost pure profit." *See* AIRTRAN00047397, Ex. 42.[5] These analyses do not suggest that this "pure profit" is offset by reduced fares.

Defendants' financial results following implementation of first bag fees further demonstrate that the fees did not cause a reduction in fares. During the worst recession the airline industry has ever experienced, AirTran – in 2009 – made record profits. As AirTran concedes, one principal driver of these profits was: "ancillary revenue initiatives" – *e.g.,* the first bag fee. *See* AIRTRAN02070722-24, Ex. 43 ("What Drove Our Record Profits in 2009? . . . Ancillary Revenue Initiatives").

[5] *See also* W. West DOJ Tr. 118:13-14, Ex. 44 ("And we're talking about bag-fee revenue, but the reality is, it's not revenue, it's profit[.]")

**B. Dr. Singer's Opinion Comports With the Facts; Defendants' Expert Opinions Do Not**

Plaintiffs' economic expert, Dr. Singer, conducted substantial analyses of first bag fees and base fares and reached a conclusion consistent with the non-litigation conclusions of Defendants' executives: first bag fees did not result in any reduction in base fares. Specifically, Dr. Singer analyzed fare data before and after Defendants introduced a first bag fee, and found no correlation between Defendants' first bag fees and a reduction in base fares. (Singer Reply ¶¶ 25-35, Ex. 29, 48-50; Singer Merits Report ¶¶ 132-44, Ex. 45). Dr. Singer performed multiple regression analyses that controlled for variables that could have affected base fares other than bag fees, and found that AirTran's imposition of a first bag fee was correlated with an *increase* in AirTran's average fares relative to Southwest and JetBlue – AirTran's low-cost carrier peers, which do not charge first bag fees. (Singer Reply ¶¶ 49-50, Ex. 29). Similarly, Dr. Singer found that Delta's fares *increased* relative to other carriers after Delta imposed a first bag fee. (*Id.* ¶ 27, Ex. 29).

In stark contrast to the factual record and Dr. Singer's analyses, Defendants' experts have concluded that the first bag fee has resulted in a base fare reduction. But Defendants' methodologies and opinions are fatally flawed. Neither of the Defendants' experts spoke with anyone at Delta or AirTran in forming their

opinions. Accordingly, they do not attempt to explain the factual evidence that contradicts their opinions but is consistent with Dr. Singer's opinion.

AirTran's expert, Eric Gaier, compares AirTran's base fares with JetBlue and Southwest (neither of which has imposed a first bag fee). In contrast to AirTran's own analysis (see pp. 27), he finds that – after AirTran imposed a first bag fee – its base fares decreased relative to JetBlue's and Southwest's and he concludes that first bag fees must have led to purported base fare reductions. Dr. Gaier's analysis is fatally flawed, however, because it failed to control for a number of clearly relevant factors. For example, Dr. Gaier conducted a regression analysis that failed to control for, among other factors, airline-specific fuel costs, even though Dr. Gaier had controlled for fuel costs in previous published work on airline pricing. (Singer Reply ¶¶ 6 & n.7, 30, Ex. 29). Dr. Gaier also conducted a "difference-in-differences" analysis in which he claimed to show a significant decline in average roundtrip fares, but that analysis used flawed methodology, including an algebraic calculation error and a failure to control for route-specific effects. (Singer Reply ¶¶ 36-45, Ex. 29; E. Gaier Oct. 21, 2010 Depo. Tr. at 115:16-116:8, 135:5-15, 143:5-16, 186:4-9, 213:14-22, Ex. 46). After these errors are corrected, the regression analysis shows that first bag fees are correlated with an *increase* in base fares, and the difference-in-differences analysis shows no practically or statistically significant correlation. *See* Singer Reply at ¶¶ 34-35, 39-

45, 48-50, Ex. 29; *cf. In re Polypropylene Carpet Antitrust Litig.*, 996 F. Supp. 18, 25 & n.5 (N.D. Ga. 1997) (discussing practical and statistical significance).

Delta's expert, Darin Lee, performed an empirical analysis, but improperly attributed any unexplained contemporaneous base fare decline to first bag fees (even though base fares had started declining before Defendants adopted a first bag fee, *see* Singer Report ¶¶ 91-93, Ex. 1), and initially analyzed the effects on legacy carriers in general rather than Delta in particular. (Singer Reply ¶¶ 9, 26-31, Ex. 29). After Dr. Singer corrected Dr. Lee's analysis to control for relevant variables and to analyze the effects specific to Delta, "Dr. Lee's results are reversed." (Singer Reply ¶ 27, Ex. 29).[6] Moreover, when asked why his conclusions are inconsistent with Delta's own view that the first bag fee does not affect base fares, Dr. Lee explained that Delta – the world's second largest airline – lacked the level of sophistication to perform the analyses that he did. D. Lee Dec. 15, 2010 Depo. Tr. 36:16-40:9, Ex. 47.

[6] In his surreply report, Dr. Lee attempted to resuscitate his analysis by adding a Delta-specific "estimate" purporting to demonstrate fare declines, but Dr. Lee recognized that the Delta-specific methodology was "less accurate" (Lee Surrebuttal ¶ 11, Ex. 49), and "is not the model which I endorse in any way." (D. Lee Depo. Dec. 15, 2010 Tr. 161:15-16, Ex. 47). Even Dr. Lee's revised analysis failed to control for carrier-specific and route-specific trends, and when these controls were incorporated, his results were reversed. (Singer Merits Report ¶¶ 136-40, Ex. 45).

In yet another attempt to divorce themselves from the factual record, Defendants retained two theoretical experts, Drs. Schwartz and Kasper, but these theoretical opinions focus on the impact of unilaterally-imposed first bag fees, and conclude only that base fares would decline under certain "plausible" conditions. (Singer Reply ¶¶ 54-57, 59, Ex. 29 (quoting Schwartz Report ¶ 38)). Defendants' experts failed to show that these "plausible" conditions were actually present in this case. (Singer Reply ¶ 58, Ex. 29; Schwartz Report ¶ 32, 41, Ex. 48).

## III. ARGUMENTS IN REPLY TO DEFENDANTS' RESPONSES

Rehashing unsuccessful arguments that airlines have raised in the past, Defendants dispute that Plaintiffs have satisfied the class certification requirements of predominance, adequacy, ascertainability, and superiority, and dispute the appropriateness of the proposed class seeking injunctive relief.[7]

As discussed below, Defendants' arguments are misplaced because: (a) common issues of law and fact predominate, as Plaintiffs will use evidence and legal principles common to the class to prove that Defendants conspired and that this conspiracy harmed all members of the proposed class – *i.e.*, those who paid a first bag fee; (b) no fundamental conflict exists between class members; (c) the class is properly defined based on objective criteria; (d) a class action is superior to

[7] Defendants apparently concede that Plaintiffs have established the numerosity, commonality, and typicality requirements of Fed. R. Civ. P. 23(a).

individual litigation; and (e) a class for injunctive relief would be appropriate in the alternative.

### A. Common Issues of Law and Fact Predominate, As Plaintiffs Will Rely on Legal Principles and Evidence Common to the Class

"'[W]hen there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position,' the predominance test will be met.'" *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 694 (S.D. Fla. 2004) (quoting *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 693 (D. Minn. 1995)). "At the class certification stage, the Court examines evidence as to *how* the class proponents intend to prevail at trial, not whether the *facts* adduced by the class opponents are susceptible to challenges by class opponents." *In re Polypropylene Carpet Antitrust Litig.*, 178 F.R.D. 603, 618 (N.D. Ga. 1997). Class-wide proof will be used at trial to demonstrate: (1) the existence of a conspiracy; (2) the conspiracy caused antitrust injury; and (3) damages to class members.

#### 1. A *Per Se* Unlawful Conspiracy Will Be Proven with Evidence Common to the Class

Defendants concede that evidence common to the class can be used to prove whether Defendants conspired. (Delta Opp'n Br. at 1 n.1; M. Schwartz Oct. 29, 2010 Depo. Tr. 72:15-20, Ex. 50; Gaier Oct. 21, 2010 Depo. Tr. 58:14-59:15, Ex.

46). This concession alone supports Rule 23's predominance requirements, as the primary focus at trial will be whether Defendants conspired. *See* Mem. in Supp. of Class Cert. at 4-16. In conspiracy cases, "even if many plaintiffs' claims require corroboration and individualized consideration, such inquiries are outweighed by the predominating fact that the defendants allegedly conspired to commit, and proceeded to engage in, [the alleged conspiratorial conduct]." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1260 (11th Cir. 2004).[8]

**2. Antitrust Injury Will Be Proven With Evidence and Methodologies Common to the Class**

In considering whether to certify a class "the court is only to consider whether the type of proof offered by plaintiffs to attempt to prove injury to the class members will be of a classwide character such that class action treatment of the case will be superior to myriad individual actions." *In re Commercial Tissue Prods.*, 183 F.R.D. 589, 596 (N.D. Fla. 1998). At the class certification stage, impact "need not be established as to each and every class member; rather, it is enough if the plaintiffs' proposed method of proof promises to establish

[8] *See also Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 108 (2d Cir. 2007) (stating that when a price-fixing violation may be proven with common evidence, a finding of predominance may be appropriate "[e]ven if the district court concludes that the issue of injury-in-fact presents individual questions.").

'widespread injury to the class.'" *Northwest Airlines*, 208 F.R.D. at 223.[9] "Plaintiffs need only come forward with plausible statistical or economic methodologies to demonstrate impact on a class-wide basis." *Klay*, 382 F.3d at 1259-60. Plaintiffs easily meet these requirements because, in general, a "person who has purchased directly from those who have fixed prices at an artificially high level in violation of the antitrust laws is deemed to have suffered . . . antitrust injury." *N.Y. v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1079 (2d Cir. 1988) (citing *Hanover Shoe*, 392 U.S. at 491-94).[10]

Here, proof of antitrust injury is strikingly simple: those who paid a first bag fee suffered antitrust injury. *See* Singer Report ¶ 77, Ex. 1; Singer Reply ¶ 22, Ex. 29. Rule 23's predominance requirement is therefore satisfied. *See Polypropylene Carpet*, 996 F. Supp. at 25 ("[S]ufficient evidence exists to conclude Plaintiffs will

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[9] "In other words, 'at the class certification stage, Plaintiffs must show that antitrust impact *can be proven* with common evidence on a classwide basis; Plaintiffs need not show antitrust impact *in fact occurred* on a classwide basis.'" *Northwest Airlines*, 208 F.R.D. at 223 (quoting *Polypropylene Carpet*, 178 F.R.D. at 618).

[10] *See also Hanover Shoe*, 392 U.S. at 489 ("[W]hen a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4."); *Polypropylene Carpet*, 178 F.R.D. at 620 ("[A]ntitrust impact is established in this type of case by showing that Defendants' activities had the effect of stabilizing prices above competitive levels.").

use common evidence to show that Plaintiffs paid supracompetitive prices for polypropylene carpet, thus establishing antitrust impact.").

Defendants seek to complicate this simple method of proving antitrust injury. Specifically, Defendants argue that their joint imposition of a first bag fee caused ancillary benefits – *i.e.*, lower base fares, new routes, and lower second bag fees. According to Defendants, even though these alleged benefits accrued on transactions separate and apart from payment of a first bag fee, any antitrust injury must be offset with the economic value of these benefits.[11]

Defendants' argument fails. As a matter of law, price-fixing overcharges cannot be offset with claimed benefits stemming from the conspiracy. As a factual matter, Defendants have no empirical support for their claim that their joint imposition of a first bag fee caused base fare reductions, the expansion of routes, or lower second bag fees. However, even if the Court were to accept Defendants' offsetting-benefit arguments, Plaintiffs have proposed a common methodology that will establish antitrust injury using evidence and methods common to the class.

[11] Consumers typically purchase tickets in advance of the day they travel and pay a first bag fee upon arrival at the airport on the day of travel. *See* Healy 30(b)(6) Depo. Tr. 123:17-124:10, Ex. 35. Accordingly, ticket purchases and first bag fee purchases are separate and independent transactions.

**a. As a Matter of Law, Defendants' Alleged Benefits Cannot Be Used to Offset the Harm Caused By Their Collusive Imposition of a First Bag Fee**

For two reasons, Defendants cannot use purported benefits allegedly resulting from their conspiracy – such as purported base fare reductions – to offset the class's first bag fee overcharges as a matter of law.

First, a plaintiff is overcharged under the antitrust laws if he pays an increased price for a product because of a price-fixing conspiracy, and it does not matter whether the plaintiff benefitted in other ways from the defendants' conduct. *Valley Drug*, 350 F.3d at 1193; *see also Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648-50 (1980) (holding that price fixing of even a component of a product is *per se* unlawful); *Nw. Fruit Co. v. A. Levy & J. Zentner Co.*, 665 F. Supp. 869, 872 (E.D. Cal. 1986) (same). The Supreme Court has rejected the argument that an overcharged direct purchaser who suffered no net economic harm – e.g., because they passed along the overcharge to a third party – did not suffer antitrust injury. *Kansas v. UtliliCorp United Inc.*, 497 U.S. 199, 217 (1990) (citing *Ill. Brick Co. v. Ill.*, 431 U.S. 720 (1977); *Hanover Shoe*, 392 U.S. at 489).

These decisions were based on "an unwillingness to complicate treble-damages actions with attempts to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge," and on concerns about

"the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct [complex price and output] decisions in the courtroom." *Ill. Brick*, 431 U.S. at 725, 731-32 (citing *Hanover Shoe*, 392 U.S. at 493).[12] Thus, "[i]n a horizontal price-fixing case . . . mitigation and offset generally do not affect the ultimate measure of damages[.]" *In re Airline Ticket Comm'n Antitrust Litig.*, 918 F. Supp. 283, 286-87 (D. Minn. 1996).[13]

Following the Supreme Court's opinion in *Hanover Shoe*, the Eleventh Circuit has recognized that a party suffers antitrust injury from paying a price-fixing overcharge and may recover the full amount of the overcharge even in the absence of net economic harm:

> [I]f the defendants' [conduct] illegally restrained competition, then all of the class members . . . would have suffered antitrust injury that is cognizable under *Hanover Shoe*. In such a scenario, the [plaintiffs] would be afforded the right to sue . . . even if they experienced a net gain. . . . [W]e read *Hanover Shoe* as directing a court to overlook the potential net gain, or conversely the

[12] AirTran argues that, even if Defendants colluded on bag fees, "offsetting base fare adjustments . . . ensure continued competition." (AirTran Opp'n Br. at 33). But even if there were base fare declines (contrary to the evidence), the Supreme Court has recognized that "[a]ny combination which tampers with price structures is engaged in an unlawful activity." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).

[13] Defendants' experts admitted that they were unaware of any cases in which damages from a price-fixed product were offset by a lower price on another product. E. Gaier Dec. 17, 2010 Depo. Tr. 198:10-20, Ex. 51; D. Kasper Dec. 15, 2010 Depo. Tr. at 10:16-23, Ex. 52; M. Schwartz Dec. 21, 2010 Depo. Tr. 88:8-23, Ex. 53; D. Lee Dec. 15, 2010 Depo. Tr. 23:9-24, Ex. 47.

> potential absence of a net loss, that a direct purchaser may in fact have experienced for the purposes of providing a direct purchaser with standing to sue.

*Valley Drug*, 350 F.3d at 1193; *see also Meijer v. Abbott Labs.*, 251 F.R.D. 431, 435 (N.D. Cal. 2008) ("[T]he *Hanover Shoe* rule [is] that a direct purchaser may recover the full amount of the overcharge, even if he is otherwise benefitted, because the antitrust 'injury occurs and is complete when the defendant sells at the illegally high price.'") (quoting *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 313 (E.D. Mich. 2001)).[14]

Consistent with these principles, the antitrust injury to Plaintiffs is the "gross overcharge," without regard to "mitigation and offset." *In re Cardizem*, 200 F.R.D. at 316;[15] *In re Airline Ticket Comm'n Antitrust Litig.*, 918 F. Supp. at 286-87.

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[14] *Accord Sports Racing Serv. v. Sports Car Club of Am.*, 131 F.3d 874, 884-85 (10th Cir. 1997) ("As a direct purchaser, [plaintiff] 'may sue for and recover the full amount of the illegal overcharge.'"); *In re Wellbutrin SR Direct Purchaser Antitrust Litig.*, No. 04-5525, 2008 WL 1946848, at *6 (E.D. Pa. May 2, 2008) (certifying class despite alleged benefits to some class members) (citing *Ill. Brick*, 431 U.S. at 724-25; *Hanover Shoe*, 392 U.S. at 489); *Meijer, Inc. v. Warner Chilcott Hldgs. Co.*, 246 F.R.D. 293, 303 (D.D.C. 2007); *In re K-Dur Antitrust Litig.*, MDL 1419, 2007 WL 5302308, at *12 (D.N.J. Jan. 2, 2007); *In re Relafen Antitrust Litig.*, 346 F. Supp. 2d 349, 369 (D. Mass. 2004); *In re Cardizem*, 200 F.R.D. at 311.

[15] In *Cardizem*, the court distinguished one of the cases cited by AirTran – *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 791 F.2d 1356, 1367 (9th Cir. 1986), which was a "lost profits damage case," not an overcharge case, and in

Here, the alleged conspiracy concerned a new price for a service that is paid separate and apart from any of the other services – *i.e.*, the price of a ticket or a second bag fee – the Defendants claim should be used to offset the first bag fee overcharges. Class members – all of whom paid a first bag fee – therefore are entitled to recover for the entire amount of this overcharge. *See, e.g.*, *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1145-46 & n.14 (9th Cir. 2003) (describing antitrust injury as the payment of "inflated" support fees); *In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 115 (S.D.N.Y. 2010) (discussing but-for price as the price of the currency conversion fee absent the conspiracy); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 219 F.R.D. 661, 679 (D. Kan. 2004); *Nw. Fruit Co.*, 665 F. Supp. at 872 (denying summary judgment motion where plaintiffs alleged conspiracy to fix cooling and palletizing charge and defendants had not "established beyond doubt that cooling and palletizing and the sale of a carton of cantaloupes are an inseparable product").

In *Universal Service Fund*, the court rejected the argument that the overcharge should be based on anything other than the narrow product affected by the conspiracy:

> Here, defendants' argument focuses on their long-distance products in general. The allegedly

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which the court did not advance the "'no injury' argument Defendants assert here." *In re Cardizem*, 200 F.R.D. at 313-14.

> conspiratorially overpriced product in this case, however, is much more narrow: the USF surcharge. That surcharge is a fungible, homogenous product embodied in a flat percentage charge that is readily susceptible of being segregated from any non-homogenous aspects of defendants' products. In other words, defendants' arguments regarding the variations in their products, pricing, services, and markets focus on the sale of defendants' products as a whole, whereas the USF surcharge is the actual product at issue here.

219 F.R.D. at 678.

Defendants cite no authority for the proposition that price fixing overcharges must be reduced by alleged benefits of transactions separate and apart from the transaction that resulted in the overcharge. Instead, Defendants cite cases involving price-fixing of a product component included in the price of a single, indivisible product and where the pricing was set through individualized discounting or haggling so that some class members may not have had to pay the alleged higher price of the product component. *See Blades v. Monsanto Co.*, 400 F.3d 562, 572-73 (8th Cir. 2005) (denying certification where the allegedly price-fixed portion of the product at issue – the germplasm component of seed – "cannot be segregated from the rest of the seed," some purchasers paid no premium for germplasm component of seed price, and products and prices were not homogenous)[16]; *Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 423-24 (5th

[16] In certifying a class, the court in *Universal Service Fund* distinguished the facts of *Blades* on grounds that are equally applicable here, stating: "defendants have

Cir. 2004) (alleging conspiracy to charge mandatory tax as a separate line item rather than including tax in list price of automobile; purchasers engaged in individualized haggling such that some may not have been overcharged);[17] *Exhaust Unlimited, Inc. v. Cintas Corp.*, 223 F.R.D. 506, 511-14 (S.D. Ill. 2004) (alleging overcharge for mandatory environmental surcharges collected by textile linen supply industry, including "several hundred various ancillary charges" relating to fees that varied in amount and in the method of calculation, "prices [were] established in decentralized negotiations," and fees "were not consistently charged").[18]

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offered no evidence to demonstrate the USF surcharge is not a homogenous product, that the USF surcharge market is highly individualized, that the USF surcharge cannot be segregated from the rest of defendants' products, or that the USF surcharge varied among customers (other than as between carriers and as between business versus residential customers, subcategories that are easily defined)." *Universal Serv. Fund*, 219 F.R.D. at 678 (discussing *Sample v. Monsanto Co.*, 218 F.R.D. 644 (E.D. Mo. 2003), *aff'd*, *Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005)).

[17] Robinson is also distinguishable because it involved a tax that was set by the state, not by the car dealers.

[18] AirTran also cites several cases involving tying claims. *See* AirTran Opp'n Br. at 19 n.74 (citing *Kypta v. McDonald's Corp.*, 671 F.2d 1282, 1285 (11th Cir. 1982); *Collins v. Int'l Dairy Queen*, 59 F. Supp. 2d 1312, 1314 (M.D. Ga. 1999)); *id.* at 20 n.75 (citing *Siegel v. Chicken Delight*, 448 F.2d 43, 52 (9th Cir. 1971)). Tying cases are inapplicable in the price-fixing context. *Cf. Freeman*, 322 F.3d at 1146 n.14 ("Distinct product markets are crucial to a tying claim, but they are largely irrelevant to a price-fixing claim.").

Second, "Defendants' ability to assert th[e] argument [that first bag fee overcharges should be offset with alleged benefits] depends upon [Defendants] having a viable set-off defense," but "[t]he problem for Defendants is that they failed to plead the defense of set-off in their answers." *Hillis v. Equifax Consumer Servs., Inc.*, 237 F.R.D. 491, 500 (N.D. Ga. 2006) (Batten, J.); AirTran Answer, Dkt. #146 (failing to plead the defenses of set-off or recoupment); Delta Answer, Dkt. #147 (same). A "setoff" is "[a] defendant's counter demand against the plaintiff, arising out of a transaction independent of the plaintiff's claim." Black's Law Dictionary (7th ed.). Defendants proposed offsets arise from transactions that are clearly independent of Plaintiffs' claims, including base fares for flights on which Plaintiffs did not pay first bag fees and are not challenging.[19] Even on the flights on which Plaintiffs paid first bag fees, the base fares are typically paid at a different time and in a separate transaction from the bag fee transaction.

Because offsets related to transactions other than first bag fees raise a common legal question, and because such offsets are not relevant as a matter of law, predominance has been established.

[19] For example, Defendants suggest that a plaintiff's claim for a first bag fee overcharge paid to Delta in 2008 must be offset by benefits from fare reductions received from AirTran in 2011 on flights on which the plaintiff did not check a first bag, even though the 2008 and 2011 flights are separate and distinct transactions.

**b. Alleged Benefits from Base Fare Reductions Involve Questions of Law and Fact Common to the Class**

Courts have previously rejected challenges to class certification on the basis of alleged base fare declines. *Northwest Airlines*, 208 F.R.D. at 205; *Domestic Air*, 137 F.R.D. at 689. For three reasons, the argument should be rejected again here.

First, as discussed in Section II, first bag fees did not cause declines in base fares. However, even if Defendants dispute Plaintiffs' evidence, it is not necessary or appropriate to resolve these factual disagreements at this stage of proceedings. *In re Terazosin*, 220 F.R.D. at 694-95 ("[T]he Court must not consider the merits . . . but rather must consider whether each element is susceptible to proof by generalized evidence."); *Domestic Air*, 137 F.R.D. at 692 ("It is not the function of the Court at this time to determine whether [plaintiffs' expert] is correct.").[20] Rather, it is sufficient that Plaintiffs have advanced a "plausible" methodology to demonstrate impact on a class-wide basis. *See Columbus Drywall & Insulation, Inc. v. Masco Corp.*, No. 1:04-CV-3066, 2006 WL 5157686, at *4 (N.D. Ga. May

[20] AirTran argues that *Domestic Air*, *Northwest Airlines*, and *Midwestern Machinery* were decided before the trend amongst courts of appeals towards more rigorous standards for class certification. (AirTran Opp'n Br. at 33). But AirTran has not identified any relevant change in law that would have affected the outcome of those cases. To the contrary, these courts recognized that a rigorous analysis was appropriate. *See, e.g.*, *Domestic Air*, 137 F.R.D. at 684 ("[W]hile it is not proper to reach the merits of a claim when determining class certification, 'this principle should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to a reasoned determination of whether a plaintiff has met her burden[.]'").

31, 2006) (citing *Klay*, 382 F.3d at 1259-60). The factual record discussed above and Dr. Singer's well-supported opinion – using multiple regression analyses to show that the first bag fee did not cause base fare reductions – easily satisfy the plausibility requirement. *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 566 (11th Cir. 1999) ("multiple regression analysis [is] a methodology that is well-established as reliable").[21]

Second, Defendants' own experts admit that any theoretical reduction in base fares would be less than the amount of the first bag fee. *See* Singer Reply ¶¶ 78, 81, Ex. 29; E. Gaier Oct. 21, 2010 Depo. Tr. 93:6-19, Ex. 46; D. Kasper Dec. 15, 2010 Depo. Tr. 21:17-19, Ex. 52 ("Q. So those who check a first bag fee would end up paying more? A. Correct."); *see also* AirTran Opp'n Br. at 30-31 (citing alleged base fare reductions of less than $30 per roundtrip). Thus, any class member who checked a bag every time they flew suffered impact. In other words, the first bag fee caused "widespread injury to the class." *Northwest Airlines*, 208 F.R.D. at 223; Singer Merits Report ¶¶ 4, 122, Ex. 45.

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[21] This Court "should not be drawn prematurely into a battle of competing experts." Manual for Complex Litigation, Fourth § 21.221 at 268 (citing *In re Polypropylene*, 996 F. Supp. at 30); *In re Netbank*, 259 F.R.D at 675 ("[I]t is inappropriate [on class certification] to delve into the merits of the case, and entertain the parties' battle of the experts.").

Defendants' argument that some class members benefit from the collusive imposition of a first bag fee (and therefore suffer no antitrust injury) presumes that base fare reductions on flights on which a class member did not check a bag are used to offset the first bag fee payments made when a class member did check a bag. No court has (or should) apply that strained methodology to price fixing overcharges.

Third, if, contrary to the facts and law discussed above, it were necessary to determine impact after accounting for Defendants' alleged offsets, widespread injury to the class can still be proven using a common methodology. Specifically, Dr. Singer has proposed alternative methodologies for determining impact to class members depending on what offsets are legally and factually relevant, if any. Singer Reply ¶¶ 77-91, Ex. 29. Under these methodologies, the group of class members who theoretically paid less, on net, "is readily identifiable with classwide evidence and methods." *Id.* ¶ 86.[22]

**c. Alleged Benefits from Speculative New Routes Involve Questions of Law and Fact Common to the Class**

AirTran asserts that a small subset of its routes added after it imposed a first

[22] *See also Carbajal v. Capital One*, 219 F.R.D. 437, 445 n.3 (N.D. Ill. 2004) (rejecting setoff defense in FDCPA case and noting that if setoffs were allowed, "any such setoffs might require nothing more than 'a mechanical calculation' which would not impact on whether the case should be maintained as a class action").

bag fee would not have existed but-for the imposition of the first bag fee, and that class members benefitted from the existence of these routes. AirTran Opp'n Br. at 35. This manufactured "offset" defense should not be considered when – as here – it is based on pure speculation. *See, e.g., Wolff & Munier, Inc. v. Whiting-Turner Contracting Co.*, 946 F.2d 1003, 1012 (2d Cir. 1991) (finding, in breach of contract case, that "the amount of such an offset would be so speculative as to constitute an improper basis for awarding damages."); *Grupo Condumex, S.A. v. SPX Corp.*, No. 3:99CV7316, 2008 WL 4372678, at *8 (N.D. Ohio Sept. 19, 2008) (stating, in case for alleged breach of express warranty, that "Courts generally decline to engage in such speculation when offsetting benefits against damages.").

AirTran has not produced a single document to support its argument that it began services on these new routes because of the imposition of the first bag fee, and a jury would almost certainly find this argument entirely speculative. Indeed, Defendants' experts concede that they are unable to tie any benefit resulting from the alleged expansion of routes to the imposition of the first bag fee. *See* E. Gaier Report ¶ 68, Ex. 54 ("[I]t would be difficult to determine reliably, from data, which of these [new routes] were added as a result of the first-bag fee, and which were not."); E. Gaier Oct. 21, 2010 Depo. Tr. 266:9-18, 267:7-15, Ex. 46.

Moreover, "the law does not allow an enterprise that maintains control of a market through practices not economically inevitable, to justify that control

because of its social advantage." *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 345 (1953), *aff'd per curiam*, 347 U.S. 521 (1954); *accord Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 693-95 (1978) (holding that a *per se* restraint on trade may not be justified by its beneficial effects).

Defendants cite no authority – and Plaintiffs are aware of none – suggesting that customers who purchase a product at an inflated price cannot recover because their market would not have been served by the defendant but for the overcharge. To the contrary, a class was certified in *Northwest Airlines* despite defendants' argument that elimination of the alleged anti-competitive practice would cause "the elimination of certain routes altogether." 208 F.R.D. at 225.[23]

**d. Alleged Benefits from Delta's Lowered Second Bag Fee Involve Questions of Law and Fact Common to the Class**

Delta argues that Defendants' imposition of a first bag fee caused Delta to reduce its second bag fee from $50 to $25 in December 2008, and that those who

[23] In any event, even if AirTran had evidence that some routes were added due to the conspiracy to impose a first bag fee, and even if the law deemed the passengers on those routes to be uninjured by Defendants' price-fixing conspiracy, any evidence used to prove or disprove the existence of those routes would be common to the class. *See* AirTran Response to Pls.' Fourth Set of Interrogatories, No. 4, Ex. 55 (purporting to identify, based on unspecified methodology, routes or capacity that would not have existed but for AirTran's first bag fee). Assuming AirTran could establish the existence of those routes and proffer an adequate legal basis for finding the passengers on those routes were not injured, those routes could simply be excluded from the class.

paid both a $15 first bag fee overcharge and benefitted from a reduced $25 second bag fee suffered no antitrust injury. Delta Opp'n Br. at 19-20.

Again, this claimed "benefit" is inconsistent with both the law and facts, and the legal and factual issues are common to the class. Delta has offered no evidence that any change in its second-bag fee was caused by its imposition of a first-bag fee. *See* Singer Reply ¶ 127, Ex. 29. Moreover, Delta's assertion is contradicted by its own behavior: Delta had begun reducing its second-bag fee even before imposing a first-bag fee, and it raised its second-bag fee twice during the class period. *Id.* ¶ 128.

Even if it were legally appropriate to offset first bag fees by the reduction in second bag fees and the jury adopts Defendants' interpretation of the facts, a methodology common to the class can be used to determine which individuals suffered a net harm from paying first bag fees and reduced second bag fees. *See* Singer Reply ¶ 129, Ex. 29.[24]

**e. Impact Can Be Demonstrated with Common Proof Even if Some Class Members Were Reimbursed**

Delta asserts that class certification should be denied because individual

[24] Alternatively, the class definition can exclude those first bag fee payments before August 4, 2009 that were accompanied by second bag fee payments. Beginning August 4, 2009, Delta increased its first and second bag fees to a combined price that exceeded the original $50 second bag fee, and Delta's "benefit" argument would no longer apply. Singer Reply ¶ 128, Ex. 29.

inquiry is required to determine which class members, if any, were reimbursed for their overcharges. Delta Opp'n Br. at 20-25. Consistent with the rule announced in *Hanover Shoe*, 392 U.S. 481, and *Illinois Brick*, 431 U.S. 720, however, direct purchasers have standing to recover the full overcharge regardless of whether the overcharge was passed on to a third party.[25] If Delta's reimbursement argument were to be accepted, then virtually no consumer class could ever be certified, as there is often a possibility that the purchaser was reimbursed, such as by their employer or parent. Delta cites a single case suggesting that class members cannot recover if they were reimbursed – *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 270-71 (D. Mass. 2004). Delta Opp'n Br. at 20. But the claims in *Relafen* were brought by indirect purchasers under state antitrust laws, and the court expressly recognized that the state laws at issue were in direct conflict with *Illinois Brick*. *Relafen*, 221 F.R.D. at 275.

Moreover, courts have previously rejected the argument that reimbursement of some class members precludes class certification. *See Northwest Airlines*, 208 F.R.D. at 225 ("[T]his inquiry [into reimbursement] goes to the merits of each

[25] Plaintiffs are unaware of any "reimbursement" exception to *Illinois Brick*, and the Supreme Court has expressed an unwillingness to create any new exceptions to *Illinois Brick*. *See UtliliCorp*, 497 U.S. at 217 ("In sum, even assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions. Having stated the rule in *Hanover Shoe*, and adhered to it in *Illinois Brick*, we stand by our interpretation of § 4.").

class member's claim and, therefore, is not an appropriate basis for denying class certification."); *Domestic Air*, 137 F.R.D. at 696 ("The Court finds that the passing-on defense [based on alleged reimbursements under preexisting contracts] is not properly raised at this time as defendants' argument goes directly to the merits of each plaintiff's claim."); *see also Midwestern Machinery*, 211 F.R.D. at 572 (finding that "a determination of actual individual injury is not necessary at this time").

In *Domestic Air*, Delta conceded that the reimbursement issue did not need to be addressed at the class certification stage. *Domestic Air*, 137 F.R.D. at 696 n.24 ("In their most recent submission, defendants [Delta *et al.*] acknowledge 'that issues pertaining to reimbursement of airline ticket purchasers and any "passing-on" defense need not be addressed at this stage of the litigation'").[26]

Thus, despite Defendants attempts to inflate and exploit the complexity of the economics of the airline industry, antitrust injury can be demonstrated with common evidence.[27]

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[26] Alternatively, if the parties who paid the reimbursement are considered the direct purchasers with the right to recover under *Illinois Brick*, then those parties should be included in the class to the exclusion of those who were reimbursed. *Cf. In re Relafen*, 221 F.R.D. at 271 ("Because these classes . . . expressly include insurers [who paid the reimbursements]. . . the Court was otherwise assured of benefits for the injured and effective antitrust enforcement.").

[27] *Midwestern Machinery*, 211 F.R.D. at 572 ("The complexity of the proposed proof, however, does not distract the Court from recognizing . . . that such

### 3. Damages Can Be Proven with Common Evidence Using Reliable Common Methodologies

Individualized determinations regarding the extent of damages suffered by each plaintiff are "insufficient to defeat class certification under Rule 23(b)(3). Numerous courts have recognized that the presence of individualized damages issues does not prevent a finding that the common issues predominate." *Klay*, 382 F.3d at 1259 (quotation and citation omitted). Notwithstanding that hypothetical individual issues concerning damages pose no bar to class certification, AirTran argues that Plaintiffs' proposed aggregate damages calculation constitutes an impermissible fluid recovery. (AirTran Opp'n Br. at 36-38).[28] But a methodology

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evaluation and analysis will be done once for the benefit of the class and not repeatedly for each individual member."); *In re Northwest*, 208 F.R.D. at 219 ("[W]hile Defendants make much of the complexity of the economics of the airline industry, . . . this precise argument has been made, and emphatically rejected, in the past"); *Domestic Air*, 137 F.R.D. at 689 (rejecting the argument that "because of the nonstandardized nature of the airline industry and the variety of competitive factors that may affect a specific sale, proof of injury must be established on a sale-by-sale basis" including because many class members paid "fares that [] remained unchanged or actually decreased"). Defendants cite *Rodney v. Northwest Airlines, Inc.*, in which class certification was denied where "Northwest would be forced to prove that competitors declined to enter the route . . . for reasons other than Northwest's reputation and then make the same showing for each of the 73 other routes at issue" in order to demonstrate antitrust injury. 146 Fed. Appx. 783, 791 (6th Cir. 2005) (unpublished). By contrast, Plaintiffs will demonstrate that Delta and AirTran collusively imposed first bag fees uniformly across all routes, and Plaintiffs will not need to separately "make the same showing for each of the . . . routes at issue." *Id.*

[28] "'Fluid recovery' refers to the case where a court allows gross damages to all purchasers without requiring proof of actual injury . . . . [and] plaintiffs are

does not constitute fluid recovery where, as here, it "evidences common impact and permits, with reasonable certainty, formulaic calculation of damages." *Domestic Air*, 137 F.R.D. at 691.

Delta also argues that Plaintiffs have not advanced a methodology for allocating damages under an aggregate damages model. (Delta Opp'n Br. at 35-37). But "[a]ssuming the jury renders an aggregate judgment, allocation will become an intra-class matter accomplished pursuant to a court-approved plan of allocation, and such individual damages allocation issues are insufficient to defeat class certification." *In re Terazosin*, 220 F.R.D. at 699.[29]

Finally, Defendants return to their "offset" arguments and claim that alleged base fare offsets raise individualized damages issues. As explained above, these arguments are inappropriate as a matter of law and inconsistent with the factual record. *See Hawaii v. Std. Oil Co. of Cal.*, 405 U.S. 251, 262 n.14 (1972) ("[D]amages are established by the amount of the overcharge. Under § 4 [of the

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relieved of their burden of proving impact and individual damage to each class member." *Domestic Air*, 137 F.R.D. at 691. "The fact that the methodologies contain some form of averaging does not automatically render them methods of fluid recovery." *Id.*

[29] Delta also asserts that any individual class member cannot receive damages in an amount greater than they sustained if, for example, an individual was reimbursed. (Delta Opp'n Br. at 37). The Supreme Court approved of that very possibility, however, in *Hanover Shoe*, 392 U.S. at 489, which provided that direct purchasers may recover their entire overcharge even if they passed on some or all of the overcharge.

Clayton Act], courts will not go beyond the fact of this injury to determine whether the victim of the overcharge has partially recouped its loss in some other way . . . ."). Accordingly, Plaintiffs can accurately calculate damages by multiplying the amount of the bag fee by the number of times class members paid it. (Singer Report ¶¶ 88-89, Ex. 1).

Even if Defendants' base fare argument is adopted by this Court and the jury, Plaintiffs can deduct the offsets and calculate damages to class members using a common formula. (Singer Reply ¶¶ 112-21, Ex. 29). Dr. Singer has offered several class-wide methods for calculating aggregate damages depending on the level of any relevant offsets. *Id.*; *see also In re Pharmaceutical 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.").

In sum, because common evidence can be used to demonstrate violation, impact, and damages, Plaintiffs have established the predominance requirement of Rule 23(b)(3) and class certification is appropriate. Even if some individualized inquiries were necessary, "such inquiries are outweighed by the predominating fact that the defendants allegedly conspired, and proceeded to engage in, [the alleged conspiratorial conduct]." *Klay*, 382 F.3d at 1260.

**B. Plaintiffs Are Adequate Representatives Because No Fundamental Conflict Exists Between Plaintiffs and the Class**

Citing *Valley Drug*, Defendants argue that a fundamental class conflict exists because certain members of the class who paid a first bag fee likely benefited from the conspiracy by enjoying base fare reductions that – when aggregated with flights these hypothetical class members flew on which they did not pay a first bag fee – net out to be greater than the cost of the first bag fee. For five reasons, Defendants' conflict argument fails.

First, *Valley Drug* is inapposite to Defendants' conflict argument. *Valley Drug* concerned a class of wholesalers that challenged an agreement to delay the market entry of a generic version of a pharmaceutical product so that the wholesalers had to purchase and re-sell more of the brand name version of the product. 350 F.3d at 1183-84. Three members of the class (which accounted for more than 50 percent of the class' total claims) were large wholesalers that – through cost plus contracts – actually earned greater profits re-selling the brand name version of the product at issue compared to the alleged unlawfully delayed generic version. *Id.* at 1190-91. Plaintiffs did not dispute this. *Id.* at 1190.

Here, by contrast, no class member resells checked first bag services at a profit. Moreover, Plaintiffs have ample evidence that no class member benefited by Defendants' first bag fee, through, for example, base fare reductions. *See*

Section II, *supra*.[30] Class members therefore suffered a net economic harm from the imposition of the first bag fee and no credible claim can be made there is any "significant" difference between the economic interests and objectives of named class representatives and unnamed class members. *See Valley Drug*, 350 F.3d at 1189 (a conflict exists only if "the economic interests and objectives of the named representatives differ significantly from the economic interests and objectives of unnamed class members.").

Second, consistent with *Valley Drug*, Defendants' conflict argument fails if "'the evidence provided by the defendants is deemed to be inaccurate or unreliable.'" *In re Terazosin*, 220 F.R.D. at 690 (quoting *Valley Drug*, 350 F.3d at 1191-92); *see also Hillis*, 237 F.R.D. at 501 (finding conflict-of-interest argument based on offset was futile where "computing the value of a purchaser's benefit would be difficult if not impossible"); *Northwest Airlines*, 208 F.R.D. at 225 (finding adequacy requirement was met where defendants' allegations of conflict – based on alleged benefits from fare reductions and the existence of routes that may not have existed otherwise – were disputed). As discussed above, Defendants' base fare reduction argument is contrary to the evidence (Section II, *supra*), and

[30] Unlike the plaintiffs in *Valley Drug* who "ha[d] not offered any facts to challenge the defendants' assertions" about net benefits causing conflicts, Plaintiffs here have met their burden by proffering evidence and expert testimony that directly rebuts Defendants' arguments that any base fare reductions resulted from the imposition of first bag fees. *See Valley Drug*, 350 F.3d at 1190.

Defendants' own experts have questioned the reliability of the evidence in demonstrating that any class member was a net beneficiary.[31] Indeed, Defendants themselves admit that their first bag fees are greater than their alleged base fare reductions. *See* pp. 27, *supra*. They therefore must apply alleged base fare reductions on flights hypothetical class members took in which they did not pay a first bag fee to the first bag fee payments these class members made in connection with flights in which they checked a bag (and paid the fee) to even support the *possibility* that some class members may have received a net benefit from base fare reductions. To Plaintiffs knowledge, no court has ever accepted such a speculative, unreliable methodology to establish a class conflict.

Third, as this Court observed in *Hillis*, even if some class members received a net benefit, such benefit may be "insufficient to rise to the level of a *fundamental conflict*." *Hillis*, 237 F.R.D. at 500 (emphasis added).[32] Defendants have not

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[31] *See* E. Gaier Surreply ¶ 56, Ex. 56 ("[M]y regression model explains . . . only 13% of the variation in underlying passenger fares."); D. Lee Surrebuttal ¶ 32, Ex. 49 ("[I]t is not possible to analyze the potential impact of the first bag fee on a classwide basis, because (among other things) . . . the magnitude of the fare offset resulting from the first bag fee[] varies by route and by passenger within a route."); E. Gaier Oct. 21, 2010 Depo. Tr. 25:17-26:13, Ex. 46 (admitting that he could not reliably determine the effect of bag fees on the availability of seats in lower fare buckets); M. Schwartz Oct. 29, 2010 Depo. Tr. 85:18-20, Ex. 50 ("[Determining what a class member] would've paid in the but-for world . . . [i]s an exercise that even a trained economist would have a lot of difficulty with.").

[32] *See also Valley Drug*, 350 F.3d at 1189 ("[T]he existence of minor conflicts alone will not defeat a party's claim to class certification."); *In re Scientific-*

presented any evidence suggesting that any proposed class member opposes the class, or that any class member has articulated any possibility for conflict or antagonism. Defendants have not named a single class member who believes he or she benefitted from paying a collusive overcharge. *Cf.* M. Schwartz Oct. 29, 2010 Depo. Tr. 85:9-86:2, Ex. 50 ("I wouldn't expect a typical class member to know whether they're better off . . . ."). The class members' economic objectives are therefore the same – to maximize the recovery to the class. *Cf. Valley Drug*, 350 F.3d at 1150 (suggesting that a conflict would only exist if "the economic interests *and objectives* of the named representatives differ significantly from the economic interests and objectives of unnamed class members") (emphasis added). Further, there is no reason to believe that the alleged "beneficiaries" would prosecute this action any less vigorously than those who suffered net harm.[33]

Fourth, as this Court previously held, a conflict-of-interest argument based on alleged offsetting benefits to some class members fails where, as here, the

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*Atlanta, Inc. Sec. Litig.*, 571 F. Supp. 2d 1315, 1335 (N.D. Ga. 2007) ("[T]he theoretical possibility of . . . conflicts is [not] sufficient to preclude class certification under Rule 23(a)(4).").

[33] One individual who AirTran claims is a net economic beneficiary is serving as a named Plaintiff, and he continues to vigorously pursue his claims. *See* AirTran Interrogatory Response 4 to Plaintiff's Third Set of Interrogatories, Ex. 57 (asserting that named Plaintiff Stephen Powell may have been a net beneficiary); *cf. Valley Drug*, 350 F.3d at 1193 (suggesting that the presence or absence of alleged beneficiaries among the named plaintiffs may be relevant to determining the existence of a conflict).

defendants "failed to plead the defense of set-off in their answers." *Hillis*, 237 F.R.D. at 500; Delta Answer, Dkt. #147; AirTran Answer, Dkt. #146.

Fifth, even if the Court and jury accept Defendants' specious "benefit" argument, Plaintiffs have proposed an alternative methodology that uses common proof to address these issues and, if necessary, determine a separate class of net "beneficiaries." *See Valley Drug*, 350 F.3d at 1194-95 & n.21 (noting that class members who potentially experienced a net gain may likely form a class of their own); *see also Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l Ltd.*, 247 F.R.D. 253, 269 (D. Mass. 2008) ("[T]he Court has the right to require subclassing if fundamental conflicts do in fact arise."); Singer Reply ¶¶ 113-19, Ex. 29 (providing a methodology for separating net winners, if any, from net losers).

In addition to the offset argument, AirTran argues that there is a conflict between class members who paid $15 first bag fees and those who paid $20, $23, or $25 after Defendants increased their first bag fees. (AirTran Opp'n Br. at 24-25). But there is no fundamental conflict between those who paid overcharges at different times during the class period, and AirTran cites no case law in support of its argument. *Id.*; *In re Miller Indus., Inc. Sec. Litig.*, 186 F.R.D. 680, 686-87 (N.D. Ga. 1999) (certifying class despite alleged conflicts between "shareholders who purchased early in the proposed Class Period versus shareholders who purchased late in the proposed Class Period."). Moreover, the conspiracy at issue

here concerns implementation of a first bag fee: but for the conspiracy neither Defendant would have implemented a first bag fee. *See* Singer Merits Rebuttal ¶ 149, Ex. 58. That the first bag fee has increased over time – as opposed to have been withdrawn – is evidence that the conspiracy remains in place. *See Id.* ¶ 34. Therefore, contrary to AirTran's argument, no conflict exists concerning the evidence needed to prove a conspiracy.

For these reasons, the named Plaintiffs are adequate representatives.

**C. The Class Is Properly Defined Based on Objective Criteria**

A class is sufficiently defined if its members "can be ascertained by reference to objective criteria." *Manual for Complex Litigation* (Fourth) § 21.222 (2004).[34] Seeking a rule of law that would effectively prohibit all consumer class actions in which class members are not in direct privity with the defendants (or where defendants simply destroy their records of class member purchases), Delta argues that the class is not sufficiently ascertainable because Defendants currently lack sufficient data in their records to identify all members of the proposed class.

[34] "[I]t is not necessary that the members of the class be so clearly identified that any member can be presently ascertained." *See Meyer v. Citizens & Southern Nat'l Bank*, 106 F.R.D. 356, 360 (M.D. Ga. 1985); *accord In re Tri-State Crematory Litig.*, 215 F.R.D. 660, 690 (N.D. Ga. 2003). To the contrary, "[d]ifficulty in identifying class members makes joinder more impractical and certification more desirable." *Meyer*, 106 F.R.D. at 360.

(Delta Opp'n Br. at 27-33).[35] But the ascertainability requirement is satisfied where, as here, "the proposed class definition allows prospective plaintiffs to determine whether they are class members with a potential right to recover." *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 594 (C.D. Cal. 2008). "Once liability is determined, each class member will be responsible for documenting his or her injury, but that is true in many class actions." *Jermyn v. Best Buy Stores*, 256 F.R.D. 418, 433 (S.D.N.Y. 2009); *see also Saltzman v. Pella Corp.*, 257 F.R.D. 471, 476 (N.D. Ill. 2009) ("Notice by publication has been used in cases where potential class member names were confidential or impracticable to ascertain.") (collecting cases).

In a prior antitrust class action before this Court, Delta and other defendants

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[35] In support of this argument, Delta cites *Grimes v. Rave Motion Pictures Birmingham, LLC*, 264 F.R.D. 659, 665 (N.D. Ala. 2010), which is dissimilar to the present case. In *Grimes*, plaintiffs brought claims under the Fair and Accurate Credit Transactions Act ("FACTA"), which prohibited the printing of more than 5 digits of a credit card number on a receipt that was provided to a non-business entity cardholder in willful violation of FACTA. *Id.* at 661. The contents of the receipt – and not just the fact of purchase – was necessary to demonstrate class membership, and Plaintiffs were required to prove willfulness and other elements. The court found that the class definition was so "amorphous" that it was "impossible . . . to know whether Grimes's proposed class is numerous enough." *Id.* at 665. Delta also cites *Mann v. TD Bank, N.A.*, No. 09-1062, 2010 WL 4226526, at *1 (D.N.J. Oct. 20, 2010) and *Dumas v. Albers Med., Inc.*, No. 03-0640, 2005 WL 2172030, at *6 (W.D. Mo. 2005), in which even the named plaintiffs were unable to demonstrate that they were class members. . Finally, Delta cites *In re Copper Antitrust Litig.*, 196 F.R.D. 348, 359-60 (W.D. Wis. 2000), in which plaintiffs proposed "an incomprehensible test" for class membership.

"argued vehemently that certification was inappropriate because . . . 'there is no *practical* way to identify . . . the purchasers of airline tickets.'" *In re Domestic Air Transp. Antitrust Litig.* ("*Domestic Air II*"), 141 F.R.D. 534, 540 (N.D. Ga. 1992). The Court rejected the argument, and certified the class, just as it should here. *Domestic Air*, 137 F.R.D. at 695.[36]

**D. A Class Action Is a Superior Method of Adjudication**

AirTran argues that a class action is not "superior to other available methods for fairly and efficiently adjudicating the controversy" (Fed. R. Civ. P. 23(b)(3)) because it may require "mini-trials" of individual issues. (AirTran Opp'n Br. at 38). But this Court has previously rejected the argument that an airline class action would be unmanageable because it would purportedly require "'mini-trials' for millions of purchasers," instead finding "a class action the *only* fair method of adjudication for plaintiffs." *Domestic Air*, 137 F.R.D. at 693.

**E. Class Certification Under Rule 23(b)(2) Is Appropriate in the Alternative**

If a damages class is certified under Rule 23(b)(3), it is unnecessary to certify a class for injunctive relief, as "the injunctive relief . . . could just as easily

[36] At a later stage of the *Domestic Air* litigation, "defendants did an about face concerning identification of class members," and "claim[ed] that their records contain sufficient information that, combined with databases of third parties, will provide names and addresses for some individuals who purchased tickets on class flights." 141 F.R.D. at 540-41.

be pursued by the . . . 'damages' class[.]" *Northwest Airlines*, 208 F.R.D. at 226. If, however, a damages class were not certified, certification under Rule 23(b)(2) would be appropriate, as the injunctive relief sought by Plaintiffs "does not require a remedy that differentiates materially among class members." *Id.*

## IV. CONCLUSION

Because Plaintiffs satisfy the requirements of Fed. R. Civ. P. 23(a) and 23(b)(3), Plaintiffs' motion for class certification should be granted, and interim class counsel should be appointed as class counsel pursuant to Fed. R. Civ. P. 23(g).

/s Daniel Kotchen (by ELF)

Dated: February 4, 2011

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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 4th day of February, 2011.

/s Daniel Kotchen
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**CERTIFICATE OF SERVICE**

The undersigned counsel certifies that on this day the plaintiffs' Reply in Support of Plaintiffs' Motion for Class Certification and Appointment of Class Counsel was served on opposing counsel via electronic mail.

This 4th day of February, 2011.

/s Daniel Kotchen Daniel Kotchen (by ELF)

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